

# **Constitutionality of the rules governing sectional title schemes**

Zerlinda van der Merwe

14270293

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Supervisor: Professor AJ van der Walt

Co-supervisor: Professor GJ Pienaar

Faculty of Law

Department of Public Law

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## Declaration

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## Summary

Various types of rules govern many areas of life in a sectional title scheme. The Sectional Titles Act 95 of 1986 prescribes model management and conduct rules in its regulations. Other non-prescribed rules are adopted by either the developers initially or later by the trustees of the body corporate. These rules provide for the control, management, administration, use and enjoyment of the sections and the common property in the scheme. Sectional owners and other occupiers have the entitlements of use and enjoyment of their individual sections and their share in the common property of the sectional title scheme, in proportion to their participation quota. These entitlements are restricted by the rules in operation within the scheme.

Although these rules limit the entitlements of sectional owners and other occupiers in the interest of the sectional title community, they may not be unreasonable in their application and effect. In some instances, the application of the rules might exceed the bounds of reasonableness and result in unfair discrimination, arbitrary deprivation, unfair administrative action or restrictions on access to courts for dispute resolution. If certain rules are unreasonable in their application, based on one or more of the abovementioned grounds, the court must interpret the potentially impermissible rules and if the court cannot avoid a declaration of invalidity by implementing a constitutional remedy such as reading-up, reading-down, reading-in or severance, these impermissible rules will need to be substituted, amended or repealed and replaced because they are potentially unconstitutional and invalid.

After a statutory and constitutional enquiry into the nature, scope, application, operation and effect of the rules governing sectional title schemes, it can be concluded that the various types of rules governing sectional title schemes restrict and limit sectional owners' and occupiers' entitlements of use and enjoyment of their individual sections and share in the common property. However, after being tested against section 25 of the Constitution of the Republic of South Africa 1996 and other non-property rights entrenched in the Bill of Rights, to determine if the rules are reasonable in their application and constitutionally permissible, it can be seen that the application of the rules do not necessarily amount to arbitrary deprivations of

property and that they can be justified in terms of the Constitution because there is sufficient reasons for the particular regulations and they are procedurally fair.

The various different types of rules governing sectional title schemes serve as reasonable regulations in as far as they contribute to a harmonious relationship between the trustees of the body corporate and the sectional owners and occupiers as members of the body corporate as well as between the members of the body corporate *inter se*. The rules serve an important function in this regard. Therefore, they are considered reasonable and constitutionally valid in as far as they do not enforce excessive regulation and as long as they are equally applicable and do not unfairly differentiate in their application.

## Opsomming

Verskeie tipes reëls reguleer alledaagse aangeleenthede in 'n deeltitelskema. Die Wet op Deeltitels 95 van 1986 maak voorsiening vir voorgeskrewe bestuurs- en gedragsreëls in die regulasies. Die ontwikkelaars of die trustees van die regspersoon kan aanvanklik met die stigting van die skema of op 'n latere stadium addisionele reëls byvoeg wat nie alreeds deur die Wet voorgeskryf is nie. Die reëls maak voorsiening vir die beheer, bestuur, administrasie, gebruik en genot van die eenheid en die gemeenskaplike eiendom in die skema. Die deeleienaars van deeltitelskemas en ander okkupeerders van die skema is geregtig om hulle individuele eenhede sowel as die gemeenskaplike eiendom, in ooreenstemming met hulle deelnemingskwota, te gebruik en geniet; en dit vorm deel van hul inhoudsbevoegdheid.

Hierdie inhoudsbevoegdheid word beperk deur die skema se reëls. Afgesien daarvan dat die reëls die deeleienaar en ander okkupeerders se inhoudsbevoegdheid beperk in die belang van die deeltitelgemeenskap, mag die reëls nie onredelik wees in die toepassing daarvan nie. In sommige gevalle kan die toepassing van die reëls die perke van redelikheid oorskry en neerkom op ongeregverdigde diskriminasie, arbitrêre ontneming, ongeregverdigde administratiewe handeling of 'n beperking plaas op toegang tot die hof met die oog op dispuutoplossing. Indien daar bevind word dat sekere reëls onredelik is in die toepassing daarvan op grond van een of meer van die voorafgemelde gronde, moet die hof artikel 39 van die Grondwet volg en die reël interpreteer om 'n deklarasie van ongeldigheid te vermy. As die hof dit nie kan vermy deur middel van konstitusionele remedies soos "op-lesing", "af-lesing", "afskeiding" of "in-lesing" nie, sal die reëls gewysig of geskrap en vervang moet word, anders sal die reël ongrondwetlik wees en ongeldig verklaar word.

Na afloop van 'n statutêre en konstitusionele ondersoek ten opsigte van die aard, omvang, toepassing, werking en effek van die reëls wat deeltitelskemas reguleer word daar bevind dat die verskeie tipes reëls wat 'n deeltitelskema reguleer 'n beperking plaas op die inhoudsbevoegdheid van deeltiteleienaars en ander

okkupeerders wat betref die reg om die eenheid sowel as die gemeenskaplike eiendom te gebruik en geniet. Ten einde te bepaal of die reëls redelik in die toepassing daarvan sowel as grondwetlik toelaatbaar is, word dit getoets in terme van artikel 25 van die Grondwet van die Republiek van Suid-Afrika 1996 en ander regte in die Handves van Regte. Daar word bevind dat die toepassing van die reëls nie noodwendig 'n arbitrêre ontneming van eiendom is nie en dat dit geregverdig kan word in terme van die Grondwet omdat daar voldoende redes vir die spesifieke regulasies is en omdat dat hulle prosedureel billik is.

Die verskeie tipes reëls wat 'n deeltitelskema reguleer dien as redelike regulasies sover dit bydra tot 'n harmonieuse verhouding tussen die trustees van die regspersoon, die deeltiteleienaars en die okkupeerders as lede van die regspersoon sowel as tussen die lede van die regspersoon *inter se*. Die reëls het 'n belangrike funksie in hierdie verband. Die reëls word geag redelik en grondwetlik geldig te wees sover dit nie buitensporige regulasies afdwing nie, gelyk toegepas word en daar nie ongeregverdig gedifferensieer word in die toepassing daarvan nie.

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# 1 Introduction

## 1 1 Research question, hypothesis and methodology

In this introductory chapter, the research question will be discussed, the hypothesis will be set out and the chosen methodology will be explained. The research question posed in this thesis is whether the rules governing sectional title schemes are constitutionally valid.<sup>1</sup> Only the rules which are potentially unconstitutional in their application, operation and effect will be discussed in this thesis. Sectional title schemes are administered, controlled and managed by the trustees of the body corporate. These trustees have been democratically elected by the sectional owners or their authorised representatives or proxies, to represent them as a communal body, the body corporate. Sectional owners automatically become members of the body corporate when purchasing a unit in the scheme. Therefore, they have the right to vote in the determination of such matters as the nomination, election and appointment of trustees. The trustees fulfil their functions of administration and management by means of the various types of rules applicable within the scheme. The rules provide for the control, management, administration, use and enjoyment of the sections and the common property in the scheme.<sup>2</sup> There are various types of rules which govern all matters of life in the scheme. The Sectional Titles Act<sup>3</sup> prescribes model management<sup>4</sup> and conduct<sup>5</sup> rules in its regulations. These rules form a clear and binding framework.<sup>6</sup> Before a unit is alienated and the body corporate established, the developer of a sectional title scheme can initially substitute, add to, amend or withdraw the management rules to the extent that he is

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<sup>1</sup> The constitutional validity of the rules governing sectional title schemes will be tested against the relevant provisions in the Constitution of the Republic of South Africa 1996. See chapter 4 for a discussion on the property clause and other non-property rights.

<sup>2</sup> S 35(2) of the Sectional Titles Act 95 of 1986.

<sup>3</sup> 95 of 1986.

<sup>4</sup> Management rules are statutorily prescribed in the regulations of the Sectional Titles Act 95 of 1986. These model rules are found in s 35(2)(a) and Annex 8 of the Act. The model management rules regulate the activities of the trustees and the members of the body corporate with regard to the management and administration of the sectional title scheme. See further chapter 3 under the heading 3 2 2 for a discussion of the nature and purpose of these rules.

<sup>5</sup> Conduct rules are statutorily prescribed in the regulations of the Sectional Titles Act. These model rules are found in s 35(2)(b) and Annex 9 of the Act. The model conduct rules determine the entitlements of use and enjoyment as well as the duties of the sectional owners and other occupiers of the scheme with regard to their individual sections and share in the common property. See further chapter 3 under the heading 3 2 3 for a discussion of the nature and purpose of these rules.

<sup>6</sup> See Maree T *Kits deeltitel oplossings* (2001) 1.

allowed in terms of the Sectional Titles Act.<sup>7</sup> Once the first unit in the scheme is alienated and the body corporate is established,<sup>8</sup> the management rules can be added to, amended or repealed by unanimous resolution<sup>9</sup> of the body corporate.<sup>10</sup> The trustees can exercise their authority and discretion by adopting house rules which fulfil the needs of a particular scheme and provide for the daily management of the scheme.<sup>11</sup>

Sectional owners have the right of ownership and the entitlements of use and enjoyment of their sections and the proportionate share in the common property of the sectional title scheme. Other occupiers have the entitlements of use and enjoyment of their leased section and accompanying share in the common property. These entitlements are restricted by the rules in operation within the scheme. Although these rules limit the sectional owners' and other occupiers' entitlements of use and enjoyment in the interest of the sectional title community, they may not be unreasonable in their application and effect.

The hypothesis states that when evaluating the model management and conduct rules, as statutorily prescribed by the Sectional Titles Act, the rules initially substituted, added to, amended or repealed by the developer and later by the trustees of the body corporate of the sectional title scheme, it is expected that they restrict the rights and the entitlements of the sectional owners and other occupiers in the scheme. Each sectional owner and occupier has a right to use and enjoy their individual sections and the accompanying share in the common property. However, there is an assumption that these entitlements are limited by the enforcement of the rules. In some instances the application of the rules might exceed the bounds of reasonableness and result in unfair discrimination, arbitrary deprivation, unfair administrative action or restrictions on access to courts for dispute resolution. These

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<sup>7</sup> Refer to ss 11(3)(e) and 35(2) of the Sectional Titles Act. See further the discussion in chapter 3 under the heading 3 2 1.

<sup>8</sup> S 36(1).

<sup>9</sup> Resolution taken unanimously by all the members present at a general meeting at which at least 80% of the total number of members of the body corporate are present or represented, or a resolution accepted in writing by all the members or their proxy/ies or their representatives.

<sup>10</sup> Refer to s 35(2)(a) and regulation 30(4) of the Sectional Titles Act. See also the discussion in chapter 3 under the heading 3 2 1.

<sup>11</sup> See the discussion of house rules in chapter 3 under the heading 3 2 4.

potentially problematic rules are amended or repealed, they must be interpreted in line with section 39 of the Constitution. The point of departure when interpreting potentially problematic rules is that it is the duty of the court to test the legislation<sup>12</sup> for inconsistency with the Constitution and to declare it invalid if it is inconsistent. The Supreme Court of Appeal<sup>13</sup> set out a formula for dealing with constitutional challenges to legislation.<sup>14</sup> If an interpretation in line with this formula is possible, the court must give effect to it. However, if an interpretation is impossible, the court must declare the act or section under consideration invalid. The Constitutional Court<sup>15</sup> endorsed the Supreme Court of Appeal's approach of reading-down or reading-up of the impugned statutory provision. Following this approach prevents the act or section under consideration from being struck down because it is unconstitutional. Other constitutional remedies upon which the court can rely is severance and reading-in.<sup>16</sup>

If it appears that rules may step over the bounds of reasonableness, are arbitrary in their application and have a discriminatory effect, they need to be tested against the relevant constitutional provisions to determine their constitutional validity. In order to perform a constitutional analysis of the rules governing sectional title schemes, a comparative approach has been followed. The chosen comparative jurisdictions are Australia, Germany, Israel and the United States of America.<sup>17</sup> The position in each country will be discussed where relevant to the discussion in each chapter and the reasons behind the choices will also be examined. This comparative approach aids the discussion by giving examples of restrictions in the chosen jurisdictions that are similar in nature, operation, applicability and effect to those that govern sectional title schemes in South Africa.

Reliance will be placed on several methodologies in order to fulfil the purpose of this evaluative discussion. Firstly, the common law position of immovable property

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<sup>12</sup> The court must test the potentially problematic statutorily prescribed or non-prescribed rule for inconsistency with the Constitution.

<sup>13</sup> *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at paras 10-11.

<sup>14</sup> See the discussion in chapter 4 under the heading 4 3 1 for the steps involved in this formula.

<sup>15</sup> *Ex Parte Minister of Safety and Security In re: S v Walters* 2002 (4) SA 613 (CC) at paras 36-39.

<sup>16</sup> Du Plessis L "Interpretation" in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Vol 2 (2<sup>nd</sup> ed 2009) 32.141. See the discussion in chapter 4 under the heading 4 3 1 for a definition of these terms.

<sup>17</sup> See the discussion below for the reasons why these jurisdictions were chosen.

ownership will be discussed in a brief and general historical survey. The reasons for the introduction of sectional title schemes as an alternative to and not as a substitute for traditional ownership will be examined. The reason for introducing legislation, the procedure of introducing legislation, the purpose and the effect of the legislation as well as its success will all be discussed.

Secondly, a statutory analysis will be used to discuss the legal nature of the rules governing sectional title schemes. The limitation of the sectional owners' and occupiers' entitlements of use and enjoyment will be examined by looking at the relevant provisions in the Sectional Titles Act. The Act prescribes various obligations and duties for the sectional owners and occupiers to comply with. Various examples of restrictive rules will be examined and the amendment, operation, scope of application and enforcement of the rules will be discussed.

Thirdly, a comparative survey will be used where relevant to the discussion. The comparative jurisdictions of Australia, Germany, Israel and the United States of America will be referred to and the reasons therefore will be examined where relevant to the discussion in each chapter. Only the relevant provisions in each jurisdiction's legislation will be discussed. This thesis does not set out to give a full explanation of the legal system in each jurisdiction, nor does it explain all the restrictions applicable in each jurisdiction. Only the restrictions similar in application, operation and effect to the rules in South Africa will be discussed.

Australia was chosen as the main comparative jurisdiction and referred to throughout the chapters because South Africa's first generation statute was modelled to a large degree on the New South Wales Strata Titles Act,<sup>18</sup> which in turn was largely influenced by the German *Wohnungseigentumsgesetz*. In chapter two, Germany was used as a comparative jurisdiction because of the similar factors influencing the introduction of legislation. In chapter three, Germany was chosen as a comparative jurisdiction because many of its statutory provisions serve as an example that South Africa may do well to follow in the future.<sup>19</sup> The South African legislature also

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<sup>18</sup> The Conveyancing (Strata Titles) Act of New South Wales 17 of 1961.

<sup>19</sup> See the discussion in chapter 3 under the heading 3 6 4.

incorporated some principles of condominium from the Israeli legislation. The Israeli Co-operative Houses Law of 1952 influenced the Sectional Titles Act<sup>20</sup> because it was faced with a similar situation as South Africa at the time of the introduction of sectional title legislation. The Israeli law was found to be successful in its enforcement, operation and compliance, and therefore serves as a valuable comparative source, as can be seen in chapter two. In chapter four, the United States of America was used as a comparative jurisdiction. This jurisdiction has been chosen because of the wide range of constitutional cases where the right of equality has come into question and has been dealt with.

Finally, a constitutional analysis will be used to determine whether the rules governing sectional title schemes are constitutionally valid in their application. In order to determine this, reference will be made to the property clause<sup>21</sup> in the Constitution. The Constitutional Court decision of *First National Bank of South Africa Limited t/a Wesbank v Commissioner for the South African Revenue Services*<sup>22</sup> provides a useful test when interpreting section 25(1) of the Constitution. Therefore, it will be examined at length in the discussion.

When determining whether a particular rule is constitutionally permissible, certain steps need to be followed. There must be an interest in property and a deprivation of this interest must occur. If the requirements of section 25(1) are complied with, the deprivation will be constitutionally valid. In this regard, the deprivation needs to occur in accordance with a law of general application, it must be in the public interest and it must not be arbitrary. These steps and requirements will be explained and examined in the discussion.<sup>23</sup> The constitutional validity of the rules in light of other rights in the Bill of Rights of the Constitution will also be discussed. These non-property

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<sup>20</sup> 66 of 1971.

<sup>21</sup> S 25(1) of the Constitution.

<sup>22</sup> 2002 (4) SA 768 (CC).

<sup>23</sup> Refer to chapter 4.

fundamental rights which will be discussed are the rights to equality,<sup>24</sup> just administrative action<sup>25</sup> and access to courts<sup>26</sup> for dispute resolution.

An example of a potentially problematic rule is section 44(1)(d) of the Sectional Titles Act. This is a statutorily prescribed rule, which deprives a sectional owner of his ownership entitlements of use and enjoyment of his section and share in the common property as well as those entitlements of other occupiers in the scheme. The rule provides that a sectional owner and other occupier must “use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises.” This rule requires sectional owners and other occupiers to behave in a way that will not disturb the use and enjoyment of the sections and common property by other sectional owners, occupiers and other persons lawfully on the premises.<sup>27</sup> Compliance with this rule ensures that all the residents living in a scheme will form a harmonious community, with the least cause for conflict and disputes. Therefore, this rule serves a legitimate aim and will be reasonable in so far as it is applied fairly and equally to all residents in the scheme.

Another example is the statutorily prescribed rule in section 44(1)(e) of the Sectional Titles Act, which provides that a sectional owner and other occupier must “not use his section or exclusive use area, or permit it to be used, in such a manner or for such a purpose as shall cause a nuisance to any occupier of a section.” This rule prohibits any behaviour or activity that may reasonably be perceived as causing a nuisance to other sectional owners and other occupiers. Noise, for example, can interfere with the peaceful use and enjoyment of another unit by its owner, occupier or by any person lawfully using the common property. This rule can be seen as a legitimate limitation of the sectional owners’ and other occupiers’ entitlements of use

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<sup>24</sup> S 9 of the Constitution. Reference will also be made to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>25</sup> S 33 of the Constitution. Reference will also be made to the Promotion of Administrative Justice Act 3 of 2000.

<sup>26</sup> S 34 of the Constitution.

<sup>27</sup> Refer to the discussion of these rules in chapter 3 under the heading 3 3 2 6.

and enjoyment because compliance with the rule will ensure that causes for disputes do not arise.

## 1 2 Overview of chapters

Chapter two involves a discussion on the historical background and development of immovable property ownership in South Africa before the introduction of sectional title schemes. The Roman Dutch common law position is discussed briefly with reference to the principles of *superficies solo cedit* (*omne quod inaedificatur solo cedit*),<sup>28</sup> *cuius est solum eius est usque ad coelum*,<sup>29</sup> *plena in re potestas*<sup>30</sup> and the subsequent amendment of these common law principles in the case of sectional titles. Due to factors such as the housing shortage and the subsequent need for more affordable housing, there was a need for statutory intervention. Therefore, legislation was introduced. The main reasons for the introduction of legislation making provision for sectional ownership will be examined. When and how this legislation was introduced and the purpose, effect and success of the legislation will also be discussed. Sectional title legislation in South Africa will be compared with legislation introduced and in effect in Australia,<sup>31</sup> Germany<sup>32</sup> and Israel.<sup>33</sup> The reasons for choosing these jurisdictions will be discussed where relevant in the chapter.

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<sup>28</sup> This common law principle means that the owner of a piece of land is also the owner of everything erected on and permanently attached to the land. See Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 1.3; Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 52 and 57-63; Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 59; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 445-446 and Van der Merwe CG *Sakereg* at (2<sup>nd</sup> ed 1989) 396.

<sup>29</sup> This common law principle means that the owner of a piece of land is also the owner of the air space above the land. See Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 60; See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 51 and 54-57 and Cowen DV "From sectional to airspace title" 1985 *Acta Juridica* 333-348 at 333.

<sup>30</sup> This common law principle means that the owner of land may exercise his entitlements of use and enjoyment without interference from others. See Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 60; Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67-70 and Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 446.

<sup>31</sup> Emphasis will be placed on strata title schemes in New South Wales, Victoria and Queensland as well as the legislation operative in each jurisdiction.

<sup>32</sup> The legislation in operation in Germany is the *Wohnungseigentumsgesetz*.

<sup>33</sup> The legislation in operation in Israel is the Co-operative Houses Law of 1952.



In chapter three, the focus will be on the legal nature of the statutorily prescribed model management and conduct rules, the rules initially substituted, added to, amended or repealed by the developer and later by the trustees of the body corporate. These rules impose limitations on the sectional owners' and occupiers' entitlements of use and enjoyment of their individual sections and share of the common property. However, most of these rules will not be unfairly restrictive on condition that they are applied equally and reasonably.<sup>34</sup> Examples of the most relevant and problematic restrictions will be examined in this chapter. Most of the rules can be amended by either the developer or the trustees of the body corporate. The amendment will be dependent on the needs of the particular scheme. In order to successfully achieve this, an amendment procedure needs to be followed. This procedure will be further discussed in this chapter.

The rules operate within the scheme and govern the control, management, administration, use and enjoyment of the sections and the common property.<sup>35</sup> The rules impose binding duties and obligations on all the owners and occupiers within a scheme.<sup>36</sup> In order to ensure that the community of sectional owners and occupiers live in relative harmony, there must be effective enforcement mechanisms and sanctions for non-compliance with the rules. These mechanisms and sanctions will be closely examined in this chapter.

Disputes are inevitable in any community where the residents live in such close proximity to one another. The causes of disputes, the parties involved and the various methods of dispute resolution will be examined in this chapter. A comparative survey will be used where relevant, concentrating on the jurisdictions that have similar approaches with regard to the above mentioned issues and those that have influenced South African legislation, namely Australia<sup>37</sup> and Germany.<sup>38</sup>

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<sup>34</sup> S 35(3) of the Sectional Titles Act 95 of 1986. See further the discussion in chapter 4.

<sup>35</sup> S 35(2).

<sup>36</sup> S 35.

<sup>37</sup> In Australia, this form of property ownership is known as strata titles.

<sup>38</sup> In Germany this form of property ownership is known as *Wohnungseigentum*.

In chapter four, a constitutional analysis is used to determine whether the various types of rules governing sectional title schemes are unconstitutional deprivations of property rights. In order to determine whether particular rules are constitutionally permissible, the extent to which they limit entitlements needs to be examined. A limitation is essentially a “justifiable infringement”,<sup>39</sup> which is not unconstitutional if it occurs for a reason that is accepted as a justification for infringing the rights in an open and democratic society based on human dignity, equality and freedom. In this chapter, the focus will be on two constitutional enquiries.

The first enquiry concerns the constitutional validity of the restrictive rules governing a sectional title scheme in terms of section 25(1) of the Constitution. It will be determined whether the restrictive rules’ application amounts to an arbitrary deprivation of property, which would be unenforceable due to its constitutional invalidity, unless the deprivation can be justified in terms of the limitation clause.<sup>40</sup>

The decision of *First National Bank of South Africa Limited t/a Wesbank v Commissioner for the South African Revenue Services*<sup>41</sup> provides a useful test when interpreting section 25(1) of the Constitution.<sup>42</sup> Ackermann J developed a test for the property challenge<sup>43</sup> by dividing the property clause enquiry into several stages, formulated as a set of questions. In terms of this methodology, it must be determined whether the law complained of affects property in terms of section 25(1). If it does, it must be asked whether it amounts to a deprivation of property by law.<sup>44</sup> If this question is answered in the affirmative, it must be determined whether the deprivation is consistent with section 25(1) and if it is not, it must be determined

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<sup>39</sup> Currie I and De Waal J *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 164.

<sup>40</sup> S 36 of the Constitution.

<sup>41</sup> 2002 (4) SA 768 (CC).

<sup>42</sup> See Freedman W “The constitutional right not to be deprived of property: the constitutional court keeps its options open” 2006 *TSAR* 83–100 at 83.

<sup>43</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 46. See further Hopkins K and Hofmeyr K “New perspectives on property” (2003) 120 *SALJ* 48–62 at 54 and Freedman W “The constitutional right not to be deprived of property: the constitutional court keeps its options open” 2006 *TSAR* 83–100 at 90.

<sup>44</sup> Refer to 4 2 4 1 for a discussion on whether the Sectional Titles Act and the rules it prescribes is considered “law”.

whether the deprivation can be justified under section 36(1) of the Constitution.<sup>45</sup> According to the Court, if a deprivation is arbitrary and not justifiable, “that is the end of the matter. The provision is unconstitutional.”<sup>46</sup>

The second constitutional enquiry will focus on other Bill of Rights issues. In this regard, the restrictive rules will be tested against certain non-property fundamental rights in the Bill of Rights,<sup>47</sup> in order to determine if they constitute constitutional limitations. The following specific constitutionally entrenched rights will be looked at more closely: equality,<sup>48</sup> specifically unfair discrimination;<sup>49</sup> just administrative action;<sup>50</sup> and access to courts.<sup>51</sup>

The rules governing a sectional title scheme must be reasonable and equally applicable to all sectional owners of units which are used for substantially the same purpose.<sup>52</sup> If these requirements are complied with and the rules are not applied arbitrarily, they will be constitutionally valid and enforceable. If there is differentiation with regard to the application of the rules, it should be asked whether the differentiation bears a rational connection to a legitimate purpose. If the differentiation bears no rational connection to a legitimate purpose, it will be contrary to section 9(1) of the Constitution, the equality provision, as it amounts to discrimination. If the differentiation does bear a rational connection to a legitimate purpose, it still amounts to discrimination and will be contrary to section 9(3) and 9(4) of the Constitution, unless the discrimination is fair in terms of section 9(5) of the

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<sup>45</sup> Van der Walt AJ *Constitutional property law* (2005) 54 and 137. In terms of s 25(8) of the Constitution, it is in principle possible to justify a limitation that does not satisfy the requirements in s 25(1), which must be complied with for formal validity, as long as it complies with the requirements in s 36(1). It is considered unlikely that the deprivation will not be in conflict with the requirements in section 36 if the deprivation is in conflict with the formal requirements in s 25(1). See further *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 58.

<sup>46</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 58.

<sup>47</sup> Found in chapter 2 of the Constitution of the Republic of South Africa 1996.

<sup>48</sup> S 9 of the Constitution.

<sup>49</sup> S 9(3).

<sup>50</sup> S 33.

<sup>51</sup> S 34.

<sup>52</sup> S 35(3) of the Sectional Titles Act 95 of 1986.

Constitution,<sup>53</sup> and therefore legitimate. For example, a rule prohibiting occupation to residents below a certain age differentiates between people from different age groups. However, this limitation could be rationally connected to a legitimate purpose of providing a specialised form of accommodation suitable to the needs of the elderly.

From this perspective, reference will be made to case law from a comparative jurisdiction, namely the United States of America. This jurisdiction has been chosen because of the wide range of constitutional cases where the right of equality has come into question and has been dealt with.

The concluding chapter five summarises what the thesis has set out to do, namely to answer the research question. It applies the methodology in order to reach the conclusions stated in the hypothesis. It gives a brief overview of the conclusions reached in each chapter and comes to a final conclusion based on the research question posed in this introductory chapter.

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<sup>53</sup> Ackermann L "Equality and the South African Constitution: the role of dignity" (2000) 60 *ZaöRV* 537-556 at 545-546.

## 2 Comparative history of sectional title legislation

### 2.1 Introduction

This chapter will involve a comparative discussion on the historical background and development of ownership of immovable property in South Africa before the introduction of sectional title schemes. This historical survey is needed because it examines the main reasons for the introduction of legislation making provision for sectional ownership, as well as when and how this legislation was introduced. The purpose, effect and success of the legislation will also be discussed. The Roman-Dutch common law position will be discussed, with reference to the principles of *superficies solo cedit* (*omne quod inaedificatur solo cedit*),<sup>54</sup> *cuius est solum eius est usque ad coelum*,<sup>55</sup> *plena in re potestas*<sup>56</sup> and the subsequent amendment of these common law principles in the case of sectional title schemes.

For the purposes of this discussion and the topic in general, the most important sections of the legislation are the provisions relating to the rules. The rules were introduced to serve as important regulations of the use and enjoyment of sections and common property in the sectional title scheme. The successful enforcement of and compliance with these rules ensure that sectional title schemes serve the purpose for which they were intended and provide an alternative form of home

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<sup>54</sup> This common law principle means that the owner of a piece of land is also the owner of everything erected on and permanently attached to the land. See Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 1.3; Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 52 and 57-63; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 445-446; Van der Merwe CG *Sakereg* at (2<sup>nd</sup> ed 1989) 396 and Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 59.

<sup>55</sup> This common law principle means that the owner of a piece of land is also the owner of the air space above the land. See Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 60; See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 51 and 54-57 and Cowen DV "From sectional to airspace title" 1985 *Acta Juridica* 333-348 at 333.

<sup>56</sup> This common law principle means that the owner of land may exercise his entitlements of use and enjoyment without interference from others. See Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 60; Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67-70 and Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 446.

ownership as a solution to the housing shortage and other needs as will be discussed.<sup>57</sup>

A brief historical comparison will be drawn between sectional title legislation in South Africa, Australia, Germany and Israel. These jurisdictions were chosen because they best compare with the South African model as they faced similar problems to those that were found in South Africa at the time of the introduction of sectional title schemes, which led to the need for an alternative form of land ownership.<sup>58</sup> The Sectional Titles Act<sup>59</sup> was modelled to a large degree on the Australian Strata Titles Act<sup>60</sup> operative in New South Wales, which in turn was largely influenced by the German *Wohnungseigentumsgesetz*.<sup>61</sup> The South African legislature also incorporated some principles of condominium from the Israeli legislation.<sup>62</sup>

## 2 2 Common law position

Ownership of property was traditionally described by common law jurists<sup>63</sup> as an absolute, comprehensive, unrestricted and individualistic right, albeit subject to qualifications.<sup>64</sup> The traditional definition of ownership was one where the owner was

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<sup>57</sup> For a discussion on the nature and function of the rules, refer to chapter 3.

<sup>58</sup> Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 1.6(1)-1.7.

<sup>59</sup> 66 of 1971 and 95 of 1986.

<sup>60</sup> Conveyancing (Strata Titles) Act 17 of 1961. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 1.5.

<sup>61</sup> See the Apartment Ownership Act of 1951. See further Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 11 and Van der Merwe CG "The Sectional Titles Act and the *Wohnungseigentumsgesetz*" (1974) 7 *CILSA* 165-185 at 165.

<sup>62</sup> See the Co-operative Houses Law of 1952. See further Van der Merwe CG "The South African Sectional Titles Act and Israeli condominium legislation" (1981) 12 *CILSA* 129-165 at 129.

<sup>63</sup> The traditional concept of landownership as absolute, individualistic and unrestricted is a view shared by many South Africans. See in this regard Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 43.

<sup>64</sup> Refer to the discussion of the common law principle *plena in re potestas*. See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67-70; Pienaar GJ "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295-308 at 295. See further Van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 170; Sonnekus JC and Neels JL *Sakereg vonnisbündel* (2<sup>nd</sup> ed 1994) 249; Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 22; Birks P "The Roman law concept of dominium and the idea of absolute ownership" 1985 *Acta Juridica* 1-37 at 1; Visser DP "The 'absoluteness' of ownership: the South African common law in perspective" 1985 *Acta Juridica* 39-52 at 39; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 16-35 and 307-325 at 16 and Van der Walt AJ "The fragmentation of land rights" (1992) 8 *SAJHR* 431-450 at 434. Refer to the discussion in *Gien v Gien*

allowed absolute powers to deal with his property as he pleased, subject to certain limitations imposed by private<sup>65</sup> and public law. In South Africa, modern developments have led to the move away from the idea of exclusivity, where the owner of property had the right to exclude anyone from interference with his property.<sup>66</sup> This break from the traditional ownership paradigm<sup>67</sup> recognised limitations and duties which were imposed on the owner through legislative intervention,<sup>68</sup> which restricted his right of ownership to his property,<sup>69</sup> in order to serve some social or public interest.<sup>70</sup> These restrictions need to be permissible.<sup>71</sup> According to Spoelstra AJ in *Gien v Gien*:<sup>72</sup>

“Eiendomsreg is die mees volledige saaklike reg wat ‘n person ten opsigte van ‘n saak kan hê. Die uitgangspunt is dat ‘n person wat ‘n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter ‘n halwe waarheid. Die absolute beskikkingsbevoegheid van ‘n eienaar bestaan binne die perke wat die reg daarop plaas.”

Translated this means that ownership is the most complete right a person can have with regard to a thing. The point of departure is that a person, as far as immoveable property is concerned, can do on and with his property as he likes. However, this apparently unlimited freedom is only partially true. The absolute entitlements of an owner exist within the boundaries of the law.

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1979 (2) SA 113 (T) and *Johannesburg Council v Rand Townships Registrar* 1910 TPD 1314 at 1319, where Wessels J quoted Savigny’s definition of ownership, namely “the unrestricted and exclusive control which a person has over a thing”.

<sup>65</sup> Such as the restrictions found in neighbour law.

<sup>66</sup> See Van der Walt AJ “Ownership and personal freedom: subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *THRHR* 569-589 at 573. See further Cowen DV “The South African Sectional Titles Act in historical perspective: an analysis and evaluation” (1973) 6 *CILSA* 1-38 at 4 and 22; Birks P “The Roman law concept of dominium and the idea of absolute ownership” 1985 *Acta Juridica* 1-37 at 27-29 and Lewis C “The modern concept of ownership of land” 1985 *Acta Juridica* 241-266 at 241. Cowen continues to point out three main reasons why the traditional concept of landownership is unsatisfactory in our modern time. See in this regard Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 70-80.

<sup>67</sup> See Van der Walt AJ “The fragmentation of land rights” (1992) 8 *SAJHR* 431-450 at 433.

<sup>68</sup> See Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 445.

<sup>69</sup> See Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 and 307-325 at 16.

<sup>70</sup> See Van der Walt AJ “The fragmentation of land rights” (1992) 8 *SAJHR* 431-450 at 433 and Lewis C “The modern concept of ownership of land” 1985 *Acta Juridica* 241-266 at 244.

<sup>71</sup> See Birks P “The Roman law concept of dominium and the idea of absolute ownership” 1985 *Acta Juridica* 1-37 at 1.

<sup>72</sup> 1979 (2) SA 113 (T) at para 1120.

Reference can also be made to the decision in *Body Corporate of Albany Court v Nedbank*,<sup>73</sup> where it was stated that:

The powerful right of ownership of an immovable property is not an absolute right. Indeed, the very essence of the Act is to render many of the interests of owners of units in a sectional scheme subservient to the will of the majority. Certain of the normal rights of an owner, for instance the right to keep pets or make building alterations, may be curtailed by the rules imposed by the majority. It is not suggested on behalf of the applicants that such interference with the rights of an owner is unconstitutional, and nor could it be. The interdependence of owners within a single building or complex logically requires co-operation, and compliance with and subservience to the will of the majority.”

Therefore, in order to ensure the proper working of the sectional title scheme as a whole and to maintain harmonious relationships between owners in a scheme, it was necessary to re-evaluate some of the traditional common law characteristics of individual ownership of immovable property upon the commencement of the sectional titles legislation.<sup>74</sup> It is necessary to point out that this re-evaluation of the common law principles applied only in the case of sectional titles because the introduction of these schemes served as the introduction of an alternative form of home ownership.<sup>75</sup>

It was also necessary to impose legitimate limitations by way of the statutorily prescribed rules, house rules and the rules added to and amended by the developer or the trustees of the body corporate of a sectional title scheme. These rules limit the rights or entitlements of an owner or other occupier as residents in a scheme in order to fairly and reasonably uphold the rights of another resident living in the scheme, thereby creating a balance between the parties involved.<sup>76</sup> Modern legal writers raise the question whether sectional ownership is “genuine ownership”<sup>77</sup> as with traditional

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<sup>73</sup> [2008] JOL 21739 (W) at para 20.

