The new sectional title legislation Some noteworthy features of the 'tricky trio'

By Tertius Maree

When the Sectional Titles Act 66 of 1971 came into effect, South African law had, for the first time, recognised the concept of 'vertical ownership' of land, land previously having been measured only on a horizontal plane in accordance with Roman Law principles.

The offices of the surveyor general as well as the deeds registries, both falling under the then Department of Land Affairs, had to adapt radically to accommodate this transformation.

One aspect that proved to be problematic was the examination, approval and filing of rules of sectional title schemes. The deeds registries were prepared to assume responsibility only for the physical storage of the rules, without accepting any responsibilities for examining and/or approving the contents of such rules, which they regarded as falling outside the ambit of their customary functions. Accordingly, the need for scrutinising the rules for legality, both as regards the contents and the validity of the adoption procedures, remained unresolved, this hiatus continuing also during the currency of the later Sectional Titles Act 95 of 1986.

During 1999 in *DeeltitelForum*, a column in *Die Burger* newspaper, the possibility of appointing an ombudsman for sectional title disputes, the functions of whom could also include scrutiny, approval and safe-keeping of rules, was raised for the first time.

This article was noticed by Dr Edwin Conroy, then a member of Parliament and the idea was adopted by Parliament. Upon discussion with Land Affairs and the Chief Registrar of Deeds, it was seen as a solution of the consistent rules problem as well as the matter of disputes and other management issues. It was also decided that the dispute resolution service should be extended to other forms of 'community schemes' and tenders were invited for drafting the required legislation. Legislation was eventually promulgated during 2011 but has currently not yet taken effect.

The Sectional Titles Schemes Management Act 8 of 2011

This statute is intended to deal with the management aspects of sectional title schemes only, as extracted from the current Sectional Titles Act. While it retains the nature of these aspects as previously found in the Sectional Titles Act, it is not identical in all respects, as far as the wording, layout and even the contents are concerned. It is also clear that while the intention had been made known not to modify the currently prescribed rules, these will inevitably have to be amended in order not to be at variance with the contents of the Act.

Extention of developer's right to extend

One example of such differences is found in s 5(1)(*c*) –
'may, upon unanimous resolution by the owners, enter into a notarial agreement to extend the period stipulated in the condition referred to in section 25(1) of the Sectional Titles Act'.

This provision, allowing the extension of a developer's right to extend the scheme, is –

- found in an entirely new section, at a different location;
- provides an entirely new power for the body corporate, namely to extend the time limit of a developer's right of extension by a unanimous resolution, implemented by means of a notarial agreement.

Subdivision and consolidation of sections

Further examples are the provisions regarding subdivision and consolidation of sections in s 7(2), which are now categorised under the heading 'Trustees of body corporate' and as far as content is concerned, now specifically refers to applications made by owners, different to the wording found in s 21 of the current Sectional Titles Act wherein no application procedure is mentioned.

Extensions of a section

The provisions in the Management Act regarding extensions of sections also present tricky snares for trustees in
s 5(1)(*h*) –
'[. . . the body corporate] must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or floor area of a section in terms of the Sectional Titles Act'.

This provision is dangerous for three reasons:

- The use of the word 'must' rather than 'may' as in the other subsections of s 5 suggests that the members, when presented by such application, may perhaps have no discretion in the matter and are thus compelled to pass the required special resolution. This would not be a sensible provision and was probably not what the drafter had intended, but is likely to lead to some disputes and can eventually only be eliminated by an order of court, unless an appropriate amendment is made by the legislature.
- Secondly, the provision suggests that the provision takes effect only if and when an owner should apply for consent to extend his section. If he does not so apply, nothing seemingly needs be done. It therefore suggests that there is no duty on an owner to apply. Currently, the current Act, states in s 24(3) –

'If an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall with the approval of the body corporate, authorized by a special resolution of its members, cause the land surveyor or architect to … .'

Making it clear that the duty rests on the owner to procure the consent of the members by special resolution before proceeding with the extension project and have it surveyed and registered, and that the members are not compelled to grant their consent.

