"This guide brings together all current legislation relevant to the sectional title industry and is a must-have for all owners, prospective owners, trustees and managing agents of sectional title properties."

– Elmo Stuart, EY Stuart Inc.

TRACS / TRAINING ACADEMY FOR COMMUNITY SCHEMES

Sectional Title Scheme Reference Guides

for Unit Owners, Trustees and Managing Agents

FIRST EDITION

All that I have

All that I am

The very breath that I draw

Is thanks to the love and mercy

of God.

To God be

all the glory

For ever and ever

Amen.

DEDICATION

To God, my amazing wife and loving family.

ACKNOWLEDGEMENTS

There are many people and organisations I wish to acknowledge and give thanks to who have assisted me and who have directly contributed to the contents of these three reference guides. First and foremost is my business partner, Johnny Wates, who encouraged and supported me not only in all our business ventures, but also in the completion of this book.

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TRACS/ TRAINING ACADEMY FOR COMMUNITY SCHEMES

SECTIONAL TITLE SCHEME REFERENCE GUIDES

FOR OWNERS, TRUSTEES AND MANAGING AGENTS

FIRST EDITION

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Published by The Training Academy for Community Schemes (TRACS)
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Available from
info@tracslearning.co.za | www.tracslearning.co.za | www.publisher.co.za
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TRACS Sectional Title Scheme Reference Guides for Unit Owners, Trustees and Managing Agents
Print ISBN 978-0-620-99809-3
PDF ISBN 978-0-6397-2563-5
ePub ISBN 978-0-6397-2564-2

First edition 2022

Publishing assistance: Quickfox Publishing
Senior project manager: Vanessa Wilson
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Proofreaders: Jean Kilroe and Lucinda Schubach
TRACS project managers: Lucinda Schubach and Yvonne Mason
Book design and DTP: Vanessa Wilson
Printing: Tandym, Cape Town, South Africa

Illustration acknowledgements
p.395: *Tail Wagging the Dog* by Linda Silvestri, www.lindasilvestri.com, reprinted with kind permission.
Daniel Reynolds: pp. 16, 30, 35
Rufus Papenfus: pp. 56, 59, 119, 138, 203

Photographic acknowledgements
Adobe Stock: p.261 Fizkes; Afanasiev Oleksii (icons). **Bigstock:** p.87 visivasnc; p.91 kuran; p.93 shisuka; p.97 ADragan; p.98 yarm.sasha; p.123 onephoto; p.133 Alena Dzihilevich; p.171; p.177 designer491; p.184; p.303 Andrey Popov; p.320 Cam684; p.398 FreedomTumZ. **Pexels:** p.53 Sora Shimazaki; p.124 Max Vakhtbovych; p.169 Christina Morillo; p.214 lilartsy; p.250 Ekaterina Bolovtsova; p.259 Christina Morillo; p.265 Sora Shimazaki; p.274 Pixabay; p.293 Mikhail Nilov; p.298 Kindel Media; p.301 Oleksandr Pidvalnyi; p.311 Rodnae Productions; p.314 Towfiqu Barbhuiya; p.342 Athena; p.350 Rodnae Productions; p.372 Life of Pix; p.379 Mikhail Nilov; p.387 Sora Shimazaki; p.402 Max Vakhtbovych; p.431 Mart Production; p.436 Todd Trapani. **Shutterstock:** p.32 Volha Hlinskaya (top), Yindee (middle), Jemastock (bottom); p.44 sivVector; p.110 petovarga; p.129 giggsy25; p.143 limeart; p.151 studiovin; p.155 Colorlife; p.161 Fizkes; p.164 ProStockStudio; p.174 Fizkes; p.200 Jwensly Dmello; p.240 Jemastock; p.263 Volha Hlinskaya; p.286 Yindee.

About this book

For many people, their sectional title unit is their greatest investment. There are several laws governing sectional title properties that give unit owners, trustees, and managing agents both rights and responsibilities.

The informative reference guides contained within this one, comprehensive volume will help you understand these laws and how they should be used to protect and manage your sectional title property.

- The **Sectional Title Unit Owner Reference Guide** offers unit owners and trustees a basic understanding of sectional title schemes by providing the key concepts of sectional title property ownership and a basic foundation to navigate some of the legislative framework involved in their property asset.
- The **Sectional Title Trustee Reference Guide** provides trustees and diligent unit owners with a more detailed understanding of important aspects of scheme management, ownership, the formation and amendment of rules, holding valid meetings, and many other important details to ensure that the scheme is transparently managed for the benefit of all residents.
- The **Sectional Title Managing Agent Reference Guide** provides specific advanced knowledge for high-level sectional title scheme management, including rehabilitation, finance, executive managing agents, the Property Practitioners Act, as well as relevant summaries of noteworthy Community Schemes Ombud Service (CSOS) case law, directives and adjudication orders.

As our population continues to grow and more people look for safety and convenience in sectional title schemes, it is vital that all the important role-players understand the rules of the game and ensure that they are implemented. This will enable everyone, regardless of their background, to be a winner through education and the Ubuntu philosophy.

What others say about the book

* * *

"Packed with everything you need to know when owning or managing a sectional title property. Highly recommended!"

– Douglas Haig, Managing Director, CIA

* * *

"TRACS is something every person involved in ST should have at their fingertips. Informative and in an easy-to-understand format."

– Adv. Barbara Shingler, CEO, Ballito Estates

* * *

"One comprehensive and easy-to-follow reference guide packed with all you need to know about sectional title living, ownership, and management. This reference guide will serve as an essential tool for all sectional title role players!"

– Chantel van Heerden, Executive Director, The Bellbuoy Group

* * *

"I'm blown away by the obvious amount of work and research done. This is the most user-friendly guide on the market and packed with everything you need to know when owning or running a sectional title property."

– Peter Steele, Managing Director, WVoigt

* * *

"Being involved in all spheres of the sectional title industry for many years, Justin Mason has managed to put it all together in this guide, which is not only informative and educational, but equips owners, trustees and managing agents to have a better understanding of each other's roles and obligations in the sectional title scheme industry.

This guide deals with all aspects of sectional title management in a practical and understandable manner, and brings together all current legislation relevant to the sectional title industry. It is a must-have resource for all sectional title owners or prospective owners, trustees and managing agents.

Even if you are already involved in the industry, this guide will give you a deeper understanding and knowledge of aspects of sectional title management that you do not necessarily encounter on a daily basis, but that may cross your path, such as financial distress and mismanagement of a body corporate, disputes, litigation, and the appointment of executive managing agents and/or administrators."

– Elmo Stuart, CEO, EY Stuart Attorneys Inc.

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List of abbreviations used in this book

This is a glossary of abbreviations and terms that are used throughout the TRACS Sectional Title Scheme Reference Guides. Please refer to this glossary if you are unsure of any abbreviation.

AGM	Annual General Meeting
AOD	Acknowledgement of Debt
CP	Common Property
CPA	Criminal Procedure Act
CSOS	Community Schemes Ombud Service
CSOSA	Community Schemes Ombud Service Act 9 of 2011
CSOS Regulations	Community Schemes Ombud Service Regulations, 2016
CSOS Regulations on Levies and Fees	Community Schemes Ombud Service Regulations: Levies and Fees, 2016
DPP	Directorate of Public Prosecutions
EAAA	Estate Agency Affairs Act
EAAB	Estate Agency Affairs Board
EMA	Executive Managing Agent
EUA	Exclusive Use Area
FFC	Fidelity Fund Certificate
HOA	Homeowners Associations
MEC	Member of the Executive Council
NAMA	National Association of Managing Agents
NCA	National Credit Act 34 of 2005
NPC	Non-profit Company
NRTA	National Road Traffic Act
OHS	Occupational Health and Safety
PAJA	Promotion of Administrative Justice Act
PCR	Prescribed Conduct Rules as they are stated in Annexure 2 of the STSMA Regulations

PMR	Prescribed Management Rules as they are stated in Annexure 1 of the STSMA Regulations
POPIA	Protection of Personal Information Act 4 of 2013
PPA	Property Practitioners Act 22 of 2019
PPRA	Property Practitioners Regulatory Authority
PPR	Property Practitioners Regulations
PQ	Participation Quota
SARS	South African Revenue Service
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
SG	Surveyor-General
SGM	Special General Meeting
SIE	Sale in Execution
SS	Sectional Scheme
ST	Sectional Title
STA	Sectional Titles Act 95 of 1986
STA Regulations	Sectional Titles Act Regulations, 1988
STSMA	Sectional Titles Schemes Management Act 8 of 2011
STSMA Regulations	Sectional Titles Schemes Management Act Regulations, 2016
TRACS	Training Academy for Community Schemes

A

SECTIONAL TITLE UNIT OWNER REFERENCE GUIDE

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Introduction

If you are reading this *Unit Owner Reference Guide*, you are either planning to purchase a sectional title property or you are a **unit owner** in a **sectional title scheme** and need a basic understanding of sectional title schemes and their management. You might also be a **trustee** for the **body corporate**, tasked with managing your sectional title scheme for the benefit of all residents.

This guide aims to provide a useful tool for both unit owners and potential trustees to understand the basics of sectional title scheme ownership and management. Because much of the content in this guide might be new to potential or existing unit owners, we have highlighted important terms in yellow.

As you read through this guide, you can find these terms in the glossary at the back of the book to refresh your memory. Each chapter ends with a summary to help you identify, at a glance, key points in the chapter. You will also find endnotes at the end of this Unit Owner Reference Guide providing additional information and references to the relevant sections of the governing legislation.

In Chapter 1, you will learn how to use these references. We wish you success on your journey of sectional title ownership and, with the help of this guide, trust that your sectional title property will serve you well.

1 Overview of Sectional Title

A **sectional title scheme** is a community scheme where the land and building(s) are within the area of jurisdiction of a municipality and are divided into two or more **sections** for the purposes of selling or letting.[1] The **unit owners** enjoy sole ownership of a section in **sectional title ownership**, together with joint ownership of **common property**, which will be further elaborated on in Paragraph 1.2. This is different from **full-title or freehold ownership**, where the owner owns the land and all the buildings on it, and there is no common property.

Sectional title schemes are one type of community scheme. A community scheme is any scheme or arrangement in terms of which there is shared use of, and responsibility for, parts of the land and buildings, including but not limited to:[2]

- Sectional title schemes;
- Share block companies;
- Home or property owners' associations;
- Housing schemes for retired persons; and
- Housing cooperatives.

1.1 Governing Legislation

Sectional title schemes are established and governed by South African laws. The current legislations that govern sectional title schemes are:

- The Sectional Titles Act 95 of 1986 (STA) and the Sectional Titles Act Regulations, 1988 (STA Regulations);
- The Sectional Titles Schemes Management Act 8 of 2011 (STSMA) and the Sectional Titles Schemes Management Act Regulations, 2016 (STSMA Regulations); and
- The Community Schemes Ombud Service Act 9 of 2011 (CSOSA) and the Community Schemes Ombud Service Regulations, 2016 (CSOS Regulations), as well as the Community Schemes Ombud Service Regulations: Levies and Fees, 2016 (CSOS Regulations on Levies and Fees).

How to interpret the referencing of Governing Legislation

Before we explain the purpose of the current legislations, an explanation of how to interpret the references may be helpful to a unit owner who does not have a background in law. You will notice small numbers above the text in some parts of this Unit Owner Reference Guide. These are references that tell you where in the legislation you will find the rule or

fact referred to. The references corresponding to the relevant numbers are located at the back of this Unit Owner Reference Guide.