<sup>74</sup> Sectional Titles Act 66 of 1971 and the Sectional Titles Act 95 of 1986. See further Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 59.

<sup>75</sup> Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 60.

<sup>76</sup> See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 23-24.

<sup>77</sup> See Van der Merwe CG “Is sectional ownership true ownership?” (1992) 3 *Stell LR* 131-136 at 133. See further Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 21.



ownership. Although there are certain restrictions and limitations imposed on sectional owners which do not normally apply to traditional individual owners, these restrictions are considered to be necessary and do not justify denying the status of genuine legal ownership to sectional owners.

Horizontal subdivision of land was not recognised in Roman law.<sup>78</sup> Therefore, sectional ownership of a part of a building was unknown.<sup>79</sup> Consequently, a building and the land upon which it stood could not be sold or transferred separately, as it was seen as being a unit because ownership occurred in its entirety and not in individual parts.<sup>80</sup> The South African legal system is based on Roman-Dutch law.<sup>81</sup> Therefore, the common law made no provision for sectional ownership in South African law.<sup>82</sup> Statutory intervention was needed in order to introduce sectional ownership by way of legislation.

With the introduction of the Sectional Titles Act,<sup>83</sup> several common law principles regarding ownership of immovable property were amended in the case of sectional titles.<sup>84</sup> The common law principle, *superficies solo cedit*, was repealed in the case of sectional titles. This principle along with the principle of *accessio*,<sup>85</sup> restricted the separate ownership of parts of a building and land as with sectional titles because the person owning the piece of land automatically owns the buildings permanently

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<sup>78</sup> Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 1.3.

<sup>79</sup> See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 54-55. See further Van der Merwe CG *Sakereg* at (2<sup>nd</sup> ed 1989) 396 and Carey Miller DL and Pope A *Land title in South Africa* (2000) 208.

<sup>80</sup> See Van der Merwe CG *Sakereg* at (2<sup>nd</sup> ed 1989) 396; Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 1.3 and Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 31.

<sup>81</sup> Zimmermann R and Visser D *Introduction: South African law as a mixed legal system* in Zimmermann R and Visser D (eds) *Southern cross: Civil Law and Common Law in South Africa* (1996) 1-30 at 9 and Fagan E *Roman-Dutch law in its South African historical context* in Zimmermann R and Visser D (eds) *Southern cross: Civil Law and Common Law in South Africa* (1996) 33-64 at 33.

<sup>82</sup> See Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 441. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* (2010 Service Issue 12) 1.7; Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 19-20; Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 56 and Van der Merwe CG *Sakereg* at (2<sup>nd</sup> ed 1989) 161.

<sup>83</sup> 66 of 1971 and 95 of 1986.

<sup>84</sup> Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 59-60.

<sup>85</sup> This principle means that whatever is built permanently on the soil accedes to the soil and forms part of it. See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 57.

built on the land.<sup>86</sup> Due to the fact that this principle became part of Roman-Dutch common law initially and later South African law, it needed to be repealed in order for sectional titles to be introduced. There was a growing economic need for the introduction of sectional titles and it was “recognised that one should not accept the accession principle as holy writ”.<sup>87</sup> Therefore, this principle was repealed in the case of sectional titles. This essentially meant that the common or joint owners of the common property were not co-owners of everything attached to the land but everyone was the sole owner of a part or a section.

According to Roman law, there was only one method in which land could be defined as the object of ownership, namely two-dimensionally.<sup>88</sup> Land was undefined horizontally and ownership of different levels or “strata”<sup>89</sup> was unknown. The reasons for this were that “Roman jurists wished to avoid difficulties of access”<sup>90</sup> and wanted “to avoid a multiplicity of reciprocal servitudes which ownership of strata seemed to involve.”<sup>91</sup> This method of defining land became part of the Roman-Dutch common law and later it was incorporated into South African law. By repealing the common law principle *cuius est solum*, as defined above, in the case of sectional titles, a section owned by the sectional owner was described both in terms of the vertical boundaries and horizontal subdivisions. Sectional ownership introduced horizontal

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<sup>86</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 58. See further *Van Wezel v van Wezel's Trustee* 1924 AD 409 at 417, where Wessels JA stated that “as soon as a structure is built into the soil it acceded to the soil; for by Civil Law as by the Roman-Dutch law the accessory has the same character as the thing to which it acceded”; *Durban Corporation v Lincoln* 1940 AD 36 at 42, where Watermeyer JA stated that “in law a building acceded to the land – it is not separate property and cannot be owned as a thing separated or disconnected from the land on which it stands” and *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454.

<sup>87</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 59.

<sup>88</sup> Land was defined “by reference to lines drawn on the surface of the earth and the projection of vertically open-ended planes along those lines.” Refer to Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 55.

<sup>89</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 55.

<sup>90</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 55.

<sup>91</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 55.

subdivision by defining the boundaries of a section as the median line of dividing the floors, walls and ceilings.<sup>92</sup>

The common law principle *plena in re potestas* was “to a large degree obviated”<sup>93</sup> by the joint exercise of the sectional owners and occupiers of their entitlements to the common property, subject to the rules of the sectional title scheme, which limited the use and enjoyment of the entitlements in the interest of all the residents in a sectional title scheme as a whole. According to this common law principle, the traditional concept of ownership was seen as “autonomous”,<sup>94</sup> “individualistic”<sup>95</sup> and “unrestricted”.<sup>96</sup> As mentioned previously, in principle, an owner could do almost anything he wanted with his immovable property. However, the law did restrict this exercise of rights “in the interests of neighbouring owners and the general public.”<sup>97</sup> With the introduction of sectional titles, there has been a move away from this traditional concept of landownership towards a more communal and restricted form of home ownership where the rights and interests of all residents living in a scheme are upheld.

### **2 3 Reasons for introducing sectional title schemes as an alternative to and not as a substitute for traditional ownership**

The primary aim behind introducing sectional title schemes as an alternative form of ownership was to satisfy the need for more affordable housing.<sup>98</sup> Sectional ownership satisfied this need while providing for the “common attributes of full legal

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<sup>92</sup> See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 56.

<sup>93</sup> Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 60.

<sup>94</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67.

<sup>95</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67.

<sup>96</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67.

<sup>97</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67.

<sup>98</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397. See further Cowen DV “The South African Sectional Titles Act in historical perspective: an analysis and evaluation” (1973) 6 *CILSA* 1-38 at 2 and Van der Merwe CG “The Sectional Titles Act and the Wohnungseigentumsgesetz” (1974) 7 *CILSA* 165-185 at 165.

ownership.”<sup>99</sup> For this reason sectional title schemes were seen as being an alternative to and not a substitute for traditional ownership.<sup>100</sup> After the introduction of sectional title schemes, it was found that they provided mainly for higher-income groups who could afford to purchase a unit and contribute towards the maintenance of the scheme.<sup>101</sup> Therefore, it was seen that there was a need for affordable housing which would be in the reach of the lower and middle-income majority.<sup>102</sup>

Urbanisation was on the rise as more people began to move away from the country, seeking both employment and affordable accommodation in the cities.<sup>103</sup> Land availability became a problem as there were scarce land resources on which to build houses, in relation to the ever increasing population. Space demands increased as people began to occupy larger areas of land than they had in the past.<sup>104</sup> There was a substantial rise in the cost of urban land and building costs such as labour and materials.<sup>105</sup> Due to the demand for housing, purchase prices increased.

Sectional title schemes promoted better utilisation of land available for accommodation, as it utilised more efficient building methods and had communal facilities. These common amenities were used and enjoyed by all of the residents in a scheme, fostering closer social relations while still maintaining a sense of privacy. The success of the scheme would be determined by the co-operation of all the residents in a scheme. This would be ensured by the implementation of rules governing the control, management, use and enjoyment of the individual sections and the common property, in order to avoid disputes.<sup>106</sup>

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<sup>99</sup> See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 19.

<sup>100</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397.

<sup>101</sup> See Cowen DV “The South African Sectional Titles Act in historical perspective: an analysis and evaluation” (1973) 6 *CILSA* 1-38 at 3.

<sup>102</sup> See Cowen DV “The South African Sectional Titles Act in historical perspective: an analysis and evaluation” (1973) 6 *CILSA* 1-38 at 3.

<sup>103</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397.

<sup>104</sup> See Cowen DV “The South African Sectional Titles Act in historical perspective: an analysis and evaluation” (1973) 6 *CILSA* 1-38 at 2.

<sup>105</sup> See Cowen DV “The South African Sectional Titles Act in historical perspective: an analysis and evaluation” (1973) 6 *CILSA* 1-38 at 3.

<sup>106</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397. See further Cowen DV “The South African Sectional Titles Act in historical perspective: an analysis and evaluation” (1973) 6 *CILSA* 1-38 at 4. See chapter 3 under the heading 3 7 for a discussion on the causes of disputes within a sectional title

It was also perceived that sectional title schemes fulfilled the social need for communal living as it provided security and satisfied the psychological need for home-ownership.<sup>107</sup> The schemes ensured social, economic and political stability by binding as much of the population as possible to a fixed and permanent place of residence.<sup>108</sup> It curbed rising inflation caused by increasing land and building costs, by providing for capital investments.<sup>109</sup> Existing alternative property institutions such as long-term lease, co-ownership based on contract, share-block schemes,<sup>110</sup> group housing and cluster housing, were considered to be inadequate at providing security of tenure and other legal rights associated with traditional ownership.<sup>111</sup>

## 2 4 Introduction of legislation

Sectional title schemes are administered, managed and controlled in accordance with the provisions of the promulgated legislation.<sup>112</sup> The situation in South Africa, as mentioned, necessitated the intervention of the legislature, which in turn introduced a statute<sup>113</sup> containing all the relevant provisions in order to administer, manage and control sectional title schemes effectively. In this section, the reasons for introducing legislation will be highlighted, also when and how legislation was introduced, as well as the purpose, effect and success of the legislation.

In 1968 a commission of enquiry found that the alternatives to sectional title schemes, such as share-block schemes were inadequate. As a result, a commission was appointed in 1970 to investigate the situation and identify the inadequacies. In

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scheme and dispute resolution mechanisms and 3 3 for a broader discussion on the legal nature of the rules governing a sectional title scheme.

<sup>107</sup> See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 23. See further Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 3-4 and Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397.

<sup>108</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397.

<sup>109</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397. See further Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 6.

<sup>110</sup> Occupiers of share-block schemes buy shares in a company and as shareholders. Their share in the company represents their share in the apartment, in the form of a personal right.

<sup>111</sup> See Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 5. See further Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 18 and Van der Merwe CG *Sakereg* at (2<sup>nd</sup> ed 1989) 400.

<sup>112</sup> Sectional Titles Act 66 of 1971 and the Sectional Titles Act 95 of 1986.

<sup>113</sup> Sectional Titles Act 66 of 1971.

1971 the commission made a recommendation to the State President to the effect that a sectional title act should be drafted.<sup>114</sup> The Sectional Titles Act<sup>115</sup> was approved on 10 June 1971 and promulgated on 30 June 1971. However, the commencement date was postponed to 30 March 1973 in order to draft the regulations and prepare the deeds registry for the registration of sectional title schemes. In the meantime, any unforeseen practical problems were solved on an ad hoc basis.<sup>116</sup>

The Sectional Titles Act was modelled to a large degree on the Australian Strata Titles Act<sup>117</sup> operative in New South Wales, which in turn was largely influenced by the German *Wohnungseigentumsgesetz*.<sup>118</sup> The South African legislature also incorporated some principles of condominium from the Israeli legislation.<sup>119</sup> As with New South Wales,<sup>120</sup> South Africa soon required a second generation statute.<sup>121</sup> Consequently a bill was published on 2 November 1984. This bill was approved and subsequently improved upon by the committee of the Department of Communication and Public Works. The new Act was announced on 17 September 1986 and came into operation on 1 June 1988.<sup>122</sup>

Originally the Act dealt with the vertical division of buildings by apportioning units in high-rise apartment blocks. Presently it also deals with the form of horizontal developments such as duplex apartments, semi-detached houses and communal housing. Apart from residential use, sectional title schemes can also be used for commercial, industrial and professional purposes or a mixture of the above mentioned. In terms of section 60(8) of the Sectional Titles Act,<sup>123</sup> the new rules as

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<sup>114</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397.

<sup>115</sup> 66 of 1971.

<sup>116</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397.

<sup>117</sup> Conveyancing (Strata Titles) Act 17 of 1961.

<sup>118</sup> See the Apartment Ownership Act of 1951. See further Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 11 and Van der Merwe CG "The Sectional Titles Act and the *Wohnungseigentumsgesetz*" (1974) 7 *CILSA* 165-185 at 165.

<sup>119</sup> See the Co-operative Houses Law of 1952. See further Van der Merwe CG "The South African Sectional Titles Act and Israeli condominium legislation" (1981) 12 *CILSA* 129-165 at 129.

<sup>120</sup> Strata Titles Act 68 of 1973.

<sup>121</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 397.

<sup>122</sup> See Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 399.

<sup>123</sup> 95 of 1986.

contained in the second generation statute apply automatically to the older schemes which were established under the first generation statute. However, where the older rules were amended or replaced by either the developer or the body corporate, they were applicable insofar as they were not in conflict with the new rules.

The Sectional Titles Act<sup>124</sup> made provision for the division of buildings into sections and common property, which made it possible to acquire separate ownership in sections, along with joint ownership in the common property. This was seen as a modification of the traditional concept of ownership of immovable property. The legislature realised the need for legislative intervention in order to provide an alternative form of title. It has been said that “the advent of sectional ownership has, on a balance, been socially and economically beneficial.”<sup>125</sup>

This legislation<sup>126</sup> applied to residential, commercial and industrial sectional title schemes. The aim of this legislation was to ensure security of tenure and alleviate the housing shortage. The Act made provision for the control, administration and management of the common property to be vested in the trustees of the body corporate, who were responsible for the enforcement of the rules. Sectional title schemes have a communal nature, differing from the individual character of traditional ownership. Due to this nature, sectional title schemes need to be managed by way of the rules to ensure that the community functions as a harmonious whole.

The defects and shortcomings of the first generation statute were to a large extent remedied by the second generation statute. An example of a shortcoming in the legislation would be that there was no simple, inexpensive and effective means of enforcing rules and settling disputes between the owners *inter se* and between the owners and the trustees of the body corporate. The first generation statute was influenced to a great extent by the New South Wales Strata Titles Act of 1961, which

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<sup>124</sup> 66 of 1971.

<sup>125</sup> See Cowen DV “From sectional to airspace tile” 1985 *Acta Juridica* 333-347 at 335.

<sup>126</sup> Sectional Titles Act 66 of 1971.

did not make provision for any rule enforcement or dispute settling mechanisms either.<sup>127</sup>

## 2 5 Comparative history

### 2 5 1 Introduction

In this comparative discussion on the historical background of sectional ownership in South Africa, reference will be made to Australia, Germany and Israel with regard to their similar forms of property subdivision. These countries have some aspects in common with the South African model of sectional ownership. They can serve as an important example of what the South African legislature has to do in order to ensure that the South African statute is as successful and effective as the older and more extensive statutes found in these foreign jurisdictions. As mentioned previously, South Africa's first generation statute was modelled to a large degree on the New South Wales Strata Titles Act, which in turn was largely influenced by the German *Wohnungseigentumsgesetz*. The South African legislature also incorporated some principles of condominium from the Israeli legislation.

The dualistic system was adopted in South Africa, as it had been in Australia and Germany.<sup>128</sup> In this system, two different types of ownership were linked together, such as separate ownership of a section and co-ownership of common property. As in South Africa, the alternative forms of ownership found in Germany were inadequate to fulfil social and economic needs. Therefore, the German legislator introduced the condominium system, which influenced the Australian legislation, which has similar rules and regulations as those found in South African sectional ownership legislation.

The Israeli Co-operative Houses Law of 1952 influenced the Sectional Titles Act<sup>129</sup> because it was introduced due to similar social and economic needs as those found

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<sup>127</sup> See Cowen DV "From sectional to airspace tile" 1985 *Acta Juridica* 333-347 at 341-342.

<sup>128</sup> See Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 36-37.

<sup>129</sup> 66 of 1971.



in South Africa at the time of introduction of sectional title legislation. The Israeli law was found to be successful in its enforcement, operation and compliance, and therefore serves as a valuable comparative source.

## 2 5 2 Australia

### 2 5 2 1 *Introduction*

The Commonwealth of Australia is made up of six states and two major mainland territories. The states are New South Wales, Victoria, Western Australia, Queensland, South Australia and Tasmania. The territories are the Australian Capital Territory and the Northern Territory. These Australian states and territories all have their own jurisdiction concerning the enactment of strata title legislation. Each state and territory also has its own legislative framework, but there is some uniformity amongst them as they all originated from the legislation introduced in New South Wales in 1960.<sup>130</sup>

In this section, the historical background of the introduction of strata title legislation in each state and territory will be discussed. The position in certain jurisdictions will be discussed in more detail due to its relevance to the South African model while others will be briefly mentioned. In this comparative discussion, the main focus will be on the following three states, Victoria, Queensland and New South Wales. The reasons for this is that the history of strata title development in Victoria is most similar to that of South Africa, the legislation in Queensland makes provision for horizontal subdivision of immovable property as can be found in South Africa and statutory strata titles originated in New South Wales, which has similar statutes as those found in South Africa and is based on vertical and horizontal division of land.

Strata title legislation is continually changing as the government reviews it and attempts to meet all of the demands of unit owners and find solutions to the challenges that arise from time to time. The original aim behind the introduction of

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<sup>130</sup> Conveyancing (Strata Titles) Act 17 of 1961.

the strata title system of ownership in Australia was to allow people to own their own apartments in multi-level or high-rise buildings. Before the introduction of strata titles, the most common way to obtain a right in a part of a building was to buy shares in the company owning the building. This was known as company title. The company would give the shareholder a right to occupy an apartment by issuing a share certificate. This form of ownership is still in existence, albeit to a much lesser extent. South Africa has a similar form of ownership, known as share-block schemes. As with share-block schemes in South Africa, company title was found to be an inadequate method of ownership as it formed part of company law and not strata title law. This defect made its application more complex and difficult, while offering less protection and security to investors.

As with the position of house rules and rules amended by the developer or trustees of the body corporate of a sectional title scheme in South Africa,<sup>131</sup> strata schemes are governed by the rules prescribed by trustees. In the past, each strata scheme was responsible for its own rules. Presently, there is a standard model for each state and jurisdiction. Strata schemes are statutorily regulated, whereas in South Africa the legislation governing sectional title schemes needs to be constitutionally compliant. Land reform in Australia is done in a piecemeal fashion and therefore it has a more complicated land registration system,<sup>132</sup> which has more complex problems. In South Africa, there was complete land reform and a simpler land registration procedure due to the Constitution and its supreme status.

## *2 5 2 2 New South Wales*

During the Second World War, construction of new residential dwellings in Australia slowed down because the production of building materials was being replaced with that which was needed for the war effort. Rent control provisions<sup>133</sup> deterred developers from investing in new building construction due to the small rental returns. Post-war, the increase in capital and labour led to a growing economy,

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<sup>131</sup> See chapter 3 under the heading 3 3 for a discussion on the legal nature of the statutorily prescribed rules, house rules and those amended by the developer or trustees.

<sup>132</sup> Refer to the discussion of the Torrens system in footnote 134.

<sup>133</sup> National Security (Landlord and Tenant) Regulations of 1941.

which meant that there was an increased demand for the erection of multi-story residential buildings. Flats in these buildings became the new form of sought after accommodation, especially in the urban areas.

Statutory strata titles originated in New South Wales. The strata system was introduced into Australia in 1961<sup>134</sup> and originated from the Torrens system of land registration.<sup>135</sup> This system was designed to facilitate acquisition of a Torrens system title to individual dwellings in a building consisting of multiple dwellings.<sup>136</sup> Mutual rights and obligations stem from the legislation and the rules which the corporation is empowered to make.<sup>137</sup> This legislation was the first of its kind and proved to be successful, based on the confidence gained by financial institutions and the fact that it was adopted by all Australian states and by some foreign jurisdictions.<sup>138</sup> Before 1961, there were, apart from individual ownership, three main schemes in New South Wales, namely company title,<sup>139</sup> leasehold title<sup>140</sup> and tenancy-in-common.<sup>141</sup>

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<sup>134</sup> Conveyancing (Strata Titles) Act of 17 of 1961.

<sup>135</sup> See Bugden GF *Strata title management practice in New South Wales* (6<sup>th</sup> ed 1993) 1; Toohar J and Dwyer B *Introduction to property law* (4<sup>th</sup> ed 2002) 76; Bradbrook AJ, MacCullum SV and Moore AP *Australian real property law* (4<sup>th</sup> ed 2007) 115-118; Moore G *Essential real property* (2005) 45-47 and Hepburn S *Principles of property law* (3<sup>rd</sup> ed 2006) 235-242. Australia had two separate systems of land title, general law and the Torrens system. In terms of general law, title to land was transferred by deed under seal. This system was developed by Common Law with occasional statutory interventions. The Torrens system was a land registration system where the government was the keeper of the master record of all the land and the owners. Title to land was transferred by means of entry on a certificate or folio in a public register. It was named after its founding father, Sir Robert Torrens. This statutory system was the principal system of title registration in New South Wales and was introduced into New South Wales in 1862 by the Real Property Act of 1862. Presently, the Torrens statutes retain the basis tenants of the system introduced in the 1860's but with amendments such as the Real Property Act of 1900 in New South Wales. In Victoria, the Torrens system has been enacted in the Transfer of Land Act of 1958 and in Queensland, the Land Title Act of 1994 is applicable. The Torrens system is not uniform, therefore, important differences exist in the functioning of the system within each state. The Torrens system provides and promotes security and certainty of title. It is a simple, speedy and inexpensive method of conveyance and dealing with interests in land.

<sup>136</sup> Bradbrook AJ, MacCullum SV and Moore AP *Australian real property law* (4<sup>th</sup> ed 2007) 604.

<sup>137</sup> Bradbrook AJ, MacCullum SV and Moore AP *Australian real property law* (4<sup>th</sup> ed 2007) 604.

<sup>138</sup> See Bugden GF *Strata Titles Act 1973: a simple explanation of the provisions relating to home unit management* (2<sup>nd</sup> ed 1974) 4.

<sup>139</sup> This scheme was governed by the Real Property Act of 1919. See further Ilkin A *Strata schemes and community schemes management and the law* (3<sup>rd</sup> ed 1998) 8 and Bugden GF *Strata title management practice in New South Wales* (6<sup>th</sup> ed 1993) 2.

<sup>140</sup> This scheme made provision for long-term lease. See further Ilkin A *Strata schemes and community schemes management and the law* (3<sup>rd</sup> ed 1998) 8 and Bugden GF *Strata title management practice in New South Wales* (6<sup>th</sup> ed 1993) 2.

<sup>141</sup> In this scheme, land and flats in a building were owned in shares in terms of co-ownership or in terms of a management agreement. An owner would forgo his occupational rights in relation of another's flat in exchange for the right to exclusively occupy a specific flat and have access to the use of common areas. See further Ilkin A *Strata schemes and community schemes management and the*

Due to the increased demand for residential accommodation, these schemes needed to be replaced with a system more capable of handling the demands.<sup>142</sup> Since 1961 the other states and territories have passed their own strata title legislation, albeit under different names.

Before the Conveyancing (Strata Titles) Act<sup>143</sup> was passed by the New South Wales Parliament, it was not possible for an owner to hold a certificate of title for a part of a building.<sup>144</sup> The early types of schemes did not provide an individual occupant of a unit with the security of separate title and ownership.<sup>145</sup> The Act enabled the vertical and horizontal subdivision of a building into strata lots<sup>146</sup> and common property areas as well as the provision of a certificate of title, which enabled the transfer of units to purchasers.<sup>147</sup> Therefore, there was a certificate of title to a section of a building or structure. This fostered a sense of freedom and protection that was not available before.

Strata title developments were introduced as a consequence of the “desire of many people to live within a close proximity of the city centre,”<sup>148</sup> and because “home unit living offers a release from the immediate care of a garden and home maintenance”<sup>149</sup> and due to the “generally lower cost of a unit compared with a house having similar amenities together with improvements in design [which] has seen more families accepting this mode of living.”<sup>150</sup>

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*law* (3<sup>rd</sup> ed 1998) 8-9 and Bugden GF *Strata title management practice in New South Wales* (6<sup>th</sup> ed 1993) 2.

<sup>142</sup> Bugden GF *Strata title management practice in New South Wales* (6<sup>th</sup> ed 1993) 2.

<sup>143</sup> 17 of 1961.

<sup>144</sup> Robinson L *Strata title units in New South Wales* (4<sup>th</sup> ed 1989) 1. Strata title legislation confers a state guaranteed title.

<sup>145</sup> See Ilkin A *Strata schemes and community schemes management and the law* (3<sup>rd</sup> ed 1998) 9.

<sup>146</sup> A strata lot consists of a cube horizontally and vertically divided.

<sup>147</sup> Bugden GF *Strata title management practice in New South Wales* (6<sup>th</sup> ed 1993) 3; Robinson L *Strata title units in New South Wales* (4<sup>th</sup> ed 1989) 1 and Bugden GF *Strata Titles Act 1973: a simple explanation of the provisions relating to home unit management* (2<sup>nd</sup> ed 1974) 4.

<sup>148</sup> Robinson L *Strata title units in New South Wales* (4<sup>th</sup> ed 1989) 1.

<sup>149</sup> Robinson L *Strata title units in New South Wales* (4<sup>th</sup> ed 1989) 1.

<sup>150</sup> Robinson L *Strata title units in New South Wales* (4<sup>th</sup> ed 1989) 1.

Strata title development in New South Wales serves as an example of “structured title arrangement.”<sup>151</sup> This development is not limited to multi-story buildings containing residential units, although this is the most common form, but are more diverse. The legislation caters for townhouses, villa homes, retirement villages, free-standing homes, retail stores, commercial offices, warehouses, industrial units and mixed use schemes. There are various types of developments found in New South Wales, strata schemes forming part of a community scheme; part building strata schemes in a community scheme;<sup>152</sup> developments containing a freehold strata scheme;<sup>153</sup> a leasehold strata scheme<sup>154</sup> and a statutory staged strata scheme forming part of a community scheme.<sup>155</sup>

The first generation legislation<sup>156</sup> was repealed and replaced with the second generation legislation, the Strata Titles Act of 1973 which was introduced due to the deficiencies with regard to dispute resolution<sup>157</sup> and management in the 1961 legislation. A complete new set of by-laws<sup>158</sup> and a more detailed amendment

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<sup>151</sup> See Allen M *Buying off the plan in New South Wales* (1999) 13.

<sup>152</sup> See Allen M *Buying off the plan in New South Wales* (1999) 27. The 1992 amendment allowed strata schemes for parts of a building. Developers divided mixed use schemes according to its use and established two or more strata schemes in a building and separate freehold developments to avoid disputes.

<sup>153</sup> See Allen M *Buying off the plan in New South Wales* (1999) 27.

<sup>154</sup> See Allen M *Buying off the plan in New South Wales* (1999) 30 and the Strata Schemes (Leasehold Development) Act 219 of 1986.

<sup>155</sup> See Allen M *Buying off the plan in New South Wales* (1999) 28. This type of development enables a developer to complete a development without interference from a buyer in exchange for full disclosure of the developers' proposals for the second and later stages of the development.

<sup>156</sup> Conveyancing (Strata Titles) Act 17 of 1961.

<sup>157</sup> Bugden GF *Strata Titles Act 1973: a simple explanation of the provisions relating to home unit management* (2<sup>nd</sup> ed 1974) 12 and Robinson L *Strata title units in New South Wales* (4<sup>th</sup> ed 1989) 1123. Before the Strata Titles Act of 1973, the only effective remedy for the determination of disputes arising from a failure to comply with duties imposed by the legislation was to approach the Supreme Court for an injunction which was an expensive and slow process and the nature of the dispute did not warrant the court's attention nor was it practicable. Therefore, if a dispute arose between residents or between residents and the body corporate, it would linger on until common sense prevailed or the disputants found some other means of resolving the dispute. The Strata Titles Act of 1973 provided an alternative remedy which was a simple and informal method of arbitrating disputes, the appointment of a Strata Titles Commissioner who had the power to determine a wide range of disputes or complaints arising within a strata scheme, and a Strata Titles Board where a magistrate had exclusive jurisdiction to hear certain types of disputes which had a nature that merited judicial determination.

<sup>158</sup> Bugden GF *Strata Titles Act 1973: a simple explanation of the provisions relating to home unit management* (2<sup>nd</sup> ed 1974) 14 and Robinson L *Strata title units in New South Wales* (4<sup>th</sup> ed 1989) 1 and 69-75. The by-laws provide that the body corporate control, manage and administer the common property for the benefit of unit owners. Before the 1973 Act was introduced, many people were deterred from living in strata schemes because of the absence of readily available remedies to compel defaulting occupiers to rectify their conduct. For example, some residents' conduct would

procedure were introduced. This Act was later repealed and replaced with the third generation legislation, the Strata Schemes Management Act<sup>159</sup> and the Strata Schemes Management Regulation,<sup>160</sup> which provided for the management of the schemes by an owners' corporation, which is known as a body corporate in South Africa. South Africa's first generation Sectional Titles Act<sup>161</sup> was based on the first generation legislation of New South Wales.

The Strata Titles Act of 68 of 1973 was amended and renamed the Strata Schemes (Freehold Development) Act 68 of 1973,<sup>162</sup> which regulated the development and subdivision of strata schemes. The Act defines a strata scheme as "a legally recognised community of lot owners, occupiers and other persons having an interest in lots as illustrated in a strata plan who have imposed or conferred on them numerous duties, restrictions and rights as detailed in the Strata Schemes Management Act of 1996, regulations and by-laws."<sup>163</sup> Therefore, a strata scheme comprises both the lots and the common property in the strata plan and the people who have interests in the lots and common property. The Strata Schemes (Freehold

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disturb the peaceful harmony of the scheme by making an unreasonable amount of noise or refusing to comply with the by-laws governing the day to day management of the scheme. The Conveyancing (strata titles) Act 17 of 1961 contains the by-laws in two schedules. These by-laws are similar to the conduct and management rules in the Annexure to the Sectional Title Act. Schedule 1 is concerned with the powers and duties of the body corporate, the duties of the proprietors, meetings and voting. These by-laws can be amended by unanimous resolution. See chapter 3 for a discussion on the amendment of rules. Schedule 2 was designed to allow individual body corporate's to add to the by-laws for the purpose of providing for different situations existing in each strata scheme. This is similar to the house rules and the rules amended by the developer or trustees in sectional title schemes. These by-laws can be altered by special resolution. The body corporate is only empowered to make by-laws for the purpose of control, management, administration, use and enjoyment of the lots and common property. If the by-law is in conflict with the strata title legislation, it will be *ultra vires* as it is beyond the power of the body corporate to make such a by-law. If the by-law is in conflict with other by-laws, the by-law made last would take precedence over the first made by-law. This would invariably cause difficulties and should be rectified as soon as possible by repealing the inconsistent by-law and clarifying it. The 1973 Act has one schedule containing the by-laws and these can be varied by special resolution. The body corporate can amend, add to or repeal the by-laws to ensure that they are suitable for a particular scheme. As with the position in sectional title schemes, house rules provide for minor matters in the administration of the strata title scheme. These rules can be declared invalid because the legislation does not make provision for it and if a dispute should arise due to non-compliance with the house rules, the commissioner has no power to order compliance with the rules. See chapter 3 for a discussion of the legal nature of house rules in sectional title schemes.

<sup>159</sup> 138 of 1996. This Act provides for day-to-day management and dispute resolution in freehold strata schemes. A freehold strata scheme is a scheme in which a person can buy ownership of a lot in a scheme. Also refer to Ilkin A *Strata schemes and community schemes management and the law* (3<sup>rd</sup> ed 1998) 2 and 10.

<sup>160</sup> 505 of 2005.

<sup>161</sup> 95 of 1986.

<sup>162</sup> This Act was substantially amended in 1996.

<sup>163</sup> S 5.

Development) Act provides for ownership of common property, the management and maintenance of that common property and for regulating the social interaction of all the residents.

Community title schemes provide for the vertical division of land with shared property and are governed by the Community Land Development Act<sup>164</sup> and the Community Land Management Act,<sup>165</sup> which was repealed by the Strata Titles (Community Land) Amendment Act.<sup>166</sup> These statutes operate with traditional strata legislation.<sup>167</sup> This type of development is popular with developers as it facilitates staged development, permits a wide range of styles of development, establishes stable and efficient mechanisms for common ownership of facilities, provides for centralised management and allows for fair apportionment of costs amongst owners.<sup>168</sup>

A buyer of a lot in a community title scheme becomes a member of the community association and must comply with the requirements as provided for in the legislation.<sup>169</sup> The management statement contains a set of by-laws and regulations for management and operational aspects of the community. The management statement is binding on the members of the scheme and operates in a similar way to the by-laws in a strata scheme,<sup>170</sup> which in turn are similar to the conduct rules prescribed by the South African Sectional titles Act.

Restrictions on the intended use of the property may arise out of development consent conditions or title restrictions. These are imposed by a consent authority or under the by-laws contained in a management document such as a community management statement or a strata management statement.<sup>171</sup> These restrictions will be further discussed in chapter three.

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<sup>164</sup> 201 of 1989.

<sup>165</sup> 202 of 1989. Read with the Community Land Development Regulation 1995.

<sup>166</sup> 203 of 1989. Read with the Community Land Management Regulation 1995.

<sup>167</sup> Bradbrook AJ, MacCullum SV and Moore AP *Australian real property law* (4th ed 2007) 607.

<sup>168</sup> See Allen M *Buying off the plan in New South Wales* (1999) 33.

<sup>169</sup> See Allen M *Buying off the plan in New South Wales* (1999) 40.

<sup>170</sup> See Allen M *Buying off the plan in New South Wales* (1999) 50.

<sup>171</sup> See Allen M *Buying off the plan in New South Wales* (1999) 72.

## 2 5 2 3 Victoria

The focus will now be shifted to the state of Victoria. There were two types of flat or unit ownership in Victoria before 1967, namely share basis or company flat share<sup>172</sup> which was later replaced by stratum title.<sup>173</sup> Unit ownership was introduced because the demand for title to or ownership of a flat or the part of a building in which to live increased after the World War II as a result of the influx of migrants and returning soldiers.<sup>174</sup> However, the difficulty in providing this form of security of tenure lay at the problem of dividing a multi-story block of flats and to delineate which parts belonged to which people and how the surrounding land was to be shared.<sup>175</sup>

Due to the complexity of the stratum system, a simpler and more appropriate system of title for building subdivision was needed. The legislator stepped in and introduced legislation through which unit ownership was achieved.<sup>176</sup> In 1967 the Strata Titles Act<sup>177</sup> was enacted. Strata subdivision permitted the vertical subdivision of buildings into individual titles for separate strata lots or villa units, with or without common property, whether or not the units were on the same level. Upon registration of a strata plan, a body corporate<sup>178</sup> comes into existence. The body corporate is similar to the service company in a stratum development. However, the body corporate is a creature of statute and not subject to the regulations of Corporations law. Upon registration as a proprietor of a unit, each unit owner automatically becomes a

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<sup>172</sup> Albert M Paul *Cooper's stratum conveyancing* (2<sup>nd</sup> ed 1991) 2. This type of flat ownership was also known as company share scheme. The company was the registered proprietor of the land and the owner of a building constructed on the land. Shareholding in the company entitled the shareholder to occupancy rights in a specified part of the building. The company's articles of association governed the duties and obligations of the company and the shareholders. Examples of duties or obligations were the payment of contributions, maintenance and repairs. A disadvantage of this type of ownership was the difficulty in obtaining finance because lenders would be advancing against shares.