- Different to other provisions, no reference whatsoever is made to a specific section in the Sectional Titles Act, which must also be complied with. This may create an impression that the special resolution is all that is necessary. This is of course not the case because the survey and registration aspects dealt with in s 24 of the Sectional Titles Act must still be complied with, including the consents required from bondholders. In fact, it will be seen that the procedures set out in the current version of the Sectional Titles Act remain basically unchanged.

Trustees should accordingly tread very carefully when dealing with extension of sections and other matters requiring registration in terms of provisions of the Sectional Titles Act.

General meetings, proxies, voting

General meetings were previously not touched on in the Act, but regulated entirely by the provisions of the Management Rules. Section 6 in the Management Act now deals with several aspects of meetings. Section 6(1) is interesting in that it states that:

'The meetings of the body corporate must take place at such time and in such form as may be determined by the body corporate.'

What does 'in such form' mean? Could it be intended to refer to meetings conducted electronically such as by Skype? And the provision diverts entirely from the norm that such practical items should be contained in and governed by the rules, and accordingly affects the current Management Rules.

The provisions of s 6 also impacts materially on the position under the current rules in that –

- s 6(5) stipulates that a person may not act as a proxy for more than two members, whereas no limit is imposed currently;
- s 6(7) stipulates that when votes are counted in number, each member has one vote, whereas the current position is that a member has the number of votes according to the number of units held by the member; and
- s 6(8) determines that: 'Where the unanimous resolution would have an unfairly adverse effect on any member, the resolution is not effective unless that member consents in writing within seven days from the date of the resolution.' Potentially this could undermine many attempted resolutions as the resolution would ostensibly be null and void if not consented to within seven days.

Conversely, some resolutions could ‘slip through’ without the required consent having been obtained.

The reason for this is the uncertainties that could arise from the phrase ‘would have an unfairly adverse effect’ resulting in consents not being asked for – and objections perhaps being raised at a later stage?

Community Schemes Ombud Act 9 of 2011

It was decided to adopt the name ‘Community Schemes Ombud Service’ for the legislation, which would include sectional title schemes, home owners’ associations, retirement schemes, share block schemes and time share schemes. The term ‘ombud’ was preferred due to its perceived gender neutrality, notwithstanding the fact that the ‘-man’ in ‘ombudsman’ did not indicate gender in its language of origin, Swedish.

The relevant legislation was promulgated in 2011 at the same time as the Management Act, with which it is interlinked. The two statutes have not yet become operational and will do so once the regulations for both are in place and the office of the Chief Ombud is ready to function. The Chief Ombud has been appointed in the person of human rights lawyer, Themba Mthethwa, who has taken office in Pretoria with an initial staff of 100. Apart from a ‘start-up’ contribution of R 40 million by government, the service is required to become financially self-sufficient, funded principally by a levy on all schemes in South Africa, and by fees payable by persons/entities making use of the service. The calculation and collecting of such levies from bodies corporate and tariff of costs payable by contesting parties must still be disclosed in the regulations, which are to be published.

The actual handling of disputes will be dealt with by local adjudicators appointed for various areas.

Any person or party affected by a dispute in respect of a community scheme arising from matters relating –

- financial issues;
- issues of conduct;
- governance;
- conduct of meetings;
- management issues; or
- access to information or documents;

may apply to the Ombud in terms of s 38 to have the dispute adjudicated. The appointed adjudicator will have powers including –

– requiring parties to provide evidence;
– inviting third parties to submit submissions; and
– to inspect physical elements and documents.

The adjudicator will be empowered to enforce compliance with the above and his ensuing order will be enforceable as a court judgment and may be appealed against to a High Court, but only in respect of a question of law. The adjudicator is obliged to report to the Chief Ombud.

A further function of the Chief Ombud, and one which I predict may become a more important one than the resolution of disputes, will be the examination, approval or otherwise, and filing and preservation of rules and rule amendments of sectional title schemes. The assessment of rules is a highly skilled task and would require well-trained personnel, which is a matter of some concern.

The Sectional Titles Act

This current statute will remain, but focussed exclusively on the survey and registration aspects of sectional titles, the management issues having been stripped out and moved to the Sectional Title Schemes Management Act.

As part of managing sectional title schemes, and as pointed out, it will nevertheless be important for trustees and managing agents to remain aware of certain provisions in the Sectional Titles Act.

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