When a reference such as 'Section 2(7)(b) of the STSMA' is stated, it means that once you have located the relevant legislation through the TRACS library or government website, you need to scroll down to Section 2 where it states, 'Bodies Corporate', first read the subsection (7) and then complete the sentence by further reading Paragraph (b) to understand the full reference. On the other hand, if you see a reference to PMR 20(1)(b) in the STSMA Regulations, that means that you need to go into the STSMA Regulations (a separate piece of legislation), scroll drown to Annexure 1 where the **prescribed management rules** (PMRs) are located, find management rule 20 which states "Voting and representatives", read subrule (1) and complete the sentence by reading Paragraph (b). These are the basics for interpreting the references to governing legislation.

The Sectional Titles Act 95 of 1986 (STA)

The Sectional Titles Act 95 of 1986 (STA) came into operation on 1 June 1988 and replaced the Sectional Titles Act of 1971. The purpose of the STA was to enable persons to own parts of a property. These parts of a property include sections, **exclusive use areas** and undivided shares in common property.

Further, the STA and its regulations provide for the division of buildings into sections and common property, and for the acquisition of separate ownership in sections coupled with joint ownership in property. It also sets out how to control certain instances of separate ownership in sections and joint ownership in common property. Additionally, the STA deals with the transfer of ownership of sections and the registration of sectional mortgage bonds for, and real rights in, sections within the sectional title scheme.

This legislation has been amended numerous times and, in its current form, deals mostly with the technical registration of the sectional title scheme by the developer and land survey provisions. Its rules and regulations about the management of the sectional title scheme are now covered in the STSMA.

The Sectional Titles Schemes Management Act 8 of 2011 (STSMA)

This legislation came into effect on 7 October 2016 and some would say that it shook the sectional title industry as it introduced new concepts, role-players, definitions and procedures, and it changed other rules and regulations, which the industry has been grappling with ever since.

The STSMA deals largely with the management and control of the sectional title scheme and specifies what the **body corporate** must do in order to, among other things:

- Hold valid meetings;
- Take out loans with creditors;
- Appoint service providers;
- Deal with ownership matters;
- Maintain the common property; and
- Manage its financial affairs, such as its administrative fund and the all-important reserve fund that was introduced.

These are just some of the areas that the legislation addresses. It is also worth noting that the PMRs referenced throughout these TRACS Sectional Title Scheme Reference Guides refer to the STSMA Regulations. We shall delve into more detail throughout this Unit Owner Reference Guide.

The Community Schemes Ombud Service Act 9 of 2011 (CSOSA)

This legislation accompanied the STSMA when it came into effect on 7 October 2016. It provides for the establishment of the **Community Schemes Ombud Service (CSOS)**. The CSOS provides for a less formal, less costly and more accessible dispute resolution mechanism for community schemes.

As this Unit Owner Reference Guide is just an introduction to sectional title scheme living, the CSOS is only briefly addressed in Chapter 5. For more information, please visit www.csos.org.za.

1.2 Sectional Title Terminology

A 'scheme' or 'sectional title scheme' has a corresponding meaning to 'development scheme' so these terms are used interchangeably.[3] The term 'development scheme' is primarily used in the provisions of legislation dealing with development schemes, sectional plans and sectional title registers.[4]

The technical aspects of sectional title development, from a developer's point of view, are beyond the scope of this Unit Owner Reference Guide. However, we will briefly discuss the sectional title plan, as this plan makes the definitions and descriptions of 'section', 'common property', 'exclusive use area' and 'unit' easier to understand. Understanding these concepts is vital in determining who is responsible for the maintenance and repairs within a sectional title environment, for example, gardens, patio areas and geysers.

Section

A section means a section shown on a **sectional plan**.[5] It is one of the parts of the scheme that is exclusively owned by a natural person (like you or me) or a legal person (like a company or trust). Prior to the enactment of the STSMA, there was no differentiation between the types of sections one encountered in a sectional title scheme. The STSMA now defines and differentiates between a **primary section** and a **utility section**.

A primary section is a section designed to be used for human occupation as a residence, office, shop, factory or for any other type of use allowed in terms of local municipal by-laws, not being a utility section.[6]

A utility section, on the other hand, is a section which, in terms of local municipal by-laws, is designed to be used as an accessory to a primary section, such as a bathroom, toilet, storeroom, workshop, shed, parking garage, parking bay or other utility area, not being a primary section.[7]

A primary and utility section's floor area is used in the calculation of your **participation quota (PQ)**, which will be dealt with later in this chapter.

Since the definition of a 'section' is related to a 'sectional plan', it is also important to understand the nature of a sectional plan.

Sectional plan

The main purpose of understanding the sectional plan is to identify the boundaries of land and buildings between a section, an exclusive use area and common property, as shown in Figure 1.

The sectional plan must be approved by the Surveyor-General and:[8]

- Must be described as a sectional plan on the document itself;
- Must show the building(s) and the land comprised in the scheme as divided into two or more sections and common property;
- Must comply with the requirements for the manner of preparing draft sectional plans in terms of Section 5 of the STA; and
- Includes a sectional plan of subdivision, consolidation or extension as provided in the STA.

Common property (CP)

The **common property** includes all the land and parts of the buildings that are not part of a section.[9] Parts of the buildings that are common property include all the foundations, roofing and the 'outer skin' of the buildings, as shown in Figure 2. Other examples of common property could be staircases, driveways, roads, an entrance gate, a guard house, a clubhouse and enclosed refuse areas. The common property is jointly owned by all unit owners in undivided shares, proportionate to the PQs of their respective sections, as specified on the relevant sectional plan.[10]

In Figure 2, the red dotted line is known as the **median line**. This is an imaginary line that passes through the middle of something. Understanding the median line is useful to better understand ownership areas and who is responsible for the maintenance and repairs of certain areas.

The common property must be controlled, administered and managed by the body corporate for the benefit of all unit owners.[11] An exclusive use area (EUA) remains common property, but the unit owner is responsible to keep it clean and neat.

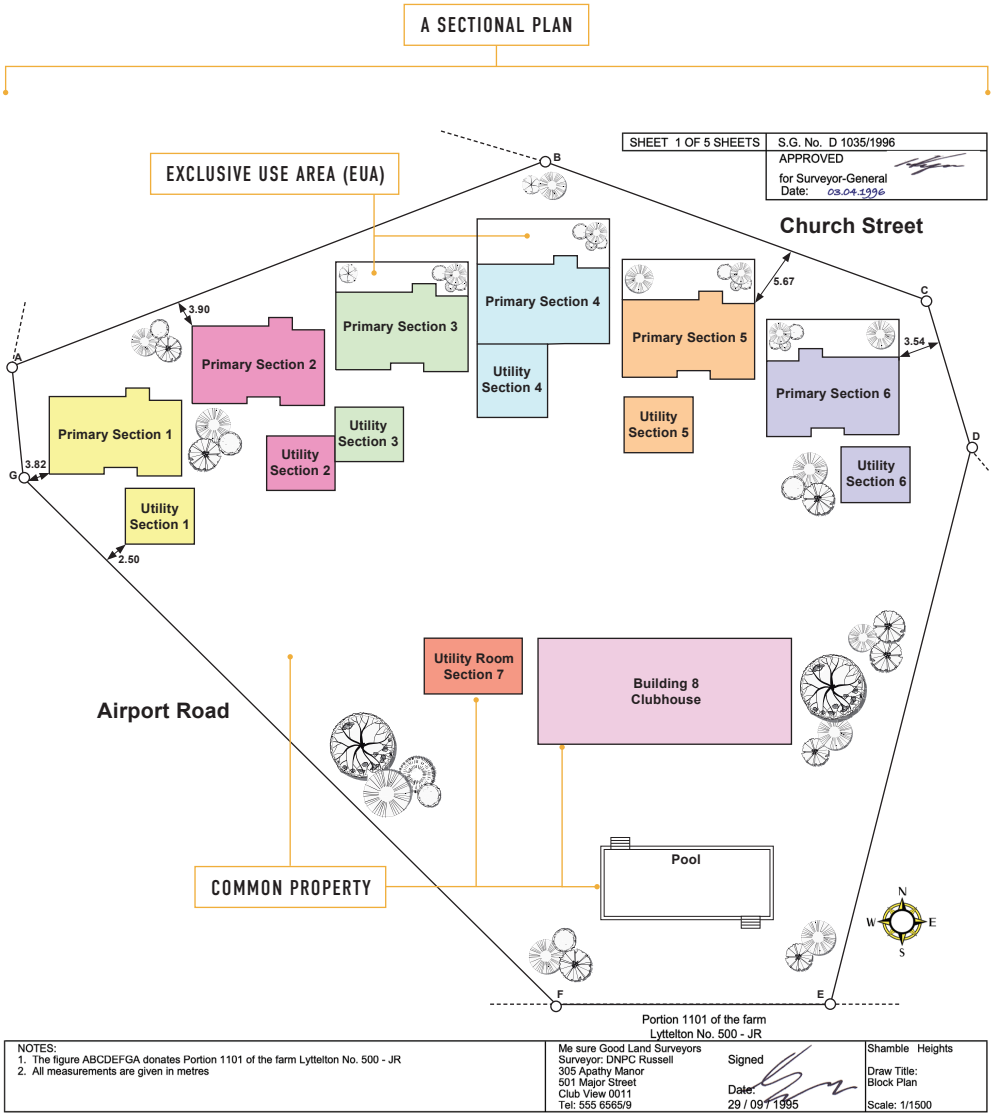


Figure 1 A sectional plan

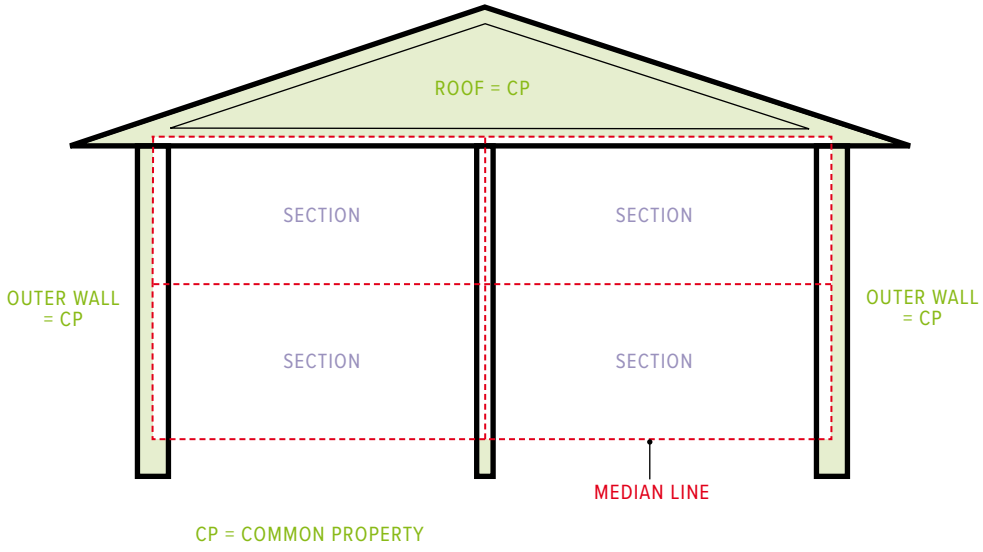


Figure 2 The median line dividing sections

Exclusive use area (EUA)

Exclusive use areas (EUAs) are special areas of common property that are reserved for use by unit owners of one or more sections.[12] They are controlled and managed by the unit owners for which they are reserved. Examples may be parking bays, gardens, storerooms or patios.

