

HOMEOWNERS' ASSOCIATIONS AND BODIES CORPORATE

The new buzz words around town at the moment, and more particularly in the property industry refer to 'Community Schemes'. The Department of Human Settlements, currently the umbrella body for such schemes have taken control of their regulation. But, what are these Community Schemes, and what is the difference between a Sectional Title development and a Home Owners' Association?

Community Schemes have been defined in Section 1 of the Community Schemes Ombud Service Act 9 of 2011 as:

Either a

1. Sectional Title Scheme
or
2. A Homeowners' Association
or
3. A Shareblock Building
or
4. A Retirement Village
or
5. A Gated Village with a Constitution
or
6. A Social Co-operative

For purposes of this article, I'll be referring to the underlined schemes.

SECTIONAL TITLE SCHEMES

Now we know that a Sectional Title Scheme is governed by The Sectional Title Schemes Management Act 8 of 2011 (STSMA). This Act is not a guideline, it is prescriptive.

Sectional Title apartments and townhouses are subject to specific provisions in the new legislation. From the 7th of October 2016 there were a few interesting changes in the STSMA, which are noted hereunder. I reiterate that these changes do not automatically relate to Homeowners' Association.

- A. The STSMA talks about an Advisory Council. This Council makes recommendations to the Minister about all matters regarding the legislation and is obliged to regularly review the need for amendments to the Acts. Although to date this Council has not been set up and finalised, it is foreseeable that the Ombud Service has placed its creation as a priority for the coming financial year.
- B. The Reserve Fund is a new innovation which should be embraced by the Sectional Title industry. The Body Corporate must establish and maintain a reserve fund which is not less than the amounts prescribed by regulation. As at the date of writing this article the calculation of contribution is as follows:
- If at the end of the financial year, the money in the reserve fund is less than 25% of the total contribution for the last financial year to the normal levy fund, then the budgeted contribution to the reserve fund must be at least 15% of the total budgeted contribution to the admin fund.
 - If the money in the reserve fund is more than 25% but less than 100% of the total contributions to the normal fund for that previous year, the budgeted contribution to the reserve fund must be at least the amount budgeted to be spent from the normal fund on repairs and maintenance to common property in the financial year being budgeted on.
 - If the amount in the reserve fund is equal or greater than 100% of the total contribution to the normal fund, then no contribution is necessary

In my experience, many Trustees operationally manage their buildings very well and have always catered for a "buffer fund". However, an inordinate number of Trustees find themselves in financial difficulty with the building being run from

“hand to mouth” on a monthly basis. This reserve fund will ensure that a building does not fall into disrepair, and that the Body Corporate at every Annual General Meeting puts its mind to the collection of monies for this fund, and the maintenance plans for the building.

It is also clear that monies going into the reserve fund are:

- a) Part of annual levies designated for reserves or the MRR plan.
- b) Any amount received under an insurance policy for damage to property for which the Body Corporate is liable.
- c) Interest on the fund.

Monies going out of the reserve fund:

- a) Payments in respect of the Maintenance, Repair and Replacement plan.
- b) Payments in respect of urgent maintenance and repair

C. Unanimous Resolution

Importantly, a unanimous resolution which would have an unfairly adverse effect on any member is not effective unless that member consents thereto, in writing within 7 days from date of the resolution. A Body Corporate or owner who is unable to obtain a unanimous resolution may approach the Chief Ombud for relief.

D. Proxies

A proxy is not allowed to act for more than two members at a general meeting.

E. Votes

Ordinary resolutions ie: 51% must be adopted by the majority of votes calculated in value. There no longer exists the show of hands on these

decisions. Also, owners of multiple units only have one vote, although they obviously have their usual vote on participation quota.

F. Rules

Any amendments to the Management or Conduct Rules must be approved by the Chief Ombud after the necessary resolutions have been taken. Once approved the chief Ombud must issue a Compliance Certificate to that effect.

G. Duties of Owners

An owner now has to notify the body Corporate of any change of ownership or occupancy in his unit. Owners may also by written consent of all the other owners, use their sections or Exclusive use areas for another purpose. If an owner considers a refusal by other owners as unreasonable, he / she can apply to the Ombud for a decision.

H. Insurance

Trustees must obtain valuations every three years, and owners may not obtain an insurance policy in respect of damage arising from risk covered by the policy of the Body Corporate. This will obviate cases of double insurance. In addition, the public liability insurance cannot be less than R10 million in any scheme.

I. Special Resolutions

If a special resolution is passed at a General Meeting by members holding less than 50% of the total value of all members' votes, the Body Corporate must not implement the resolution for 7 days after the meeting unless the resolution is urgent and it could be agreed that safety would be compromised or there would be significant loss to the scheme.

If within that 7 day period, owners holding at least 25% of the total votes in value by written request require that the Body Corporate hold a Special General Meeting to reconsider the resolution, then, the resolution can't be implemented

unless it is again passed by Special Resolution or a quorum is not present within 30 minutes of the time set for the meeting.