<sup>173</sup> Albert M Paul *Cooper's stratum conveyancing* (2<sup>nd</sup> ed 1991) 2 and 4-5. See further the Transfer of Land Act of 1958, which was amended by the Transfer of Land (Stratum Estates) Act of 1960. Under the stratum system, a building was subdivided into lots or units and a service company owned the common land surrounding the units, known as the residual land. The lot owners received a certificate of title to a lot together with shares in the service company. The service company and each lot owner entered into a service agreement which set out their duties and obligations, such as the payment of contributions. The disadvantage of this type of unit ownership was the difficulty in obtaining finance as mortgagees could not take priority over a registered claim by the company.

<sup>174</sup> Albert M Paul *Cooper's stratum conveyancing* (2<sup>nd</sup> ed 1991) 1. Consequently, there was a need for housing and an increased demand for flat type accommodation.

<sup>175</sup> See Ball R "Strata Titles Act and unit ownership" (1971) 1-12 at 1.

<sup>176</sup> See Ball R "Strata Titles Act and unit ownership" (1971) 1-12 at 2-6.

<sup>177</sup> 1967.

<sup>178</sup> Known as owners' corporations since 2007.



member of the body corporate. The registered unit owners are the registered proprietors of the common property as tenants in common in shares.

The by-laws set out the rights, powers, duties and liabilities of the body corporate and its members. The body corporate is responsible for the control, administration and management of the scheme, which is achieved through the implementation of by-laws.<sup>179</sup> These by-laws have a restrictive nature as they limit the use and enjoyment of unit owners in the interests of all the residents in a scheme.

This system of unit ownership is similar to sectional ownership in South Africa with regard to the existence and functions and membership of the body corporate, the common property and the by-laws. The statutorily prescribed rules, the house rules and the rules amended by the developer or trustees of the body corporate which govern sectional title schemes in South Africa also restrict the use and enjoyment entitlements of sectional owners to ensure the efficient operation of the scheme and to maintain harmonious relationships within the scheme.

In 1974 cluster subdivision<sup>180</sup> was introduced in Victoria due to the “desire for more flexible siting of units on land,”<sup>181</sup> the “preservation of special site features”<sup>182</sup> and the “provision of special interest developments.”<sup>183</sup> Cluster titles are a rare occurrence and are similar to strata titles with regard to the body corporate, by-laws and common property. Cluster titles provide for the vertical division of land.

In 1988 the Subdivision Act<sup>184</sup> introduced subdivision title, in which the body corporate’s rules govern the owners’ rights to use the common property and the lots. It also regulates each owner’s contribution to the maintenance of the scheme. The Subdivision Act repealed the Strata Titles Act of 1967 and the Cluster Titles Act of

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<sup>179</sup> See Ball R “Strata Titles Act and unit ownership” (1971) 1-12 at 9.

<sup>180</sup> Cluster Titles Act 1974.

<sup>181</sup> Albert M Paul *Cooper’s stratum conveyancing* (2<sup>nd</sup> ed 1991) 2.

<sup>182</sup> Albert M Paul *Cooper’s stratum conveyancing* (2<sup>nd</sup> ed 1991) 2. An example would be trees.

<sup>183</sup> Albert M Paul *Cooper’s stratum conveyancing* (2<sup>nd</sup> ed 1991) 2. An example would be tennis courts.

<sup>184</sup> 53 of 1988.

1974. It covers subdivisions of land and buildings in Victoria, which later led to the introduction of the Owners Corporation Act.<sup>185</sup> Existing company share scheme titles, existing stratum titles, existing strata titles<sup>186</sup> and cluster titles<sup>187</sup> continued to exist under the Subdivision Act.

#### 2 5 2 4 *Queensland*

The Building Units and Group Titles Act<sup>188</sup> provides for the establishment and administration of community title schemes in Queensland. Land is subdivided according to either a primary plan or a community titles plan. The Act is similar to the South African sectional title legislation<sup>189</sup> as it provides for the allocation and maintenance of common property,<sup>190</sup> an elected body corporate that is responsible for the management of the building units scheme,<sup>191</sup> the payment of levies as part of the owners' contributions and a penalty in the case of non-payment,<sup>192</sup> by-laws<sup>193</sup> and dispute resolution procedures.<sup>194</sup> The management of these schemes is regulated by the Body Corporate and Community Management Act of 1997 and Body Corporate and Community Management Regulations.<sup>195</sup>

#### 2 5 3 Germany

Germany was chosen as a comparative jurisdiction because the reasons behind the introduction of condominiums as an alternative form of housing were the same as in South Africa before the legislature intervened and introduced sectional title schemes. In both jurisdictions, a growth in population led to a housing shortage and the consequent need for affordable housing.

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<sup>185</sup> 69 of 2006.

<sup>186</sup> On condition that the body corporate complied with the Subdivision Act and the Regulations of 1989 and that no new units were built.

<sup>187</sup> On condition that the body corporate complied with the Subdivision Act and the Regulations of 1989.

<sup>188</sup> 69 of 1994.

<sup>189</sup> Sectional Titles Act 95 of 1986.

<sup>190</sup> Ss 27-29.

<sup>191</sup> Ss 43-56.

<sup>192</sup> Ss 100-104.

<sup>193</sup> Ss 132-136 and Schedule 1 ss 1-11.

<sup>194</sup> Ss 174-200.

<sup>195</sup> 269 of 2008.

In Germany, the possible alternatives to the condominium system, specifically long-term lease, share-block schemes and *Stockwerkseigentum*, were inadequate and unsatisfactory. The *Stockwerkseigentum* was a primitive and underdeveloped form of apartment ownership, where storeys in a high-rise building were subdivided in individual ownership. Due to the individualistic character which it fostered, the individual owners were responsible for the management and maintenance of the building. No provision was made for a central administrative body to deal with the organisation and upkeep of the building. This inevitably led to many disputes amongst the owners. No machinery existed for the settling of disputes or sanctions against members who made community life unbearable. This led to the adoption of the nickname of *Streithäuser*.<sup>196</sup> Due to these deficiencies, the public viewed this institution with suspicion.

The First and Second World Wars caused a serious housing shortage in Germany. Coupled with this was an increased desire for home ownership, which led to an unfavourable situation where the German legislator had to intervene and reconsider apartment ownership as a solution to the crisis. Carl Wirths, a member of the German Federal Parliament who is considered to be the founding father<sup>197</sup> of the condominium system in Germany, initiated the promulgation of this legislation in West Germany in 1951.

The Federal Republic of Germany's Apartment Ownership Act was enacted in 1951.<sup>198</sup> The most important reasons why the German legislator found it necessary to introduce a system of condominium, were the shortage of inexpensive accommodation, unprecedented population growth in the cities, the demand for inexpensive residential land within commuting distance of the big cities, and the rise of land and building prices. Therefore the dream of owning a house on a separate piece of land<sup>199</sup> was not realised by many.

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<sup>196</sup> Meaning "houses of dissent". Those that viewed this form of ownership in an unfavourable light had the saying that "one can see a *Stockwerkseigentum* from a distance".

<sup>197</sup> In Germany, he is known as the *Vater des Wohnungseigentums*.

<sup>198</sup> Also known as the *Wohnungseigentumsgesetz* in Germany.

<sup>199</sup> Also known as *Einfamilienhaus*.

By enacting condominium legislation, the legislator attempted to solve the above mentioned problems by providing a cheaper form of ownership, such as ownership of flats, where the costs were borne collectively by the residents. The main aim of the legislator was to satisfy the psychological desire of the majority of families in a capitalistic society to own their own homes. They hoped that this would lead to social, economic and political stability, which was considered to be very important in post-war Germany.<sup>200</sup> The secondary aim was to cater for the wealthier members of society such as businessmen and to provide for holiday accommodation, industrial space and retirement schemes.

## 2 5 4 Israel

Israel was chosen as a comparative jurisdiction because many of the provisions in the Sectional Titles Act<sup>201</sup> were influenced by the Israeli condominium legislation.<sup>202</sup> The law governing co-operative housing in Israel is an example of legislative intervention in response to social and economic pressures as well as psychological needs.<sup>203</sup> Israel found itself in a similar situation as that in South Africa, which influenced the need to introduce a system of condominiums,<sup>204</sup> namely a higher demand for low cost housing caused by the increase in population due to natural causes and immigration, the high costs associated with land and building, the developers' unwillingness to build new buildings due to the tenant protection legislation, the psychological need for home ownership, rising inflation, a desire for a closer social life and security and the lack of any satisfactory existing alternatives to condominiums.<sup>205</sup>

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<sup>200</sup> See Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 3.

<sup>201</sup> Sectional Titles Act 66 of 1971 and Sectional Titles Act 95 of 1986.

<sup>202</sup> See Cowen DV "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" (1973) 6 *CILSA* 1-38 at 1 and Van der Merwe CG "The Sectional Titles Act and the Wohnungseigentumsgesetz" (1974) 7 *CILSA* 165-185 at 165.

<sup>203</sup> See Elman P "Co-operative housing in Israel" (1969) 4 *Israel LR* 333-363 at 333.

<sup>204</sup> See Van der Merwe CG "The South African Sectional Titles Act and the Israeli condominium legislation" (1981) 14 *CILSA* 129-164 at 130; Elman P "Co-operative housing in Israel" (1969) 4 *Israel LR* 333-363 at 333-334 and Van der Merwe CG "The Sectional Titles Act and the Wohnungseigentumsgesetz" (1974) 7 *CILSA* 165-185 at 165.

<sup>205</sup> See Van der Merwe CG "The South African Sectional Titles Act and the Israeli condominium legislation" (1981) 14 *CILSA* 129-164 at 130-131.

The underlying principle in both the South African Sectional Titles Act and the Israeli condominium legislation is that the sectional owner or apartment owner becomes the individual owner of his section or apartment.<sup>206</sup> His powers of use and enjoyment are limited by the provisions of the statutorily prescribed restrictions and schedules of rules.<sup>207</sup> Both statutes provide that the condominium must be managed in terms of the rules which regulate the relations between owners and their associated rights and duties.<sup>208</sup> In both jurisdictions, the rules are important as they regulate the administration, use and enjoyment of the condominium.<sup>209</sup>

In 1952 a Co-operative Houses Law was enacted. After it underwent a number of amendments, a consolidated version was issued in 1961.<sup>210</sup> The Co-operative Houses Law was incorporated into the Israeli Land Law in 1969.<sup>211</sup> The Israeli Land Law was seen as “durable”<sup>212</sup> due to its “soundness in law”<sup>213</sup> and “compatibility”<sup>214</sup> with the above mentioned social and economic needs. The small number of cases that have come before the courts and the tribunals suggests that the legislative framework currently in operation is effective and wide-reaching, which ensures that its enforcement, operation and compliance is “generally smooth”.<sup>215</sup>

## 2 6 Concluding remarks

In this chapter there was a comparative discussion of the historical background of the immovable property ownership system in South Africa before the introduction of separate ownership of a part or section of land or a building as in sectional title

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<sup>206</sup> See Van der Merwe CG “The South African Sectional Titles Act and the Israeli condominium legislation” (1981) 14 *CILSA* 129-164 at 144.

<sup>207</sup> See Van der Merwe CG “The South African Sectional Titles Act and the Israeli condominium legislation” (1981) 14 *CILSA* 129-164 at 145.

<sup>208</sup> See Van der Merwe CG “The South African Sectional Titles Act and the Israeli condominium legislation” (1981) 14 *CILSA* 129-164 at 151. See further s 61 Land Law and s 35(2) Sectional Titles Act 95 of 1986.

<sup>209</sup> See Van der Merwe CG “The South African Sectional Titles Act and the Israeli condominium legislation” (1981) 14 *CILSA* 129-164 at 153.

<sup>210</sup> See the Co-operative Houses Law (Consolidated Version) of 1961. See further Weisman J “The Land Law, 1969: a critical analysis” (1970) 5 *Israel LR* 379-456 at 442.

<sup>211</sup> See the Laws of the State of Israel 5729 of 1969. See further Weisman J “The Land Law, 1969: a critical analysis” (1970) 5 *Israel LR* 379-456 at 442.

<sup>212</sup> See Elman P “Co-operative housing in Israel” (1969) 4 *Israel LR* 333-363 at 336.

<sup>213</sup> See Elman P “Co-operative housing in Israel” (1969) 4 *Israel LR* 333-363 at 336.

<sup>214</sup> See Elman P “Co-operative housing in Israel” (1969) 4 *Israel LR* 333-363 at 336.

<sup>215</sup> See Elman P “Co-operative housing in Israel” (1969) 4 *Israel LR* 333-363 at 337.

schemes. The common law position was discussed, with reference to its principles of ownership<sup>216</sup> and the subsequent amendment of these principles. The main reasons for the introduction of legislation, making provision for sectional ownership was examined, as well as when and how this legislation was introduced. The purpose, effect and success of the legislation were also discussed.

The jurisdictions used as a comparative measure, Australia, Germany and Israel, were chosen because they faced similar challenges to those found in South Africa, which led to the need for an alternative form of land ownership. There were also similarities between their systems of separate ownership of a part or section of land or a building and sectional ownership in South Africa.

In conclusion, it can be seen that by comparing the currently operative South African sectional title legislation and those in operation in other similar jurisdictions, it has beneficial value because these legislatures have through experience established what works effectively and what needs improvement. Therefore, in doing so, it can guide the South African legislature in amending or promulgating sectional title legislation. With regard to the general topic, it is very important to have guiding principles to follow when deciding what restrictions are applicable to a particular scheme based on its nature and purpose. It is also important to have a guide when determining how far these restrictions may limit the entitlements of ownership before they are considered restrictive in their application and effect.

This comparative historical introduction is further expanded on in the next chapter, where the legal nature of the rules governing sectional title schemes will be discussed with a comparative perspective. Some of the concepts introduced in this chapter will be further explained in the following chapter.

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<sup>216</sup> *Superficies solo cedit (omne quod inaedificatur solo cedit); cuius est solum eius est usque ad coelum and plena in re potestas.*

## 3 Comparative description of the rules governing sectional title schemes

### 3 1 Introduction

In this chapter, a statutory analysis will be undertaken to describe the different types of rules governing sectional title schemes. The focus will be on the legal nature of the rules, the limitations on sectional ownership imposed by the rules, examples of restrictions, the amendment procedure, the scope of the application and operation of the rules, the enforcement mechanisms, the sanctions for non-compliance with the rules, the causes of and people involved in disputes and dispute resolution. This description will be aided by a comparative survey where relevant, concentrating on the jurisdictions that have similar approaches with regard to the above mentioned issues and those that have influenced South African legislation, namely Australia<sup>217</sup> and Germany.<sup>218</sup>

These two jurisdictions were chosen as suitable comparative countries as they will serve to identify any shortcomings in the applicable legislation and provide possible solutions that may be applied in future. Australia's strata title<sup>219</sup> legislation is similar to the South African sectional title legislation and its legal system is similar to that found in South Africa.<sup>220</sup> This is important, as it will lead to a better understanding of how sectional titles fits into the property law scheme as a whole. The need for an alternative form of property ownership was similar in South Africa and Germany. Policy considerations, such as the social need for housing and security were both similar factors in the introduction of sectional title schemes in South Africa and *Wohnungseigentum* in Germany. German legislation makes provision for very effective enforcement mechanisms for the rules and sanctions for non-compliance

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<sup>217</sup> In Australia this form of property ownership is known as strata titles.

<sup>218</sup> In Germany this form of property ownership is known as *Wohnungseigentum*.

<sup>219</sup> Strata titles involve the vertical and horizontal subdivision of land and the building on the land into lots and common property. The lots are made up of the units or apartments and the common property is made up of the land above, below and around the building, as well as the common facilities within the building such as elevators and stairs. The lots are parcels of "airspace" usually bounded by floors, walls and ceilings as defined on a plan drawn by a surveyor and registered in the local titles office. The common property is everything that is left after the lots are taken out of the original land parcel.

<sup>220</sup> See 3 2 1; 3 5 and 3 7 5 below.

with the rules that serve as an example that South Africa may do well to follow in the future.<sup>221</sup>

The hypothesis set out in the introductory chapter<sup>222</sup> will be examined more closely in this chapter. When evaluating the model rules as prescribed by the Sectional Titles Act<sup>223</sup> and those adopted by the trustees of the body corporate of the sectional title scheme, it is expected that they restrict the rights and the entitlements of the sectional owners and other occupiers of the sections. It is assumed that there is a limitation of ownership in the enforcement of the rules and the obligations imposed through them. In some instances the rules might exceed the bounds of reasonableness and result in unfair discrimination, arbitrary deprivation, unfair administrative action or restrictions on access to courts for dispute resolution.

The aim of the discussion in this chapter is to identify the rules governing sectional title schemes which might limit ownership, after which it could be established in a later chapter<sup>224</sup> whether any of these restrictions go beyond that which is considered reasonable. It could then be argued whether these rules should be declared invalid and unenforceable due to the fact that they are contrary to the fundamental rights entrenched in the Constitution.<sup>225</sup>

## **3 2 Rules governing a sectional title scheme**

### **3 2 1 Introduction**

The focus of the discussion will be on the rules which are statutorily prescribed in the Sectional Titles Act, hereinafter referred to as the Act, known as the model or standard rules. They provide for the control, management, administration, use and enjoyment of the sections<sup>226</sup> and the common property<sup>227</sup> in the scheme.<sup>228</sup> The rules

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<sup>221</sup> See 3 6 4 below.

<sup>222</sup> See chapter 1.

<sup>223</sup> 95 of 1986.

<sup>224</sup> See chapter 4.

<sup>225</sup> Ss 9, 25(1), 33 and 34 of the Constitution of the Republic of South Africa 1996.

<sup>226</sup> A section is a part of a building which is indicated on the sectional plan and in respect of which separate ownership or co-ownership can be acquired. It can be described with reference to the



from this source fall within two classes, namely the management rules<sup>229</sup> and the conduct rules,<sup>230</sup> which will be discussed fully. The Act, the model management rules and the conduct rules operate within a hierarchy, with the Act being the supreme statute and the conduct rules not being allowed to conflict with the management rules.

A sectional title scheme is controlled and managed by the rules from the moment the body corporate is established.<sup>231</sup> The body corporate is established after the opening of the sectional title register when the developer alienates the first unit.<sup>232</sup> Secondly, there are the rules that are adopted, substituted, amended, added to and or repealed by either the developer or by the trustees of the body corporate by resolution.<sup>233</sup> When submitting an application for the opening of a sectional title register at the deeds registry, the developer must submit a conveyancer's certificate providing that the rules prescribed in terms of the Act<sup>234</sup> are applicable to the scheme in question. The developer may substitute, add to, amend or repeal the prescribed management and conduct rules to the extent that he is allowed in terms of the Act.<sup>235</sup>

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median line of the floors, walls and ceilings. It includes a balcony or porch and parking belonging to the section.

<sup>227</sup> The common property includes the land and all parts of the building which do not form part of the sectional owners' sections. Sectional owners jointly own the common property in bound common ownership, the share being calculated according to the participation quota. Examples are lifts; staircases; corridors; swimming pool; tennis courts and the club house.

<sup>228</sup> S 35(2) of the Sectional Titles Act 95 of 1986.

<sup>229</sup> S 35(2)(a) and Annex 8.

<sup>230</sup> S 35(2)(b) and Annex 9.

<sup>231</sup> S 35(1) and (4). See further Carey Miller DL and Pope A *Land title in South Africa* (2000) 220.

<sup>232</sup> S 36(1).

<sup>233</sup> The prescribed management rules can be substituted, added to, amended or repealed by a unanimous resolution. A unanimous resolution is a resolution taken unanimously by all the members present at a general meeting at which at least 80% of the total number of members of the body corporate are present or represented, or a resolution accepted in writing by all the members or their proxy/ies or their representatives. The prescribed conduct rules can be substituted, added to, amended or repealed by a special resolution. A special resolution is a resolution taken by the majority of at least 75% of the votes of the members of the body corporate present or represented at a general meeting, or a resolution accepted in writing by 75% of all the members of a body corporate or their proxy/ies or their representatives. See 3 4 below.

<sup>234</sup> S 35(2)

<sup>235</sup> Ss 11(3)(e) and 35(2)(a) and (b). See further regulation 30(1) GN R664 (GG11245) 8 April 1998.

The prescribed management and conduct rules can be substituted, added to, amended or repealed by resolution of the body corporate.<sup>236</sup> The body corporate must notify the registrar of deeds of any rules substituted, added to, amended or repealed.<sup>237</sup> The rules will come into operation at the date of filing the notice at the deeds registry.<sup>238</sup> The prescribed conduct rules may be substituted, added to, amended or repealed provided that they are not irreconcilable with the prescribed management rules.<sup>239</sup> Any management or conduct rule made by either the developer or the body corporate must be reasonable and apply equally to all sectional owners and other occupiers of units that are put to substantially the same purpose.<sup>240</sup> Thirdly, there are those rules that are adopted by the trustees, known as the house rules, which may not be contrary to either the Act or the prescribed management and conduct rules.<sup>241</sup> The body corporate must make available the rules in operation on application by a sectional owner or other occupier.<sup>242</sup>

As mentioned in the introduction to this chapter, a comparative survey will be used to discuss the similar approaches to the issues surrounding sectional title schemes in other jurisdictions. Australian strata title schemes are similar in nature to South African sectional title schemes, and as such, serve as a good comparative example. The Conveyancing (Strata Titles) Act<sup>243</sup> was the first to address horizontal subdivision of buildings in Australia. The Strata Schemes Management Act<sup>244</sup> and the Strata Schemes Management Regulation<sup>245</sup> govern the management of strata title schemes in Australia.<sup>246</sup> In New South Wales, by-laws are applicable to strata schemes regardless of the nature of the scheme.<sup>247</sup> The legislation does not limit matters for which by-laws may be enacted. However, they may not prohibit occupation of a lot by children in a residential scheme or prohibit the keeping of a

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<sup>236</sup> S 35(2)(a) and (b). See also regulation 30(4) of the Sectional Titles Act. See footnote 233 above for the definitions of the relevant resolutions that must be taken. See 3 4 below.

<sup>237</sup> S 35(5)(a) of the Sectional Titles Act. See 3 4 below.

<sup>238</sup> S 35(5)(c) of the Sectional Titles Act. See 3 4 below.

<sup>239</sup> S 35(2)(b) of the Sectional Titles Act. See further 3 4 below.

<sup>240</sup> S 35(3).

<sup>241</sup> Ss 36(4) and 37(1)(r) of the Sectional Titles Act.

<sup>242</sup> S 35(6) of the Sectional Titles Act.

<sup>243</sup> 1961.

<sup>244</sup> 138 of 1996.

<sup>245</sup> 505 of 2005.

<sup>246</sup> The main focus will be on the position in New South Wales as the legislation is most similar to that in South Africa.

<sup>247</sup> See Allen M *Buying off the plan in New South Wales* (1999) 20.

dog as a guide or hearing dog by an owner or occupier in a strata scheme.<sup>248</sup> These prohibitions will be discussed at a later stage in this discussion.

### 3 2 2 Management rules

As mentioned previously, the rules governing a sectional title community fall within two classes, the first being the management rules. These rules are prescribed by regulation and they regulate the activities of the trustees and the members of the body corporate, with regard to the administration of the scheme. The model management rules deal with matters concerning the trustees of the body corporate,<sup>249</sup> such as their appointment by election,<sup>250</sup> their meetings,<sup>251</sup> their functions, powers and duties,<sup>252</sup> each member of the body corporate's levy contributions,<sup>253</sup> any luxurious or non-luxurious improvements on the common property,<sup>254</sup> the keeping of annual financial records,<sup>255</sup> the appointment, powers and duties of the managing agent,<sup>256</sup> meetings of the owners,<sup>257</sup> duties of the owners and occupiers of the sections<sup>258</sup> and the determination of disputes through the use of arbitration as provided for by the Amendment Act.<sup>259</sup>

### 3 2 3 Conduct rules

The second class of rules governing a sectional title scheme are the conduct rules,<sup>260</sup> which are also prescribed by regulation. They determine the entitlements of use and the duties of sectional owners with regard to their individual sections and their share in the common property. These model rules deal with matters such as the

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<sup>248</sup> See Allen M *Buying off the plan in New South Wales* (1999) 21.

<sup>249</sup> Annex 8 rules 4-29 and s 35(2)(a) of the Sectional Titles Act 95 of 1986.

<sup>250</sup> Annex 8 rule 6.

<sup>251</sup> Annex 8 rule 15.

<sup>252</sup> Annex 8 rules 25-29.

<sup>253</sup> Annex 8 rules 30-31.

<sup>254</sup> Annex 8 rule 33.

<sup>255</sup> Annex 8 rules 36-39.

<sup>256</sup> Annex 8 rules 46-49.

<sup>257</sup> Annex 8 rules 50-67.

<sup>258</sup> Annex 8 rules 68-70.

<sup>259</sup> Annex 8 rule 71 of the Sectional Titles Amendment Act 44 of 1997.

<sup>260</sup> Annex 9; s 35(2)(b) of the Sectional Titles Act 95 of 1986 and Sch 1 Model by-laws for residential schemes Strata Schemes Management Regulations 2005.

keeping of pets,<sup>261</sup> refuse disposal,<sup>262</sup> vehicles parked on the common property,<sup>263</sup> any damage, alterations and additions to the common property,<sup>264</sup> the scheme's external appearance,<sup>265</sup> any signs and notices advertised on the common property,<sup>266</sup> littering,<sup>267</sup> laundry,<sup>268</sup> the storage of inflammable material and other dangerous acts,<sup>269</sup> the letting of units<sup>270</sup> and the eradication of pests.<sup>271</sup>

### 3 2 4 House rules

There is no statutory provision permitting the creation of house rules. In fact, the explicit provision for the model management and conduct rules could be seen as impliedly excluding other methods of rule-making.<sup>272</sup> Unlike the statutorily prescribed rules, the implementation and enforcement of house rules is not controlled, thereby undermining the certainty and protection afforded to owners. This might suggest that a strict approach should be followed which does not allow these rules in sectional title schemes.<sup>273</sup> However, these rules, which are adopted by the trustees of the body corporate, regulate the control, use, safety and cleanliness of the common property<sup>274</sup> and are seen as more flexible than those that are statutorily prescribed. Therefore, they serve as effective tools to regulate practical problems as they arise in the daily management of the scheme, as they may be amended by the trustees at short notice.

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<sup>261</sup> Annex 9 rule 1 of the Sectional Titles Act 95 of 1986. See further *Body Corporate of the Laguna Ridge Scheme v Dorse* 1999 (2) SA 512 (D) and Sch 1 Model by-law 16.

<sup>262</sup> Annex 9 rule 2 and Sch 1 Model by-laws 9 and 15.

<sup>263</sup> Annex 9 rule 3 and Sch 1 Model by-law 2.

<sup>264</sup> Annex 9 rule 4 and Sch 1 Model by-laws 4 and 5.

<sup>265</sup> Annex 9 rule 5 and Sch 1 Model by-laws 5, 10 and 17.

<sup>266</sup> Annex 9 rule 6. See further *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009).

<sup>267</sup> Annex 9 rule 7.

<sup>268</sup> Annex 9 rule 8 and Sch 1 Model by-law 10.

<sup>269</sup> Annex 9 rule 9 and Sch 1 Model by-law 12.

<sup>270</sup> Annex 9 rule 10.

<sup>271</sup> Annex 9 rule 11.

<sup>272</sup> See Wood-Bodley MC "House rules' in sectional title schemes – are they ultra vires?" (2003) 120 SALJ 602-609 at 607. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (April 2010 Issue 12) 13.33-13.35.

<sup>273</sup> See Wood-Bodley MC "House rules' in sectional title schemes – are they ultra vires?" (2003) 120 SALJ 602-609 at 608.

<sup>274</sup> Examples of issues governed by the house rules are speed limits, parking and noise restrictions.

The trustees are empowered to do all things reasonably necessary for the control, management and administration of the common property. Therefore, by adopting house rules, they are exercising their statutory powers. House rules are enforceable when they comply with two requirements of legitimacy. They must be an exercise of the trustees' powers of control over the common property or permission given by the trustees exercising their discretion.<sup>275</sup> However, they may not be objectionable in the way that they restrict the rights of sectional owners.<sup>276</sup>

The Strata Titles Management Act of 1996 makes provision for house rules in strata schemes in New South Wales. When the owners' corporation<sup>277</sup> is unable to obtain a special resolution to enable an addition to be made to the by-laws<sup>278</sup> found in Schedule 1 of the Act, they pass a Schedule 2 by-law. "This attempted means of equating a house rule to a by-law may achieve the desired result for the purpose of providing for minor matters in the administration of the scheme, where all the participants in the scheme are prepared to acknowledge and comply with the house rules."<sup>279</sup> Owners and occupiers of lots in strata title schemes may voluntarily comply with house rules, but if a dispute arises due to non-compliance with the rules, no power is vested in the Commissioner to order compliance with these rules.

### 3 3 Legal nature of the rules

#### 3 3 1 An introduction to the legal nature of rules

The legal nature of private-law institutions, such as sectional title schemes, are usually described as contractual,<sup>280</sup> the basis of the scheme being a contract entered into between owners *inter se* and between the owners and the body corporate.

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<sup>275</sup> S 38(j) of the Sectional Titles Act 95 of 1986.

<sup>276</sup> See Wood-Bodley MC "House rules' in sectional title schemes – are they ultra vires?" (2003) 120 *SALJ* 602-609 at 605.

<sup>277</sup> Legal entity, statutorily established which comprises all the owners of the lots in a strata scheme and is responsible for the management of the scheme.

<sup>278</sup> Rules governing the day-to-day management of the strata scheme.

<sup>279</sup> Collins DA and Jackson RJ *Strata title units in New South Wales* (1974) 72.

<sup>280</sup> See Pienaar GJ "Die regsraad van privaatregtelike reëls en regulasies" (1991) 54 *THRHR* 400-413 at 400 and Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 464.

According to Spoelstra J in *Wiljay Investments v Body Corporate Bryanston Crescent*:<sup>281</sup>

“[t]he rules set out in Schedule 1 of the Sectional Titles Act 66 of 1971 are not intended to define or limit the ownership of individual owners of sections, units, or common property. The rules, read with the provisions of the Act, contain a constitution or the domestic statute of the Body Corporate. In this sense, it could properly be construed as containing the terms of an agreement, between owners *inter se*, and between owners on the one hand, and the Body Corporate on the other hand, providing for the use, enjoyment and maintenance of the property which forms the object of the hybrid rights of ownership created by the Act. Arrangements of this nature have never been considered as servitudes of any nature.”

In *Lottering v Palm*,<sup>282</sup> the court confirmed what was said in *Wiljay Investments v Body Corporate Bryanston Crescent*, namely that the rules of a body corporate should properly be construed as containing the terms of an agreement between owners *inter se* and between owners and the body corporate. The agreement intended to provide peaceful, reasonably certain and presumably the most satisfactory arrangement possible under the circumstances for the use, enjoyment and maintenance of the property which forms the object of the rights.

In the *Lottering* case, neighbours in a sectional title scheme were in dispute regarding the position of the boundary between the two units. Lottering had for many years been in possession of the disputed area. Palm wanted to build a carport and obtained permission from the body corporate to extend the boundary wall. Permission was granted and construction on the retaining wall commenced. The wall clearly encroached on the area of which Lottering had been in possession and as such sought demolition of the wall. Palm argued that Lottering, as a member of the body corporate and as a subscriber to the rules of the body corporate, had impliedly consented to the permission granted by the body corporate to Palm. The court held that the permission was a creation of a right and in the absence of Lottering’s clear consent, Palm was obliged to approach the court to enforce the right. Palm’s failure

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<sup>281</sup> 1984 (2) 722 SA (T) at 727D-F.

<sup>282</sup> 2008 (2) SA 553 (D) at 557A-C.

to do so amounted to her taking the law into her own hands and was subsequently unlawful. The court granted the demolition order temporarily pending the resolution of the boundary dispute between the parties.

However, despite the authority of the *Wiljay Investments v Body Corporate Bryanston Crescent* decision, it might be more accurate to describe the legal nature of the rules by referring to the fact that they were created by the owners as the objective law of an autonomous private law community. Therefore, the rules can be classified as the internal law of the community of owners as a body corporate.<sup>283</sup> This approach is followed for the rules that are substituted, added to, amended and repealed by the developer initially and later by the trustees of the body corporate, whereas the Sectional Titles Act statutorily prescribes rules in its regulations. These rules are binding on the sectional owners and other occupiers as will be discussed later.

To further the argument that the rules are not contractual in nature, one can look at various aspects surrounding the establishment and operation of a sectional title scheme. Firstly, the body corporate is established without the need for the conclusion of a contract regulating its existence and operation.<sup>284</sup> Secondly, the membership of the owners to the body corporate is not contractual in nature as they become members of the body corporate automatically when they obtain a legal right to their units.<sup>285</sup> Therefore, the internal relationship between owners as members of the body corporate cannot be contractual in nature. Thirdly, a sectional title scheme is controlled and managed by the rules from the moment the body corporate is established. This has the implication that potential owners who are not yet members of the body corporate and have not yet reached consensus regarding the rules, are

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<sup>283</sup> See Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 124-125 and Wood-Bodley MC “‘House rules’ in sectional title schemes – are they ultra vires?” (2003) 120 *SALJ* 602-609 at 603. See also *Wiljay Investments v Body Corporate Bryanston Crescent* 1984 (2) 722 SA (T) at 727D-F.

<sup>284</sup> See Pienaar GJ “Die beheersregspersoon by deeleiendom – ‘n noodsaaklike rariteit” (1983) 46 *THRHR* 62-81 at 71-72.

<sup>285</sup> *J de Moor (Edms) Bpk v Beheerligaam van Outeniqua* 1985 (3) SA 997 (T), where it was seen that the body corporate manages the scheme according to the rules and is responsible for the enforcement thereof.

also bound by the rules when they subsequently become owners.<sup>286</sup> Therefore, it is incorrect to refer to them as being contractual in nature.

Another view is that the rules are delegated legislation.<sup>287</sup> As such, they have to pass the test of reasonableness. In order to determine this, the individual circumstances of each case must be considered as factors. If they are unreasonable, the rules will be invalid and *ultra vires* as their enforcement would then lead to oppression, partiality and inequality.<sup>288</sup> However, this view is difficult to apply as the management organ of the community of owners, the body corporate, represented by the trustees, is not a public-law state or administrative body. The members of the body corporate are private persons, therefore the scheme is not managed in the light of public interests.<sup>289</sup>

The rules establish a clear and binding framework in which both the management of the sectional title scheme and relationships between sectional owners and occupiers are governed.<sup>290</sup> The rules determine the nature of the scheme and thus which conditions are suitable to the scheme. The seller of a unit must provide the prospective purchaser with a copy of the rules governing the sectional title scheme.<sup>291</sup> As mentioned previously, the rules are not contractual in nature and as such are not provided to the purchaser on the basis of a contractual agreement based on mutual consent between the purchaser and the body corporate. Instead, the rules serve as a mechanism whereby the purchaser undertakes to behave in a manner that will not prejudice the harmonious community or the efficient operation of the sectional title scheme. The purchaser must read and agree to this “fine print” and not behave recklessly by ignoring it. He must abide by the rules and act accordingly. The purchaser must question any conditions that he believes are

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<sup>286</sup> See Pienaar GJ “Die regsraad van privaatregtelike reëls en regulasies” (1991) 54 *THRHR* 400-413 at 406.