Some EUAs only benefit one unit owner, for example a lift that only services the penthouse.

Exclusive use rights are either Real Rights that are registered at the Deeds Office, or Personal Rights that are conferred by the developer or the body corporate in terms of management or conduct rules.[13] One of the body corporate's functions is to levy additional contributions on unit owners who have exclusive use rights on any part of the common property to defray the associated costs of maintaining that EUA,[14] unless, in terms of the rules, the unit owners concerned are responsible for the maintenance of the EUA.

Participation quota (PQ)

The PQ is the formula that calculates:

- The size of the unit owner's undivided share in the common property;[15]
- The value of the vote of the unit owner(s) of a section;[16]
- The **levies** (or contributions) due by the unit owner of a section;[17] and
- The proportion of the body corporate's unpaid debts for which the unit owner may be held liable.[18]

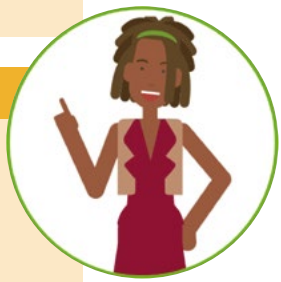
The PQ may be adjusted by the developer when opening a sectional title register or through a special resolution by members of the body corporate, if at least 30% of the units in the sectional title scheme are owned by owners other than the developer.[19] However, if a unit owner is adversely affected, their written consent is required.[20] EUAs are never included in the PQs of a section.

A schedule that lists the PQ for each section can be found in the sectional plan. This schedule is considered correct unless proved otherwise.[21]

How to calculate PQ

To calculate the PQ for a given section in a scheme for residential purposes, the individual section's floor area is divided by the total floor area of the sections in the buildings comprised in the scheme.[22] The result of this calculation is then multiplied by 100 to obtain a percentage, rounded to four decimal places.

$$PQ = \frac{\text{Floor area of a section in m}^2}{\text{Total floor area of all sections in m}^2} \times 100$$



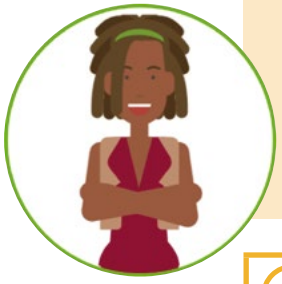
EXAMPLE

1. Calculate the PQ for a unit of 98 m² in a scheme that is 1 200 m² in total.

$$PQ = \frac{98}{1\,200} \times 100$$
$$= 8.1667\%$$

EXAMPLE (continued)

2. If the annual budget for maintenance and other expenses is R200 000, calculate the unit owner's **monthly** levies.



$$= (\text{Annual budgeted levy} \times \frac{\text{unit PQ \%}}{100}) \div 12$$

$$= (\frac{\text{R200 000} \times 8.1667}{100}) \div 12$$

$$= \text{R1 361.12}$$

Remember that EUAs are not included when calculating a unit owner's PQ. The body corporate must charge extra levies to unit owners who have exclusive use rights on any part of the common property,[23] unless, in terms of the rules, the unit owners concerned are responsible for the maintenance of the EUA.

Levies[24]

A **normal levy**/contribution is determined in relation to the administrative fund and reserve fund and is based on the budget presented at the **annual general meeting (AGM)**. In other words, it is calculated from the approval of the estimate of income and expenditure at a body corporate AGM. Once the levies have been established and a trustees' resolution is passed to this effect, unit owners become legally liable for payment of the levies, which may be recovered by the body corporate from the unit owners.

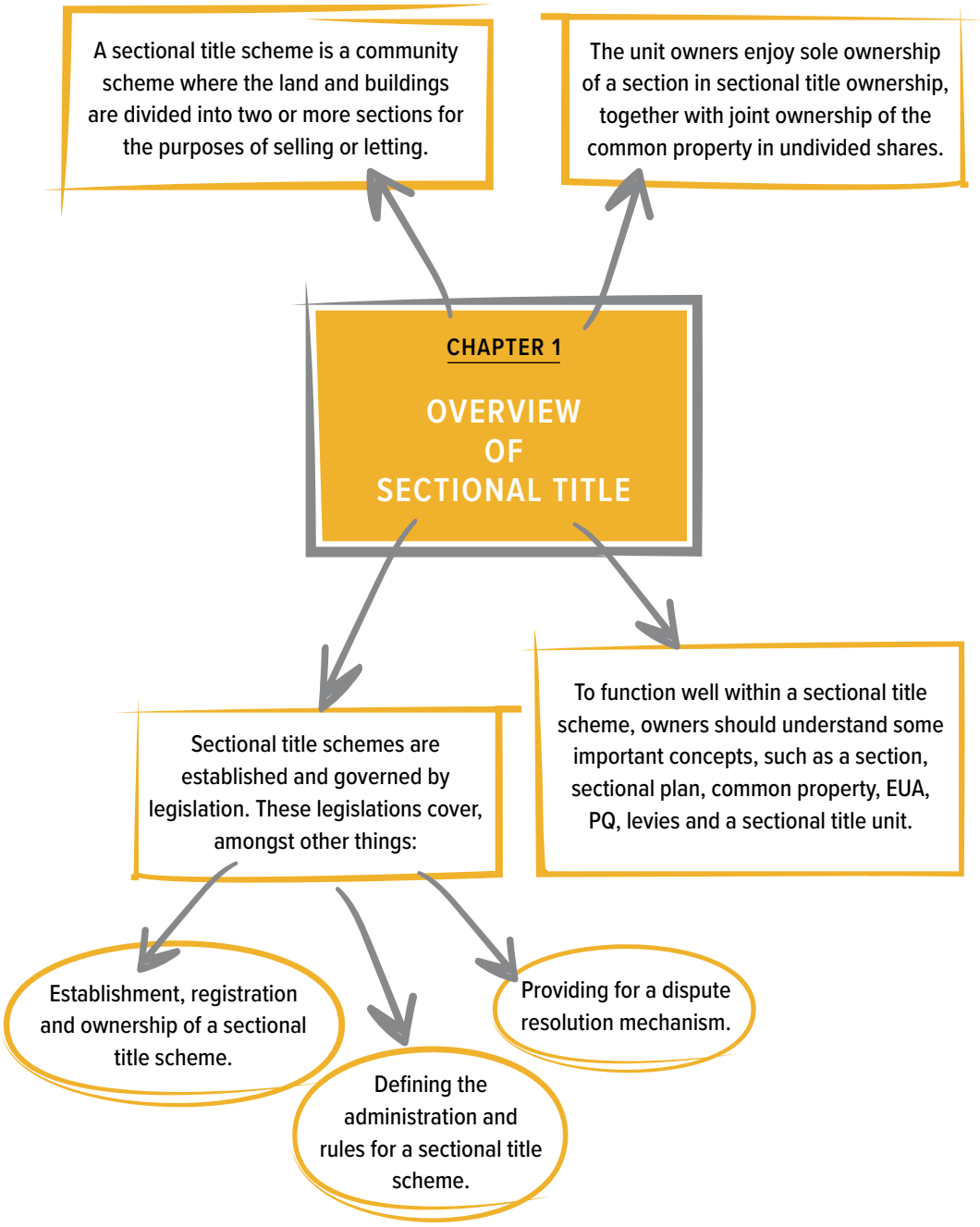
A **special levy** is a contribution other than the normal levies (expenses estimated for annual operating costs and those listed in the ten-year maintenance plan). For the trustees to raise a special levy, the required expenditure must be unforeseen, urgent and necessary.

Unit

A unit is not just a section; it is a section together with its undivided share in the common property apportioned to that section in accordance with the PQ of that section[25], as shown in the following equation.

Unit = Section + Undivided share in the common property

1.3 Summary


A sectional title scheme is a community scheme where the land and buildings are divided into two or more sections for the purposes of selling or letting.
The unit owners enjoy sole ownership of a section in sectional title ownership, together with joint ownership of the common property in undivided shares.
CHAPTER 1
OVERVIEW OF SECTIONAL TITLE
Sectional title schemes are established and governed by legislation. These legislations cover, amongst other things:
To function well within a sectional title scheme, owners should understand some important concepts, such as a section, sectional plan, common property, EUA, PQ, levies and a sectional title unit.
Establishment, registration and ownership of a sectional title scheme.
Defining the administration and rules for a sectional title scheme.
Providing for a dispute resolution mechanism.

2 The Body Corporate

Every **sectional title scheme** has a sectional title owners' association, which is called a body corporate. A body corporate is established to control, administer and manage the land and buildings, particularly the **common property** in the scheme.[26] The body corporate is responsible for enforcing the rules of the scheme.[27] A body corporate is established for a scheme as soon as any person other than the developer becomes an owner of a unit in the scheme.[28] The developer and the new **unit owner** and any subsequent unit owners are members of the body corporate.

As soon as you become a unit owner, you automatically become a member of the body corporate.[29] If you sell your unit, you are no longer a member of the body corporate once the sale has been registered in the new unit owner's name after transfer at the Deeds Office.[30]

Each body corporate must have a name and a **sectional scheme (SS) number** assigned to it.[31] In the example in Annexure A, the SS No. is 112/1996. This number means that Shamble Heights was the 112th sectional title scheme established in the year 1996 in that deeds registry. The full name of the body corporate is 'The Body Corporate of Shamble Heights SS 112/1996'.

The **trustees** of the body corporate perform and exercise the functions and powers of the body corporate, namely, to govern the land, buildings and common property of the scheme.[32] The trustees perform their duties in accordance with the STSMA and STSMA Regulations as well as any directions or restrictions imposed by the unit owners at a **general meeting**.[33] Trustees and the functions they perform are discussed in more detail in Chapter 3.

Directions and restrictions imposed on trustees by the unit owners in general meetings empower the unit owners and should not be taken lightly. The trustees should not be seen as 'the boss', but rather as respected representatives of the scheme, working for the best interests of all its members given their fiduciary duties to the members. These directions and restrictions should be recorded in the minutes of the general meeting for record purposes.

2.1 Bodies Corporate are Legal Entities

A **legal entity** is also known as a legal person. It is an organisation that can do the same things in law that a human person can do, such as enter into contracts, sue or be sued.

A body corporate is a distinct legal entity capable of suing and of being sued in its name in respect of:[34]

a. Any contract entered into by the body corporate, such as a contract for security services to be supplied to the body corporate, or a contract for the painting of the common property;
b. Any damage to the common property, such as that caused by a unit owner driving under the influence of alcohol and crashing into the clubhouse;

c. Any matter in connection with the land or buildings for which the body corporate is liable or for which the unit owners are jointly liable, for example, a burst sewerage pipe on the municipal road that causes sewage runoff into the common property;
d. Any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under the STSMA; and
e. Any claim against the developer in respect of the scheme, if so determined by **special resolution**.