A better explanation by way of example:

- There are 10 units in the scheme each having the same floor area.
- An SGM is called to pass a Special Resolution and the minimum quorum is present at 33.3% - round up to 4 members.
- The Special Resolution is passed, which is 75% of 4.
- Therefore only 3 members need to vote in favour of the resolution for it to pass.
- Now, in terms of Management Rule 20(9), less than 50% of the members have successfully passed the Special Resolution.

The Rules give the owners a “second bite at the cherry” so to speak, by postponing implementation to give more owners a chance to re-group.

J. Maintenance, Repair and Replacement Plan

This is a completely new innovation in Sectional Title Schemes. The Management Rule sets out that the Body Corporate must prepare a written maintenance, repair and replacement plan which sets out the major capital expenses expected to require maintenance, repair and replacement within the next 10 years. These type of capital expenses relate to wiring, lighting and electrical systems, parking, roads, paved areas, security systems, communal and recreational facilities. The plan must set out the present condition of those items, the timeline for repair, the estimated cost, the expected life of the items once maintained, repaired or replaced.

It is important to note that the reserve account will fund the plan, and the plan must be reported on at every Annual General Meeting.

K. Finances / Discounts / Auditors

The budget may now include a ten percent discount on levies if all owner's contributions are paid on due dates. There is no longer a reference to an

accounting officer in the Sectional title legislation. Consequently, all buildings, even those with 10 or less units must be audited.

L. Executive Managing Agents

A brand new concept of the "Executive Managing Agent" has been included in the Rules. Distinguishable from an ordinary Managing Agent, the Executive Managing Agent actually steps into the shoes of the Trustees, has an extremely onerous fiduciary duty, and is liable for any loss suffered by the Body Corporate as a result of not applying care and skill.

The Body Corporate, may upon special resolution appoint an Executive Managing Agent

or

25% of the owners in value can force an appointment.

Ordinary Managing Agent

- Appointed by an ordinary resolution or by a registered mortgagee holding 25% in number of primary section.

- A management agreement may not endure for more than 3 years.

M. Pets

If you are disabled and require the use of an assistance dog to reside with you, and accompany you on common property, you will not need the formal consent of Trustees, the Trustees are deemed to give consent. This rule is in the model rules. Every complex should, in my opinion adopt this rule.

HOMEOWNERS' ASSOCIATIONS

The above innovations do not automatically apply to Homeowners' Associations. These Associations can either be created in the Companies' office by way of a Memorandum of Incorporation, or by way of a Council stamped Constitution. They

are not covered by the Sectional Titles Schemes Management Act. However, should they wish to adopt certain provisions from the Act and Rules, nothing stops them. In plain English, if I live in a Cluster Golf Estate Development, the Maintenance, Repair and Replacement plan does not apply in my scheme unless the scheme has legally adopted that particular rule. If I lived in a Sectional Title Scheme, the Managing, Repair and Replacement rule automatically applies.

The Community Schemes Ombud Service Act on the other hand, applies to all Community Schemes. The service is there to regulate, monitor and control the quality of all Community Scheme governance documentation and must provide dispute resolution. Whilst the Act does not specifically talk about a compliance certificate for Homeowners' Association rules, the Ombud's office will be effecting amendments in the coming months to bring the law regarding registration and rule compliance for Homeowners' Associations into line with Sectional Title Schemes. In the interim the Ombud's service is encouraging Homeowners' Associations to send rules in for vetting. The Ombud will definitely have jurisdiction currently to deal with any disputes taking place in these cluster schemes, as they are mandated by statute. Over and above the oversight role, the Ombud service will be entitled to receive the Community Schemes Ombud Services levy from Homeowners' Associations whether company registered or simply in a constitution format. Homeowners' Associations not registering with CSOS will be penalised.

Admittedly, the Ombud service faced serious challenges in its infancy, however, all indications are that great strides have been made now that monies are being received by over thirty three thousand complexes. For those complexes which have not yet registered with CSOS, the mandate has been given to the Executive by the Board to start penalising such schemes. A pivotal part within this last fourth quarter for the Ombud service was the capacitation of various departments with urgently required human resources. There has been a remarkable 41% growth in the staff compliment within the 2017-2018 financial year. In this fourth quarter, 1365 (one thousand three hundred and sixty five) referrals for disputes were received. Out of 1365, 879 applicants hailed from Gauteng. Interestingly only 195 of the total figure relates to disputes within Homeowners' Associations. Sectional Title Schemes registered the most disputes, being 1124. The balance constitutes retirement schemes and shareblocks. Now that the Ombud's office is gaining traction, there will be time to augment and improve the provision of services, and to some extent to flesh out

interesting issues in the industry, such as the Air BnB onslaught. I feel honoured to sit on the Community Schemes Board, and look forward to a study trip in Washington DC during May to attend a Community Schemes Conference, and to benchmark our service against international policies and infrastructure.

Marina Constan
Director
BBM Inc Attorneys