<sup>287</sup> See Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 12. This is legislation that is delegated to a state organ by the state in order to perform the administrative actions as provided for in the delegated legislation.

<sup>288</sup> See Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 130.

<sup>289</sup> See Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 131.

<sup>290</sup> See Maree T *Kits deeltitel oplossings* (2001) 1.

<sup>291</sup> See Paddock GJ *Sectional title handbook* (1983) 7.



contrary to his constitutional rights before entering into the contract of sale with the seller and the contractual relationship with the body corporate of the sectional title scheme in which he is purchasing a unit. Once the unit is purchased, such owner must apply to court to have the offending management or conduct rule set aside. If the rules are seen as reasonable they are acceptable. However, if they are unreasonable, they are considered to be unacceptable and unenforceable.<sup>292</sup>

The rules must be comprehensive in order to provide for efficient control and management of the scheme while not attempting to cover “every conceivable aspect of life in the scheme”.<sup>293</sup> However, the rules should be capable of providing for a penalty of some kind in the event of a persistent breach. If the rules over-reach their aim of regulating the behaviour of owners and other residents, they may be “flouted with impunity”,<sup>294</sup> which will lead to a situation in which the rules are ignored by the owners and occupiers and therefore cease to be a valuable mechanism of control and management by the trustees.

While nobody wants to impose unreasonable restrictions, owners and trustees of sectional schemes must always be aware that the common property belongs to every owner and that every owner has some control over what happens to it. Reasonable people do not often object to reasonable changes, but when unauthorised changes become “weapons between unreasonable people” the body corporate must intervene.<sup>295</sup> The Act<sup>296</sup> requires that the rules be applied reasonably and equally between sectional owners who use their units for substantially the same purpose. Rules may therefore not be adapted in order to suit the needs of an individual or certain group of sectional owners as this would be an unreasonable application.

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<sup>292</sup> S 35(5) of the Sectional Titles Amendment Act 44 of 1997. See further Van der Merwe CG “A critical analysis of the innovations introduced by the Sectional Titles Act of 1997” (1998) 61 *THRHR* 171-193 at 191.

<sup>293</sup> See Paddock GJ *Sectional title handbook* (1983) 18.

<sup>294</sup> See Paddock GJ *Sectional title handbook* (1983) 18-19.

<sup>295</sup> See Gauld B *A year of sectional titles* (2002)

[http://www.sto.co.za/library/index.php?title=Books:A\\_Year\\_of\\_Sectional\\_Titles\\_-\\_Bob\\_Gauld](http://www.sto.co.za/library/index.php?title=Books:A_Year_of_Sectional_Titles_-_Bob_Gauld) (accessed online on 01/09/2010).

<sup>296</sup> S 35(3) of the Sectional Titles Act 95 of 1986.

## 3 3 2 Limitation of the entitlements of ownership

### 3 3 2 1 Introduction

The exercise of a sectional title owner's entitlements, as well as the entitlements of other occupiers, is limited by the entitlements of other sectional owners and occupiers to a much larger extent than with common law ownership. The rules restrict the common law principle of *plena in re potestas*, in terms of which the owner of the land may exercise his entitlements of use and enjoyment fully. Due to these restrictions, some legal academics have followed the view that sectional title ownership is not "real" or "genuine"<sup>297</sup> ownership but rather a limited real right. The reason for this view was that the traditional view of ownership was incorrectly seen as absolute, whereas ownership of a sectional title unit has restrictions placed on it. In a dense and intensified community such as that found in sectional title schemes, rules which limit the entitlements of ownership are needed in order to ensure order and harmony<sup>298</sup> within the community of owners and residents. Therefore, this view carries no weight in light of the developments of the property concept in modern times, justified by the fact that a sectional title scheme is a unique development and ownership of this form of property is genuine ownership.

This confirms the principle that ownership in general as well as sectional ownership is neither absolute nor individualistic, but must rather always be exercised by taking the rights of others into consideration as seen in the Roman law maxim, *sic utere tuo ut alienum non laedas*. This principle means that a sectional owner or occupier can use and enjoy their section as long as they do not infringe upon the rights of other sectional owners or occupiers or be in conflict with the public interest in general. Therefore, the sectional owner or occupier must act in the interests of good neighbourliness and not inconvenience, prejudice or abuse the rights of other sectional owners. However, if the restriction is abnormal or not reasonable to tolerate, there is a remedy available, such as an interdict or a claim for damages.

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<sup>297</sup> See Van der Merwe CG "Is sectional ownership true ownership?" (1992) 3 *Stell LR* 131-136 at 133. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.20-8.22.

<sup>298</sup> Carey Miller DL and Pope A *Land title in South Africa* (2000) 219-220

There are many different types of restrictions on sectional ownership, the most important of which will be looked at more closely, namely the obligations and restrictions imposed by the Sectional Titles Act,<sup>299</sup> the prescribed rules<sup>300</sup> and restrictions imposed by developers and / or the body corporate,<sup>301</sup> common law nuisance,<sup>302</sup> existing servitudes,<sup>303</sup> real rights,<sup>304</sup> restrictive conditions on the sectional plan and restrictions imposed by implied reciprocal servitudes.<sup>305</sup>

Every member of the body corporate must be aware of and considerate towards the rights of other owners and occupiers of the scheme because of the close proximity of residents of the scheme and their shared use and enjoyment of the common property. The rules must not be seen as being restrictions on “individual liberty”<sup>306</sup> but as “guarantees of the common right”<sup>307</sup> of all members of the body corporate to the use and enjoyment of their sections and the protection of the property interests of their investments.

### 3 3 2 2      *Obligations and duties of the sectional owner*

The point of departure is that the owner obtains full ownership of his section, although his use and enjoyment of his section is restricted by the rules in a manner that ensures equality and harmony amongst all the members of the sectional title

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<sup>299</sup> S 44(1)(a)-(g) and Annex 8 rule 68(1)(v) and (vii) of the Sectional Titles Act. See further *Cujé-Jakoby v Kaschub* 2007 (3) SA 345 (C) and *Bonthuys v Scheepers* (CA 303/2006) [2007] ZAECHC 68 (17 April 2007). See further Van der Merwe CG “Refusal to consent to change of use of sectional title unit – Cujé-Jakoby v Kaschub” (2008) 71 *THRHR* 692-698 at 697-698. See also Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.6-8.12.

<sup>300</sup> S 44(1)(b); Annex 8 rule 68 (1)(i)-(iv) and Annex 9 rules 1(1), 2(1)(a), 5-6, 9 and 11. See further *Body Corporate of the Laguna Ridge Scheme v Dorse* 1999 (2) SA 512 (D). See also Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.15-8.19.

<sup>301</sup> Restrictions imposed by the body corporate are known as house rules. See 3 2 4 above. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.19.

<sup>302</sup> Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.5.

<sup>303</sup> Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.5.

<sup>304</sup> Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.5.

<sup>305</sup> Namely the reciprocal servitude for subjacent and lateral support as provided for in s 28(1)(a)(i) and (b)(i) and the reciprocal servitude for the passage or provision of certain services such as water through pipes as provided for in s 28(1)(a)(ii) and (b)(ii). See also Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.12-8.14.

<sup>306</sup> See Paddock GJ *Sectional title handbook* (1983) 19.

<sup>307</sup> See Paddock GJ *Sectional title handbook* (1983) 19.

community.<sup>308</sup> The Sectional Titles Act<sup>309</sup> does not intend to impose unreasonably onerous conditions on the owners and occupiers as it is not necessary to do so. Most owners and occupiers respect the wishes and privacy of the other residents and generally act in a considerate manner, complying with the rules. However, for the less “neighbourly”<sup>310</sup> minority who cause “disharmony”,<sup>311</sup> a management rule<sup>312</sup> prescribes dispute and arbitration procedures which may be used against them. In order to ensure financial stability and social harmony within the community, there must be effective enforcement mechanisms to ensure compliance and efficient sanctions in the case of non-compliance.

The owners and other duly authorised occupiers have the following financial and non-financial obligations to comply with.<sup>313</sup> They must pay reasonable levies which will cover their individual share of the maintenance and administrative costs,<sup>314</sup> they must keep their section in a good state of repair,<sup>315</sup> they may not use their sections in a manner that is or causes a nuisance to any other resident in the scheme,<sup>316</sup> they may not damage the reputation<sup>317</sup> or prejudice the aesthetic or harmonious appearance of the scheme<sup>318</sup> and they may not use their unit for any purpose other than what is indicated on the sectional plan unless they obtain the written consent of all the other owners in the scheme. This permission may not be unreasonably withheld and if it is, the body corporate must provide good reasons for doing so.

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<sup>308</sup> See Van der Merwe CG “The Sectional Titles Act and the Wohnungseigentumsgesetz” (1974) 7 *CILSA* 165-185 at 176. In terms of ss 35(2) and 44(1)(d)-(e) of the Sectional Titles Act 95 of 1986, rules restricting ownership are only registrable if they relate to the use and enjoyment of sections and the common property.

<sup>309</sup> S 44 of the Sectional Titles Act.

<sup>310</sup> See Gauld B *A year of sectional titles* (2002)

[http://www.sto.co.za/library/index.php?title=Books:A\\_Year\\_of\\_Sectional\\_Titles\\_-\\_Bob\\_Gauld](http://www.sto.co.za/library/index.php?title=Books:A_Year_of_Sectional_Titles_-_Bob_Gauld) (accessed online on 01/09/2010).

<sup>311</sup> See Van der Merwe CG and Erasmus JHJ “The enforcement of the obligations of sectional owners in a sectional title scheme” (1999) 62 *THRHR* 259-271 at 260.

<sup>312</sup> Annex 8 rule 71.

<sup>313</sup> S 32 of the Sectional Titles Act 95 of 1986. See further Van der Merwe CG and Erasmus JHJ “The enforcement of the obligations of sectional owners in a sectional title scheme” (1999) 62 *THRHR* 259-271 at 260.

<sup>314</sup> Ss 32(3)(c) and 37(1)(a).

<sup>315</sup> S 44(1)(c).

<sup>316</sup> S 44(1)(e).

<sup>317</sup> Annex 8 rule 68(1)(i).

<sup>318</sup> Annex 8 rule 68(1)(iv).

The management and conduct rules regulating a sectional title scheme have a restrictive effect, and therefore place a limitation on the rights of use and enjoyment of the owners and occupiers. The rules that will be looked at more closely are the following: the conduct rule preventing a sectional owner or occupier from keeping a pet without the written consent of the trustees,<sup>319</sup> the harmonious appearance rule,<sup>320</sup> the rules regulating noise and nuisance,<sup>321</sup> and the conduct and management rules regulating the use and misuse of a section.<sup>322</sup>

### *3 3 2 3 Prohibition on the keeping of pets without the written consent of the trustees*

When considering an application to keep pets, the trustees should exercise their discretion and should not unreasonably refuse permission. They should also consider whether any special circumstances would warrant a departure from the general policy of the scheme.<sup>323</sup> The factors that they could take into consideration when determining whether the pet would constitute a nuisance would include the size, nature and temperament of the pet. The trustees should also consider whether any of the other residents would be inconvenienced or their peaceful use and enjoyment of their sections disturbed and whether or not there have been similar pets allowed in the scheme before. The trustees may impose conditions to be complied with when allowing the owner or occupier to keep a pet and in the event of non-compliance, the trustees may withdraw their approval. An absolute prohibition on the keeping of pets would only be allowed in exceptional circumstances as it is contrary to the sectional owner's right to use and enjoyment of his section. It is within the power of the trustees' discretion to limit the number and kind of pets allowed per section. However, the trustees are not allowed to unreasonably withhold their consent.

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<sup>319</sup> Annex 9 rule 1.

<sup>320</sup> Annex 9 rule 5 and Annex 8 rule 68(1)(iv).

<sup>321</sup> Ss 44(1)(d) and 44(1)(e).

<sup>322</sup> S 44(1)(g) and Annex 8 rule 68(1)(i).

<sup>323</sup> If the general policy of the scheme is to prohibit pets. An example of a special circumstance would be if the sectional owner or other occupier is blind and is in need of a guide dog.

Relevant case law would be the case of *Body Corporate of the Laguna Ridge Scheme v Dorse*.<sup>324</sup> Dorse was the owner and occupier of a unit in a sectional title scheme. She kept a small dog in her unit. However, she had not sought permission from the trustees of the body corporate to keep the dog in the scheme. The managing agents of the scheme requested her to house her dog elsewhere. Dorse had replied by letter to the body corporate requesting permission to keep the dog. The rules pertaining to the scheme provided that no animals, except birds in cages, could be kept in a section or on the common property unless expressly permitted in writing by the trustees. Dorse's request had been considered at a meeting of the trustees but it had been decided that no exception could be made to the rules in her case and that she was to find alternative accommodation for the dog. Dorse had not done so, which had prompted an application to court by the body corporate for an order that Dorse remove the dog from her unit. Dorse opposed the application and brought a counter-application to review and set aside the decision of the trustees to refuse her application to keep a dog in her unit and for an order that she be allowed to keep the dog in terms of specified conditions.

Dorse contended that the trustees' refusal to grant permission had been a result of an unwarranted adherence to a fixed principle and contemplation of irrelevant considerations such as the creation of a precedent without according due attention to certain particular circumstances, namely that the dog did not bark, was carried whenever it left the unit and did not in any way constitute a nuisance to Dorse's neighbours. Dorse contended further that in the circumstances the trustees' decision had been so grossly unreasonable as to warrant an inference that they had not applied their minds to the facts of the matter or the applicable rules.

The court held that in terms of the rules of the scheme, the trustees had been vested with judicial discretion to grant or refuse permission to keep pets in units or on the common property. It appeared from the evidence that the body corporate had adopted a policy that permission for keeping a pet should not be granted unless special circumstances warranted a departure from the general policy. As the trustees

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<sup>324</sup> 1999 (2) SA 512 (D).

had refused permission for a dog to remain on the premises, it had to be assumed that they had found no special circumstances in Dorse's case to warrant a departure from the general policy. However, it was not apparent on what grounds the trustees had made this finding. The only impression which could be gained from the evidence was that the issues of policy and precedent had been dominant, if not decisive factors governing the exercise of the trustees' discretion. The trustees offered no reasons why it was considered that the size, nature and temperament of the dog nor Dorse's contentions that the dog did not constitute a nuisance and was never on the common property, were not good enough reasons to grant permission to Dorse to keep the dog. These were highly relevant considerations and should have been taken into account.

The court held that the question of precedent was not a relevant consideration and should not have influenced the trustees' decision. Each request for permission to keep an animal had to be considered on its own merits and a decision had to be based on the facts and circumstances relevant to the particular case. Refusal to grant permission purely because it would create a precedent would be tantamount to failure to consider and decide an application on its own merits and would result in a refusal to depart from the general policy of not granting permission. The court held further that it was apparent from the rules of the scheme that a restriction on the keeping of animals was designed to avoid causing a nuisance to other residents of the scheme. However, in the case of Dorse's dog, there could never be a danger of nuisance as it, according to Dorse, did not bark and was never allowed on the common property. The court held that there could be no conceivable reason why the trustees could not have considered that the circumstances relating to Dorse's particular dog were not such as to warrant the granting of permission for it to be kept in the unit in terms of the conditions to which Dorse was prepared to agree. It was apparent from the trustees' conduct that they had taken into account irrelevant considerations such as precedent and ignored relevant circumstances pertaining to the particular dog and whether its presence in Dorse's unit could possibly constitute a nuisance. The trustees' decision was so grossly unreasonable as to warrant an inference that they had failed to apply their minds to the matter at hand. On this

basis, the trustees' decision was reviewable. The body corporate's application was dismissed and Dorse's counter-application was granted.

The Strata Schemes Management Act of 138 of 1996<sup>325</sup> regulates the keeping of pets in strata schemes in New South Wales. The Act provides in its by-laws that pets may only be kept in strata schemes with the consent of the owners' corporation. Consent may be sought by writing a letter to the secretary of the owners' corporation. In this letter, the lot owner wishing to keep a pet should describe the pet referring to its age, size and appearance and disposition. They should note whether they are a responsible pet owner and whether they were allowed to keep a pet previously in a similar scheme. If so, references from the previous owners' corporation should be provided. The lot owner could also investigate whether any pets were allowed in the scheme previously in order to serve as persuasive precedent if needed.

Should the owners' corporation refuse to consent to the keeping of a pet, the lot owner needs to determine whether the consent was unreasonably withheld. If so, they can refer the matter for mediation or adjudication. If a pet is kept without the consent of the owners' corporation, they can serve a notice requiring the lot owner to comply with the relevant by-law. If the lot owner fails to comply, the owners' corporation can apply for an order from the Consumer, Trader and Tenancy Tribunal for a fine to be paid by the owner or occupier of the lot. If the owner or occupier does not comply with this order, a further penalty will be imposed.<sup>326</sup> If the owners'

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<sup>325</sup> Sch 1 By-law 16 which states that (1) Subject to section 49(4), an owner or occupier of a lot must not, without the approval in writing of the owners' corporation, keep any animal on the lot or the common property. (2) The owners' corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property. See also *Chiles and Rush v Owners Corporation SP 14801* [2001] NSWSSB 7 (30 August 2001), where it was found that even though the scheme had a "no pets policy", the owners corporation unreasonably withheld its approval to keep two dogs on lots owned by Chiles and Rush. The court held that the dogs could be kept subject to certain conditions. See further *Chomyn v Owners Corporation SP 14801* [2001] NSWSSB 6 (10 August 2001), where the court allowed a dog to be kept on a lot in a scheme even though there was a "no pets policy" in the scheme as well as a "no dogs allowed" sign on the notice board. The court considered the fact that the dog had a friendly nature and that it did not bark excessively. See also *Renshaw v Owners Corporation SP 12963* [1999] NSWSSB 40 (7 July 1999); *Ross v Orvisky* [1998] NSWSSB 27 (22 May 1998); *Ross v Owners Corporation SP 13674* [1998] NSWSSB 17 (20 March 1998) and *Truran v Owners Corporation SP 22048* [2001] NSWSSB 12 (19 November 2001).

<sup>326</sup> S 150 of the Strata Schemes Management Act 138 of 1996.



corporation grants their consent to the keeping of an animal on the lot, the owner must ensure that the presence of the pet does not become a nuisance.

### *3 3 2 4 Harmonious appearance rule*

This rule states that an owner or occupier may not do anything which will detrimentally affect the aesthetic appeal of the scheme by making their section or exclusive use area look different from others in the scheme.<sup>327</sup> This is an absolute prohibition. Therefore, the written consent of the trustees of the body corporate cannot be obtained in order to circumvent this rule. Most residential sectional title schemes consist of sections built to a higher density than that which is usually found in single, freehold developments, therefore strict visual control must be enforced and is usually achieved by designing around a particular design and colour theme. This results in a harmonious appearance. Therefore, this rule was written in the interest of visual harmony.

### *3 3 2 5 Rules regulating noise and nuisance*

The problem of noise and nuisance is subjective and can easily be resolved through the exercise of co-operation. Therefore, it is incumbent on every owner to be sensitive to the needs of their neighbours. However, if the problem persists, the matter will be referred to arbitration or mediation in terms of the prescribed management rule.<sup>328</sup> The duty rests on purchasers to be aware of the potential for noise within a scheme.<sup>329</sup> Some types of noise are not easily controlled.<sup>330</sup> Therefore, the sections that are close to the source of noise will depreciate in value. When making the decision as to whether an act constitutes a nuisance, the trustees of the body corporate must take all the relevant circumstances into consideration

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<sup>327</sup> Annex 8 rule 68(1)(iv) and Annex 9 rules 5 and 6 of the Sectional Titles Act 95 of 1986. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs on the common property of the scheme.

<sup>328</sup> Annex 8 rule 71.

<sup>329</sup> An example would be that people who are retired cannot expect dead quiet mid-afternoon when the majority of the residents are young.

<sup>330</sup> Examples of types of noise that cannot be controlled are lifts, pool pumps and security gate motors.

before concluding that the owner or occupier of a unit has contravened a prescribed rule.<sup>331</sup>

The Strata Titles Act<sup>332</sup> contains an express rule against nuisance created by noise which states that “a proprietor or occupier of a lot shall not upon the parcel create any noise likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or of any person lawfully using the common property.”<sup>333</sup> It also contains a provision whereby an owner must ensure that the floor covering of his apartment is sufficient to prevent the transmission of noise likely to disturb the peaceful enjoyment of the owner or occupier of another section.<sup>334</sup>

### 3 3 2 6 *Rules regulating the use and misuse of sections*

In a similar way as with noise and nuisance regulation, controlling use and misuse of sections is problematic because there is a high degree of subjectivity involved in most body corporate decisions on this issue. The trustees, acting in the interests of the body corporate, must exercise their discretion and take all the relevant circumstances into consideration when making the decision as to whether to grant their consent to the change of use<sup>335</sup> of a particular section upon the request of the owner. All the other owners and occupiers residing in the scheme must agree in writing to the change of use.<sup>336</sup>

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<sup>331</sup> Ss 44(1)(d) and 44(1)(e). See further Nowitz M “Some thoughts on ss 41-43 of the Sectional Titles Act 95 of 1986” (February 1990) *De Rebus* 121-124 at 122 and *Cujé-Jakoby v Kaschub* 2007 (3) SA 345 (C).

<sup>332</sup> 68 of 1973.

<sup>333</sup> Sch 1 rule 12.

<sup>334</sup> Sch 1 rule 25. See further *Austen v Manche* [1998] NSW SBB 19 (23 March 1998); *Toma v Troobnikoff* [1998] NSW SBB 1 (7 January 1998) and *Troobnikoff v Toma* [1998] NSW SBB 58 (30 September 1998). See also *Thomas v Bunyan* [1998] NSW SBB 69 (16 December 1998), where noise emitted from a security alarm caused a nuisance to other lot owners in a scheme. The court referred to s 117 of the Strata Schemes Management Act 138 of 1996, which requires that an owner must not use or enjoy a lot or common property or limit a lot to be used in such a manner or for such a purpose to cause a nuisance to the occupiers of another lot or to interfere with the use or enjoyment of the common property by the occupiers of another lot.

<sup>335</sup> S 44(1)(g) and Sch 1 Model by-law 18.

<sup>336</sup> See *Bonthuys v Scheepers* (CA 303/2006) [2007] ZAECHC 68 (17 April 2007); *Cujé-Jakoby v Kaschub* 2007 (3) SA 345 (C), and *Body Corporate of the Tuzla Mews Scheme v Yang* [2001] 3 All SA 427 (W).

The factors influencing the trustees' decision are the extent of the noise that will be generated by the use of the section,<sup>337</sup> the nuisance that will be caused,<sup>338</sup> and the effects on the safety of the scheme. An owner or resident may not do anything that will damage the reputation of the building.<sup>339</sup> The types of use which will be characterised as injurious to the reputation of the building will vary depending on the values of the community in question at the time of such use.

Relevant case law would be *Bonthuys v Scheepers*,<sup>340</sup> where the owner of a unit in residential sectional title scheme wished to operate a hairdressing salon from her residential unit. Scheepers, the owner, was unable to secure written consent of all the other owners in the sectional title scheme. Scheepers instituted proceedings in the Magistrates' Court, relying on section 44(2)(a) of the Sectional Titles Act, which provides that any owner which is of the opinion that any refusal of consent of another owner is unfairly prejudicial, unjust or inequitable to her, may make an application to court. Scheepers was successful in obtaining an order allowing her to operate a hairdressing salon from her residential unit.

The other owners in the residential scheme took the Magistrates' Court's judgment on appeal to the High Court. The judge made a ruling that the magistrate had misdirected himself by attaching too much weight and consideration to Scheepers' personal circumstances. This had been done to the exclusion of the interests of the other residential unit holders who had acquired their units for residential purposes only, as expressly provided for on registered sectional title plan. The High Court set aside the order made by the Magistrates' Court. The result was that Scheepers could no longer operate a business from her home due to fact that the prejudice suffered by all the other residents of sectional title scheme far outweighed the prejudice suffered by her as the applicant. The High Court weighed up the effect that such a

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<sup>337</sup> See *Cujé-Jakoby v Kaschub* 2007 (3) SA 345 (C).

<sup>338</sup> Clients and staff entering and leaving the premises and parking on the common property can cause a nuisance to the sectional owners and occupiers.

<sup>339</sup> Annex 8 rule 68(1)(i).

<sup>340</sup> [2007] JOL 20836 (E). See a discussion of this case in Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.11. See further *Owners Corporation v Anderson Holdings Pty Limited* [2001] NSWSSB 2 (14 April 2001), where the court held that an owner of a lot in a strata scheme may not conduct a business from his residential unit.

business operation would have on the peace and tranquillity of the sectional title scheme and considered the fact that instead of increasing the value of the scheme, such consent would adversely affect the sectional title scheme. Scheepers' personal circumstances did not justify this departure.

Another relevant case is *Cujé-Jakoby v Kaschub*,<sup>341</sup> where the applicant, a sectional owner conducted the business of hiring out residential units on behalf of other owners. Cujé also operated a laundry in a converted garage. Fellow residents complained of the nuisance<sup>342</sup> caused by the noise from the laundry. Cujé relocated the business to other converted garages. The body corporate had approved the change of use and the conversion. All the owners,<sup>343</sup> excepting Kaschub, had approved the change of use and the conversion. At an annual general meeting held previously, Kaschub had voted in favour of the change of use, but had suggested that the laundry be moved and a side door closed. However, Kaschub was not prepared to undertake to withdraw her objection at this stage if such suggested changes were made. Cujé hesitated because of Kaschub's lack of guarantee and reservation of rights.

When deciding whether a refusal of consent is unfairly or unreasonably prejudicial, unjust or inequitable, one reads in conduct which can be seen as being a departure from the acceptable standards of fair play. The reason that Kaschub's refusal could be seen as unreasonable is that on a previous occasion, she had consented to the change of use as well as the fact that she herself had changed the use of her own garage. The court found that the objections were fanciful and relied on certain bald statements such as the apparent negative impact that such use would have on her security, her right to privacy and the value of the property. The court found that on

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<sup>341</sup> 2007 (3) SA 345 (C). See a discussion on the case in Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 8.10-8.11.

<sup>342</sup> S 44(1)(e) of the Sectional Titles Act, provides that an owner shall not use his section or exclusive use area or permit to be used in such a manner or for such a purpose as shall cause a nuisance to any occupier of a section.

<sup>343</sup> S 44(1)(g) and (2)(a)-(b) provides that the intended purpose must be gleaned from registered sectional plan unless written consent of all owners is obtained. If consent is refused, leading to it being unfairly prejudicial, unjust or inequitable, such person may approach court for order of which court deems just and equitable.

the issue of security, having strangers come into a scheme to fulfil such work as done by Cujé would negatively affect her security. In terms of her right to privacy, it is an inevitable consequence of living in a sectional title scheme with common areas that people will be moving around on such common property. Regarding the reduced value, the availability of an efficient on-site and centralized letting arrangement would have the likely effect of making the properties in question more attractive to potential owners wishing for part-time residential occupation.

Kaschub also argued that the use for commercial purposes was unlawful due to fact that building works were done without approved plans. Cujé had obtained approval for the conversion by the home-owners association and had, therefore, proceeded with the alterations in terms of the plan which he had assumed would be approved by the body corporate. The court decided that Kaschub's refusal to grant Cujé her consent would be prejudicial and that by asking Cujé to move the business to alternative premises would have a devastating impact on the business and on those people benefiting from the services provided. The decisive factor in the court's decision was Kaschub's attitude, as she had consented to the proposed conversion but had then proceeded to refuse to give her written consent. Kaschub had wanted a compromise. However, she did not wish to abide by it. Such conduct was seen as grossly unreasonable. Therefore, the court found that Kaschub was deemed to have given written consent to use of particular sections of the sectional title scheme for commercial purposes.

Another relevant case is *Body Corporate of the Tuzla Mews Scheme v Yang*,<sup>344</sup> which dealt with civil liability for non-compliance with an arbitration award in favour of the body corporate. A dispute arose between a sectional title owner, Yang and the body corporate about the improper use of property in the sectional title scheme. The dispute arose after Yang had erected a structure on the common property without the body corporate's permission. Yang committed a further offence by using two of his units for industrial purposes when they had clearly been marked as residential sections.

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<sup>344</sup> [2001] 3 All SA 427 (W).

The body corporate sought committal of Yang for contempt for failing to comply with the court order, namely the arbitration award. The body corporate made an application to have the award confirmed as an order of court in order to enforce it. The court held that Yang's building activity on the common property in the development scheme was a contravention of many of the provisions of Sectional Titles Act and ordered Yang to restore the common property to its prior condition. Yang was afforded a period of 60 days to obtain consent of each owner to authorise him to utilise the two units for industrial purposes. The court provided that should the requisite consents not be given by each owner within the time limit, Yang would be obliged to restore the units to residential properties. The application was dismissed on the grounds that Yang had acted in contravention to the provisions of the Sectional Titles Act.

### **3 4 Amendment and operation of the management and conduct rules**

The prescribed management and conduct rules, as set out by the developer, are of force and are binding on the body corporate, all owners and occupiers of the sections from the moment that the body corporate is established.<sup>345</sup> In order to prevent later problems when amending the rules at the members' meeting, the developer must ensure that the rules are suitable for the type of scheme in question.<sup>346</sup> When applying for the opening of a sectional title register, the developer can replace these management rules with others more comprehensive and better suited to the needs of the sectional title scheme.<sup>347</sup>

The management rules may be supplemented or repealed by the body corporate from time to time by unanimous resolution,<sup>348</sup> while the conduct rules may be

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<sup>345</sup> S 35(1) and (4). See also Annex 8 rule 69.

<sup>346</sup> See *Maree T Kits deeltitel oplossings* (2001) 1.

<sup>347</sup> See 3 2 1 above.

<sup>348</sup> S 35(2)(a). See further *Unit 1051 Twin Towers South (Pty) Ltd v Trustees of Twin Towers Body Corporate* [2007] JOL 20532 (C), where members of the body corporate adopted rules through a unanimous resolution, in substitution of the rules contained in Annex 8 of the Act. The offending rule was irreconcilable with the prescribed management rules and had to be set aside because it was found to be unreasonable. See further *Body Corporate of Brenton Park Building No 44/1987 v Brenton Park CC* 1998 (1) SA 441 (C), where members of the body corporate adopted a new set of

supplemented, amended or repealed by the body corporate by special resolution,<sup>349</sup> provided they are not irreconcilable with the prescribed management rules.<sup>350</sup> The rules can only be amended to the extent allowed by the regulations and some cannot be amended at all.<sup>351</sup> The amendment must be reasonable and equally applicable to all owners who use the units for essentially the same purpose.<sup>352</sup>

Before the 1997 amendments,<sup>353</sup> if the management rules were later amended by the body corporate, the body corporate had to give notice of the amendment, in the prescribed manner, to the Registrar, who would decide whether the rules imposed any obligations or conditions which detracted from the sectional owner's rights or whether they were in conflict with the Sectional Titles Act or the regulations and should therefore be rejected.<sup>354</sup> Such amended rules would only come into operation once the amendment was stated on the certificate and handed in with the sectional plan. The amended provision<sup>355</sup> states that the Registrar is no longer obliged to note any substitution, addition, amendment or repeal of rules against the conveyancer's certificate, relating to the rules which must accompany the developer's application for registration of the sectional plan and the opening of a sectional title register. Such a substitution, addition, amendment or repeal of rules comes into operation on the date on which the Registrar files the notification of such a change.<sup>356</sup> The body corporate has to notify the Registrar of any supplementation, amendment or repeal of the rules.<sup>357</sup> The body corporate must make available to all the owners or the empowered party, all the rules in operation at that time to ensure that they are aware

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rules through a unanimous resolution, in substitution of the rules contained in Annex 8 and 9 of the Act. See also *Thompson v Body Corporate of the Woodbridge Island Sectional Title Scheme No. SS213/1989* (unreported case 3379/2005) (C). See 3 2 1 above.

<sup>349</sup> S 35(2)(b). See also 3 2 1 above.

<sup>350</sup> S 35(2)(b). See further *Unit 1051 Twin Towers South (Pty) Ltd v Trustees of Twin Towers Body Corporate* [2007] JOL 20532 (C).

<sup>351</sup> Refer to regulation 30(1) of the Sectional Titles Act.

<sup>352</sup> S 35(3).

<sup>353</sup> Sectional Titles Amendment Act 44 of 1997.

<sup>354</sup> Van der Merwe CG "A critical analysis of the innovations introduced by the Sectional Titles Act of 1997" (1998) 61 *THRHR* 171-193 at 191.

<sup>355</sup> S 35(5) of the Sectional Titles Amendment Act 44 of 1997.

<sup>356</sup> See Van der Merwe CG "A critical analysis of the innovations introduced by the Sectional Titles Act of 1997" (1998) 61 *THRHR* 171-193 at 191-192.

<sup>357</sup> S 35(5)(a) of the Sectional Titles Act.

of the rules governing the use and enjoyment of their section and their share in the common property.<sup>358</sup>

### **3 5 Scope of application of the rules**

The rules govern the control, management, administration, use and enjoyment of the individual sections and the common property.<sup>359</sup> They impose binding duties and obligations on all residents.<sup>360</sup> They do not apply to visitors. The rules do not bind outsiders directly, but the owners of the unit can be held responsible, in terms of the rules, for their visitors' conduct, as they are required to ensure that their guests comply with the rules governing the scheme.<sup>361</sup> In terms of the strata titles by-laws, the owners and residents must ensure that their visitors do not behave, in a lot or on the common property, in a manner which may disturb the peaceful enjoyment of any other residents.<sup>362</sup>

### **3 6 Enforcement of the rules**

#### **3 6 1 Introduction**

The rules governing a sectional title scheme are enforceable against all the owners and occupiers of a section in a scheme. Effective enforcement mechanisms are necessary in order to ensure that there is compliance with the rules, social harmony and financial stability within the scheme. Here, mention will be made of who enforces the rules, the mechanisms available to enforce the rules and the sanctions that can be used if there is non-compliance with the rules.

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<sup>358</sup> S 35(6).

<sup>359</sup> S 35(2).

<sup>360</sup> S 35(4) and Annex 9 rule 10. The rules are applicable to sectional owners, their successors in title and other occupants.

<sup>361</sup> Annex 8 rule 69. See further Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 122-123. Refer to chapter 4 for a discussion on whether the prescribed and non-prescribed rules are considered to be law of general application.

<sup>362</sup> Sch 1 Model by-law 8.