2.2 Functions

The body corporate has numerous functions, including but not limited to those summarised in Table 1.[35]

Table 1 Functions of the body corporate

Functions of the body corporate include:
Establishing and maintaining an **administrative fund** to cover the estimated annual operating costs of the common property, such as: • repairs; • maintenance; • management and administration; • reasonable provision for future maintenance; • payment of rates and taxes and other municipal service charges to the buildings or land; • payment of any insurance premiums relating to the buildings or land; and • other such payments in respect of the discharge of any duty or fulfilment of an obligation of the body corporate.
The establishment and maintenance of a **reserve fund** of sufficient amounts to cover the cost of future maintenance and repair of the common property in such amounts as are prescribed by the Minister in Regulation 2 of the STSMA Regulations.
Determining each unit owner's levies in proportion to the PQs[36] of their respective **sections**, and collecting these contributions for payment to the administrative and reserve funds.

Functions of the body corporate include (continued):
Insuring the buildings for their replacement value against risks, such as fire, and paying the insurance premiums.[37] Also insuring against other risks as deemed necessary by the unit owners through a special resolution.[38]
Opening and operating an account with a registered bank or any other financial institution.
Maintaining all the common property and keeping it in a state of good and serviceable repair.
Maintaining any plant, machinery, fixtures and fittings used in connection with the common property and sections.
Notifying the Chief Ombud (CSOS), the local municipality and the Registrar of Deeds of its *domicilium citandi et executandi* (the address where legal **notices** may be sent; this is usually the address of the **chairperson** or the **managing agent**, or the physical address of the body corporate).
Complying with: • Any notice or order by any competent authority requiring any repairs or work on the land or buildings; • Any reasonable request for the names and addresses of the persons who are the trustees and/or members of the body corporate; and • Any law relating to the common property or to any improvement of land in the common property.

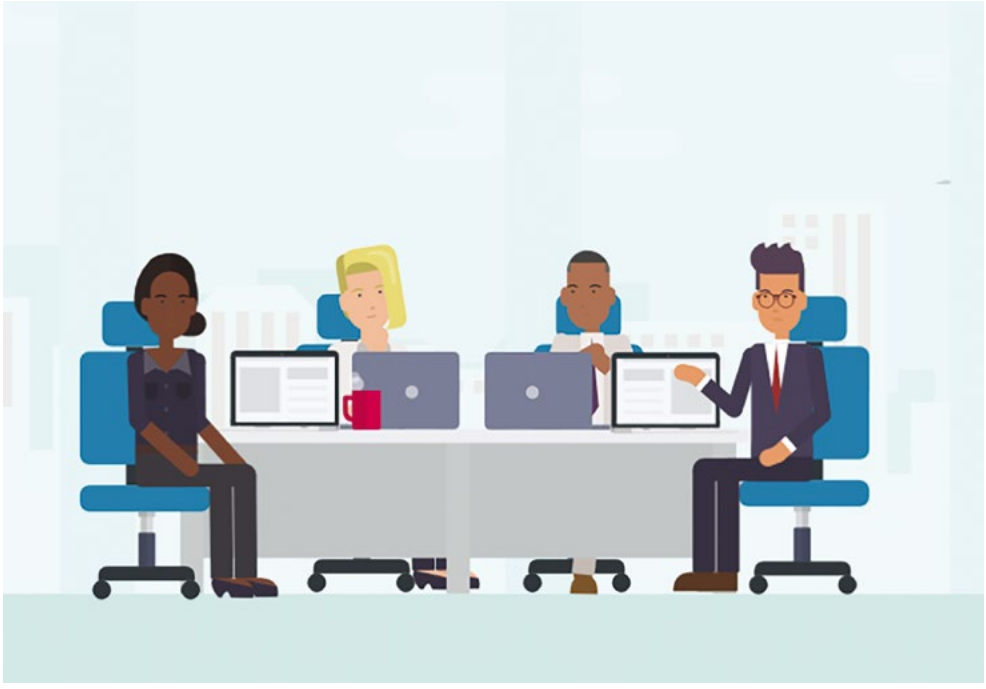
The unit owners' monthly contributions to the administrative fund are calculated using the current annual budget, which is tabled at the body corporate's AGM. The unit owners' contributions to the reserve fund are more complex to calculate. Annexure B, published with permission from MG Taute Registered Auditors, explains how the reserve fund is calculated.[39] The Trustee Reference Guide in the TRACS Sectional Title Scheme Reference Guides explains these calculations in more depth. The calculation of the minimum amounts for the reserve fund can be found in the STSMA Regulations.[40]

As part of its duty to maintain the common property, the body corporate must prepare a written ten-year plan for future maintenance,

repair and replacement for the common property. The reserve fund caters for these costs.

The ten-year plan must set out:[41]

a. The major capital items expected to require attention within the next ten years;
b. The present condition or state of repair of those items;
c. The time when those items or components of those items will need to be maintained, repaired or replaced;
d. The estimated cost of maintenance, repair and replacement of those items or components;
e. The expected life of those items or components once maintained, repaired or replaced; and
f. Any other information the body corporate considers relevant.



2.3 Powers

The body corporate has several powers which, if used effectively, will ensure that it can fulfil its legislative functions. These powers are summarised in Table 2.

Table 2 Some of the powers of the body corporate

The powers of the body corporate include, but are not limited to, the ability to:[42]
Appoint agents and employees, such as caretakers, security guards, and the all-important managing agent.[43]
Purchase, sell, mortgage, take and give transfer of, or let units (on the authority of a special resolution).
Purchase or hire movable property for the enjoyment or protection of the common property, such as new lawnmowers or bicycles for security personnel.
Establish and maintain lawns, gardens and any other recreational facilities on the common property.
On authority of a special resolution, borrow money for the performance of its functions in the event of: • unit owners not paying their levies and falling into arrears; • shortfalls in budgeted annual operating costs; • urgent repair work not budgeted for; and • the legal fees involved in the collection of arrear levies from non-paying unit owners.[44]
Secure the repayment of moneys borrowed by **notarial bond** over unpaid contributions, or by mortgaging any property vested in it.[45]
Invest any moneys of the administration fund.
Enter into an agreement with a unit owner or occupier for the provision of any amenity or service by the body corporate, such as a unit owner wishing to lease the clubhouse for a small café for residents.[46] This kind of leasing of common property requires a special resolution of the body corporate.
Do all things necessary for the enforcement of the rules, such as the management rules and conduct rules that are discussed in more detail in Chapter 4.
Do all things necessary for the management and administration of the common property.

Body corporate organogram

Unit owners

Unit owners elect the trustees.

Trustees and chairperson

A chairperson is a trustee who has been elected as a chairperson by majority vote of the trustees in order to preside over meetings of the body corporate and to preside at trustee meetings.

Managing agent and body corporate staff

Managing agents and body corporate staff are contracted by the trustees of a body corporate to perform specified financial, secretarial, administrative or other management services under the supervision of the trustees.

Service providers

Service providers are selected and contracted by the trustees.

This is a basic summary of an organogram of sectional title schemes. However, it is important to understand that sectional title schemes are unique and may be structured differently. The most important point to understand is that all owners, including co-owners, within a sectional title scheme automatically become members of the body corporate upon transfer of the unit into their names. A body corporate is established to control, administer and manage the land and buildings, particularly the common property, within the sectional title scheme.

2.4 Body Corporate Meetings

While the body corporate has functions that have been set out for it in the STSMA and has powers given to it to carry out those functions, the body corporate also gets directions from members at owner meetings.

There are four types of meetings in a sectional title scheme:

- The first general meeting;
- Annual general meeting (AGM);
- **Special general meeting** (SGM), which is any general meeting other than the AGM; and
- Trustees' meeting.

As members of the body corporate, unit owners must meet to discuss issues that affect the sectional title scheme, make decisions and interact with the trustees. All meetings that involve the unit owners are referred to as **general meetings**, of which there are two types: AGM and SGM.

Annual general meetings[47]

The AGM must be held within four months of the end of each financial year. This is a vital meeting, where the members of the body corporate must consider, but are not limited to, the most recent audited financial statements, the insurance of the body corporate, the election and appointment of **trustees**, and the budget for the upcoming financial year, among other items of business to be dealt with on the agenda.

Special general meetings

All general meetings that are not AGMs are called SGMs.[48] Trustees may call an SGM when they deem it necessary to do so.[49] They must call an SGM when instructed in writing by unit owners holding at least 25% of the **PQs in value** or a bondholder of at least 25% of the primary sections **in number**.[50]

In preparation for any general meeting, the trustees or managing agent should have prepared voting cards to facilitate votes taken in value.[51]

The **PQ** of a section determines the value of the vote of the unit owner of the section.[52]

EXAMPLE

Example of 'in value'

'In value' refers to the value of the PQ shares of members, not the one-member-one-vote principle. To pass a resolution by 75% in value, you need to add up the votes of those present and/or validly represented, and in favour in terms of their PQs. When you have at least 75% of the PQs voting in favour, the resolution is passed.

Example of 'in number'

To achieve 75% 'in number' means that you need 75% of the total number of members to vote in favour of the resolution. Each member present and/or validly represented is entitled to one vote, regardless of their PQ. If there are ten members, you need seven-and-a-half (so, eight) members to vote in favour of the resolution. You always round up because there is no such thing as part of a person.

Types of resolutions

Decisions at owners' meetings are confirmed by way of **resolutions** by the unit owners of the body corporate. Once these resolutions are confirmed, they will be implemented by the trustees.

There are three types of resolutions, namely ordinary resolutions, special resolutions and unanimous resolutions.

An **ordinary resolution** is a resolution taken by at least 51% of the value of votes of the members present or represented by **proxy** at a meeting.[53]

A **special resolution** is a resolution passed by at least 75% of the votes (calculated in value and in number) of members of the body corporate who are present at a meeting or represented by proxy. A special resolution may also be agreed to in writing by at least 75% of all such members of the sectional title scheme.[54]

A special resolution is required for the body corporate to borrow money.

A **unanimous resolution** is a resolution passed by all members of the body corporate at a meeting at which at least 80% calculated in both value and number, of the votes of all the members of the body corporate, are present or represented, and all the members who cast their votes do so in favour of the resolution; or it is a resolution agreed to in writing by all the members of the body corporate. For example, such a resolution is required to substitute, add to, amend or repeal management rules of the body corporate.[55]

There has been a significant amount of debate about the effect on the voting when a member abstains from voting. There currently appears to be two schools of thought. Both schools agree that an abstention is not a vote in favour of or against the resolution being voted on. The first school of thought is that the abstention vote must be included in the total number of votes. The second school considers the abstention to be the same as if the member was not present and as such his vote is not included in the number of votes. Time will tell which school is correct.

If 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.[56]

Table 3 compares the types of resolutions and the requirements to pass each type of resolution.

Table 3 Summary of how each type of resolution is taken

	Ordinary Resolutions	Special Resolutions	Unanimous Resolutions
In writing		75% in number and value of all members	100% in number and value of all members
At a general meeting	More than 50% in value of members present, and/or validly represented by proxy	75% in number and value of members present, and/or validly represented by proxy	100% in number and value of at least 80% of all members; see note regarding members' abstention from voting under 'unanimous resolution' above

Table 4 gives examples of when an ordinary resolution is required.

Table 4 Scenarios in which an ordinary resolution is required

An ordinary resolution is appropriate when deciding to:
Install and maintain separate post-paid meters to measure the supply of electricity, water, gas or the supply of any other service to each member's sections and EUAs and to the common property;[57]
Remunerate a trustee who is not a member;[58]
Appoint a managing agent;[59]
Remove a trustee from office;[60] and
Cancel the management agreement in accordance with its terms or refuse to renew the management agreement when it expires.[61]

Table 5 gives examples of when a special resolution is required.

Table 5 Scenarios when a special resolution is required

A special resolution is required to:
Lease common property for less than 10 years;[62]
Install pre-paid water and electricity meters;[63]
Borrow money;[64]
Create servitudes;[65]
Cancel the management agreement on two months' notice;[66]
Grant trustees who are members the right to remuneration, whether monetary or otherwise, for their services;[67]
Change the location of a general meeting to one that is not in the local municipal area where the scheme is situated;[68]
Insure any additional insurable interest the body corporate has in the land and buildings and relating to the performance of its functions for an amount determined in that resolution;[69]

A special resolution is required to (continued):
Appoint an executive managing agent (EMA);[70]
Approve the extension of boundaries or floor area of a section;[71]
Add to, amend, or repeal conduct rules;[72]
Change the value of the votes of the owner of any section, or the liability of the owner of any section to make contributions,[73] subject to any adversely affected unit owner's written consent[74] and subject to there being owners, other than the developer, of at least 30% of the units in the scheme;[75]
Sue the developer of the scheme for any claim in respect of the scheme;[76] and
Purchase, take transfer of, mortgage, sell, give transfer of or hire or let units.[77]

Table 6 gives examples of when a unanimous resolution is required.

Table 6 Scenarios when a unanimous resolution is required

A unanimous resolution is required:
To sell any part of the common property;[78]
To effect improvements to the common property that are not reasonably necessary;[79]
To let the common property under a lease for more than 10 years;[80]
To create a registered exclusive use right;[81]
To extend the period within which the developer may erect or complete a building, or an extension of an existing building;[82]
To add to, amend, or repeal management rules;[83]
For the deemed destruction of the scheme subject to all holders of registered sectional mortgage bonds and the persons with registered real rights concerned, agreeing thereto in writing;[84]
To rebuild or reinstate any building, or not to rebuild or reinstate any building, which was damaged or destroyed;[85] and
To make loans from body corporate funds.[86]

Table 7 gives examples of when a member's or members' written consent is required.

Table 7 Scenarios in which a member's or members' written consent is required

Written consent is required:
From any member where the unanimous resolution would have an unfairly adverse effect on that member, unless that member consents in writing within seven days from the date of the unanimous resolution;[87]
From an owner where the owner is adversely affected by a decision taken by special resolution to make new rules by which a different value is attached to the vote of the owner of any section or the liability of any section to make contributions;[88]
From all members to sell a right of extension of the scheme to a third party subject to the written consent of the mortgagee of each unit in the scheme;[89] and
From all members waiving their right to an SGM, if the body corporate wishes to take a resolution without holding an SGM.[90]

Voting at a general meeting

All votes are calculated in value, except in the case of a special or unanimous resolution, where the number of votes must be considered as well. Votes are calculated in value either as the total of the PQs allocated to the sections registered in that member's name, or in accordance with a different method stipulated in a rule that is made in accordance with the STSMA, whichever is applicable.[91] In contrast, when votes are calculated in number, each member has one vote.[92]

When two or more persons are entitled to exercise one vote jointly, as in the case of co-ownership of a section in the scheme, only one person may vote. They must jointly appoint a proxy.[93]

All special and unanimous resolutions must be adopted according to their definitions, as given in *Table 3: Summary of how each type of resolution is taken*.[94] All other resolutions must be adopted by the majority of the votes calculated in value of all members present and voting.[95]

A member is not entitled to vote if:

a. They fail to pay the body corporate an amount due by that member after a court or adjudicator has given judgement or order for payment.[96]
b. They persist in breaching conduct rules despite a court order or adjudicator's order.[97]

The restraint on voting only applies to ordinary resolutions and not to special and unanimous resolutions.[98]

The outcome of each vote, including the number and value of votes for and against the resolution, must be recorded in the minutes of the meeting and announced by the chairperson.[99]

Notices of body corporate meetings

Notice of body corporate meetings must be given. The notice of a general meeting must be accompanied by an **agenda** and copies of any documents that are to be considered or approved by the members, and also a **proxy** appointment form in the prescribed format.[100] The notices must be sent by prepaid registered post or, if agreed, by electronic means.[101]

The standard notice period for a general meeting is at least 14 days.[102] When a **special** or **unanimous resolution** will be taken, at least 30 days' notice of the meeting must be given to all the members of the body corporate, and the notice must specify the proposed resolution.[103] Shorter notice is provided for in the PMRs, subject to certain circumstances.[104]

Table 8 gives the notice periods for a general meeting, a special resolution and a unanimous resolution.

Table 8 Summary of required notice periods based on the resolution to be taken

	A general meeting	Special resolution	Unanimous resolution
Ordinary notice period	14 days	30 days	
Notice period for urgent matters provided that the trustees resolve as such	7 days	7 days as contained in the PMRs except for meetings held under PMR 29(2) and 29(4) OR less than 14 days' notice, if this is agreed to in writing by all unit owners entitled to attend.[105]	

The notices must be hand-delivered or sent by pre-paid registered post to the members of the sectional title scheme.[106] They may also be sent by registered post to an address of the member's choosing, provided in writing by the member.[107] If the member does not inform the body corporate of a change of address, notices can be sent to the member's section in the scheme, being the physical address of the primary section registered in that person's name.[108]

In addition to the notice being sent as described above, the body corporate may also send the notice to the member by fax or email.[109] Unless the unit owner has chosen, by notifying the body corporate in writing, to do away with their right to receive the notice via pre-paid registered post or hand-delivery, and chooses only to receive the notices via email or fax, the notices must still be sent via pre-paid post or hand-delivered, even when email or fax is used. Not every person in South Africa has an email address, and few South Africans use a fax machine.

Quorum requirements

A **quorum** is the minimum number of eligible persons who must be present at a meeting to start the meeting and make the proceedings at the meeting valid. Without a quorum, no meeting can take place.

When dealing with ordinary and special resolutions tabled/proposed at a general meeting, the quorum requirements are as follows:

a. For a scheme with fewer than four **primary sections** or a body corporate with fewer than four members, a quorum is established by members entitled to vote and holding two-thirds (66.7%) of the total votes of members in value.[110]
b. For any other scheme, a quorum is constituted by members entitled to vote and holding one-third (33.3%) of the total votes of members in value.[111]
c. If a quorum is not met within 30 minutes of the appointed time, the meeting will be adjourned to the same day in the next week, at the same place and time. If, on the day to which the meeting is adjourned, a quorum is not present within 30 minutes from the time appointed for that adjourned meeting, the members entitled to vote and present in person or by proxy at that adjourned meeting constitute a quorum.[112]

When adopting a unanimous resolution, the minimum quorum requirement is 80% of the total number of members and 80% of the value of all their votes.[113]

Table 9 summarises the number of members who constitute a quorum for each type of proposed resolution.

Table 9 The quorum required for each type of proposed resolution

	Ordinary and special resolutions		Unanimous resolutions
Number of primary sections/members	Fewer than 4	More than 4	Any number
Quorum required	66.7% in value of total member PQ	33.3% in value of total member PQ	80% in both value and number

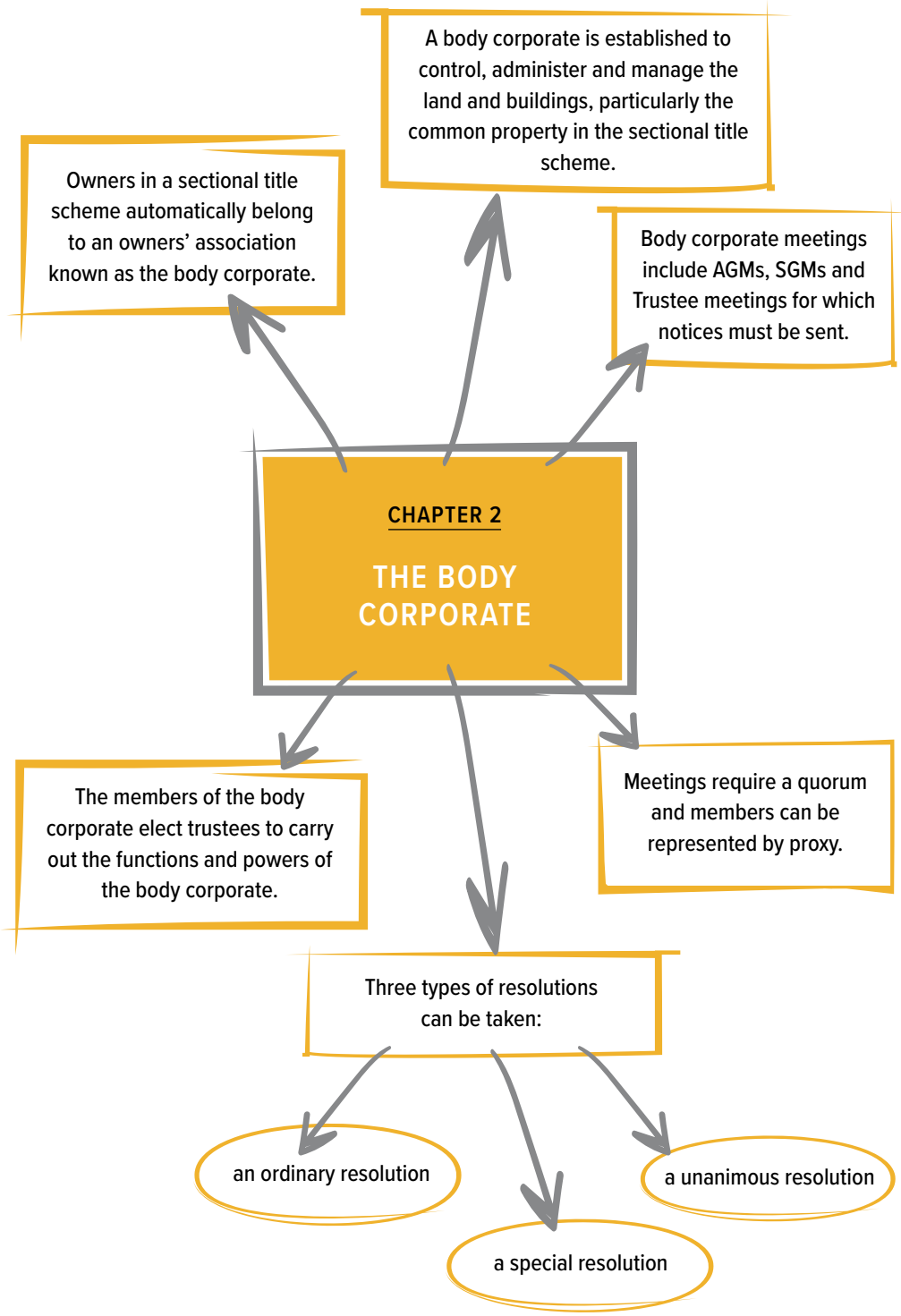
Proxy votes

A member may be represented in person or by proxy. A proxy is the authority given by one person to another to represent that person at a meeting. The proxy may cast votes on behalf of the person giving the proxy. **A person may not act as proxy for more than two members at the same time.**[114]

The proxy does not have to be a member of the body corporate; however, the managing agent or an employee of the managing agent or the body corporate may not be a proxy for a member.[115] A trustee is not an employee of the body corporate, so another member can give their proxy to a trustee. However, in the case of the trustee being paid a salary by the body corporate, they then become an employee of the body corporate and therefore cannot be a proxy.