## 3 6 2 Parties enforcing the rules

The rules governing the sectional title scheme are enforced by the trustees, a democratically elected group, representing the body corporate, with whom they are in a fiduciary relationship.<sup>363</sup> The trustees are responsible for the management, control and administration of the sectional title scheme.<sup>364</sup> They are bound to the rules and therefore they have no free or unlimited discretion with regard to the exercise of the management function unless the rules make provision for it.<sup>365</sup> They are obliged to take action when they become aware of any breaches of the rules, either by personal observation or when a complaint is lodged by a resident. Should they fail to act an aggrieved owner can initiate proceedings on behalf of the body corporate.<sup>366</sup> The trustees are empowered<sup>367</sup> to do all things reasonably necessary to enforce the rules of the body corporate.<sup>368</sup>

## 3 6 3 Mechanisms to enforce rules and sanctions for non-compliance

### 3 6 3 1 Introduction

The South African sectional title legislation was to a large extent based on the Conveyancing (Strata Titles) Act,<sup>369</sup> which did not include any rule enforcement or dispute settling mechanism. The deficiency in the legislation was recognised and second generation legislation<sup>370</sup> was drafted, which amended the shortcoming. Neither the Sectional Titles Act nor the management or conduct rules contain effective sanctions to be enforced against sectional owners who fail to fulfil their

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<sup>363</sup> See Delpont HJ "The new Sectional Titles Act 95 of 1986" (January 1987) 3 *Juta's SA Journal of Property Law* 21-31 at 29.

<sup>364</sup> Ss 40(1)-(2) and 37(1)(r). See further *J de Moor (Edms) Bpk v Beheerliggam Outenikwa 75/80* 1985 (3) SA 997 (T) and Nowitz M "Some thoughts on ss 41-43 of the Sectional Titles Act 95 of 1986" (February 1990) *De Rebus* 121-124 at 122.

<sup>365</sup> See Maree T *Kits deeltitel oplossings* (2001) 1

<sup>366</sup> See Delpont HJ "The new Sectional Titles Act 95 of 1986" (January 1987) 3 *Juta's SA Journal of Property Law* 21-31 at 29.

<sup>367</sup> S 35(4).

<sup>368</sup> S 38. See further Smit B *Townhouse living, a guide*

[http://www.sto.co.za/library/index.php?title=Books:Townhouse\\_Living%2C\\_A\\_Guide\\_-\\_Basil\\_Smit](http://www.sto.co.za/library/index.php?title=Books:Townhouse_Living%2C_A_Guide_-_Basil_Smit) (accessed online on 01/09/2010); Nowitz M "Some thoughts on ss 41-43 of the Sectional Titles Act 95 of 1986" (February 1990) *De Rebus* 121-124 at 122 and Butler D "The arbitration of disputes in sectional title schemes under management rule 71" (1998) 9 *Stell LR* 256-279 at 256. An example would be that upon entering a sectional title scheme, clear and effective notices serve as a warning of enforcement.

<sup>369</sup> 17 of 1961 (New South Wales).

<sup>370</sup> Strata Titles Act 68 of 1973 (New South Wales).

obligations. However, it is important that the rules should be enforceable through effective sanctions in the event of non-compliance.

Effective sanctions are important as buyers rely on the proper and stable administration of the scheme for the realisation of their anticipated lifestyle. The rules will only be effective if there is a “workable system”<sup>371</sup> of enforcement mechanisms; otherwise, it will be necessary to obtain a court order to enforce compliance. The existing enforcement mechanisms and sanctions for non-compliance are those for financial obligations and non-financial obligations, which will be discussed in greater detail below.

### *3 6 3 2 Enforcement mechanisms and sanctions for financial obligations*

When an owner is in default with his levy contributions, the trustees of the body corporate are required to take some form of effective action against him. The trustees cannot evict the recalcitrant owner as he is the owner of the unit.<sup>372</sup> However, there are a number of sanctions that can be enforced in the case of non compliance, although the effectiveness of some is limited.

The trustees of the body corporate can institute legal proceedings against the owner for any outstanding levy contributions,<sup>373</sup> all the legal costs incurred in recovering the arrear levies<sup>374</sup> and accrued interest on such amount.<sup>375</sup> As the body corporate is a juristic person, it cannot recover these amounts in the Small Claims Court, which would have involved a cheaper procedure.

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<sup>371</sup> See Paddock GJ *Sectional title handbook* (1983) 26.

<sup>372</sup> See *Body Corporate of the Shaftesbury Sectional Title Scheme v Estate of the late Wilhelm Rippert* [2003] 2 All SA 233 (C) and s 26(3) of the Constitution of the Republic of South Africa 1996. See further the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>373</sup> Ss 37(1) and 47; Annex 8 rules 30 and 31(1) of the Sectional Titles Act. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.6.

<sup>374</sup> Annex 8 rule 31(5). See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.7.

<sup>375</sup> S 37(2) and Annex 8 rule 31(6). See further Van der Merwe CG and Erasmus JHJ “The enforcement of the obligations of sectional owners” (1999) 62 *THRHR* 259-271 at 261.

The voting right at a general meeting can be taken away if a sectional owner is in default with his levy contributions.<sup>376</sup> However, this deprivation is only applicable if there is an ordinary resolution and not if the owner has to vote regarding a special or unanimous resolution which affects the future of all sectional owners in the scheme.

The Registrar may not register a transfer of a unit unless a conveyancer's certificate is produced confirming that at the date of registration, the body corporate has certified that all monies due to it have been paid or that provision has been made for payment in the near future.<sup>377</sup> This is an embargo provision placed on the alienation of a unit if there are outstanding levies.<sup>378</sup> However, this sanction is only effective if the unit is not mortgaged.

The body corporate can attach the moveable assets belonging to the owner and sell them in execution to cover the defaulting payments.<sup>379</sup> If there are no movable assets or an insufficient amount has been obtained, the trustees can attach the unit and have it sold in execution.<sup>380</sup> Mortgage bond holders are also sometimes involved and it is questionable whether their rights may rank higher than those of the body corporate. However, the body corporate is granted a perfect claim to the proceeds of the sale and is therefore ranked higher than mortgagees.<sup>381</sup>

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<sup>376</sup> Annex 8 rule 64(a). Annex 8 rule 15(5) provides that sectional owners are entitled to attend and speak at trustee meetings but they are not entitled to vote if they have any outstanding levy payments or if they have not fulfilled other duties and obligations or if they have breached any other rules. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.8.

<sup>377</sup> S 15B(3)(a)(i)(aa). See in this regard the following cases which confirm this sanction: *Nel NO v Body Corporate of the Seaways Building* [1995] 1 All SA 87 (C) and 1996 (1) SA 131 (A); *South African Permanent Building Society v Messenger of the Court, Pretoria* 1996 (1) SA 401 (T); *Barnard NO v Regspersoon van Aminie* [2001] 3 All SA 433 (A); *Body Corporate of the Geovy Villa v Sheriff, Pretoria Central Magistrate's Court* 2003 (1) SA 69 (T); *FirstRand Bank v Body Corporate of Geovy Villa* [2004] 1 All SA 259 (SCA) and *BOE Bank Ltd v Body Corporate of the Towers Scheme* [2005] JOL13224 (D). See further Van der Merwe CG "Sanctions in terms of the South African Sectional Titles Act and the German Wohnungseigentumsgesetz: should the South African statute be given equally sharp teeth?" (1993) 26 *CILSA* 85-97 at 88.

<sup>378</sup> Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.9.

<sup>379</sup> S 66(1)(a) of the Magistrates' Courts Act 32 of 1944; Uniform Rules of the High Court 45(1) (GN R48 (GG 999) 12 January 1965) and Annex 8 rule 36 of the Sectional Titles Act. See also *FirstRand Bank v Body Corporate of Geovy Villa* [2004] 1 All SA 259 (SCA). See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.10.

<sup>380</sup> Segal N "Any cure for the body corporate blues?" (2004) 121 *SALJ* 552-555 at 553 and Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.12(3).

<sup>381</sup> S 15B(3)(a)(i)(aa) of the Sectional Titles Act. See *Nel NO v Body Corporate of the Seaways Building* [1995] 1 All SA 87 (C) and 1996 (1) SA 131 (A); *South African Permanent Building Society v*

The Magistrates' Courts Act<sup>382</sup> also makes provision for sanctions, emoluments attachment orders,<sup>383</sup> garnishee orders<sup>384</sup> and administration orders.<sup>385</sup> The body corporate could attach the rent<sup>386</sup> owing by a lessee to the defaulting owner of the unit or it may institute sequestration proceedings against the owner.<sup>387</sup> However, this too runs the risk of incurring high costs.

### 3 6 3 3      *Enforcement mechanisms and sanctions for non-financial obligations*

The voting right at a general meeting can be taken away if a sectional owner persistently breaches the conduct rules as set out in Annexure 9.<sup>388</sup> However, this deprivation is only applicable if there is an ordinary resolution and not if the owner has to vote regarding a special or unanimous resolution which affects the future of all sectional owners in the scheme. Therefore, this is not an effective enforcement mechanism as its applicability is conditional on the type of resolution taking place.

An owner who fails to maintain and repair his section may be given written notice to maintain or repair it.<sup>389</sup> If the owner fails to comply, the body corporate can affect the necessary maintenance and repairs and recover the reasonable cost from the owner.<sup>390</sup> In the case of a vehicle being parked on the common property without the

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*Messenger of the Court, Pretoria* 1996 (1) SA 401 (T); *Body Corporate of the Geovy Villa v Sheriff, Pretoria Central Magistrate's Court* 2003 (1) SA 69 (T) and *FirstRand Bank v Body Corporate of Geovy Villa* [2004] 1 All SA 259 (SCA). See further Van der Merwe CG "Sanctions in terms of the South African Sectional Titles Act and the German Wohnungseigentumsgesetz: should the South African statute be given equally sharp teeth?" (1993) 26 *CILSA* 85-97 at 88.

<sup>382</sup> 32 of 1944.

<sup>383</sup> S 65J. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.12(1).

<sup>384</sup> S 72.

<sup>385</sup> S 74-74W.

<sup>386</sup> S 68. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.11.

<sup>387</sup> S 8 of the Insolvency Act 24 of 1936. See also *Nel NO v Body Corporate of the Seaways Building* [1995] 1 All SA 87 (C) and 1996 (1) SA 131 (A) and *Barnard NO v Regspersoon van Aminie* [2001] 3 All SA 433 (A). See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.12(2).

<sup>388</sup> Annex 8 rule 64(b). See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.33.

<sup>389</sup> See Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.34.

<sup>390</sup> Annex 8 rule 70. See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.34.

written consent of the trustees, the body corporate may have it removed at the risk and expense of the owner.<sup>391</sup>

A statutory obligation or rule can only be enforced by way of a court order for specific performance, an action for damages, an interdict<sup>392</sup> or for the payment of legal costs.<sup>393</sup> Choosing the path of litigation<sup>394</sup> is an expensive and time-consuming enforcement mechanism and will not necessarily lead to a harmonious community but could rather permanently disturb the harmony of the sectional title community. A balance must be reached between the right of the owner to be protected, weighed against the preservation of the harmonious relationships in the scheme.

In order to prevent such drastic measures, a general resolution should be passed by the body corporate to empower the trustees to impose fines or a penalty system in the case of contraventions, to establish a domestic tribunal to deal with these matters, or to require security from an owner to ensure that he will refrain from vexatious actions in the future.<sup>395</sup> In this case, a fair investigation is required. Domestic tribunals were introduced under the first generation 1971 legislation<sup>396</sup> and removed in terms of the second generation 1986 legislation<sup>397</sup> because the power to punish was in the hands of lay people, which made it open to abuse. This “disciplinary committee”<sup>398</sup> dealt with penalties linked to offences with the use of fines and sanctions. According to the saying “fines do not good neighbours make,”<sup>399</sup> it can be seen that the imposition of fines as penalties is an imperfect enforcement

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<sup>391</sup> Annex 9 rule 3(2). See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.34.

<sup>392</sup> Annex 8 rule 71(1). See also *Body Corporate Montpark Drakens v Smuts* (22380/05) [2006] ZAGPHC 38 (26 April 2006); *Body Corporate of the Shaftesbury sectional title scheme v Estate of the late Wilhelm Rippert* [2003] 2 All SA 233 (C); *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W) and *Queensgate Body Corporate v Claesen* (A3076/98) [1998] ZAGPHC 1 (26 November 1998). These cases confirm the use of an interdict as an enforcement mechanism.

<sup>393</sup> Annex 8 rule 31(5).

<sup>394</sup> *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 (3) SA 167 (SCA).

<sup>395</sup> Ss 37(1)(r) and 38(j). See further Smit B *Townhouse living, a guide*

[http://www.sto.co.za/library/index.php?title=Books:Townhouse\\_Living%2C\\_A\\_Guide\\_-\\_Basil\\_Smit](http://www.sto.co.za/library/index.php?title=Books:Townhouse_Living%2C_A_Guide_-_Basil_Smit) (accessed online on 01/09/2010).

<sup>396</sup> Sectional Titles Act 66 of 1971.

<sup>397</sup> Sectional Titles Act 95 of 1986.

<sup>398</sup> Paddock GJ *Sectional title handbook* (1983) 26.

<sup>399</sup> Gauld B *A year of sectional titles* (2002)

[http://www.sto.co.za/library/index.php?title=Books:A\\_Year\\_of\\_Sectional\\_Titles\\_-\\_Bob\\_Gauld](http://www.sto.co.za/library/index.php?title=Books:A_Year_of_Sectional_Titles_-_Bob_Gauld) (accessed online on 01/09/2010).

mechanism as trustees do not have and should not be given the authority to impose fines as this could result in an abuse of power.

Complaints by residents in connection with a breach of rules by fellow residents must be submitted in writing to the trustees, in confidence and supported by the signature of a reliable witness. The first warning issued by the trustee is a “friendly reminder”.<sup>400</sup> However, if the offending party refuses to cooperate and blatantly ignores the trustees’ pleas, a fine is imposed. In order to ensure that the imposition of a fine is justified and that the resident is not being victimised, each breach of the rules should be carefully documented in the “breach of rules” register.<sup>401</sup> At times, the rules are not adhered to because of ignorance on the part of the owners, although “ignorance of the law is not a defence”.<sup>402</sup> The trustees should put into place a positive “rules awareness” programme to keep residents informed and updated on the rules in operation.<sup>403</sup>

### 3 6 4 Comparative perspective of enforcement mechanisms and sanctions for non-compliance

As mentioned in the introduction to this chapter, a comparative survey will be used, where relevant, of jurisdictions which have similar approaches to the issues surrounding sectional title schemes. In this instance, Germany provides a good illustration of how effective enforcement mechanisms could look. Although the German sanctions are absolute and effective in their application, it has been questioned whether similar sanctions with such “sharp teeth” would be possible in the South African context.<sup>404</sup> Before implementing any exclusionary sanctions in

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<sup>400</sup> Smit B *Townhouse living, a guide*

[http://www.sto.co.za/library/index.php?title=Books:Townhouse\\_Living%2C\\_A\\_Guide\\_-\\_Basil\\_Smit](http://www.sto.co.za/library/index.php?title=Books:Townhouse_Living%2C_A_Guide_-_Basil_Smit) (accessed online on 01/09/2010).

<sup>401</sup> Smit B *Townhouse living, a guide*

[http://www.sto.co.za/library/index.php?title=Books:Townhouse\\_Living%2C\\_A\\_Guide\\_-\\_Basil\\_Smit](http://www.sto.co.za/library/index.php?title=Books:Townhouse_Living%2C_A_Guide_-_Basil_Smit) (accessed online on 01/09/2010).

<sup>402</sup> This principle is known as *ignorantia juris non excusat*.

<sup>403</sup> Smit B *Townhouse living, a guide*

[http://www.sto.co.za/library/index.php?title=Books:Townhouse\\_Living%2C\\_A\\_Guide\\_-\\_Basil\\_Smit](http://www.sto.co.za/library/index.php?title=Books:Townhouse_Living%2C_A_Guide_-_Basil_Smit) (accessed online on 01/09/2010).

<sup>404</sup> Van der Merwe CG “Sanctions in terms of the South African Sectional Titles Act and the German Wohnungseigentumsgesetz: should the South African statute be given equally sharp teeth?” (1993) 26 *CILSA* 85-97 at 86.

South Africa, such as those found in Germany, caution must be exercised to not limit ownership to a great extent and not to destroy the reputation of the scheme.

An example of a German sanction, as provided for in the *Wohnungseigentumsgesetz*,<sup>405</sup> empowers an application to be made to court by the body corporate, for an order forcing an owner who committed such a serious breach of his obligations that it cannot be expected from the other residents to continue living in the same community, to dispose of his unit. If the owner fails to comply with the court order, the manager is empowered to sell the unit by public auction at the fair market value and give the proceeds of the sale to the defaulting owner.<sup>406</sup> The purpose of such an absolute sanction is to ensure a harmonious community and even though its application is rare, it serves as an effective deterrent.<sup>407</sup>

A lesser sanction by which an apartment owner's financial obligations can be enforced, which is similar to that of South Africa, is that an owner's right to vote may be withdrawn in the case of non-compliance with an obligation. The owner may then challenge the sanction before a special court which will decide whether the sanction is appropriate and reasonable.<sup>408</sup>

## 3 7 Disputes

### 3 7 1 Introduction

In any social environment, disputes are inevitable. In such a close-knit and dense community as a sectional title scheme, disputes sometimes have serious

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<sup>405</sup> S 18 *Wohnungseigentumsgesetz* 1951.

<sup>406</sup> Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 142-143; Van der Merwe CG and Erasmus JHJ "The enforcement of the obligations of sectional owners" (1999) 62 *THRHR* 259-271 at 268-269; Van der Merwe CG "Sanctions in terms of the South African Sectional Titles Act and the German *Wohnungseigentumsgesetz*: should the South African statute be given equally sharp teeth?" (1993) 26 *CILSA* 85-97 at 87 and Van der Merwe CG "The Sectional Titles Act and the *Wohnungseigentumsgesetz*" (1974) 7 *CILSA* 165-185 at 178.

<sup>407</sup> Van der Merwe CG "The Sectional Titles Act and the *Wohnungseigentumsgesetz*" (1974) 7 *CILSA* 165-185 at 178.

<sup>408</sup> Van der Merwe CG "Sanctions in terms of the South African Sectional Titles Act and the German *Wohnungseigentumsgesetz*: should the South African statute be given equally sharp teeth?" (1993) 26 *CILSA* 85-97 at 87.

consequences for the body corporate. A situation where different people, mostly strangers, live together in a close community and share common amenities, is bound to lead to disagreements, hence the saying “co-ownership is the mother of all disputes.”<sup>409</sup> Here reference will be made to the causes of disputes, the parties involved in a dispute and the options available for resolving disputes. The parties involved can choose to make use of one or more of the following methods in order to resolve a situation of conflict based on the method most suited to the dispute or the one which offers the most advantages or the least disadvantages. These mechanisms could also be reverted to as a matter of course; negotiation, mediation, arbitration, litigation, domestic tribunals, the instituting of fines and sectional title courts.

There are many causes of disputes that need to be effectively resolved before the community can function as a harmonious entity. A few examples will be discussed, namely differences of opinion between the owners *inter se* and between the trustees and the owners,<sup>410</sup> enforcement mechanisms, non-compliance with the rules,<sup>411</sup> lack of substantive and procedural restraints on rule-making,<sup>412</sup> unfair and unreasonable restrictions limiting the owners’ use and enjoyment of their sections and referred to as “Hitler-like commands”<sup>413</sup> and misconduct on the part of owners and residents.

A dispute can either arise between unit owners or residents *inter se*, known as “opposing owner factions”<sup>414</sup> or between owners or residents and the trustees or the managing agent. Disputes can even arise between trustees, a situation known as

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<sup>409</sup> Paddock J “10 steps to dealing with conflict in sectional title schemes” (January 2009) 4 *Paddocks Press* 1-3 at 1.

<sup>410</sup> Paddock GJ “Options for resolving sectional title disputes” (January 2009) <http://www.sto.co.za/images/200904%20Options%20%For%20Resolution%20of%20Sectional%20Title%20Disputes.pdf> (accessed online on 01/09/2010).

<sup>411</sup> *Body Corporate of the Tuzla Mews Scheme v Yang* [2001] 3 All SA 427 (W).

<sup>412</sup> Such as notice and an opportunity to be heard. See further Anonymous “Judicial review of condominium rulemaking” (1981) 94 *Harv LR* 647-667 at 647.

<sup>413</sup> Poliakoff GA “Conflicting rights in condominium living” 1980 (54) *The Florida Bar Journal* 756-761 at 756.

<sup>414</sup> Mason J *Sectional title scheme rehabilitation: a business plan* (2006)

[http://www.sto.co.za/library/index.php?title=Books:Scheme\\_Rehabilitation:\\_A\\_Business\\_Plan\\_-\\_Justin\\_Mason](http://www.sto.co.za/library/index.php?title=Books:Scheme_Rehabilitation:_A_Business_Plan_-_Justin_Mason) (accessed online on 01/09/2010).



“opposing trustees”.<sup>415</sup> The trustees act as the representatives of the body corporate and as such should consider the best interests of the owners and residents, and not enrich them at the expense of the body corporate.<sup>416</sup>

### 3 7 2 Options for resolving disputes

If the managing agent and the trustees believe that they have neither the necessary skill nor the ability to resolve a dispute, the Sectional Titles Act provides for the appointment of three types of professionals to assist the body corporate, namely a curator *ad litem*,<sup>417</sup> an administrator<sup>418</sup> and an arbitrator.<sup>419</sup> Trustees, if they are owners in the scheme and managing agents often lack the required mediation skills needed in order to resolve disputes and their impartiality often comes into question due to conflict of interests or inconsistency with regard to the application of the rules.<sup>420</sup>

Negotiation is the least formal method of dispute resolution. The parties negotiate directly with one another in order to resolve the dispute at hand by coming to an agreement that attempts to satisfy everyone’s needs. However, this is normally only the first step in a very time consuming process of dispute resolution.

Mediation is a popular method of dispute resolution as it ensures a harmonious community after the mediation process by preserving the relationships of all those

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<sup>415</sup> Mason J *Sectional title scheme rehabilitation: a business plan* (2006) [http://www.sto.co.za/library/index.php?title=Books:Scheme\\_Rehabilitation:\\_A\\_Business\\_Plan\\_-\\_Justin\\_Mason](http://www.sto.co.za/library/index.php?title=Books:Scheme_Rehabilitation:_A_Business_Plan_-_Justin_Mason) (accessed online on 01/09/2010).

<sup>416</sup> Delpont H “The new Sectional Titles Act 95 of 1986” (January 1987) 3 *SA Journal of Property Law* 21-31 at 29.

<sup>417</sup> Ss 41-43 of the Sectional Titles Act. See further Nowitz M “Some thoughts on ss 41-43 of the Sectional Titles Act 95 of 1986” (February 1990) *De Rebus* 121-124 at 121.

<sup>418</sup> S 46(3). This is considered to be an extreme step to be taken and should be undertaken with caution.

<sup>419</sup> This is the preferred option. Mason J *Sectional title scheme rehabilitation: a business plan* (2006) [http://www.sto.co.za/library/index.php?title=Books:Scheme\\_Rehabilitation:\\_A\\_Business\\_Plan\\_-\\_Justin\\_Mason](http://www.sto.co.za/library/index.php?title=Books:Scheme_Rehabilitation:_A_Business_Plan_-_Justin_Mason) (accessed online on 01/09/2010).

<sup>420</sup> Van der Merwe CG “Sectional title courts as an alternative to arbitration for the settlement of disputes in a sectional title scheme” (1999) 116 *SALJ* 624-641 at 624.

involved in the process.<sup>421</sup> An impartial and trained mediator helps the parties involved reach a settlement. However, mediators do not have any decision-making power.

Before the 1997 amendments, neither the Sectional Titles Act nor the regulations made provision for dispute resolution. Under the Act, the Arbitration Act<sup>422</sup> was referred to regarding matters of dispute that required resolution. Since the amendments, the standard management rules<sup>423</sup> make provision for the resolution of disputes by way of arbitration. If a real difference of opinion arises between the body corporate and an owner or between the owners, the dispute can be referred to arbitration. An arbitrator is an impartial third party, a decision-maker appointed by contract, statute or chosen by the parties involved. An arbitrator should be appointed to resolve such dispute unless the relief sought cannot be granted in arbitration proceedings.<sup>424</sup> The arbitration procedure is more expedient and less expensive than court proceedings. The decision of the arbitrator, known as an award, is final and binding. It may be enforced by being made an order of the high court upon application.<sup>425</sup> Statutory arbitration is currently the only method sanctioned for dispute resolution as the regulations make it compulsory.<sup>426</sup>

The body corporate can approach a high court for an interdict.<sup>427</sup> However, due to the complexity of the relationships involved in sectional title disputes, resolving disputes with this traditional method is a formal, time-consuming and expensive

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<sup>421</sup> Paddock GJ "Options for resolving sectional title disputes" (January 2009) <http://www.sto.co.za/images/200904%20Options%20For%20Resolution%20of%20Sectional%20Title%20Disputes.pdf> (accessed online on 01/09/2010).

<sup>422</sup> 42 of 1965.

<sup>423</sup> Annex 8 rule 71 of the Sectional Titles Act. See Van der Merwe CG "Sectional title courts as an alternative to arbitration for the settlement of disputes in a sectional title scheme" (1999) 116 *SALJ* 624-641 at 624 and Butler D "The arbitration of disputes in sectional title schemes under management rule 71" (1998) 9 *Stell LR* 256-279 at 257.

<sup>424</sup> *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 (3) SA 167 (SCA).

<sup>425</sup> *Body Corporate of the Tuzla Mews Scheme v Yang* [2001] 3 All SA 427 (W) and *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA).

<sup>426</sup> Van der Merwe CG "Sectional titles courts as an alternative for the settlement of disputes in a sectional title scheme" (1999) 116 *SALJ* 624-641 at 624-625.

<sup>427</sup> Annex 8 rule 71 (7). See also *Body Corporate Montpark Drakens v Smuts* (22380/05) [2006] ZAGPHC 38 (26 April 2006).

process,<sup>428</sup> leading to a situation not suited for maintaining social harmony. Such judicial intervention is not suited to matters of a trivial nature. Therefore litigation is seen as being an inappropriate forum for dispute resolution in sectional title schemes.<sup>429</sup>

### 3 7 3 Proposed methods of dispute resolution

An all-encompassing method of dispute resolution is needed for resolving sectional title disputes. A mechanism adopted by Australia, similar to sectional title courts, seems to be preferable to the arbitration procedure sanctioned by the Sectional Titles Amendment Act in South Africa, due to the low costs involved, accessibility, simplicity, speed, certainty, enforcement, publicity or confidentiality and its binding nature.<sup>430</sup> Another method that could be adopted to resolve disputes is that of Germany, which makes provision for an informal and voluntary procedure regulating the settlement of disputes without the need for legal representation. The sectional owner approaches the district magistrate who then sets out to settle the dispute at hand.<sup>431</sup>

The Minister of Human Settlements published the Community Scheme Ombud Service Bill<sup>432</sup> in 2009 for public comment. The purpose of the Bill is to provide for the establishment of the Community Scheme Ombud Service, a juristic person, and to provide for its functions and powers.<sup>433</sup> Amongst others, its functions are to

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<sup>428</sup> Paddock GJ "Options for resolving sectional title disputes" (January 2009) <http://www.sto.co.za/images/200904%20Options%20For%20Resolution%20of%20Sectional%20Title%20Disputes.pdf> (accessed online on 01/09/2010).

<sup>429</sup> Van der Merwe CG "Sectional title courts as an alternative to arbitration for the settlement of disputes in a sectional title scheme" (1999) 116 *SALJ* 624-641 at 624 and Butler D "The arbitration of disputes in sectional title schemes under management rule 71" (1998) 9 *Stell LR* 256-279 at 257.

<sup>430</sup> Van der Merwe CG "Sectional title courts as an alternative to arbitration for the settlement of disputes in a sectional title scheme" (1999) 116 *SALJ* 624-641 at 637 and 640.

<sup>431</sup> This method is known as *Freiwillige Gerichtsbarkeit*. Van der Merwe CG "The Sectional Title Act and the Wohnungseigentumsgesetz" (1974) 7 *CILSA* 165-185 at 182.

<sup>432</sup> (GN 1448 (GG 32666) 30 October 2009). See further Van der Merwe CG *Sectional titles, share blocks and time-sharing* Vol 1 (2010) 9.58-9.79.

<sup>433</sup> S 1.

develop and provide a dispute resolution service.<sup>434</sup> This Bill has been amended by the Community Scheme Ombud Service Bill of 2010.<sup>435</sup>

The Department of Agriculture and Land Affairs recognised that amendments to the Sectional Titles Act were needed in order to improve dispute resolution mechanisms and other management issues. A task team was appointed to investigate these matters and on 30 October 2009, the Sectional Title Schemes Management Bill was published.<sup>436</sup> The Bill removes the rules relating to sectional title scheme management and administration from the Sectional Titles Act to ensure that all provisions relating to management is contained in the Bill. Apart from the introduction of a Sectional Title Ombudsman, the Bill did not introduce any alternatives to the dispute resolution mechanisms found in the Act. This Bill has been amended by the Sectional Title Schemes Management Bill 20 of 2010.<sup>437</sup>

### **3 8 Concluding remarks**

In this chapter, a statutory analysis and comparative survey have been used to describe the rules governing a sectional title scheme. The sources and the types of rules were examined, as well as their legal nature, the limitations that they impose, the amendment procedure, the operation and scope of application of the rules, the enforcement mechanisms available, the sanctions for non-compliance, disputes and the various methods of dispute resolution that can be used. At this stage, a conclusion can be reached that if rules were not introduced and enforced in sectional title schemes, the community of sectional owners and other occupiers would not be able to co-exist as harmonious members of the body corporate. The trustees would not be able to control and administer the scheme which would lead to financial instability and the eventual failure and winding-up of the scheme.

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<sup>434</sup> S 3(1)(a).

<sup>435</sup> (GN 686 (GG 33366) 9 July 2010).

<sup>436</sup> (GN 1447 (GG 32666) 30 October 2009).

<sup>437</sup> (GN 685 (GG 33366) 9 July 2010).

As put forward in the hypothesis, the rules restrict the rights and the entitlements of the owners and occupiers of the sections, and there is a limitation of ownership in the enforcement of the rules and the obligations imposed. In some instances the rules might exceed the bounds of reasonableness and result in unfair discrimination, arbitrary deprivation, unfair administrative action and restrictions on access to courts for dispute resolution. The discussion in this chapter served to identify the types of rules that may exceed the bounds of reasonableness, therefore making it necessary, in the next chapter, to evaluate the rules in light of the Constitution in order to ensure that rules which are contrary to the fundamental rights entrenched in the Constitution, are declared invalid and unenforceable.

## 4 Comparative discussion on the constitutionality of the rules

### 4 1 Introduction

Purchasers of units in sectional title schemes automatically become members of the body corporate<sup>438</sup> at registration of the units in their names.<sup>439</sup> They are then bound<sup>440</sup> by the statutorily prescribed model management<sup>441</sup> and conduct<sup>442</sup> rules, as well as the rules substituted, added to, amended or repealed by the developer<sup>443</sup> initially or later by the body corporate.<sup>444</sup> Prospective buyers and new sectional owners are often unaware of the existence of the rules, or if they know of the rules, they are unaware of its contents. These various types of rules are seen as the objective, internal law of a private law institution,<sup>445</sup> such as the community of owners as a body corporate and are not contractual in nature.<sup>446</sup> The statutorily prescribed model rules are law of general application.<sup>447</sup> However, the rules amended, added to, substituted and repealed by the developers initially and later by the trustees of the

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<sup>438</sup> See s 36(1) of the Sectional Titles Act 95 of 1986, which provides that the body corporate of a sectional title scheme is deemed established when a person, other than the developer, becomes an owner of a unit. See further s 39(1) which provides that this communal association of sectional owners is represented by democratically elected trustees.

<sup>439</sup> *J de Moor (Edms) Bpk v Beheerliggaam van Outeniqua* 1985 (3) SA 997 (T) 1002-1003. See further Van der Merwe CG “Die reëls van die deeleiendomsgemeenskap ingevolge die Wet op Deeltitels” 1981 *TSAR* 251-271 at 267-270.

<sup>440</sup> Pienaar GJ “Die regsraad van privaatregtelike reëls en regulasies” (1991) 54 *THRHR* 400-413 at 405-406.

<sup>441</sup> Management rules are governed by s 35(2)(a) and are found in Annex 8 of the Sectional Titles Act.

<sup>442</sup> Conduct rules are governed by s 35(2)(b) and are found in Annex 9 of the Sectional Titles Act.

<sup>443</sup> Ss 11(3)(e) and 35(2)(a) and (b).

<sup>444</sup> S 35(2)(a) and (b).

<sup>445</sup> *Wiljay Investments (Pty) Ltd v Body Corporate Bryanston Crescent* 1984 (2) SA 722 (T) 727D. See further *Lottering v Palm* 2008 (2) SA 553 (D) at 557A-C, which confirmed the court’s decision in *Wiljay Investments (Pty) Ltd v Body Corporate Bryanston Crescent*, namely that the rules governing sectional title schemes constitute the terms of an agreement between the members of the body corporate and the trustees. However, despite the authority of these two decisions, it is more accurate to describe the legal nature of the rules by referring to the fact that they were created by the owners as the objective law of an autonomous private law community. Therefore, the rules can be classified as the internal law of the community of owners as a body corporate. Refer to chapter 3 for a discussion on the legal nature of the rules under the heading 3 3.

<sup>446</sup> See Pienaar GJ “Die regsraad van privaatregtelike reëls en regulasies” (1991) 54 *THRHR* 400-413 at 400; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 464; Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 124-125 and Wood-Bodley MC “‘House rules’ in sectional title schemes – are they ultra vires?” (2003) 120 *SALJ* 602-609 at 603.

<sup>447</sup> See the discussion on law of general application under the heading 4 2 4 1.

body corporate are not prescribed by legislation but are rather the internal objective law of a private law institution.<sup>448</sup>

The body corporate is a juristic person, but the sectional owners, as members of the body corporate, are held personally liable for the debts of the sectional title community in proportion to their participation quotas.<sup>449</sup> The rules provide for the control, management, administration, use and enjoyment of the sections and the common property.<sup>450</sup> In some sectional title schemes, these use rights are regulated to such an extent by rigid and inflexible rules that the sectional owners' exercise of their property rights is restricted. However, the trustees, who are in a fiduciary relationship to the members of the body corporate, may not act *ultra vires* or outside their scope of authority. Therefore, they may not impose excessive rules as part of their executive function.

Other than the model management and conduct rules prescribed by the Sectional Titles Act, non-prescribed rules also limit sectional owners' property rights. These additional rules are the house rules, the rules amended, added to or substituted by the developer<sup>451</sup> before the establishment of the body corporate and the rules repealed, amended, added to or substituted by the body corporate<sup>452</sup> through either unanimous<sup>453</sup> or special resolution.<sup>454</sup>

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<sup>448</sup> See the discussion in chapter 3 under the heading 3 3 1. See further Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 124-125 and Wood-Bodley MC "House rules' in sectional title schemes – are they ultra vires?" (2003) 120 *SALJ* 602-609 at 603. See also *Wiljay Investments v Body Corporate Bryanston Crescent* 1984 (2) 722 SA (T) at 727D-F.

<sup>449</sup> Ss 1(4) and 32(1) of the Sectional Titles Act. The participation quota determines the value of the vote, the undivided share in the common property and the share of contributions in the form of levies. It is calculated by dividing the floor area (measured to the middle of the separating wall) of a section with the combined floor area of all the sections together, calculated to four decimal points.

<sup>450</sup> See s 35(2).

<sup>451</sup> Ss 35(2) and 11(3)(e). Refer to chapter 3 for a discussion of the amendment procedure under the headings 3 2 1 and 3 4.

<sup>452</sup> Ss 35(2)(a) and 35(5)(a). Refer to chapter 3 for a discussion of the amendment procedure under the headings 3 2 1 and 3 4.