If a member appoints a proxy, then the proxy must accept the mandate on the prescribed form, unless we are dealing with the appointment in a mortgage bond, which will accompany the notice of the general meeting, along with the agenda and copies of any documents that are to be considered or approved by the members.[116] The proxies must be delivered either to the body corporate 48 hours before the meeting or handed to the chairperson before or at the start of the meeting.[117] The proxies must also be confirmed as part of the order of business at the meeting itself.[118]

2.5 Summary


A body corporate is established to control, administer and manage the land and buildings, particularly the common property in the sectional title scheme.
Owners in a sectional title scheme automatically belong to an owners' association known as the body corporate.
Body corporate meetings include AGMs, SGMs and Trustee meetings for which notices must be sent.
CHAPTER 2
THE BODY CORPORATE
The members of the body corporate elect trustees to carry out the functions and powers of the body corporate.
Meetings require a quorum and members can be represented by proxy.
Three types of resolutions can be taken:
an ordinary resolution
a special resolution
a unanimous resolution

3 Important Role-players

Having looked broadly at the **body corporate**, let us now examine each role-player more closely:

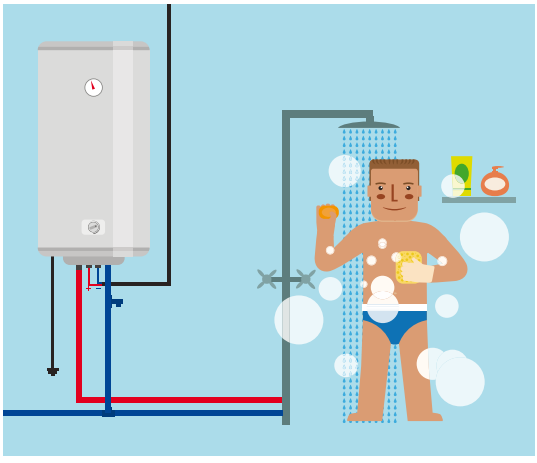
- Unit owners;
- Trustees;
- The chairperson;
- The managing agent;
- The executive managing agent; and
- The administrator.

3.1 The Unit Owner

By fulfilling their duties, **unit owners** can improve their quality of life and maintain property value in the sectional title scheme. The duties of unit owners are listed in Table 10.

Table 10 Duties of unit owners

Unit owners have the following duties:[119]
To allow access to their **section** to any person authorised in writing by the body corporate in order to inspect, maintain, repair or renew pipes, wires, cables and ducts that may be used or enjoyed in connection with another section or the **common property**. Such access will be given during reasonable hours and on notice, unless in cases of emergency when no notice is required.
To carry out all work that may be ordered by any competent authority in respect of their section, and pay all related charges, expenses and assessments that may be payable in respect of their section.
To repair and maintain their section in a state of good repair. Ensure that if they have an EUA, to keep it clean and neat.
To use and enjoy the common property without interfering unreasonably with the use and enjoyment of other unit owners or other persons lawfully on the premises.
To refrain from causing a disturbance or being a nuisance when using their section or EUA.
To notify the body corporate of any change of ownership or occupancy in their section and of any mortgage registered over the property.
To use their section or EUA only for the purpose for which it was intended.
Take all reasonable steps to ensure compliance with the conduct rules in force in terms of Section 10(2)(b) of the STSMA and ensure compliance by any tenant or other occupant of any section or EUA, including the member's employees, guests, visitors and family members.[120]



Even though a water-heating installation, such as a geyser, may form part of the common property and is insured by the body corporate, a member must maintain, repair and replace the installation that serves the member's section, and cover the costs.[121]

3.2 The Trustees

Generally, trustees are the elected managers of the body corporate. Furthermore, trustees are now referred to as 'scheme executives' and need to take reasonable steps to inform and educate themselves about the community scheme, its affairs, activities, and the legislation and governance documentation in terms of which the community scheme operates.[122]

It must be noted that all members are trustees until the first **general meeting** is held to elect trustees after the establishment of the development scheme.[123] Furthermore, if a body corporate consists of less than four members who are owners of primary sections, each member or their representative recognised by law is a trustee without the need for election to office.[124]

The requirements for a trustee to hold office are that they:[125]

- Need not be a member of the body corporate or the legally recognised representative of a member;
- May not be the managing agent or an employee of the managing agent, or body corporate (unless that person is a member themselves); and
- May not be present if they have a direct/indirect personal interest in any matter to be discussed by the board of trustees.

A trustee ceases to hold office if they:[126]

- Resign by written notice to the body corporate;
- Are declared to be of unsound mind by a court of law;
- Are or become insolvent and the trustee's estate is sequestrated;
- Are convicted of any offence involving dishonesty, such as theft, fraud, forgery or perjury, either in South Africa or abroad;
- Are sentenced to prison without the option of a fine;
- Are removed from an office of trust because of misconduct in respect of fraud or the misappropriation of money;
- Are removed from office by **ordinary resolution** of a general meeting provided that the intention to vote on the proposed removal was specified in the notice convening the meeting;
- Are or become disqualified to hold office as a director of a company in terms of the Companies Act;[127] and

- Fail or refuse to pay the body corporate any amount due after a court or an adjudicator gave judgement or ordered the trustee to make payment.

Nomination and election of trustees

Trustees are nominated in writing by unit owners.[128] The nominated person must consent in writing, with their consent attached to the written nomination.[129] The nomination must be delivered to the body corporate 48 hours before the AGM.[130] If there are fewer valid nominations for trustees submitted prior to the meeting than the required number of trustees, then further nominations can be made at the meeting with the consent of the nominees.[131]

Trustees must be elected at the first general meeting, after which trustees must be elected at each subsequent AGM.[132]

Should one trustee cease to hold office, the remaining trustees or the members in a general meeting may appoint a replacement trustee.[133] This replacement trustee will hold office until the end of the next AGM and is eligible to be re-elected, if properly nominated.[134]

A trustee's term is from the end of one AGM to the end of the next AGM, after which they effectively cease to hold office but are entitled to seek to be renominated and elected for a new term.[135]

Powers and duties

Trustees' powers and functions are subject to legislation, and the management and conduct rules of the sectional title scheme. They are also subject to instructions and restrictions that unit owners propose and agree to in general meetings.[136] Trustees, therefore, also carry out the directives of the majority of the unit owners in the body corporate as determined in general meetings. Table 11 summarises the duties of trustees.

Table 11 Trustees' duties

Trustees' duties include:[137]
Attending meetings to carry out the body corporate's business;
Exercising the body corporate's powers and functions that are assigned and delegated to them in terms of legislation and **resolutions**, directives and restrictions taken at general meetings;
Applying the body corporate's funds in accordance with the budgets approved by the members in general meetings;
Appointing agents or employees in terms of a duly signed written agreement; and
Compiling minutes of each trustee and general meeting and distributing them to relevant parties.

A trustee stands in a **fiduciary** relationship to the body corporate,[138] which means that the trustee must act in good faith and honestly for the interest and benefit of the body corporate, and must not exceed their powers.[139] To this end, a trustee must also avoid conflicts of interest and not receive personal economic benefits, directly or indirectly, from the body corporate or from any other related person, and must notify every other trustee of the nature and extent of any direct or indirect material interest that they may benefit from in respect of contracts with the body corporate.[140]

Importantly, if the body corporate suffers a loss due to a breach of their fiduciary duty by a trustee, that trustee may be held personally liable for any loss suffered because of the breach, or could be made to pay the economic benefit received by the trustee in certain situations.[141]

Trustees' meetings

Meetings can be called at any time by a trustee but with not less than seven days' notice. A shorter notice may only be given in the case of an emergency.[142]

A trustee meeting is validly constituted when at least 50% of the total trustees **in number** are present; however, there must not be less than two trustees, to form a **quorum**.[143]

Each trustee holds one vote, and if the vote is tied, including that of the chairperson, the chairperson will cast the deciding vote, unless there are only two trustees.[144]

How trustees make decisions on behalf of the body corporate

The trustees must adopt decisions by proposing resolutions that are accepted by majority vote at their meetings. These resolutions may also be adopted via written **notice**, which will be subsequently signed by the trustees to indicate their agreement before the expiry of the closing date specified in the notice.[145]

Paying a trustee

A trustee who is an owner can only be compensated if this is determined by way of **special resolution** at a general meeting.[146] A non-owner trustee can be paid at a rate that is agreed to with the body corporate and which must form part of the scheme's **administrative fund**.[147] Any expenses or disbursements actually and reasonably incurred by any trustee in the exercise of their duties as such, must be reimbursed by the body corporate.[148]

3.3 The Chairperson

A chairperson is a trustee who has been elected as chairperson by a majority vote of the trustees in order to preside over trustee meetings and meetings of the body corporate.[149] From the establishment of the body corporate until the first general meeting, though, the developer or the developer's nominee is the chairperson of the trustees.[150] However,

if there are only two members in a body corporate the provisions relating to chairpersons do not apply.[151]

The chairperson of the trustees must preside at every general meeting of the body corporate unless otherwise resolved by the members at the meeting.[152] If the chairperson is not present within 15 minutes after the time appointed for the said meeting or is unwilling or unable to act, the members present must elect a chairperson for such meeting.[153]

Table 12 summarises the chairperson's functions.

Table 12 Functions of the chairperson

The chairperson is required to:[154]
Maintain order and guide the members through the business of the meeting as per the **agenda** and the law of meetings;
Ensure the motions and amendments proposed at the meeting are kept within the scope of the notice and powers of the established meeting;
Ensure that the scheme's rules, minute books and any other documents relevant to the business of the meeting are available at the meeting;
Act fairly, impartially and courteously;
Adjourn meetings when they are not able to be continued or completed;
Make decisions on points of procedure, such as: • Before the meeting starts, propose a cut-off time for the meeting to end subject to the members' approval; • Make sure that attendees stick to the topics and follow the agenda; • Ensure that everyone wishing to take part in discussions and decision-making is afforded equal opportunity and time to do so; • Allow everyone equal time to address a point;
Settle disputes by giving rulings on points of order; and
Surrender the chair to a temporary chairperson elected by the members for any period during which the chairperson wishes to engage in the debate of any item of business.

3.4 The Managing Agent

A managing agent is an individual or commercial concern that provides sectional title scheme management services under the supervision of the trustees.[155] The managing agent plays a vital role in assisting the body corporate and the trustees with the day-to-day business of managing the sectional title scheme. The managing agent's role can be broadly defined as assisting the body corporate with its financial, administrative and physical management.

When the body corporate enlists the services of a managing agent, both parties should ensure that the management agreement between the managing agent and the body corporate complies with the requirements set out in the STSMA Regulations.[156] For example, the agreement may not endure longer than three years.[157]

The managing agent can attend all meetings and provide advice, but may not act as a **proxy** or vote at any of the meetings unless they are members themselves.[158] The managing agent must also receive a copy of all notices calling for meetings.[159]

The managing agent's offices can also be nominated as the body corporate's service address, otherwise known as the *domicilium citandi et executandi*.[160]

Table 13 gives finer details of the managing agent's various functions.