<sup>453</sup> Resolution taken unanimously by all the members present at a general meeting at which at least 80% of the total number of members of the body corporate are present or represented, or a resolution accepted in writing by all the members or their proxy/ies or their representatives.

<sup>454</sup> Resolution taken by the majority of at least 75% of the votes of the members of the body corporate present or represented at a general meeting, or a resolution accepted in writing by 75% of all the members of a body corporate or their proxy/ies or their representatives.

There are two constitutional issues that will be discussed in this chapter. The question of constitutional validity arises firstly, when one considers whether private institutions, such as the body corporate, may restrict property rights and secondly, when one looks at the extent to which restrictions are considered to be constitutionally permissible. In terms of the first issue, section 8 of the Constitution of the Republic of South Africa 1996, provides for the horizontal application<sup>455</sup> of the Constitution. Section 8(1) of the Constitution states that “the Bill of Rights applies to all law” and section 8(2) provides 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.” In terms of the property clause, section 25 of the Constitution, horizontal application is debatable.<sup>456</sup>

When the body corporate infringes a sectional owner or other occupier’s rights and the owner or the occupier, as a private person, relies directly on a provision in the Constitution to found a cause of action for a constitutional attack on the body corporate, as a private person, in a private dispute,<sup>457</sup> direct horizontal application<sup>458</sup> occurs. One question investigated in this chapter is whether such horizontal application is feasible. The statutorily prescribed model rules are law of general application<sup>459</sup> and as such are a vertical application of the state’s legislative power as they are imposed by the state or an organ of state acting under the state’s authority. However, the rules amended, added to, substituted and repealed by the developers initially and later by the trustees of the body corporate are not prescribed by legislation but are rather the internal objective law of a private law institution<sup>460</sup> and as such are a horizontal application between the body corporate as a private

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<sup>455</sup> See De Waal J and Erasmus G “The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition” (1996) 7 *Stell LR* 179-209 at 202 and Van der Walt AJ *Constitutional property law* (2005) 44.

<sup>456</sup> Van der Walt AJ and Pienaar GJ *Introduction to the law of property* (6<sup>th</sup> ed 2009) 302.

<sup>457</sup> Van der Walt AJ *Constitutional property law* (2005) 44.

<sup>458</sup> See Ackermann L “Equality and the South African Constitution: the role of dignity” (2000) 60 *ZaöRV* 537-556 at 550.

<sup>459</sup> See the discussion on law of general application under the heading 4 2 4 1.

<sup>460</sup> See the discussion in chapter 3 under the heading 3 3 1. See further Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 124-125 and Wood-Bodley MC “‘House rules’ in sectional title schemes – are they ultra vires?” (2003) 120 *SALJ* 602-609 at 603. See also *Wiljay Investments v Body Corporate Bryanston Crescent* 1984 (2) 722 SA (T) at 727D-F.



institution and the sectional owners and other occupiers when they restrict the property rights of these parties.

In terms of the second issue, it will be determined whether the statutory restrictions brought about by the rules are unconstitutional deprivations of property rights in terms of section 25 of the Constitution, which states that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” It will be determined whether the restrictive rules’ application amounts to an arbitrary deprivation of property, which would be unenforceable due to its constitutional invalidity and whether the deprivation can be justified in terms of the limitation clause.<sup>461</sup> Section 39(2) of the Constitution states that “when interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” This constitutional mandate necessitates a section 25(1) constitutional validity inquiry with regard to legislation that might limit constitutional rights. A limitation of a constitutional right is essentially a “justifiable infringement”,<sup>462</sup> which is not unconstitutional if it occurs for a reason that is accepted as a justification for infringing the rights in an open and democratic society based on human dignity, equality and freedom. The decision of *First National Bank of South Africa Limited t/a Wesbank v Commissioner for the South African Revenue Services*<sup>463</sup> (hereinafter referred to as *FNB*) provides a useful test when interpreting section 25(1)<sup>464</sup> and it will be extensively referred to in this discussion.

Rules, serving as “regulatory controls”, restrict sectional owners’ free use, enjoyment, exploitation and disposal of property, thereby “diminishing its value or profitability.”<sup>465</sup> These restrictive rules will be tested against certain non-property fundamental rights in the Bill of Rights,<sup>466</sup> in order to determine if they constitute constitutional limitations. The following specific constitutionally entrenched rights will

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<sup>461</sup> S 36 of the Constitution.

<sup>462</sup> Currie I and De Waal J *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 164.

<sup>463</sup> 2002 (4) SA 768 (CC).

<sup>464</sup> See Freedman W “The constitutional right not to be deprived of property: the constitutional court keeps its options open” 2006 *TSAR* 83–100 at 83.

<sup>465</sup> Van der Walt AJ *Constitutional property law* (2005) 124.

<sup>466</sup> Found in chapter 2 of the Constitution of the Republic of South Africa 1996.

be looked at more closely: equality,<sup>467</sup> specifically unfair discrimination;<sup>468</sup> just administrative action;<sup>469</sup> and access to courts.<sup>470</sup> From this perspective, reference will be made to case law from a comparative jurisdiction, namely the United States of America. This jurisdiction has been chosen because of the wide range of constitutional cases where the right of equality has come into question and has been dealt with.

## 4 2 Section 25(1) of the Constitution and *FNB* as an interpretative tool

### 4 2 1 Introduction

In the *FNB* decision, Ackermann J developed a test for the property challenge<sup>471</sup> by dividing the property clause enquiry into several stages, formulated as a set of questions. In terms of this methodology, it must be determined whether the law complained of affects property in terms of section 25(1). If it does, it must be asked whether it amounts to a deprivation of property by law.<sup>472</sup> If this question is answered in the affirmative, it must be determined whether the deprivation is consistent with section 25(1) and if it is not, it must be determined whether the deprivation can be justified under section 36(1) of the Constitution.<sup>473</sup> According to the Court, if a deprivation is arbitrary and not justifiable, “that is the end of the matter. The provision is unconstitutional.”<sup>474</sup> The test then need not continue to the expropriation stage. However, if the deprivation infringes section 25(1) but is a justified limitation, the

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<sup>467</sup> S 9 of the Constitution.

<sup>468</sup> S 9(3).

<sup>469</sup> S 33.

<sup>470</sup> S 34.

<sup>471</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 46. See further Hopkins K and Hofmeyr K “New perspectives on property” (2003) 120 *SALJ* 48–62 at 54 and Freedman W “The constitutional right not to be deprived of property: the constitutional court keeps its options open” 2006 *TSAR* 83–100 at 90.

<sup>472</sup> Refer to 4 2 4 1 for a discussion on whether the Sectional Titles Act and the rules it prescribes is considered “law”.

<sup>473</sup> Van der Walt AJ *Constitutional property law* (2005) 54 and 137. In terms of s 25(8) of the Constitution, it is in principle possible to justify a limitation that does not satisfy the requirements in s 25(1), which must be complied with for formal validity, as long as it complies with the requirements in s 36(1). It is considered unlikely that the deprivation will not be in conflict with the requirements in section 36 if the deprivation is in conflict with the formal requirements in s 25(1). See further *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 58.

<sup>474</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 58.

question arises whether it is an expropriation. If so, the deprivation must comply with the requirements of section 25(2)(a), be for a public purpose or in the public interest and section 25(2)(b), be subject to compensation.<sup>475</sup>

## 4 2 2 Interest in property

In order to determine whether there is an interest in property, it needs to be determined what the term 'property' encompasses. A sectional title unit is not traditional immovable property. The *FNB* case confirmed that land and movable corporeals are property for the purposes of protection in terms of the property clause. The Court also found that there is no indication that property for the purposes of the property clause is restricted to corporeal property.<sup>476</sup> For the purposes of this discussion, property is the "objects of rights and the rights themselves."<sup>477</sup>

The Court in *FNB*, as a preliminary inquiry, considers whether the right or entitlement affected by the deprivation, constitutes an interest in property. It must, in the case of sectional titles, be determined whether the right or entitlement, namely ownership of a unit and the use and enjoyment of a section and share in the common property,<sup>478</sup> constitutes a property interest within the Court's interpretation of section 25(1) of the Constitution.<sup>479</sup> The entitlement of use and enjoyment does not only extend to sectional owners but also to other occupiers in a scheme, such as tenants because

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<sup>475</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 59.

<sup>476</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 51, which states that "at this stage of our constitutional jurisprudence it is, for reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25. Here it is sufficient to hold that ownership of a corporeal movable must – as ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25."

<sup>477</sup> Currie I and De Waal J *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 530. See further Van der Walt AJ *Constitutional property clauses: a comparative analysis* (1999) 349-353, where property is defined as "property as rights". The object of the right is the immovable property, namely the section and the share in the common property. The rights themselves is the ownership of units and the entitlement of use and enjoyment of the section and the share in the common property in the case of sectional owners and the entitlement of use and enjoyment in the case of other occupiers.

<sup>478</sup> See Allen T "Commonwealth constitutions and the right not to be deprived of property" (1993) 42 *Int & Comp LQ* 523-552 at 532 and Freedman W "The constitutional right not to be deprived of property: the constitutional court keeps its options open" 2006 *TSAR* 83–100 at 91.

<sup>479</sup> See Freedman W "The constitutional right not to be deprived of property: the constitutional court keeps its options open" 2006 *TSAR* 83–100 at 83.

the rules affect all parties residing in a scheme irrespective of ownership. The sectional owners' property interests are stronger than those of other occupiers, and therefore require stronger justification for any limitations.

### 4 2 3 Deprivation

The second stage in the constitutional inquiry as set out in the *FNB* decision, is whether there has been a deprivation of the property. In the *FNB* decision, Ackermann J defines a deprivation by saying that "any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."<sup>480</sup> Therefore, deprivation is not limited to the taking away of property but includes the regulation of property, such as the restrictions imposed by sectional title rules, which limit the owner's right of use and enjoyment. In determining whether or not there has been a deprivation, the extent to which the use and enjoyment of property has been interfered with should be determined.<sup>481</sup>

The deprivation provision, section 25(1) of the property clause in the Constitution, is phrased negatively and does not include a positive guarantee of property.<sup>482</sup> It merely protects private rights against improper state interference by way of state

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<sup>480</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 57. See further Currie I and De Waal J *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 541.

<sup>481</sup> The Court in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 32 at 545J-546C, states that the definition of deprivation depends on the "extent of the interference with or limitation of use, enjoyment or exploitation" and that "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation." This approach tends to lean more towards excessive regulations when all regulations should actually be included in a constitutionally test or inquiry. See further Van der Walt AJ *Constitutional property law* (2005) 126-128, where Professor van der Walt criticizes the definition of what constitutes a deprivation in the *Mkontwana* decision. Professor van der Walt says that the definition should be read with care because it is problematic. Firstly, it is strange that deprivations are restricted to what is normal in an open and democratic society because all legitimate restrictions on the use and enjoyment of property are normal. Secondly, it serves no useful purpose to restrict the concept of deprivation to 'substantial' or 'abnormal' i.e. excessive regulatory derivations because 'normal' deprivations will then be excluded from the constitutional control in s 25(1) which will lead to an 'interpretative struggle' when determining what constitutes a 'substantial' deprivation.

<sup>482</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 48. See further Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution, 1996* (1999) 18 and Van der Walt AJ *Constitutional property law* (2005) 13.

regulation of the use of property. However, this protection is not absolute. Certain limitations on the use of common property, as regulatory measures enforced by legislation, may result in a constitutionally legitimate and valid deprivation or regulation of property rights. Section 25(1) provides that deprivations will be constitutionally valid if they are introduced by law of general application and if they do not permit an arbitrary deprivation of property. A regulatory measure is arbitrary when the legislation does not provide sufficient reason for the particular regulation or if it is procedurally unfair.<sup>483</sup> Limitations on the property or property rights of sectional owners in sectional title communities will normally fall within this category of regulations which are constitutionally permissible, because such limitations are laid down by generally applicable legislation. Therefore, for practical purposes, the main requirement would be that they are not arbitrary.<sup>484</sup>

Non-prescribed rules, such as those substituted, added to, amended or repealed by either the developer<sup>485</sup> initially or later by the body corporate<sup>486</sup> by resolution,<sup>487</sup> are also valid as the Act authorises the developer and the body corporate to ensure that the rules operative suit the needs of the sectional title scheme. In terms of house rules, the trustees are empowered to do all things reasonably necessary for the control, management and administration of the common property. Therefore, by adopting house rules, they are exercising their statutory powers. House rules are enforceable when they comply with two requirements of legitimacy. They must be an exercise of the trustees' powers of control over the common property or permission given by the trustees exercising their discretion.<sup>488</sup> However, they may not be objectionable in the way that they restrict the rights of sectional owners.<sup>489</sup>

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<sup>483</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 100.

<sup>484</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* paras 61-70.

<sup>485</sup> Ss 35(2) and 11(3)(e) of the Sectional Titles Act. Refer to the discussion of these rules in chapter 3 under the heading 3 2 1.

<sup>486</sup> Ss 35(2)(a) and 35(5)(a). Refer to the discussion of these rules in chapter 3 under the heading 3 2 1.

<sup>487</sup> Special or unanimous resolution. Refer to footnote 233 for a definition of each.

<sup>488</sup> S 38(j) of the Sectional Titles Act 95 of 1986.

<sup>489</sup> See Wood-Bodley MC "House rules' in sectional title schemes – are they ultra vires?" (2003) 120 SALJ 602-609 at 605. Refer to the discussion of house rules in chapter 3.

Besides the individual function of securing the property rights of individual sectional owners, constitutional validity of property also has a social function.<sup>490</sup> This function dictates that property rights may be restricted by statutorily prescribed and other limitations in the interest of the community of sectional owners. The rules of sectional title communities are of such a nature that the property rights of members of these communities are restricted in the interest of the property community, and are therefore constitutionally permissible regulations. However, if these restrictions are unreasonable in their application and are found to be in conflict with the fundamental non-property rights entrenched in the Bill of Rights, they will be constitutionally invalid and impermissible.<sup>491</sup>

The function of the deprivation provision is “to ensure that the property clause does not render property absolute or inviolate, and to establish the constitutional principle that at least some (mostly state) interferences with and limitations of (the use of) property are inevitable and necessary (in the public interest) and, therefore, legitimate”<sup>492</sup> and “to ensure that the inevitable and necessary limitations of property are not imposed arbitrarily and unfairly, but in line with the constitutional guarantee of due process.”<sup>493</sup> Therefore, the deprivation provision assumes that property (and the property guarantee) may be limited and lays down the requirements for limitations to be valid and legitimate. Section 25(1) is interpreted and applied in terms of a balance between the protection of individual rights and the promotion or protection of the social or public responsibilities or duties.<sup>494</sup>

For the purposes of this discussion, attention will now be turned specifically to deprivations in sectional title schemes. The Sectional Titles Act deprives sectional

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<sup>490</sup> Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 579.

<sup>491</sup> A sectional title scheme will never be able to exclude a certain race, religion, gender, age etc merely to serve a social function of upholding the rights of the community of sectional owners and other occupiers as these restrictions will be in direct conflict with constitutional rights.

<sup>492</sup> See Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution, 1996* (1997) 18 and Van der Walt AJ *Constitutional property law* (2005) 137.

<sup>493</sup> See Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution, 1996* (1999) 18 and Van der Walt AJ *Constitutional property law* (2005) 137.

<sup>494</sup> See Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution, 1996* (1999) 19.

owners and other occupiers of their property rights by regulating their entitlements of use and enjoyment of their sections and their share in the common property. These rights are limited by the rules prescribed by the Act and those non-prescribed rules, such as the house rules adopted by the trustees and the rules added to, amended, substituted, repealed and adopted by either the developer initially or by the body corporate by the appropriate resolution.

The first example of a set of statutorily prescribed rules which deprive an owner or occupier of their entitlements of use and enjoyment is section 44 of the Sectional Titles Act, which sets out the duties of the owners and occupiers of sections. These obligations interfere with the sectional owners' and occupiers' entitlements of use and enjoyment. For example, section 44(1)(d) states that an owner shall "use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises." This rule requires sectional owners and occupiers to behave in a way that will not disturb the use and enjoyment of the sections and common property by other sectional owners, occupiers and other persons lawfully on the premises.<sup>495</sup> Compliance with this rule ensures that all the residents living in a scheme will form a harmonious community, with the least cause for conflict and disputes. Therefore, this rule serves a legitimate aim and will be reasonable in so far as it is applied equally to all residents in the scheme.

Another example is the statutorily prescribed rule in section 44(1)(e) of the Sectional Titles Act, which states that an owner shall "not use his section or exclusive use area, or permit it to be used, in such a manner or for such a purpose as shall cause a nuisance to any occupier of a section." This rule prohibits any behaviour or activity that may reasonably be perceived as causing a nuisance to other sectional owners and occupiers. Noise, for example, can "destroy the harmonious fabric of a sectional title scheme."<sup>496</sup> Therefore, the creation of any noise likely to interfere with the peaceful enjoyment of another unit by its owner, occupier or by any person using the

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<sup>495</sup> Refer to the discussion of these rules in chapter 3 under the heading 3.3.2.6.

<sup>496</sup> Van der Merwe CG, Mohr P and Blumberg M "The Bill of Rights and the rules of sectional title schemes: a comparative perspective" (2000) 11 *Stell LR* 155-181 at 178.

common property, may possibly be prohibited by a special rule. Therefore, this rule can be seen as being a legitimate limitation of the sectional owners' and other occupiers' entitlements of use and enjoyment because compliance with the rule will ensure that causes for disputes do not arise.

As mentioned before, sectional owners and occupiers may not use their sections in a manner that will cause unreasonable nuisance to other residents in the scheme, thereby prejudicing their use and enjoyment of their sections to a degree that exceeds what the other residents can reasonably be expected to tolerate. However, what can be expected to be tolerated is the normal and lawful use of a section. Because the problem of noise and nuisance is subjective and can easily be resolved through the exercise of co-operation, it is incumbent on every owner to be sensitive to the needs of their neighbours. However, if the problem persists, the matter will be referred to arbitration or mediation in terms of the prescribed management rule.<sup>497</sup>

The duty rests on prospective buyers to be aware of the potential for noise within a scheme. Some types of noise are not easily controlled. Therefore, the sections that are close to the source of the noise will depreciate in value. When making the decision as to whether an act constitutes a nuisance, the trustees of the body corporate must take all the relevant circumstances into consideration before concluding that the owner or occupier of a unit has contravened a rule.<sup>498</sup>

One group of limitations brought about by the rules concern the appearance of the sections and the scheme.<sup>499</sup> The model management rules found in Annexure 8 of the Sectional Titles Act should be read with section 35(1)(a) of the Act. Management rule 68(1)(i) provides that an owner "shall not use his section, exclusive use area or any part of the common property, or permit it to be used, in such a manner or for such purpose as shall be injurious to the reputation of the building." Management rule 68(1)(iv)<sup>500</sup> provides that an owner "shall not do anything to his section or

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<sup>497</sup> Annex 8 rule 71 of the Sectional Titles Act 95 of 1986.

<sup>498</sup> Refer to the discussion in chapter 3 under the heading 3 3 2 5.

<sup>499</sup> Refer to the discussion in chapter 3 under the heading 3 3 2 4.

<sup>500</sup> See further Annex 9 rules 5, 6 and 8.



exclusive use area which is likely to prejudice the harmonious appearance of the building.”

One of the main and most attractive features of a sectional title scheme is its harmonious appearance. Prospective buyers are interested in purchasing a unit in a scheme where all the sections are similar in appearance, neat and well maintained. Purchasers want to be assured that their section and share in the common property will increase in value and will attract similar interest. A restriction in the United States of America which is similar to the harmonious appearance rule<sup>501</sup> in the South African Sectional Titles Act, is the uniform architectural standards restriction. In common interest developments in the USA, the rules dictate uniform architectural standards such as the colour of individual homes,<sup>502</sup> the style of windows,<sup>503</sup> the type of lighting<sup>504</sup> and fencing<sup>505</sup> permissible, where cars are allowed to be parked and what type of car is allowed to be parked on the premises.<sup>506</sup>

Another set of limitations brought about by the rules concern the body corporate's powers to enforce payment of the owner's debts by execution against the section.<sup>507</sup> In exchange for the entitlement of use and enjoyment of sections and the common property, residents must pay levies. When a sectional owner is in default with his levy contributions, the trustees of the body corporate are required to take some form of effective action against him. The trustees cannot evict the recalcitrant sectional owner as he is the owner of the unit.<sup>508</sup>

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<sup>501</sup> Annex 8 rule 68(1)(iv).

<sup>502</sup> *West Hill Colony Inc v Sauerwein* 138 NE 2d 403 (Ohio Ct App 1956).

<sup>503</sup> *Sterling Village Condominium Inc v Breitenbach* 251 So 2d 685 (Fla 4<sup>th</sup> DCA 1971).

<sup>504</sup> *Delaporte v Preston Square Inc* 680 SW 2d 561 (Tex Ct App 1984).

<sup>505</sup> *Heritage Heights Home-owners Association v Esser* 565 P 2d 207 (Ariz Ct App 1977).

<sup>506</sup> See Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 156-157. See further *Holleman v Mission Trace Home-owners Association* 556 SW 2d 632 (Tex Civ App 1977); *Bernado Villas Management Corp Number Two v Black* 235 Cal Rptr 509 (Ct App 1987) and *Unit Owners Association of Build America 1 v Gillman* 292 SE 2d 378 (Va 1982).

<sup>507</sup> Refer to the discussion in chapter 3 under the heading 3 6 3 2.

<sup>508</sup> See *Body Corporate of the Shaftesbury Sectional Title Scheme v Estate of the late Wilhelm Rippert* [2003] 2 All SA 233 (C). See further s 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

There are a number of sanctions that can be enforced in the case of non compliance with financial obligations. However, the effectiveness of some sanctions is limited. These sanctions serve an important function because they ensure financial stability and security in a sectional title scheme. The continued existence of a scheme is dependent on the sectional owners' fulfilling their financial obligations. Potential purchasers will not buy a unit in a scheme that cannot be effectively controlled and managed as it will negatively affect their investment and entitlements of ownership. An example of an arguably ineffective sanction is when the voting right at a general meeting is taken away when a sectional owner is in default with his levy contributions.<sup>509</sup> This deprivation is only applicable if there is an ordinary resolution and not if the owner has to vote regarding a special or unanimous resolution which affects the future of all sectional owners in the scheme.

The Registrar may not register a transfer of a unit unless a conveyancer's certificate is produced confirming that at the date of registration, the body corporate has certified that all monies due to it have been paid or that provision has been made for payment in the near future.<sup>510</sup> This is an embargo provision placed on the alienation of a unit if there are outstanding levies. However, this sanction is only effective if the unit is not mortgaged.<sup>511</sup> The body corporate can attach the moveable assets belonging to the owner and sell them in execution to cover the defaulting payments.<sup>512</sup> If there are no moveable assets or an insufficient amount has been

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<sup>509</sup> Annex 8 rule 64(a) of the Sectional Titles Act 95 of 1986. Annex 8 rule 15(5) provides that sectional owners are entitled to attend and speak at trustee meetings but they are not entitled to vote if they have any outstanding levy payments or if they have not fulfilled other duties and obligations or if they have breached any other rules. Refer to the discussion in chapter 3 under the heading 3 6 3 2. Annex 8 rule 15(5) provides that sectional owners are entitled to attend and speak at trustee meetings but they are not entitled to vote if they have any outstanding levy payments or if they have not fulfilled other duties and obligations or if they have breached any other rules.

<sup>510</sup> See s 15B(3)(a)(i)(aa) of the Sectional Titles Act. See further *Nel NO v Body Corporate of the Seaways Building* [1995] 1 All SA 87 (C) and 1996 (1) SA 131 (A); *South African Permanent Building Society v Messenger of the Court, Pretoria* 1996 (1) SA 401 (T); *Barnard NO v Regspersoon van Aminie* [2001] 3 All SA 433 (A); *Body Corporate of the Geovy Villa v Sheriff, Pretoria Central Magistrate's Court* 2003 (1) SA 69 (T); *FirstRand Bank v Body Corporate of Geovy Villa* [2004] 1 All SA 259 (SCA) and *BOE Bank Ltd v Body Corporate of the Towers Scheme* [2005] JOL13224 (D). See further Van der Merwe CG "Sanctions in terms of the South African Sectional Titles Act and the German Wohnungseigentumsgesetz: should the South African statute be given equally sharp teeth?" (1993) 26 *CILSA* 85-97 at 88.

<sup>511</sup> Refer to the discussion in chapter 3 under the heading 3 6 3 2.

<sup>512</sup> See s 66(1)(a) of the Magistrates' Courts Act 32 of 1944; Uniform Rules of High Court 45(1) (GN R48 (GG 999) 12 January 1965) and Annex 8 rule 36 of the Sectional Titles Act. See also *FirstRand*

obtained, the trustees can attach the unit and have it sold in execution.<sup>513</sup> Mortgage bond holders are also sometimes involved and it is questionable whether their rights may rank higher than those of the body corporate. However, the body corporate is granted a perfect claim to the proceeds of the sale and is therefore ranked higher than mortgagees.<sup>514</sup>

The Magistrates' Courts Act<sup>515</sup> also makes provision for the following sanctions: emoluments attachment orders,<sup>516</sup> garnishee orders<sup>517</sup> and administration orders.<sup>518</sup> The body corporate could attach the rent<sup>519</sup> owing by a lessee to the defaulting owner of the unit or it may institute sequestration proceedings against the owner.<sup>520</sup> However, this too runs the risk of incurring high costs.<sup>521</sup>

The model conduct rules in Annexure 9 of the Sectional Titles Act, which are to be read with section 35(2)(b) of the Act, further limit the sectional owner or occupier's entitlement of use and enjoyment. Conduct rule 1(1) states that "an owner or occupier shall not, without the consent in writing of the trustees, which approval may not be unreasonably withheld, keep any animal, reptile or bird in a section or on the common property."<sup>522</sup> Conduct rule 3 prohibits any sectional owner or occupier from

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*Bank v Body Corporate of Geovy Villa* [2004] 1 All SA 259 (SCA). Refer to the discussion in chapter 3 under the heading 3 6 3 2.

<sup>513</sup> Segal N "Any cure for the body corporate blues?" (2004) 121 *SALJ* 552-555 at 553. Refer to the discussion in chapter 3 under the heading 3 6 3 2.

<sup>514</sup> See s 15B(3)(a)(i)(aa). See further *Nel NO v Body Corporate of the Seaways Building* [1995] 1 All SA 87 (C) and 1996 (1) SA 131 (A); *South African Permanent Building Society v Messenger of the Court, Pretoria* 1996 (1) SA 401 (T); *Body Corporate of the Geovy Villa v Sheriff, Pretoria Central Magistrate's Court* 2003 (1) SA 69 (T) and *FirstRand Bank v Body Corporate of Geovy Villa* [2004] 1 All SA 259 (SCA). See further Van der Merwe CG "Sanctions in terms of the South African Sectional Titles Act and the German Wohnungseigentumsgesetz: should the South African statute be given equally sharp teeth?" (1993) 26 *CILSA* 85-97 at 88.

<sup>515</sup> 32 of 1944.

<sup>516</sup> S 65J.

<sup>517</sup> S 72.

<sup>518</sup> S 74-74W.

<sup>519</sup> S 68.

<sup>520</sup> See s 8 of the Insolvency Act 24 of 1936. See further *Nel NO v Body Corporate of the Seaways Building* [1995] 1 All SA 87 (C) and 1996 (1) SA 131 (A) and *Barnard NO v Regspersoon van Aminie* [2001] 3 All SA 433 (A).

<sup>521</sup> Refer to the discussion in chapter 3 under the heading 3 6 3 2.

<sup>522</sup> *Body Corporate of the Laguna Ridge Scheme v Dorse* 1999 (2) SA 512 (D). See further the discussion in chapter 3 under the heading 3 3 2 3.

parking or leaving their vehicles anywhere on the common property.<sup>523</sup> Conduct rule 4 prohibits any alterations to the common property.<sup>524</sup> Conduct rule 5 prohibits any conduct that would lead to an aesthetically displeasing or undesirable effect when view from the outside of the scheme.<sup>525</sup> These statutorily prescribed deprivations will now be tested in terms of their constitutional validity.

## 4 2 4 Compliance with the requirements of section 25(1)

### 4 2 4 1 *Law of general application*

According to the test set out in the *FNB* decision, if there has been a deprivation of a property interest, it needs to be consistent with the provisions of section 25(1) of the Constitution. The first threshold or minimum requirement which must be met for the limitation of a right is that the deprivation has to be imposed by law of general application. This means that the authorising law in question, the rules governing sectional title schemes, has to apply generally and equally. The rule “must not apply solely to an individual case, or must not restrict the rights only of specific individuals.”<sup>526</sup> The law in question, the rules governing sectional title schemes, has to be non-arbitrary<sup>527</sup> in its application, specific, accessible,<sup>528</sup> clear,<sup>529</sup> precise<sup>530</sup> and

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<sup>523</sup> Refer to the discussion of the harmonious appearance rule. See Annex 8 rule 68(1)(iv) and Annex 9 rules 5, 6 and 8. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs on the common property of the scheme. See further the discussion in chapter 3 under the heading 3 3 2 4.

<sup>524</sup> Refer to the discussion of the harmonious appearance rule. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs on the common property of the scheme. See further the discussion in chapter 3 under the heading 3 3 2 4.

<sup>525</sup> Refer to the discussion of the harmonious appearance rule. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs on the common property of the scheme. See further the discussion in chapter 3 under the heading 3 3 2 4.

<sup>526</sup> Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 340.

<sup>527</sup> Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 340.

<sup>528</sup> Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution, 1996* (1997) 105. See further De Waal J and Erasmus G “The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition” (1996) 7 *Stell LR* 179-209 at 204 and Van der Walt AJ *Constitutional property law* (2005) 144.

<sup>529</sup> Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 340.

<sup>530</sup> Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 340.

apply “impersonally”<sup>531</sup> to all. Generally speaking, “[n]on-arbitrariness means that where, for example, a rule confers a discretion on an official to limit rights, that discretion must be constrained by identifiable legal standards and may not be unfettered.”<sup>532</sup>

Ackermann J finds that the legislation tested in the *FNB* decision “clearly constitutes a law of general application”.<sup>533</sup> The legislation in question, the Sectional Titles Act, can be seen as law of general application because it is national legislation, applying to all sectional title schemes registered under the Act. An act which applies nationally should constitute law of general application and regulatory laws, such as the Act in question, are usually of a general nature.<sup>534</sup> The Sectional Titles Act prescribes model management and conduct rules, which can be seen as law of general application. The statutorily prescribed model rules are law<sup>535</sup> as they are prescribed by the Sectional Titles Act, national legislation, which is law of general application and as such they are made in execution of the state’s vertical application of legislative power.

However, the question remains whether additional, non-prescribed rules, such as those amended by a unanimous or special resolution of the body corporate, could also be considered to be law of general application. The argument for these additional rules as law of general application is that they do not only apply to the sectional owners as members of the body corporate, but also to outsiders or third parties such as other occupiers and visitors. The sectional owners and other occupiers residing in the scheme bear the responsibility of ensuring that these outsiders comply with the rules and act accordingly. The Sectional Titles Act authorises developers and the body corporate to amend, add to, repeal, substitute

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<sup>531</sup> Currie I and De Waal J *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 169.

<sup>532</sup> Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 340.

<sup>533</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 61.

<sup>534</sup> Van der Walt AJ *Constitutional property law* (2005) 144.

<sup>535</sup> See Woolman S and Botha H “Limitations” in Woolman S, Roux T and Bishop M *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed 2009) 34.51, where the authors list what is considered as law, namely legislation, regulations, subordinate legislation, municipal by-laws, common law rules, customary law rules, rules of court and international conventions.

and adopt rules suitable to the scheme when necessary.<sup>536</sup> Therefore, these rules are law of general application.

The question arises whether the rules adopted, amended, added to, substituted and repealed by the developer initially and later by the trustees of the body corporate, are law.<sup>537</sup> These rules are seen as the internal objective law of a private law institution.<sup>538</sup> The developer as a private person and the body corporate as a private body or institution have the authority in terms of the Sectional Titles Act to amend, add to, substitute and repeal the model rules and to adopt rules specifically suited to meet the needs and requirements of a particular scheme. These adopted rules will be applicable to a sectional title scheme in so far as they are not in conflict with the statutorily prescribed model rules, whereas the amended model rules will be applicable in so far as they are not unconstitutional in their application and effect. Therefore, these rules are law.

#### 4 2 4 2 *Public interest*

Although section 25(1) does not contain an explicit public purpose requirement, it has been argued that a public purpose requirement needs to be read into section 25(1).<sup>539</sup> Foreign law follows the position of strict enforcement of this requirement.<sup>540</sup> In the case of sectional titles, it needs to be asked whether there is a public interest requirement that is being fulfilled with the application of the Sectional Titles Act. As

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<sup>536</sup> Ss 11(3)(e) and 35(2)(a) and (b). See regulation 30(1) GN R664 (GG11245) 8 April 1998. See S 35(2)(a) and (b). See further regulation 30(4) of the Sectional Titles Act. See the discussion in chapter 3 under the heading 3 4.

<sup>537</sup> See Woolman S and Botha H "Limitations" in Woolman S, Roux T and Bishop M *Constitutional law of South Africa* Vol 3 (2<sup>nd</sup> ed 2009) 34.51, where the authors list what is considered as law, namely legislation, regulations, subordinate legislation, municipal by-laws, common law rules, customary law rules, rules of court and international conventions.

<sup>538</sup> See the discussion in chapter 3 under the heading 3 3 1. See further Horwitz A *The function and operation of the community of sectional owners: its successes and failures* (1985) 124-125 and Wood-Bodley MC "'House rules' in sectional title schemes – are they ultra vires?" (2003) 120 *SALJ* 602-609 at 603. See also *Wiljay Investments v Body Corporate Bryanston Crescent* 1984 (2) 722 SA (T) at 727D-F.

<sup>539</sup> Van der Walt AJ *The constitutional property clause: a comparative analysis of section 25 of the South African Constitution, 1996* (1997) 108. See further Van der Walt AJ *Constitutional property law* (2005) at 138 and 140 where reference is made to Theunis Roux and his idea of the "arbitrariness vortex". This means that the requirement that a deprivation needs to be in the public interest or for a public purpose usually falls under the requirement that deprivations must not be arbitrary.

<sup>540</sup> Van der Walt AJ *Constitutional property law* (2005) 138.

discussed in chapter 2,<sup>541</sup> sectional title schemes were introduced as an alternative to the traditional form of ownership of immovable property because the average person was in need of more affordable housing.

It can be seen that there is a public interest in the application of the Act as it attempts to provide a workable solution to the housing shortage in South Africa by providing security of tenure and fulfilling the psychological need for home ownership.<sup>542</sup> However, due to the nature of sectional title schemes, they do not provide housing to lower income groups. Therefore, a more suitable form of housing is necessary in order to provide for the housing needs of groups of people that sectional title schemes do not provide for. The various types of rules governing sectional title schemes are enforced by the trustees of the body corporate in order to ensure that the schemes function properly. Therefore, they should be legitimate in as far as they effectively serve the purpose for which they were introduced. They should provide an alternative form of home ownership, similar to traditional ownership of immovable property, but with limitations on the entitlements of use and enjoyment in the interest of the community. These limitations should be reasonable and should not restrict the sectional owners' rights and interests to such an extent that would be disproportionate to the interest they serve to the community of sectional owners as a whole.

#### 4 2 4 3 *Arbitrariness*

The deprivation will be considered to be invalid if the law in question, the rules prescribed and authorised by the Sectional Titles Act, is arbitrary.<sup>543</sup> The deprivation will be considered to be arbitrary if the law in question, the various types of rules governing sectional title schemes, fails to provide a sufficient reason for the

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<sup>541</sup> See 2 3.

<sup>542</sup> Refer to chapter 2 for a discussion of the situation in South Africa before the introduction of sectional title legislation.

<sup>543</sup> See De Waal J and Erasmus G "The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition" (1996) 7 *Stell LR* 179-209 at 205 and Freedman W "The constitutional right not to be deprived of property: the constitutional court keeps its options open" 2006 *TSAR* 83-100 at 86.

deprivation and / or if it is procedurally unfair.<sup>544</sup> Non-compliance with this threshold requirement will lead to an invalid limitation. The court determines whether there is a sufficient reason for the deprivation by looking for a sufficient nexus. A nexus must exist between the purpose for the limitation and the means selected to serve the purpose and between the purpose of the law in question and the property and the owner in question.<sup>545</sup> If there is no or an insufficient nexus, the deprivation is arbitrary.

In determining whether there is a sufficient reason for the deprivation, the court must look at all the relevant facts of each case,<sup>546</sup> “bearing in mind that the enquiry is concerned with ‘arbitrary’ in relation to the deprivation of property under section 25(1).”<sup>547</sup> The court must make use of the following factors,<sup>548</sup> which serve as useful tools in determining whether there is sufficient reason for the deprivation: the relationship between the means employed (the deprivation) and the ends sought to be achieved (the purpose of the law), the relationship between the purpose for the deprivation and the person whose property is affected and the relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation in terms of that property.<sup>549</sup>

The Court, in *FNB*,<sup>550</sup> distinguishes between a thin and a thick test for the determination of a sufficient reason. The thin test states that a sufficient reason can be established by a mere rational relationship between the means employed and the

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<sup>544</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 100.

<sup>545</sup> See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) paras 34-35. See further Freedman W “The constitutional right not to be deprived of property: the constitutional court keeps its options open” 2006 *TSAR* 83–100 at 95.

<sup>546</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 100. See further Hopkins K and Hofmeyr K “New perspectives on property” (2003) 120 *SALJ* 48–62 at 57.

<sup>547</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 100.

<sup>548</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 100. See further Freedman W “The constitutional right not to be deprived of property: the constitutional court keeps its options open” 2006 *TSAR* 83–100 at 87.

<sup>549</sup> The relationship between of all these factors is the nexus, which establishes the sufficient reason which the court needs to determine.

<sup>550</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 65.



ends sought. The thick test states that sufficient reason must be established by a proportionality evaluation which is similar to (but not identical with) that which is required by section 36(1). When determining which test applies to a particular situation, one needs to consider the nature of the property and the extent of the deprivation. When the property in question is the ownership of land and when all the entitlements of the owner are affected, a “more compelling”<sup>551</sup> purpose will have to be established in order for there to be a sufficient reason for the deprivation.

In summary, any law that authorises a deprivation of property must establish sufficient reason for the deprivation. This reason must at least be rationally linked to a legitimate government purpose and may sometimes have to be justified by establishing a proportionate balance between the ends sought and the means employed.<sup>552</sup>

In this context, the various types of rules prescribed or authorised by the Sectional Titles Act, authorises a deprivation of property, namely a restriction on the sectional owners and occupiers’ entitlements of use and enjoyment, must establish a sufficient reason for the deprivation, such as the necessity to form a harmonious community. The deprivation must be justified by establishing a proportionate balance between the ends sought, namely the regulation of sectional owners’ use rights for the benefit of the community and the means employed, namely the rules limiting the entitlements of use and enjoyment.

The various types of rules governing sectional title schemes can be seen as a regulation of property rights in relation to specific property by a private body, the body corporate that is responsible for the enforcement of the rules and compliance therewith. These rules are imposed by the body corporate as law of general application and are not arbitrary. There is a sufficient reason for the deprivation and

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<sup>551</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* para 66.

<sup>552</sup> Van der Walt AJ *Constitutional property law* (2005) 145.

it is rationally linked to a legitimate purpose. The rules serve as a normal regulation of property rights in the interest of the community of sectional owners.

A few examples of these regulatory rules will be discussed. In terms of section 44(1)(d) and (e) of the Sectional Titles Act, the rules restricting the behaviour of sectional owners, other occupiers and their visitors, must be reasonable in light of the Constitution. Therefore, it needs to be determined whether the rules are legitimate in their purpose and whether they are reasonably related to that purpose.<sup>553</sup> The same is true in the case of management rule 68(1)(iv), which is the harmonious appearance rule.<sup>554</sup> The rule must be reasonable in light of the Constitution by being related to a legitimate purpose.<sup>555</sup> As mentioned previously, one of the main and most attractive features of a sectional title scheme is its harmonious appearance. Prospective buyers are interested in purchasing a unit in a scheme where all the sections are similar in appearance, neat and well maintained. Purchasers want to be assured that their section and share in the common property will increase in value and will attract similar interest. Condominium schemes in the USA impose restrictions on architectural standards and the use of common facilities. In these developments, a standard of reasonableness applies. The court measures the restriction and refuses to enforce it if it is unreasonable, arbitrary or capricious.<sup>556</sup>

Another example is conduct rule 1(1) of the Sectional Titles Act, which prohibits the keeping of pets<sup>557</sup> in a scheme without written approval of the trustees of the body

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<sup>553</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 179.

<sup>554</sup> See also Annex 9 rules 3-6 and 8.

<sup>555</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 178.

<sup>556</sup> See *Holleman v Mission Trace Home-owners Association* 556 SW 2d 632 (Tex Civ App 1977) which states that the homeowner perceives his home as his castle in which he may do as he pleases, but this right to use his property as he pleases must yield in some degree where ownership is exercised in co-operation with others. See also *Hidden Harbour Estates Inc v Norman* 309 So 2d 180 (Fla Dist App 1975), which states that “inherent in the condominium concept is the principle that to promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such close proximity and are using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.”

<sup>557</sup> This rule is similar to the rule prohibiting the keeping of pets in condominium schemes in the USA. See Poliakoff GA “Conflicting rights in condominium living” (1980) 54 *Florida Bar Journal* 756-761 at 758. See further *Dulaney Towers Maintenance v O'Brey* 418 A2d 1233 (Md Ct Spec App 1980) at

corporate. The rule prohibiting the keeping of pets must be reasonable in light of the Constitution. When the body corporate introduces a rule prohibiting the keeping of pets, through amendment, the residents owning pets prior to the amendment may keep the pets, but they may not replace them once they die. This is essentially a “slow phase-out” of the animals in a scheme.<sup>558</sup>

According to the court in the South African case of *Body Corporate of the Laguna Ridge Scheme v Dorse*,<sup>559</sup> when considering an application to keep pets, the trustees should exercise their discretion and should not unreasonably refuse permission. They should also consider whether any special circumstances would warrant a departure from the general policy of the scheme. The factors that they could take into consideration when determining whether the pet would constitute a nuisance would include the size, nature and temperament of the pet. The nature of the scheme would also be a factor to be taken into consideration.<sup>560</sup> The trustees should also consider whether any of the other residents would be inconvenienced or whether their peaceful use and enjoyment of their sections would be disturbed and whether or not there have been similar pets allowed in the scheme before. The trustees may impose conditions to be complied with when allowing the owner or occupier to keep a pet and in the event of non-compliance, the trustees may withdraw their approval.

An absolute prohibition on the keeping of pets would only be allowed in exceptional circumstances. It is within the power of the trustees’ discretion to limit the number and kind of pets allowed per section. However, the trustees are not allowed to unreasonably withhold their consent. The USA court in *Wilshire Condominium*

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1235, where a rule limiting the number of pets a unit owner may keep in their unit, was found to be a reasonable regulation. The reasons for this being that it is “based on potentially offensive odours, noise, possible health hazards, clean-up and maintenance problems” and the fact that pets can and do defile hallways, elevators and other common areas. See further *Winston Towers 200 Association v Saverio* 360 So 2d 470 (Fla Dist Ct App 1978) and *Wilshire Condominium Association v Kohlbrand* 368 So 2d 629 (Fla Dist Ct App 1979).

<sup>558</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 180.

<sup>559</sup> 1999 (2) SA 512 (D).

<sup>560</sup> The trustees of a high rise apartment scheme with no gardens would be less likely to permit pets than the trustees of a scheme in which the units have gardens and ample space for pets.

*Association v Kohlbrand*<sup>561</sup> “adopted the view that a restriction against the replacement of dogs is reasonably consistent with principles that promote the health, happiness and peace of mind of unit owners living in such close proximity.” The court decided that a rule prohibiting dogs is generally reasonable and should, therefore, be upheld. According to the court in *Wilshire*, it is not necessary for the association to prove that the keeping of dogs constitutes a nuisance, just as the conduct of homeowners does not have to “constitute a nuisance in order to justify regulation thereof.”<sup>562</sup>

Any rule, whether statutorily prescribed model management and conduct rules or non-prescribed adopted rules, must be reasonable in its application, serve a legitimate purpose or have a sufficient reason for its application and be applied equally to all the residents in a scheme. The nature of the scheme and the circumstances of each deprivation must be taken into consideration when determining whether a rule leads to an arbitrary deprivation of the sectional owners’ and occupiers’ entitlements.

## **4 3 Constitutional validity in light of other rights in the Bill of Rights**

### **4 3 1 Equality**

The fundamental right to equality is protected by the Constitution and legislation enacted by Parliament to give effect to it.<sup>563</sup> Section 7(1) states that the “Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” Section 7(2) states that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights.” This constitutional protection of the rights in the Bill of Rights emphasises the importance of ensuring that none of the rights are infringed in the application of any legislation. The Sectional Titles Act serves as the example in this discussion.

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<sup>561</sup> At 630.

<sup>562</sup> *Hidden Harbour Estates Inc v Norman* 309 So 2d 180 (Fla Dist App 1975) at 180-182.

<sup>563</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Section 39(1) of the Constitution states that “when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. The point of departure when interpreting potentially problematic rules in line with the Constitution in terms of section 39, is that the duty of the court with the required jurisdiction, to test the legislation<sup>564</sup> for inconsistency with the Constitution and to declare it invalid if it is inconsistent. An important object of constitutional interpretation is to establish respect for the supremacy of the Constitution.<sup>565</sup> The court can interpret legislation on conformity with the Constitution.<sup>566</sup> The legislation must be interpreted “through the prism of the Bill of Rights.”<sup>567</sup>

The Supreme Court of Appeal<sup>568</sup> set out a formula for dealing with constitutional challenges to legislation. The court must examine the objects and purport of the act or section under consideration; examine the ambit and the meaning of the rights protected by the Constitution; and ascertain whether it is reasonably possible to interpret the act or section under consideration in such a manner that it conforms with the Constitution. If such an interpretation is possible, the court must give effect to it but if it is impossible, the court must declare the act or section under consideration invalid. The Constitutional Court<sup>569</sup> endorsed the Supreme Court of Appeal’s approach of reading-down or reading-up of the impugned statutory provision in order to prevent it from being struck down because it is unconstitutional. Other constitutional remedies upon which the court can rely is severance and reading-in.<sup>570</sup> With regard to severance, any unconstitutional parts of the impugned legislation is severed or cut off from the rest of the legislation and struck down in

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<sup>564</sup> The court must test the potentially problematic statutorily prescribed or non-prescribed rule for inconsistency with the Constitution.

<sup>565</sup> Du Plessis L “Interpretation” in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Vol 2 (2<sup>nd</sup> ed 2009) 32.13. See further *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 887 (CC) at para 100.

<sup>566</sup> Du Plessis L “Interpretation” in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Vol 2 (2<sup>nd</sup> ed 2009) 32.138.

<sup>567</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at para 21. See also Du Plessis L “Interpretation” in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Vol 2 (2<sup>nd</sup> ed 2009) 32.140.

<sup>568</sup> *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at paras 10-11.

<sup>569</sup> *Ex Parte Minister of Safety and Security In re: S v Walters* 2002 (4) SA 613 (CC) at paras 36-39.

<sup>570</sup> Du Plessis L “Interpretation” in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Vol 2 (2<sup>nd</sup> ed 2009) 32.141.

order to preserve the constitutionally consistent remainder. When reading-in, the court inserts a word or phrase into the impugned legislative provision to render it constitutional and to avoid it being declared invalid.

The Court, in *South African National Defence Union v Minister of Defence* (hereinafter referred to as *SANDU*),<sup>571</sup> confirmed what Chaskalson CJ said in *Minister of Health NO v New Clicks South Africa (Pty) Ltd*,<sup>572</sup> namely that “legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored.”<sup>573</sup> This principle establishes a “subsidiarity rule”.<sup>574</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act (hereinafter referred to as PEPUDA)<sup>575</sup> is legislation that falls into this category. “The principle expounded by the Court is grounded in the norm that ‘to permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.’”<sup>576</sup>

PEPUDA was enacted in terms of section 9(4) of the Constitution and seeks to regulate unfair discrimination.<sup>577</sup> In terms of the subsidiarity principle, as mentioned previously, any constitutional enquiries on the validity of provisions that lead to unfair discrimination, should first turn to PEPUDA before being referred to the Constitution. Therefore, if there is a query regarding the discriminatory effect of a rule governing a sectional title scheme, the constitutional validity of the rule will first be tested in terms of PEPUDA.

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<sup>571</sup> 2007 (5) SA 400 (CC) paras 51-52.

<sup>572</sup> 2006 (2) SA 311 (CC) para 437.

<sup>573</sup> Para 437.

<sup>574</sup> Van der Walt AJ “Normative pluralism and anarchy: reflections on the 2007 term” (2008) 1 CCR 77-128 at 100. See further *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44.

<sup>575</sup> 4 of 2000.

<sup>576</sup> *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 52 and Van der Walt AJ “Normative pluralism and anarchy: reflections on the 2007 term” (2008) 1 CCR 77-128 at 102.

<sup>577</sup> S 5(1).

In order to determine whether there has been a violation of the equality clause,<sup>578</sup> there are certain “stages” of the enquiry that need to be followed.<sup>579</sup> It must firstly be determined whether the challenged law differentiates between people. This stage encompasses the “threshold test”<sup>580</sup> in the determination of violations of the equality clause. If differentiation does occur, it needs to be determined whether it bears a rational connection<sup>581</sup> to a legitimate government purpose. If it does not, the differentiation will be a violation of section 9(1). If it does bear a rational connection to a legitimate purpose, the differentiation can still be considered as discrimination. In this case, it must be determined whether the differentiation amounts to unfair discrimination. In order to ascertain this, it must first be concluded that discrimination exists.<sup>582</sup>

Discrimination can either be established on a specified ground or its existence can depend objectively on the potential to impair fundamental human dignity or have any other adverse effect on it.<sup>583</sup> The Court in *Harksen v Lane*,<sup>584</sup> states that not all discrimination is unfair. Therefore, the determining factor is the impact of the discrimination on its victims. The impact is determined with reference to the purpose of the prohibition against discrimination. The Court<sup>585</sup> lists three sets of factors which can be taken into account when determining whether discrimination has an unfair impact. The Court considers the position of the complainants in society, the nature of

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<sup>578</sup> S 9 of the Constitution.

<sup>579</sup> *Harksen v Lane* 1998 (1) SA 300 (CC) para 53. In this case, Goldstone J set out a test, which was developed under the Interim Constitution but followed under the Final Constitution in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 15. See further Albertyn C and Goldblatt B “Equality” in Woolman S, Roux T and Bishop M *Constitutional law of South Africa* (2<sup>nd</sup> ed 2009) 43; Currie I and De Waal J *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 235; Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 349 and Albertyn C “Equality” in Cheadle H, Davis D and Haysom N *South African constitutional law: the Bill of Rights* (2<sup>nd</sup> ed Issue 8 March 2010) 32.

<sup>580</sup> Currie I and De Waal J *The Bill of Rights handbook* (5<sup>th</sup> ed 2005) 236; Albertyn C and Goldblatt B “Equality” in Woolman S, Roux T and Bishop M *Constitutional law of South Africa* (2<sup>nd</sup> ed 2009) 17 and Albertyn C “Equality” in Cheadle H, Davis D and Haysom N *South African constitutional law: the Bill of Rights* (2<sup>nd</sup> ed Issue 8 March 2010) 14, where the author is of the opinion that “differentiation lies at the heart of equality jurisprudence” and that the “task of the court is to determine when the differentiation is permissible and when it infringes the equality right.”

<sup>581</sup> Albertyn C “Equality” in Cheadle H, Davis D and Haysom N *South African constitutional law: the Bill of Rights* (2<sup>nd</sup> ed Issue 8 March 2010) 15, where it is referred to as the rationality test.

<sup>582</sup> Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 350.

<sup>583</sup> *Harksen v Lane* para 46.

<sup>584</sup> Paras 50-51.

<sup>585</sup> Para 52. See further Albertyn C “Equality” in Cheadle H, Davis D and Haysom N *South African constitutional law: the Bill of Rights* (2<sup>nd</sup> ed Issue 8 March 2010) 51.

the discriminatory law or conduct and the purpose sought to be achieved by it and the extent to which the rights of the complainant have been impaired and whether there has been an impairment of fundamental dignity.

If it can be established that discrimination does exist, it needs to be determined whether such discrimination is unfair.<sup>586</sup> As with the establishment of the existence of discrimination, unfairness can be established on a specified ground, in which case it will be presumed or it can be established by the complainant. The test for determining unfairness considers the impact of discrimination on the complainant. If the differentiation is found not to be unfair, there will be no violation of section 9(3) or 9(4) of the Constitution. However, if the discrimination is considered to be unfair, it needs to be determined whether it can be justified under the limitation clause.<sup>587</sup> Differentiation, not amounting to discrimination, is only valid if there is no rational connection between the differentiation and legitimate purpose.<sup>588</sup>

The rules governing a sectional title scheme must be reasonable and equally applicable to all sectional owners of units which are used for substantially the same purpose.<sup>589</sup> If these requirements are complied with and the rules are not applied arbitrarily, they will be constitutionally valid and enforceable. If there is differentiation with regard to the application of the rules, it should be asked whether the differentiation bears a rational connection to a legitimate purpose. If the differentiation bears no rational connection to a legitimate purpose, it will be contrary to section 9(1) of the Constitution, the equality provision, as it amounts to discrimination. If the differentiation does bear a rational connection to a legitimate purpose, it still amounts to discrimination and will be contrary to section 9(3) and 9(4) of the Constitution, unless the discrimination is seen as being fair in terms of section 9(5) of the Constitution,<sup>590</sup> and therefore legitimate.

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<sup>586</sup> S 9(5) of the Constitution.

<sup>587</sup> S 36 of the Constitution.

<sup>588</sup> Currie I and De Waal J *The new constitutional and administrative law* Vol 1 (2001) 350.

<sup>589</sup> S 35(3) of the Sectional Titles Act 95 of 1986.

<sup>590</sup> Ackermann L "Equality and the South African Constitution: the role of dignity" (2000) 60 *ZaöRV* 537-556 at 545-546.



Due to the fact that the by-laws are so far-reaching in their attempt to “achieve a harmonious community”,<sup>591</sup> they can be seen as being unlimited, which could impose a burden on the affected unit owners. Therefore, they need to be “constrained” by the Constitution, a statute or the common law.<sup>592</sup> The state intervenes at this point in order to enforce equality and non-discrimination principles, but this intervention may result in limitations to constitutionally entrenched fundamental freedoms. This judicial review “preserves the stability and fairness of condominium life without jeopardizing the unit owners’ contractual interests.”<sup>593</sup> On the other hand, a loss of freedom is considered to be “inherent in an intensified community of unit owners living in closer proximity to each other.”<sup>594</sup> Therefore, those who purchase units in “multi-unit developments are often required to surrender significantly greater degrees of freedom [in order] to obtain advantages offered by ownership of units in a close-knit community.”<sup>595</sup>

Specific rules with the potential to be unconstitutional will now be discussed with reference to relevant case law and a comparative evaluation. Discriminatory conduct or management rules of the sectional title scheme are allowed only in a few extraordinary circumstances in order to maintain the identity of a community. This is done only insofar as the human dignity of others is not infringed.

In the United States of America, certain restrictions are unconstitutional as they unfairly discriminate against certain members of the community. Others are discriminatory in nature, but they are justified, and therefore not unfair or unenforceable. Reasonable restrictions concerning use, occupancy and transfer of condominium units are necessary for the operation and protection of owners in a condominium scheme, but restrictions that are unevenly enforced violate the equal

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<sup>591</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 156.

<sup>592</sup> Anonymous “Judicial review of condominium rulemaking” (1981) 94 *Harv LR* 647-667 at 647.

<sup>593</sup> Anonymous “Judicial review of condominium rulemaking” (1981) 94 *Harv LR* 647-66 at 655.

<sup>594</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 158.

<sup>595</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 158.

protection clause and are unenforceable because rules must be enforced equally in a scheme to ensure that they do not differentiate between owners and occupiers.

In the USA, in order to determine whether a restriction is valid and enforceable, a two stage test is applied. Firstly, the question is asked as to whether the restriction is reasonable and secondly, whether the restriction is discriminatory, arbitrary or oppressive in its application. Condominium rules are only enforced if they are reasonable.<sup>596</sup> The board of trustees bears the burden of proving the reasonableness of the rule.<sup>597</sup> Associations are barred from enforcing rules that are unreasonable, arbitrary or capricious and that bear no relationship to the health, happiness and enjoyment of life of the unit owners.<sup>598</sup>

As in South Africa, each owner must surrender a measure of personal freedom to the regulatory authority of the home owner's association, which enforces the rules for the common good of all the owners.<sup>599</sup> If a board does not have the authority in terms of a law or condominium documents to enforce rules, the rules will be invalid and unenforceable.<sup>600</sup> Rules must not be arbitrarily enforced, they must not have a discriminatory effect,<sup>601</sup> they must be enacted in good faith and they must be adopted for the common welfare of the owners and occupants of the condominium.<sup>602</sup>

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<sup>596</sup> See *Di Lorenzo V The law of condominiums and cooperatives* (1990) at 4:10. See further *Hidden Harbour Estate v Norman* 309 So 2d 180 (Fla Dist Ct App 1975).

<sup>597</sup> See *Di Lorenzo V The law of condominiums and cooperatives* (1990) at 4:20. See further *Hidden Harbour Estate v Norman* 309 So 2d 180 (Fla Dist Ct App 1975).

<sup>598</sup> See *Di Lorenzo V The law of condominiums and cooperatives* (1990) at 4:17. See further Anonymous "Judicial review of condominium rulemaking" (1981) 94 *Harv LR* 647-667 at 658. See also *Hidden Harbour Estate v Norman* 309 So 2d 180 (Fla Dist Ct App 1975); *Ryan v Baptiste* 565 SW 2d 196 (Mo Ct App 1978) at 198 and *Holleman v Mission Trace Home-owners Association* 556 SW 2d 632 (Tex Civ App 1977) at 636, where the court found the restriction to be justified due to the association's purpose and "highly restrictive nature of the development".

<sup>599</sup> Van Wagner E, Lauridsen G and VC "No children allowed: a comment on ownership restrictions precluding occupancy by children" (1983) 7 *Journal of Juvenile Law* 68-79 at 68. See further *Di Lorenzo V The law of condominiums and cooperatives* (1990) at 4:19.

<sup>600</sup> *Di Lorenzo V The law of condominiums and cooperatives* (1990) at 4:18. See further *Holleman v Mission Trace Home-owners Association* 556 SW 2d 632 (Tex Civ App 1977) and *Dulaney Towers Maintenance v O'Brey* 418 A2d 1233 (Md Ct Spec App 1980).

<sup>601</sup> *Di Lorenzo V The law of condominiums and cooperatives* (1990) at 7:31.

<sup>602</sup> *Di Lorenzo V The law of condominiums and cooperatives* (1990) at 4:20 and 7:32.

If a sectional title scheme in South Africa had to implement a rule prohibiting a certain race or limiting the scheme to a particular race, it would be unenforceable because the equality clause prohibits unfair discrimination. This is an application of the strict test used to determine unfair discrimination in especially race and gender issues. If either the prescribed management or conduct rules, house rules or rules added to and amended by the developer or the body corporate amounts to an unfair discrimination in terms of section 9 of the Constitution, they will be unreasonable in terms of section 35(3) of the Sectional Titles Act. The offending rule will be struck down due to its invalidity in terms of the Act and not due to its unconstitutional invalidity.<sup>603</sup>

If the discrimination is not unfair, it will not be unreasonable as long as it serves a legitimate purpose in light of the Constitution. In terms of balancing the competing interests in this regard, it is “questionable whether the interest in not living with members of a different race or ethnic origin can be considered a legitimate purpose in a multi-ethnic society.”<sup>604</sup> The constitutionally protected principles of contractual freedom and private autonomy will be outweighed by the founding values of the Constitution. Therefore, racial discrimination will not be linked to a legitimate purpose because equality and “non-racialism” is considered “the most basic values” of the Constitution,<sup>605</sup> which is “clear from the explicit constitutional acknowledgement of South Africa’s history.”<sup>606</sup> Racial discrimination is seen as “absolutely contrary to the founding values of the Constitution”<sup>607</sup> and any rule fostering such discrimination will not be reasonable in light of the Constitution. The core democratic values, as set out in the Constitution, are the right to human dignity, the achievement of equality, the

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<sup>603</sup> Refer to the discussion of the subsidiarity principle above.

<sup>604</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 172.

<sup>605</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 171.

<sup>606</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 171.

<sup>607</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 172.

advancement of human rights and freedoms. These are the “guiding values”<sup>608</sup> in the interpretation<sup>609</sup> and limitation<sup>610</sup> of rights.

In *Christian Education South Africa v Minister of Education*,<sup>611</sup> the Court held that when determining whether certain restrictions on the right to equality were unconstitutional, it involved a “context sensitive balancing test” where the context in which the restriction occurred and the reason for such restriction would be considered. However, in the case of restrictions on the grounds of race and gender, a “strict scrutiny test”<sup>612</sup> was used, which made justifying these infringements impossible. In some condominium schemes in the USA, the homeowners associations institutes rule limiting prospective purchasers to those who will be compatible with the racial composition of the community. These rules amount to racial discrimination that will be unconstitutional in the South African context.<sup>613</sup>

A rule resulting in discrimination based on ethnic or social origin would likely be unreasonable for the same reasons as in the case of rules amounting to racial discrimination. In some condominium schemes in the USA, rules have been adopted that prevent prospective purchasers, who do not conform to the social composition of the community, from buying a unit in the scheme.<sup>614</sup> These rules would probably also be unconstitutional in the South African context.

In order to determine whether discrimination based on gender will be reasonable, there must be a “clearly discernible reason for the rule in order to render its

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<sup>608</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 171.

<sup>609</sup> S 39(1)(a) of the Constitution.

<sup>610</sup> S 36(1).

<sup>611</sup> 2000 (4) SA 757 (CC).

<sup>612</sup> Paras 29-30.

<sup>613</sup> See *Shelley v Kramer* 334 US 1 (1948), where it was found that judicial enforcement of racially restrictive covenants is an exercise of state action that violates the equal protection clause 14<sup>th</sup> Amendment. See further *Village of Arlington Heights v Metropolitan Housing Development Corporation* 429 US 252 (1977) and *Jones v Alfred H Mayer Co* 392 US 409 (1968) and *Hurd v Hodge* 334 US 24 (1948).

<sup>614</sup> *Chianese v Culley* 397 F Supp 1344 (SD Fla 1975).

discriminatory nature reasonable.<sup>615</sup> A rule prohibiting a particular gender or limiting a scheme to one gender will be reasonable and valid, provided it serves a legitimate purpose.

In South Africa, there is no legitimate purpose in light of the Constitution that could render a rule amounting to discrimination based on marital status<sup>616</sup> or on the basis of sexual orientation valid. The likely purpose behind introducing a rule such as the former would be to impose a higher moral standard which is insufficient to uphold a restriction of this nature, and therefore it would be unconstitutional in light of the Constitution. In the USA, condominium schemes have been known to introduce rules limiting residence to single families<sup>617</sup> or traditionally married couples and prohibiting cohabitation by unrelated persons.<sup>618</sup> In light of South Africa's historical context, the role of dignity, as a founding value, is very important when testing whether restrictions amount to unfair discriminatory regulations that are unconstitutional and invalid.<sup>619</sup>

The South African courts have held that if a rule is not reasonably applied but selectively or arbitrarily enforced, it will be contrary to section 35(3) of the Sectional Titles Act, which states that any rule must "apply equally to all owners of units put to substantially the same purpose". Rules limiting residence in a scheme to persons of a certain age<sup>620</sup> or rules prohibiting certain age groups from taking up residence in a scheme,<sup>621</sup> result in discrimination. The rule will either be struck down or the court must determine whether the rule is reasonable in light of the Constitution, by weighing up the conflicting rights and interests involved.<sup>622</sup>

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<sup>615</sup> Van der Merwe CG, Mohr P and Blumberg M "The Bill of Rights and the rules of sectional title schemes: a comparative perspective" (2000) 11 *Stell LR* 155-181 at 173.

<sup>616</sup> Van der Merwe CG, Mohr P and Blumberg M "The Bill of Rights and the rules of sectional title schemes: a comparative perspective" (2000) 11 *Stell LR* 155-181 at 174.

<sup>617</sup> *Bay Island Towers Inc v Bay Island-Siesta Association* 316 So 2d 574 (Fla 2d DCA 1975).

<sup>618</sup> *Green v Greenbelt Homes Inc* 194 A 2d 273 (Md Ct App 1963).

<sup>619</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

<sup>620</sup> For example, the elderly or those who have reached the age of retirement.

<sup>621</sup> For example, children under the age of 18.

<sup>622</sup> Van der Merwe CG, Mohr P and Blumberg M "The Bill of Rights and the rules of sectional title schemes: a comparative perspective" (2000) 11 *Stell LR* 155-181 at 176. For example, weighing up the right of a family to live together as opposed to the interest of the older residents to live in peace and quiet.

The decisive question in this regard is whether the purpose served by the rule amounting to discrimination based on age is sufficiently legitimate to render it reasonable. Therefore, age restrictions can be considered reasonable in light of the Constitution if they are related to the legitimate purpose of providing appropriate facilities to meet the differing housing needs and desires of the varying age groups. If a sectional title scheme is established to provide for the needs of the elderly and retired, a restriction limiting residence to people over a certain age, will be reasonable. However, the average sectional title scheme would not be able to prohibit families with small children.

In the USA, age restrictions are seen as reasonable if the “mischievousness” and “rowdiness” of children and the purpose of creating a tranquil neighbourhood, by eliminating noise associated with children, are taken into consideration.<sup>623</sup> In *White Egret Condominium Inc v Franklin*,<sup>624</sup> the court found that age limitations or restrictions are “reasonable means to accomplish the lawful purpose of providing appropriate facilities for the differing housing needs and desires of the varying age groups,” but the court also found that not all age restrictions should be considered reasonable. The court found that “these age restrictions can’t be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing.” According to the court, restrictions on age and rules limiting residence in a community to adults<sup>625</sup> may be justified even though they amount to

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<sup>623</sup> *Ritchey v Villa Nueva Condominium Association* 146 Cal Rptr 695 (Ct App 1978).

<sup>624</sup> 379 So 2d 346 (Fla 1979).

<sup>625</sup> SHS “Housing discrimination” (1979) 17 *Journal of Family Law* 167-173 at 167-173. See further *O’Connor v Village Green Owners Association* 622 P 2d 427 (Cal 1983), where the court found that restrictions were reasonable and not arbitrary, discriminatory nor counter to public policy; *Riley v Stoves* 526 P 2d 747 (Ariz Ct App 1974), where the court found the restriction to be a reasonable means to secure a quiet and peaceful neighbourhood for older buyers who sought to retire in an area undisturbed by children; *Flowers v John Burnham & Co* 21 Cal App 3d 700, 98 Cal Rptr 644 (1971), where it was seen that regulating the tenant’s ages and sex was not unreasonable or arbitrary as “independence, mischievousness, boisterousness and rowdyism of children vary from age to age and sex”; *Massachusetts Board of Retirement v Muriga* 427 US 307 (1976) where restrictions on age are a reasonable means for tailoring housing needs to suit various segments of the population. The court that a proper constitutional test of an age restriction is whether the restriction under the circumstances is reasonable or whether it’s discriminatory, arbitrary or oppressive in its application; *White Egret Condominium Inc v Franklin* 379 So 2d 346 (Fla 1979), where the restriction on age was unequally and arbitrarily enforced; *Constellation Condominium Association v Harrington* 467 So 2d 378 (Fla 2d DCA 1985); *Hill v Fontaine Condominium Association* 334 SE 2d 690 (Ga 1985); *Preston Tower Condominium Association v SB Realty Inc* 685 SW 2d 98 (Tex Ct App 1985); *Everglades Plaza Condominium Association v Buckner* 462 So 2d 835 (Fla 4<sup>th</sup> DCA 1984); *Majestic View Condominium Association v Bolotin* 429 So 2d 438 (Fla 4<sup>th</sup> DCA 1983); *Pacheco v Lincoln Place Condominium Inc*

age discrimination, as long as they have uniform enforcement<sup>626</sup> and not be arbitrarily or unreasonably applied.<sup>627</sup> They must also be aimed at maintaining a community consisting of senior citizens<sup>628</sup> and not merely aimed at excluding children as permanent residents.<sup>629</sup> In general, the USA courts find these restrictions reasonable, but in some cases the courts have refused to uphold age restrictions as they discriminatory and unreasonably applied.<sup>630</sup>

Rules discriminating on the basis of religion, conscience and / or belief will be unreasonable in light of the Constitution if they prohibit residents of a particular religion, but rules limiting residence to a particular religious group may serve a legitimate purpose even though they are discriminatory. The purpose for this limitation needs to be sufficiently legitimate to render it reasonable.<sup>631</sup> Section 15(1) of the Constitution states that everyone has the right to freedom of conscience, religion, thought, belief and opinion.” Section 31(1) provides that “persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.” If the limitation serves a sufficiently legitimate purpose, the rule will be reasonable and upheld. However, this does not serve as a general principle. The court needs to consider the circumstances of each particular case and not allow the rules to operate as a “guise” for discriminating against another religion.<sup>632</sup> In the USA rules limiting prospective purchasers to those

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410 So 2d 573 (Fla 3d DCA 1982); *Breene v Plaza Tower Association* 310 NW 2d 730 (ND 1981); *Makeever v Lyle* 609 P 2d 1084 (Ariz Ct App 1980); *Ritchey v Villa Nueva Condominium Association* 146 Cal Rptr 695 (Ct App 1978) and *Coquina Club Inc v Mantz* 342 So 2d 112 (Fla 2d DCA 1977).

<sup>626</sup> Di Lorenzo *The law of condominiums and cooperatives* (1990) at 7:1. See further *White Egret Condominium Inc v Franklin* 379 So 2d 346 (Fla 1979)

<sup>627</sup> Poliakoff GA “Conflicting rights in condominium living” (1980) 54 *Florida Bar Journal* 756-761 at 758.

<sup>628</sup> Di Lorenzo V *The law of condominiums and cooperatives* (1990) at 7:23. See further *Ritchey v Villa Nueva Condominium Association* 146 Cal Rptr 695 (Ct App 1978), where the court stated that age restrictions should not be unreasonable restraints on alienation; *Riley v Stoves* 526 P 2d 747 (Ariz Ct App 1974) and *O'Connor v Village Green Owners Association* 622 P 2d 427 (Cal 1983).

<sup>629</sup> Di Lorenzo V *The law of condominiums and cooperatives* (1990) at 7:20.