Table 13 Functions of the managing agent

1. Assistance with meetings
Guide trustees to ensure that general meetings are held in accordance with the relevant sectional title legislation.
2. Assistance with financial management, including but not limited to:
Prepare debtors age analyses and levy rolls to track charges and payments of contributions, including special contributions, and record any arrears and interest thereon;
Manage the collection of overdue amounts due to the body corporate by liaising with legal service providers and provide all relevant documentary proof of valid charges and contributions being collected;
Manage the body corporate's administrative and **reserve funds** and prepare budgets for same;

2. Assistance with financial management, including but not limited to (continued):
Manage the investment of moneys into the reserve fund;
Manage the trust account on behalf of the body corporate;
Prepare or procure a written ten-year maintenance, repair and replacement plan;
Ensure that the trustees appoint insurers for the replacement value of the buildings and land;
Keep proper books of account and advise the trustees regarding those books; and
Procure audited financial statements with the assistance of an independent auditor appointed by the trustees and ensure that the auditor has all relevant documentation to carry out their task.
3. Assistance with physical management
Assist with improvements to common property, including the installation and maintenance of water, electricity and gas meters, by utilising the service providers appointed by the trustees to perform these services;
Advise and support trustees when there is a contravention of any law or by-law relating to the use of sections and common property;
Advise and administratively support trustees when common property alterations might impair the stability of the building or interfere with enjoyment;
Advise the trustees to forbid anything that will have a negative effect on the value of the building;
Support trustees administratively to ensure that sections and **EUAs** are used for their intended purpose; and
Support trustees to ensure that members comply with their obligation to maintain their section and/or EUA.
4. Assistance with administrative management
Lodge the body corporate registration and notification of amendments with the CSOS to ensure compliance;
Compile and keep a complete and up-to-date set of management and conduct rules;
Consolidate rules whenever amended; and
Keep the body corporate's records, including the minutes of all meetings, information of all trustees, members and tenants, the **sectional plan**, all general and trustees' meeting **resolutions**, and contracts involving the body corporate.

Managing agents with the necessary expertise have the time and knowledge to alleviate the burden of the sectional title scheme management by unpaid and busy trustees. In fact, if no unit owners are willing or able to take on the heavy burdens of trusteeship, the owners may, by special resolution, appoint an **executive managing agent**.

The executive managing agent

An executive managing agent is a special type of managing agent who is appointed to perform the powers and functions of a board of trustees.[161] This is a new role-player introduced in terms of the STSMA that became effective in October 2016. This executive managing agent effectively steps into the shoes of the trustees.

This also means that the executive managing agent takes on the fiduciary responsibilities that are assigned to trustees in the performance of their duties and could find themselves liable for any loss suffered by the body corporate should they fail to exercise such skill and care.[162]

Therefore, it is apparent that an executive managing agent's role goes beyond the traditional duties of a managing agent.

3.5 The Administrator

An **administrator** is a court-appointed, suitably qualified and independent person or commercial concern that takes over the role of the trustees.[163] An administrator essentially steps into the shoes of the trustees to manage and run the body corporate, **to the exclusion of the body corporate**. A body corporate needs to be well managed to avoid the need for administrators.

The court will appoint an administrator if there is evidence of serious financial or administrative mismanagement of a body corporate and if there is a reasonable probability that the body corporate will be able to meet its legislative obligations should it be placed under administration.[164]

The body corporate, the local municipality, a judgement creditor of the body corporate and a unit owner or person with a registered real right

over a unit can apply to a Magistrate's Court for the appointment of an administrator of the body corporate.[165]

The appointment must be for a fixed period on terms that the court deems fit.[166] Furthermore, the administrator will be entitled to payment of remuneration and expenses approved by the court in the appointment order.[167]

Powers and duties of an administrator

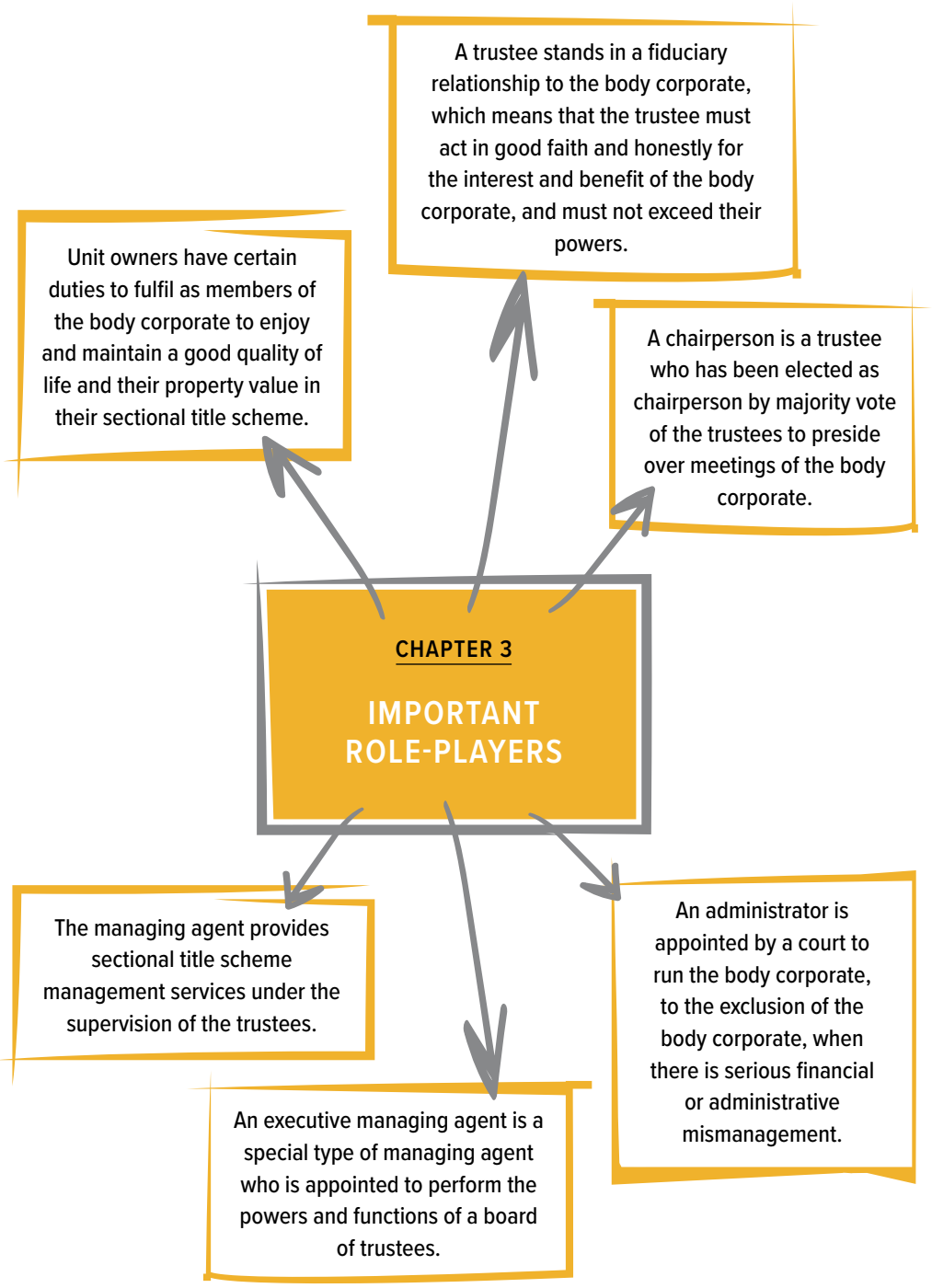
The powers and duties of the administrator are decided on a case-by-case basis by the court. These powers must be exercised as soon as reasonably possible to address the body corporate's management problems.[168]

The administrator must convene and preside at meetings required in terms of the STSMA and in accordance with the scheme's rules, lodge copies of the notices and minutes of meetings as well as written reports on the administration process every three months with the Ombud.[169]

Applications can be made to remove or replace the administrator, and to extend or amend the administrator's term.[170]

With the above brief introductions to the various role-players in the sectional title industry, mention has often been made of the 'scheme's rules'. The management and conduct rules are important enforcement documents that all the role-players must know, understand and be able to apply when situations require.

3.6 Summary


A trustee stands in a fiduciary relationship to the body corporate, which means that the trustee must act in good faith and honestly for the interest and benefit of the body corporate, and must not exceed their powers.
Unit owners have certain duties to fulfil as members of the body corporate to enjoy and maintain a good quality of life and their property value in their sectional title scheme.
A chairperson is a trustee who has been elected as chairperson by majority vote of the trustees to preside over meetings of the body corporate.
CHAPTER 3
IMPORTANT ROLE-PLAYERS
The managing agent provides sectional title scheme management services under the supervision of the trustees.
An administrator is appointed by a court to run the body corporate, to the exclusion of the body corporate, when there is serious financial or administrative mismanagement.
An executive managing agent is a special type of managing agent who is appointed to perform the powers and functions of a board of trustees.

4 Body Corporate Rules

The body corporate must keep a copy of all rules and have the rules available for inspection at meetings of trustees and unit owners.[171]

A body corporate has two sets of rules, namely the management rules and the conduct rules.[172]

The management and conduct rules are important enforcement documents that all the role-players must know, understand and be able to apply when situations require.

4.1 Management Rules

The management rules dictate the way in which a body corporate should be managed and administered.[173] Thus, it is vital that unit owners and trustees understand the contents thereof to perform their duties. Furthermore, an understanding of the management rules will empower unit owners to engage intelligently and actively at the body corporate's **general meetings**.

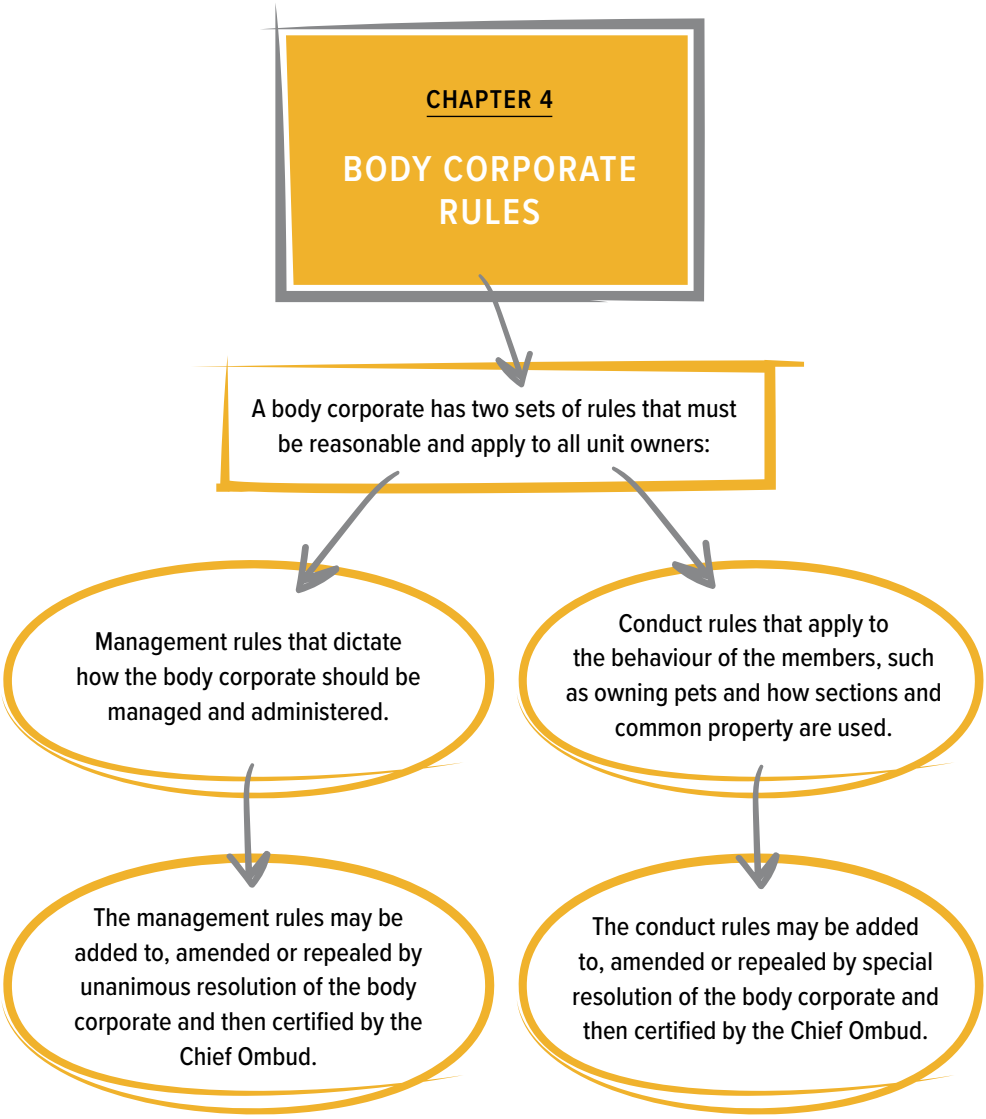
The management rules also deal with rules regulating the appointment and removal of trustees, trustee and general meetings and the financial, physical and administrative management of the body corporate. The management rules may be added to, amended or repealed by unanimous resolution of the body corporate.[174]