<sup>630</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 175.

<sup>631</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 177.

<sup>632</sup> Van der Merwe CG, Mohr P and Blumberg M “The Bill of Rights and the rules of sectional title schemes: a comparative perspective” (2000) 11 *Stell LR* 155-181 at 177.

compatible with the religious,<sup>633</sup> philosophical<sup>634</sup> or social composition of the community<sup>635</sup> amounts to discrimination.

The point of departure is that the rules governing sectional title schemes must apply equally to all residents in a scheme and to prospective purchasers. The rules may not differentiate between certain groups of people in its application. However, if the rules do differentiate, there must be a rational connection to a legitimate purpose before it will be permissible. For example, a sectional title scheme providing for the needs of the elderly and retired may prohibit residents below a certain age. This differentiation will be valid as it serves a legitimate purpose, providing suitable accommodation for the elderly in the form of a retirement scheme. The rule restricting occupation will be discriminatory in its application but it will not be unfair discrimination because there is a rational connection to a legitimate purpose. Therefore, the rule will be constitutionally valid.

#### 4 3 2 Just administrative action

Section 1(1) of the Promotion of Administrative Justice Act<sup>636</sup> (hereinafter referred to as PAJA) defines administrative action as

“any decision taken, or any failure to take a decision by (a) an organ of state, when (i) exercising a power in terms of the Constitution or a provincial constitution or (ii) exercising a public power or performing a public function in terms of any legislation or (b) a natural 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, which adversely affects the rights of any person and which has a direct, external legal effect”.

Apart from the statutorily prescribed rules governing sectional title schemes, developers and later the body corporate may add to or amend the rules in accordance with what is needed for the scheme in question. Management rule 28(2)

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<sup>633</sup> See *Corporation of the President Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos* 483 US 327 (1987); *West Hill Baptist Church v Abbate* 261 NE 2d 196 (Ohio Ct CP 1969) and *New Jersey v Celmer* 404 A 2d 1 (NJ) and 444 US 951 (1979).

<sup>634</sup> *Taormina Theosophical Community Inc v Silver* 190 Cal Rptr 38 (Ct App 1983).

<sup>635</sup> *Chianese v Culley* 397 F Supp 1344 (SD Fla 1975).

<sup>636</sup> 3 of 2000.



of the Sectional Titles Act provides that the trustees, as representatives of the body corporate “shall 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”. In order to fulfil their responsibilities, they need to make rules suitable to the needs of their scheme.

The exercise of the trustees’ statutorily prescribed authority can be demonstrated by their ability to prescribe house rules which regulate the control, use, safety and cleanliness of the common property.<sup>637</sup> These rules are seen as more flexible than those that are statutorily prescribed. Therefore, they serve as effective tools to regulate practical problems as they arise in the daily management of the scheme because they may be amended by the trustees on short notice. House rules are enforceable when they comply with two requirements of legitimacy. Firstly, they must be an exercise of the trustees’ powers of control over the common property or permission given by the trustees exercising their discretion.<sup>638</sup> Furthermore, they may not be objectionable in the way they restrict the rights of sectional owners<sup>639</sup> and they may not be in conflict with the statutorily prescribed conduct and management rules.

In order to determine whether the making of these rules qualify as administrative action, it is necessary to refer to the definition of administrative action as defined in section 1(1) of PAJA. The trustees are empowered in terms of management rule 25 to perform and exercise the duties and powers of the body corporate in terms of the rules. This mandate permits them to make decisions in the interest of the community of sectional owners.

However, it is first necessary to determine whether the making of rules can be defined as a “decision” in terms of PAJA. The court in *New Clicks SA (Pty) Ltd v*

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<sup>637</sup> Examples of issues governed by the house rules are speed limits, parking and noise restrictions.

<sup>638</sup> S 38(j) of the Sectional Titles Act 95 of 1986.

<sup>639</sup> Wood-Bodley MC “‘House rules’ in sectional title schemes – are they ultra vires?” (2003) 120 *SALJ* 602-609 at 605.

*Tshabalala-Msimang*<sup>640</sup> found that “regulations could not be regarded as a decision under PAJA, partly because rulemaking was not listed in the definition and partly on the basis of other indications that rulemaking was intended to be excluded from the purview of PAJA.”<sup>641</sup> However, in a dissenting judgement, it was reasoned that “PAJA would be unconstitutional if it did not cover rule-making, for it would fail to give effect to the terms of section 33(1) of the Constitution.”<sup>642</sup> The Supreme Court of Appeal<sup>643</sup> and the Constitutional Court<sup>644</sup> did not deal with the question. However, the minority in the Constitutional Court, “strongly supported the view that the making of regulations fell within the scope of administrative action in section 33 of the Constitution” and “found that the references to any decision of an administrative nature and doing or refusing to do any other act or thing of an administrative nature brought regulation-making within the scope of the definition of a decision.”<sup>645</sup> Therefore, if the majority judgement is followed, the trustees’ making of rules is not taking a decision as defined by PAJA.

Secondly, it must be determined whether the trustees can be defined as firstly, an organ of state; either exercising a power in terms of the Constitution or a provincial constitution or exercising a public function in terms of any legislation; or secondly, a natural or juristic person when exercising a public power or performing a public function in terms of an empowering provision. At first glance, it can be seen that if the trustees could be defined as an organ of state, they would not be exercising a power in terms of the Constitution or a provincial constitution. They would rather be exercising a public function in terms of legislation, namely the Sectional Titles Act, as can be seen by section 239(b) of the Constitution, which describes an organ of state as “any other functionary or institution (ii) exercising a public power or performing a public function in terms of any legislation.” If this were the case, administrative law would apply to their actions.

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<sup>640</sup> *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang* NO 2005 (2) SA 530 (C). See further Hoexter C *Administrative law in South Africa* (2007) 188.

<sup>641</sup> Paras 48-49.

<sup>642</sup> Para 50.

<sup>643</sup> *Pharmaceutical Society of South Africa v Tshabalala-Msimang* NO 2005 (3) SA 238 (SCA).

<sup>644</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).

<sup>645</sup> Paras 128 and 467.

However, it is debatable whether trustees exercise a public power or perform a public function. The body corporate is a private institution and its membership consists of all the sectional owners in a scheme and its powers, duties and functions are performed by a board of trustees, who represent the sectional owners in this private scheme. Although the trustees interact with many outsiders or third parties who are not members of the scheme, such as visitors, they still do not exercise a public power or perform a public function to the general public as a whole but rather to the community which they represent. The trustees, by enforcing rules and ensuring compliance therewith, regulate the property rights in respect of specific property, as a private body and not in the general regulation of property. Therefore, trustees' do not fall under the second part of the definition of organ of state.

Seeing as trustees cannot be described as organs of state, it needs to be determined whether they can be defined as either a natural or a juristic person, exercising a public power or performing a public function in terms of an empowering provision. The trustees are representatives of the body corporate, which is a juristic person but, as was mentioned above, the trustees do not exercise a public power or perform a public function, even though they are empowered to perform valid acts<sup>646</sup> in terms of an empowering provision, the Sectional Titles Act.

Therefore, in terms of the definition of administrative action in section 1(1) of PAJA, the making of rules by the trustees does not qualify as administrative action.

### 4 3 3 Access to courts

Section 34 of the Constitution provides that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” Sectional title schemes function as a community of sectional owners, forming a body corporate, which is represented by the elected trustees, who administer, control and manage the scheme in the interests of the community, through the enforcement of the rules.

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<sup>646</sup> Annex 8 rule 71.

Due to this unique structure and restrictive nature of sectional title schemes, disputes often arise between the trustees and the members of the body corporate, or the members of the body corporate *inter se*. These disputes arise out of or are in connection with the Sectional Titles Act or the management and conduct rules.<sup>647</sup>

It can be argued that as provided in section 34 of the Constitution, a dispute can be referred to an alternative tribunal or forum other than a court. According to management rule 71(1) of the Act, any dispute, except where an interdict or other urgent relief is sought from a court, will be determined in terms of the management rule, which provides for the determination of disputes by arbitration.

Therefore, statutory provision is made for disputes to first be resolved by internal remedies such as arbitration, before it can be referred to an external channel, such as a court with jurisdiction as provided for in section 34 of the Constitution.<sup>648</sup>

#### **4 4 Concluding remarks**

Sectional owners have an ownership entitlement in their section. They have the entitlement of use and enjoyment in their sections and proportionate share of the common property. Other occupiers have an interest in property in the form of their entitlements of use and enjoyment of their sections and their share in the common property of the sectional title scheme. The statutorily prescribed conduct and management rules, the house rules and the rules which are added to and amended by the developer or later by the body corporate through the required resolutions, are all-encompassing and provide for the control, management, administration, use and enjoyment of the sections and the common property. They serve as regulations of and limitations on the sectional owners and occupiers property rights and deprive them of some of their entitlements.

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<sup>647</sup> Refer to chapter 3 under the heading 3 7 for a discussion of disputes arising in sectional title schemes, the parties involved and the options for resolving these disputes, namely negotiation, mediation, arbitration, litigation and a proposed method.

<sup>648</sup> Refer to chapter 3 under the heading 3 7 3 for a discussion of the proposed method of dispute resolution.

The question of constitutionality arises when it needs to be determined to what extent these restrictive rules infringe on constitutional rights and whether they are constitutionally permissible. Section 39(2) of the Constitution provides that when legislation is interpreted, fundamental rights entrenched in the Bill of Rights must be upheld. In order to determine whether the rules governing sectional title schemes are constitutionally valid and permissible, a section 25(1) constitutional inquiry is first of all needed.

In this chapter, the focus was on two constitutional enquiries. Firstly, the emphasis was placed on the constitutional validity of the prescribed rules governing sectional title schemes. It needed to be determined whether the application of the rules amounted to arbitrary deprivations of property. It also needed to be determined whether these deprivations would be unenforceable due to its constitutional invalidity or whether they would be justified in terms of section 25(1), the specific limitation clause or in terms of section 36(1), the general limitation clause, provided the requirements were complied with.

The second constitutional enquiry focussed on the fact that the rules applicable to sectional title schemes need to uphold other fundamental rights entrenched in the Bill of Rights. In order to accomplish this, conflicting interests need to be balanced against one another and in light of the Constitution. The fundamental rights tested in this regard were the right to equality, just administrative action and access to court.

A comparative approach was followed, using similar provisions in the United States of America as an example of how rules are introduced and enforced in condominium schemes and how the courts test whether or not they are reasonable and enforceable in light of the Constitution, bearing in mind, the competing interests of the owners in such communal developments. In order to determine if a restriction is justified, the court considers the facts of each case because certain infringements are deemed to be more severe than others.

In this comparative discussion, it was found that the statutorily prescribed rules governing sectional title schemes, house rules as well as those amended by the developer or the body corporate, serve as regulations. These regulations are found to be deprivations of the sectional owners' ownership entitlement of use and enjoyment as well as the occupiers' entitlements of use and enjoyment of their sections and their share in the common property of the sectional title scheme. These deprivations were found to be reasonable in so far as they contribute to a harmonious relationship between the body corporate and the sectional owners and the sectional owners *inter se*. In sectional title communities, it is considered important to have effective regulations in place which will ensure that the community operates efficiently and to the benefit of all the members of the body corporate. However, the rules will step over the bounds of reasonableness if they are excessive in their regulation.

The rules as amended by either the developer or the body corporate have the potential of being unconstitutional in this regard. Therefore, the trustees need to be aware and prohibit the implementation of such rules. In terms of the constitutional validity of the rules in light of the Bill of Rights, the rules are found to be reasonable and valid as long as they do not unfairly differentiate between certain groups on the grounds as mentioned in the Constitution as this will be unfair discrimination which is considered unreasonable, invalid and constitutionally impermissible. In these instances, it will be very difficult to justify any infringements of the rights guaranteed in the Bill of Rights.

## 5 Conclusion

### 5 1 Introduction

This evaluative discussion set out to answer the research question posed in the introductory chapter,<sup>649</sup> namely whether the various types of rules governing sectional title schemes are constitutionally valid.<sup>650</sup> The introductory chapter mentioned the different types of rules applicable in sectional title schemes. These rules were further discussed and evaluated in the remaining chapters. The model management<sup>651</sup> and conduct<sup>652</sup> rules prescribed by the Sectional Titles Act<sup>653</sup> and the rules substituted, added to, amended or repealed by either the developer initially before the establishment of the body corporate or later by the trustees of the body corporate of a sectional title scheme, were evaluated in terms of their constitutional validity.

To adequately answer the research question posed, the applicable rules required examination to determine whether any were unconstitutional and invalid in their application and effect. A comparative approach was followed to aid this constitutional evaluation. Reference was made to Australia, Germany, Israel and the United States of America as comparative jurisdictions. The relevance of each jurisdiction was further discussed where relevant in each chapter.

In the introductory chapter, the hypothesis stated that it is expected that the model management and conduct rules, as statutorily prescribed by the Sectional Titles Act, the rules initially adopted by the developer and those later amended and substituted

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<sup>649</sup> Refer to chapter 1, the introductory chapter.

<sup>650</sup> See the Constitution of the Republic of South Africa 1996. See also chapter 4.

<sup>651</sup> Management rules are statutorily prescribed in the regulations of the Sectional Titles Act 95 of 1986. These model rules are found in s 35(2)(a) and Annex 8 of the Act. They regulate the activities of the trustees and the members of the body corporate with regard to the management and administration of the sectional title scheme. See further chapter 3 for a discussion on the nature, function, applicability, operation and consequences of these rules.

<sup>652</sup> Conduct rules are statutorily prescribed in the regulations of the Sectional Titles Act. These model rules are found in s 35(2)(b) and Annex 9 of the Act. They determine the entitlements of use and enjoyment as well as the duties of the sectional owners and other occupiers with regard to their individual sections and share in the common property. See further chapter 3 for a discussion on the nature, function, applicability, operation and consequences of these rules.

<sup>653</sup> 95 of 1986.

by the trustees of the body corporate of the sectional title scheme, restrict the rights and the entitlements of the owners and other occupiers in the scheme. Each sectional owner and other occupier has a right or entitlement to use and enjoy their individual sections and share in the common property. In the case of the sectional owners, the rights of use and enjoyment stems from their entitlement of ownership. With regard to other occupiers, the entitlement of use and enjoyment accompanies their right to occupy the section in terms of a contractual relationship with the sectional owner.

There is an assumption that these entitlements are limited by enforcement of the various rules governing the sectional title scheme. In some instances the application of the rules might exceed the bounds of reasonableness and result in unfair discrimination, arbitrary deprivation, unfair administrative action and restrictions on access to courts for dispute resolution. If it is found that certain rules are unreasonable in their application, based on one or more of these grounds, these potentially problematic rules must be interpreted in line with section 39 of the Constitution. It is the duty of the court to test the legislation<sup>654</sup> for inconsistency with the Constitution and to declare it invalid if it is inconsistent. This is known as reading-up or reading-down. Other constitutional remedies upon which the court can rely is severance and reading-in.<sup>655</sup> These impermissible rules will need to be repealed and replaced, amended or substituted with rules that are constitutionally valid in their application and effect.

Through a statutory analysis,<sup>656</sup> it was determined that the sectional owners' and other occupiers' entitlements of use and enjoyment of their individual sections and accompanying share in the common property, are indeed limited by the various different types of rules governing sectional title schemes. These rules restrict and bind each member of the body corporate. Several examples of the more problematic restrictive rules have been examined and the limitation of the entitlements tested

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<sup>654</sup> The court must test the potentially problematic statutorily prescribed or non-prescribed rule for inconsistency with the Constitution.

<sup>655</sup> Du Plessis L "Interpretation" in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Vol 2 (2<sup>nd</sup> ed 2009) 32.141. See the discussion in chapter 4 under the heading 4 3 1.

<sup>656</sup> Refer to chapter 3.



against constitutional provisions to determine their constitutional validity. The model management and conduct rules that are looked at more closely are the following: the conduct rule preventing a sectional owner or occupier from keeping a pet without the written consent of the trustees,<sup>657</sup> the rules ensuring the harmonious appearance of the sectional title scheme,<sup>658</sup> the rules regulating noise and nuisance within the scheme,<sup>659</sup> and the conduct and management rules regulating the use and misuse of a section.<sup>660</sup> These rules serve as examples of how the Sectional Titles Act prescribes restrictions which limit the sectional owners' ownership entitlements as well as the entitlements of other occupiers to use and enjoy their sections and share in the common property. Most of the rules are valid in so far as they are reasonable in their application and are applied equally to the sectional owners and other occupiers in the scheme.

For example, section 44(1)(d) of the Sectional Titles Act states that an owner shall "use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises." This rule prohibits the sectional owners and other occupiers from behaving in a way that will disturb the use and enjoyment of the sections and common property by other sectional owners, occupiers and other persons lawfully on the premises.<sup>661</sup> Therefore, it restricts their entitlements of use

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<sup>657</sup> Annex 9 rule 1. See also *Body Corporate of the Laguna Ridge Scheme v Dorse* 1999 (2) SA 512 (D), where the court explained the trustee's discretion when determining whether a pet should be allowed in the scheme. See further the discussion in chapter 3 under the heading 3 3 2 3.

<sup>658</sup> Annex 8 rule 68(1)(iv) and Annex 9 rules 5, 6 and 8. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs on the common property of the scheme. See further the discussion in chapter 3 under the heading 3 3 2 4.

<sup>659</sup> Ss 44(1)(d) and 44(1)(e). See the discussion in chapter 3 under the heading 3 3 2 5.

<sup>660</sup> S 44(1)(g) and Annex 8 rule 68(1)(i). See also *Bonthuys v Scheepers* (CA 303/2006) [2007] ZAEHC 68 (17 April 2007); *Cujé-Jakoby v Kaschub* 2007 (3) SA 345 (C), and *Body Corporate of the Tuzla Mews Scheme v Yang* [2001] 3 All SA 427 (W). See further the discussion in chapter 3 under the heading 3 3 2 6.

<sup>661</sup> Refer to the discussion of these rules in chapter 3 under the heading 3 3 2 6. See chapter 4 under the heading 4 2 3. See further s44(1)(e) of the Sectional Titles Act, which states that an owner shall "not use his section or exclusive use area, or permit it to be used, in such a manner or for such a purpose as shall cause a nuisance to any occupier of a section." As long as this rule is applied equally, it will be legitimate. See further Management rule 68(1)(i), which provides that an owner "shall not use his section, exclusive use area or any part of the common property, or permit it to be used, in such a manner or for such purpose as shall be injurious to the reputation of the building." Management rule 68(1)(iv) provides that an owner "shall not do anything to his section or exclusive use area which is likely to prejudice the harmonious appearance of the building." These rules are valid

and enjoyment of their own section and share in the common property. However, compliance with this rule ensures that all the residents living in a scheme will form a harmonious community, with the least cause for conflict and disputes. Therefore, this rule serves a legitimate aim and will be reasonable in so far as it is applied equally to all residents in the scheme.

However, when the rules are so restrictive as to limit any of the rights entrenched in the Constitution, these potentially problematic rules must be interpreted in line with section 39 of the Constitution. It is the duty of the court to test the legislation<sup>662</sup> for inconsistency with the Constitution and to declare it invalid if it is inconsistent. This is known as reading-up or reading-down. Other constitutional remedies upon which the court can rely is severance and reading-in.<sup>663</sup> If the interpretation fails, a constitutional analysis<sup>664</sup> is required. Various restrictive rules were tested against the property clause<sup>665</sup> and other non-property fundamental rights<sup>666</sup> entrenched in the Bill of Rights to determine whether they were constitutionally valid or whether they were unreasonable, unconstitutional and needed to be repealed and replaced, amended or substituted.

For example, a sectional title scheme providing for the needs of the elderly and retired may prohibit residents below a certain age. This differentiation will be valid as it serves a legitimate purpose, providing suitable accommodation for the elderly in the form of a retirement scheme. The rule restricting occupation will be discriminatory in its application, but it will not be unfair discrimination because there is a rational connection to a legitimate purpose. Therefore, the rule will be constitutionally valid.

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as they provide the surety required by prospective purchasers and current sectional owners that their units in the scheme will increase in value and attract potential purchasers.

<sup>662</sup> The court must test the potentially problematic statutorily prescribed or non-prescribed rule for inconsistency with the Constitution.

<sup>663</sup> Du Plessis L "Interpretation" in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* Vol 2 (2<sup>nd</sup> ed 2009) 32.141. See the discussion in chapter 4 under the heading 4 3 1.

<sup>664</sup> Refer to chapter 4.

<sup>665</sup> S 25(1) of the Constitution.

<sup>666</sup> Ss 9, 33 and 34.

## 5 2 Overview of chapters

Chapter one, the introductory chapter, began by posing the research question. It introduced the hypothesis, listed and explained the methodology employed throughout the thesis, gave a brief overview of the chapters and introduced the main issues that were dealt with in each chapter.

In chapter two, there was a comparative discussion of the historical background of the immovable property ownership system in South Africa. This discussion focused on the period before the introduction of separate ownership of a part or section of land or a building, as in sectional title schemes. The common law position was discussed, with reference to its principles of ownership<sup>667</sup> and their subsequent amendment in the case of sectional titles. This amendment served as an adaptation of the application of the principles to sectional title schemes, which were an alternative form of immovable property ownership. Firstly, the common law principle, *superficies solo cedit*, was repealed in the case of sectional titles. This principle restricted the separate ownership of parts of a building and land as with sectional titles because the person owning the piece of land automatically owns the buildings permanently built on the land.<sup>668</sup> Due to the fact that this principle became part of Roman-Dutch common law initially and later South African law, it needed to be repealed in order for sectional titles to be introduced. According to Roman law, land was undefined horizontally and ownership of different levels or “strata”<sup>669</sup> was unknown. By repealing the common law principle *cuius est solum*, as defined above, in the case of sectional titles, a section owned by the sectional owner was described both in terms of the vertical boundaries and horizontal subdivisions. Sectional ownership introduced horizontal subdivision by defining the boundaries of a section

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<sup>667</sup> *Superficies solo cedit (omne quod inaedificatur solo cedit); cuius est solum eius est usque ad coelum and plena in re potestas*. See chapter 2 for a further discussion on the definition and application of these common law principles.

<sup>668</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 58. See further *Van Wezel v van Wezel's Trustee* 1924 AD 409 at 417, where Wessels JA stated that “as soon as a structure is built into the soil it acceded to the soil; for by Civil Law as by the Roman-Dutch law the accessory has the same character as the thing to which it acceded”; *Durban Corporation v Lincoln* 1940 AD 36 at 42, where Watermeyer JA stated that “in law a building acceded to the land – it is not separate property and cannot be owned as a thing separated or disconnected from the land on which it stands” and *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454.

<sup>669</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 55.

as the median line of dividing the floors, walls and ceilings.<sup>670</sup> According to the common law principle, *plena in re potestas*, the traditional concept of ownership was seen as “autonomous”,<sup>671</sup> “individualistic”<sup>672</sup> and “unrestricted”.<sup>673</sup> With the introduction of sectional titles, there has been a move away from this traditional concept of landownership towards a more communal and restricted form of home ownership where the rights and interests of all residents living in a scheme are upheld.

The main reasons for the introduction of legislation, making provision for sectional ownership were examined, as well as when and how this legislation was introduced. The purpose, effect and success of the legislation were also discussed. Australia, Germany and Israel were chosen as comparative jurisdictions because they each faced similar challenges to those found in South Africa at the time when need arose for an alternative form of immovable property ownership. There were also similarities between their systems of separate ownership of a part or section of land or a building and sectional ownership in South Africa. The choice of each jurisdiction was explained with reference to examples where relevant in the chapter. A comparative approach was followed throughout the chapter as each comparative jurisdiction has particular useful and successful suggestions that the South African legislature can follow in future.

In chapter three, a statutory analysis and a comparative survey were used to describe the various types of rules governing a sectional title scheme. In this chapter, the focus of the discussion was on where the rules can be found, the types of rules applicable, the legal nature of the rules in operation and the limitations that they impose. Sectional title schemes are governed by two sets of rules which restrict the property rights of sectional owners, successors in title and other occupiers who

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<sup>670</sup> See Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 56.

<sup>671</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67.

<sup>672</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67.

<sup>673</sup> Cowen DV *New patterns of landownership. The transformation of the concept of ownership as plena in re potestas* (1984) 67.

are resident in a scheme. Firstly, model conduct and management rules are statutorily prescribed in the Sectional Titles Act. These rules are applicable in so far as they are constitutionally valid. They can be amended, added to, substituted and repealed by either the developer initially or later by the body corporate. These rules are applicable in so far as they are not in conflict with the prescribed rules in operation within the scheme. Secondly, the trustees of the body corporate can adopt non-prescribed rules by resolution of the members of the body corporate. These adopted rules are applicable in so far as they are not in conflict with the prescribed rules. They are seen as being the internal objective law of a private law institution. Reference was also made to the amendment procedure, the operation and scope of application of the rules, the enforcement mechanisms available, the sanctions for non-compliance, disputes and the various methods of dispute resolution that can be used.

Various examples of restrictive rules were identified in this chapter. The rules that will be looked at more closely are the following: the conduct rule preventing a sectional owner or occupier from keeping a pet without the written consent of the trustees,<sup>674</sup> the harmonious appearance rule,<sup>675</sup> the rules regulating noise and nuisance,<sup>676</sup> and the conduct and management rules regulating the use and misuse of a section.<sup>677</sup> The trustees of the body corporate are vested with judicial discretion to grant or refuse permission to keep pets in a sectional title scheme and to grant or refuse permission to change the use of a section in a scheme. The trustees must consider all the special circumstances of each case in order to warrant a departure from the general policy. This judicial discretion must be exercised reasonably. There is an absolute prohibition that a sectional owner and other occupier's may not do anything in the section or on the common property that will detrimentally affect the aesthetic appeal of a scheme or cause noise or other forms of nuisance. Sectional title schemes are usually of a higher density than other forms of home ownership and as such strict control needs to be exercised over the conduct of the residents in order to ensure that the community functions as a harmonious whole.

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<sup>674</sup> Annex 9 rule 1.

<sup>675</sup> Annex 9 rule 5 and Annex 8 rule 68(1)(iv).

<sup>676</sup> Ss 44(1)(d) and 44(1)(e).

<sup>677</sup> S 44(1)(g) and Annex 8 rule 68(1)(i).

It was argued that these rules could in some cases exceed the bounds of reasonableness, making it necessary for the court to step in and fulfil its duty as mandated by section 39 of the Constitution by interpreting the rules in order to avoid a declaration of invalidity. If the interpretation fails and none of the constitutional remedies are applicable, it will be necessary to evaluate the rules in light of the Constitution to ensure that rules which are contrary to the fundamental rights entrenched in the Constitution are declared invalid and unenforceable. The rules must be applied equally within the scheme in order for it to be a reasonable restriction of the property rights and entitlements of the sectional owners and other occupiers residing in the scheme. In most cases, the rules are reasonable as they serve to ensure that the community of sectional owners and other occupiers live in an efficiently functioning community where disputes and other conflicts are avoided to the advantage of the community as a whole. The following chapter continues by testing these rules in terms of their constitutional validity.

In chapter four, a constitutional analysis was used to determine to what extent the restrictive rules infringe on constitutional rights and whether these rules are constitutionally permissible. The rules are all-encompassing and provide for the control, management, administration, use and enjoyment of the sections and the common property. They serve as regulations of and limitations on the sectional owners' and occupiers' property rights, depriving them of their entitlements of use and enjoyment of their individual sections and share in the common property. In this chapter, the focus was on two constitutional enquiries.

Firstly, the emphasis was placed on the constitutional validity of the rules governing sectional title schemes. It needed to be determined whether the application of the rules amounted to arbitrary deprivations of property. It also needed to be determined whether these deprivations would be unenforceable due to its constitutional invalidity or whether they would be justified in terms of the property clause.<sup>678</sup> The second constitutional enquiry focussed on the fact that the rules applicable to sectional title

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<sup>678</sup> S 25(1) of the Constitution.

schemes need to uphold various non-property rights<sup>679</sup> as entrenched in the Bill of Rights. A comparative approach was followed, using similar provisions in the United States of America as an example of how rules are introduced and enforced in condominium schemes and how the courts test whether or not they are reasonable and enforceable in light of the Constitution. In this chapter, the statutorily prescribed model rules tested in terms of their constitutional validity were constitutionally valid in so far as they were applied equally within a scheme and were reasonable in their application and effect. The non-prescribed rules adopted by either the developer initially or later by the body corporate, can be more problematic as these rules are adopted to meet the specific needs and requirements of a particular scheme and as such, they need to be considered in light of the nature of the particular scheme in question. These rules will be applicable in so far as they are applied equally and are reasonable in their application and effect but most importantly, they must not be in conflict with any of the statutorily prescribed rules.

As mentioned previously, certain model rules were highlighted as potentially problematic restrictions and tested in terms of their constitutional validity. The first example of a set of statutorily prescribed rules which deprive an owner or occupier of their entitlements of use and enjoyment is sections 44(1)(d) and (e) of the Sectional Titles Act, which sets out the duties of the owners and occupiers of sections. These obligations interfere with the sectional owners' and occupiers' entitlements of use and enjoyment. Section 44(1)(d) states that an owner shall "use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners or other persons lawfully on the premises." This rule requires sectional owners and occupiers to behave in a way that will not disturb the use and enjoyment of the sections and common property by other sectional owners, occupiers and other persons lawfully on the premises.<sup>680</sup> Compliance with this rule ensures that all the residents living in a scheme will form a harmonious community, with the least cause for conflict and disputes. Therefore, this rule serves a legitimate aim and will be reasonable in so far as it is applied equally to all residents in the scheme. Section 44(1)(e) of the Sectional Titles Act, states that

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<sup>679</sup> Ss 9, 33 and 34.

<sup>680</sup> Refer to the discussion of these rules in chapter 3 under the heading 3 3 2 6.

an owner shall “not use his section or exclusive use area, or permit it to be used, in such a manner or for such a purpose as shall cause a nuisance to any occupier of a section.” This rule prohibits any behaviour or activity that may reasonably be perceived as causing a nuisance to other sectional owners and occupiers. This rule can be seen as being a legitimate limitation of the sectional owners’ and other occupiers’ entitlements of use and enjoyment because compliance with the rule will ensure that causes for disputes do not arise.

Management rule 68(1)(i) provides that an owner “shall not use his section, exclusive use area or any part of the common property, or permit it to be used, in such a manner or for such purpose as shall be injurious to the reputation of the building.” Management rule 68(1)(iv)<sup>681</sup> provides that an owner “shall not do anything to his section or exclusive use area which is likely to prejudice the harmonious appearance of the building.” The model conduct rules in Annexure 9 of the Sectional Titles Act, further limit the sectional owner or occupier’s entitlement of use and enjoyment. Conduct rule 1(1) states that “an owner or occupier shall not, without the consent in writing of the trustees, which approval may not be unreasonably withheld, keep any animal, reptile or bird in a section or on the common property.”<sup>682</sup> Conduct rule 3 prohibits any sectional owner or occupier from parking or leaving their vehicles anywhere on the common property.<sup>683</sup> Conduct rule 4 prohibits any alterations to the common property.<sup>684</sup> Conduct rule 5 prohibits any conduct that would lead to an aesthetically displeasing or undesirable effect when view from the outside of the scheme.<sup>685</sup> One of the main and most attractive features of a sectional title scheme is

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<sup>681</sup> See further Annex 9 rules 5, 6 and 8.

<sup>682</sup> *Body Corporate of the Laguna Ridge Scheme v Dorse* 1999 (2) SA 512 (D). See further the discussion in chapter 3 under the heading 3 3 2 3.

<sup>683</sup> Refer to the discussion of the harmonious appearance rule. See Annex 8 rule 68(1)(iv) and Annex 9 rules 5, 6 and 8. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs on the common property of the scheme. See further the discussion in chapter 3 under the heading 3 3 2 4.

<sup>684</sup> Refer to the discussion of the harmonious appearance rule. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs on the common property of the scheme. See further the discussion in chapter 3 under the heading 3 3 2 4.

<sup>685</sup> Refer to the discussion of the harmonious appearance rule. See also *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009), where the body corporate of a sectional scheme sought a court order prohibiting a sectional owner from erecting advertising signs



its harmonious appearance. Prospective buyers are interested in purchasing a unit in a scheme where all the sections are similar in appearance, neat and well maintained. Purchasers want to be assured that their section and share in the common property will increase in value and will attract similar interest. Therefore, restrictions such as those previously mentioned are necessary for the continued and future existence and success of the sectional title community.

### **5 3 Concluding remarks**

The thesis has attempted to answer the research question posed in the introductory chapter, which questioned whether the model management and conduct rules prescribed by the Sectional Titles Act and the rules amended, added to, substituted, repealed and adopted by either the developer initially or later by the trustees of the body corporate of a sectional title scheme, are constitutionally valid.

It can be concluded that the various types of rules governing sectional title schemes restrict and limit sectional owners' and occupiers' entitlements of use and enjoyment of their individual sections and share in the common property. However, after being tested against the property clause<sup>686</sup> and other non-property rights,<sup>687</sup> to determine if the rules are reasonable in their application and constitutionally permissible, it can be seen that the application of the rules do not amount to arbitrary deprivations of property and are justified in terms of the property clause. However, if there is no sufficient reason for the deprivation of property rights and entitlements by the restrictive rules and the deprivation is not rationally linked to a legitimate purpose, it will be arbitrary and constitutionally invalid.

The various types of rules prescribed or authorised by the Sectional Titles Act, authorises a deprivation of property, namely a restriction on the sectional owners and occupiers' entitlements of use and enjoyment and must establish a sufficient reason for the deprivation, such as the necessity to form a harmonious community.

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on the common property of the scheme. See further the discussion in chapter 3 under the heading 3 3 2 4.

<sup>686</sup> S 25(1) of the Constitution.

<sup>687</sup> Ss 9, 33 and 34 of the Constitution.

The deprivation must be justified by establishing a proportionate balance between the ends sought, namely the regulation of sectional owners' use rights for the benefit of the community and the means employed, namely the rules limiting the entitlements of use and enjoyment.

The various types of rules governing sectional title schemes can be seen as a reasonable regulation of property rights in relation to specific property by a private body, the body corporate that is responsible for the enforcement of the rules and compliance therewith. These rules are imposed by the body corporate as law of general application and are not arbitrary. There is a sufficient reason for the deprivation and it is rationally linked to a legitimate purpose. The rules serve as a normal and reasonable regulation of property rights in the interest of the community of sectional owners in as far as they contribute to a harmonious relationship between the trustees of the body corporate and the sectional owners and occupiers as members of the body corporate as well as between the members of the body corporate *inter se*. The rules serve an important function in this regard. Therefore, they are considered reasonable and constitutionally valid in as far as they do not enforce excessive regulation and as long as they are equally applicable and do not unfairly differentiate in their application. Rules which enforce excessive regulation or unreasonable and unequal restrictions are not constitutionally permissible unless its application is justified.

## **Abbreviations**

*CCR*: Constitutional Court Review

*CILSA*: Comparative and International Law Journal of Southern Africa

*Harv LR*: Harvard Law Review

*Int & Comp LQ*: International and Comparative Law Quarterly

*Israel LR*: Israel Law Review

*Juta's SA Journal of Property*: Jutta's South African Journal of Property

*SALJ*: South African Law Journal

*Stell LR*: Stellenbosch Law Review

*THRHR*: Tydskrif vir die Hedendaagse Romeins-Hollandse Reg

*TSAR*: Tydskrif vir die Suid-Afrikaanse Reg

*ZaöRV*: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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