4.2 Conduct Rules

The conduct rules set out binding rules for behaviour amongst the members of the body corporate, for example, conduct rules dictate whether a unit owner can keep a pet and if so, the rules relating thereto. These rules govern the use and enjoyment of the **sections** and the **common property** of the body corporate.[175]

Both the management and the conduct rules must be reasonable and apply equally to all unit owners.[176] In fact, to ensure the reasonableness and fairness of these rules, they are subject to approval by the Chief Ombud at the CSOS.[177] In addition, they need to ensure that none of their rules fall into the CSOS undesirable rules category.

4.3 Summary


CHAPTER 4
BODY CORPORATE RULES
A body corporate has two sets of rules that must be reasonable and apply to all unit owners:
Management rules that dictate how the body corporate should be managed and administered.
Conduct rules that apply to the behaviour of the members, such as owning pets and how sections and common property are used.
The management rules may be added to, amended or repealed by unanimous resolution of the body corporate and then certified by the Chief Ombud.
The conduct rules may be added to, amended or repealed by special resolution of the body corporate and then certified by the Chief Ombud.

5 The Community Schemes Ombud Service (CSOS)

The Community Schemes Ombud Service (CSOS) was established in terms of the Community Schemes Ombud Service Act (CSOSA) to regulate the conduct of parties within **community schemes** and to ensure their good governance.

Table 14 lists the functions of the CSOS.

Table 14 Functions of the CSOS

The CSOS was established to:[178]
Regulate the conduct of parties in community schemes;
Regulate, monitor and control the quality of all sectional title scheme governance;
Develop and provide a dispute resolution service;
Provide training for conciliators, adjudicators and other employees of the service; and
Take custody of, preserve and provide public access electronically or by other means to sectional title scheme governance documentation.

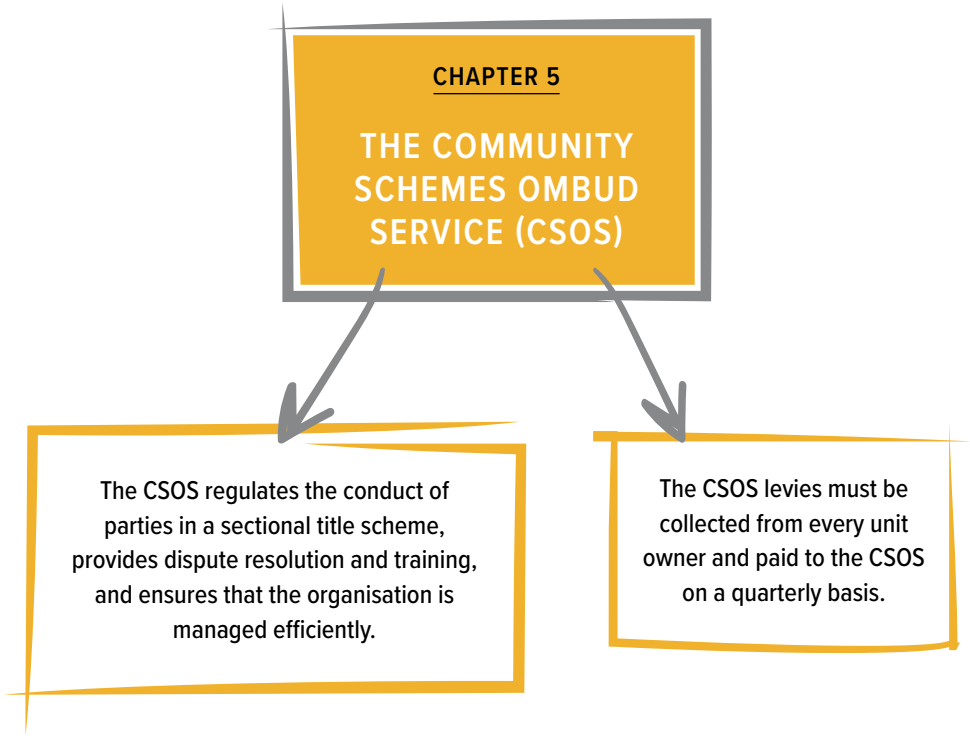
The CSOS are entitled to charge fees. These fees may change from time to time and can be confirmed on the following link: www.csos.org.za

More information about the CSOS

a. CSOS levies: All **sectional title schemes** must collect the prescribed monthly CSOS levy from every **unit owner** within the sectional title scheme and pay this levy to the CSOS on a quarterly basis.[179]
b. Relief provided by the CSOS in dispute resolution: The categories of relief that can be applied for are listed in Section 39 of the CSOSA.

Download your CSOS levy calculator at https://csos.org.za/payment-of-levies.

5.1 Summary



Conclusion

The Unit Owner Reference Guide was designed to assist unit owners understand the basic concepts that underline sectional title ownership. We trust that this guide will be a helpful resource to you in the protection and management of your valuable property asset. For more detailed information, refer to the Trustee Reference Guide.

Feel free to offer feedback on the Unit Owner Reference Guide on: https://www.tracslearning.co.za/contact-us.

FAQs

Chapter 1: Overview of Sectional Title

Q Do unit owners enjoy sole ownership in a sectional title scheme?

A Unit owners enjoy sole ownership of a section in a sectional title scheme, together with an undivided share of ownership in the common property of the sectional title scheme.

Q What is a community scheme?

A A community scheme is any scheme or arrangement in terms of which there is shared use of, and responsibility for, parts of the land and buildings, including but not limited to sectional title schemes and homeowners associations.

Q Who is responsible for managing the common property?

A The common property must be controlled, administered and managed by the body corporate for the benefit of all unit owners. Trustees are elected and appointed to represent the body corporate in respect of the day-to-day management of the scheme, and a managing agent may be appointed to manage certain financial, physical and administrative aspects of the scheme.

Q Who is responsible for the maintenance of an EUA?

A Exclusive use rights are either real rights that are registered at the Deeds office, or personal rights that are conferred by the developer or the body corporate in terms of management or conduct rules. It is the duty of the owner of the EUA to keep it clean and in a neat condition.

Q Can anyone have access to an EUA?

A According to the STSMA, an owner must permit any person authorised in writing by the body corporate to enter his or her EUA for the purposes of inspecting and maintaining it.

Q How do you calculate the participation quota (PQ)?

A The PQ is expressed as a percentage to four decimal places calculated by dividing the floor area of each owner's section, as shown on the sectional plan, by the total of all the floor areas of all sections in the scheme.

$$PQ = \frac{\text{Floor area of a section in } m^2}{\text{Total floor area of all sections in } m^2} \times 100$$

Q How are levies determined?

A Levies are established and passed by a trustee resolution. Once the amount of levies has been established and a trustee resolution passed, unit owners become legally liable for payment of the levies. There are two types of levies that unit owners are liable for: ordinary levies and special levies.

An ordinary levy is determined once the budget for the anticipated operational income and expenses have been approved at an AGM, and the trustees then determine the amount of each unit owner's levy contribution. This amount is usually equal to the unit owner's PQ share of the total budget.

A special levy is determined by the trustees on the authority of a trustee resolution, if it is for an expense that was not included in the operational budget and needs to be paid.

Chapter 2: The Body Corporate

Q What is the purpose of a body corporate?

A The purpose of a body corporate is to control, administer and manage the land and buildings, particularly the common property in the scheme, and to ensure that each unit owner in the scheme can participate in the running of the affairs that relate to and impact on their properties.

Q How do you become part of the body corporate?

A As soon as you become a unit owner in a scheme by registration of the transfer of the property in your name, you automatically become a member of the body corporate. If you sell your unit, upon the registration of the transfer of the unit in the new unit owner's name, you no longer form part of the body corporate.

Q What is a trustee?

A A trustee is an elected person, who does not need to be a member of the body corporate, who is tasked with performing and exercising the functions and powers of the body corporate, such as governing the land, buildings and common property of the scheme.

Q What is the difference between an annual general meeting (AGM) and a special general meeting (SGM)?

A An AGM is where the members of the body corporate must consider, but are not limited to, approval of the minutes from the previous AGM, approval of the most recent audited financial statements, approval of the relevant insurance schedules, the appointment and election of trustees and the budget for the anticipated income and expenditure for the following financial year. A body corporate must hold an AGM within four months of the end of each financial year.

All general meetings other than the AGM are considered SGMs. An SGM may be called when the trustees deem it necessary to do so. An SGM must be called when instructed in writing by members holding at least 25% of the total quotas or a bondholder of at least 25% of all the primary sections in number.

Q When is a special resolution passed?

A A special resolution is a resolution passed by at least 75% of the votes of the members of the body corporate who are present at a meeting or represented by proxy, calculated in both number and value. A special resolution may also be agreed to in writing (round robin) by at least 75% of all members of the sectional title scheme, calculated in both value and number.

Where a special resolution is passed at a general meeting and the quorum at that meeting is less than 50% of the total value of all members' votes, the resolution cannot be implemented for a period of one week, unless the trustees resolve that there are reasonable grounds to believe that immediate action is necessary to ensure safety or prevent significant loss or damage to the scheme.

Within seven days of a trustee resolution, as previously mentioned, members holding at least 25% of the total votes of all members in value

may, by written and signed request delivered to the body corporate, require that the body corporate hold a special general meeting to reconsider the resolution. If such a demand is delivered to the body corporate, the trustees must not implement such a resolution unless it is passed again by special resolution, or if a quorum is not present within 30 minutes of the time set for the meeting.

Some examples for when a special resolution is required are when the body corporate needs to borrow money or to install pre-paid water and electricity meters or to lease the common property for less than ten years.

Q When is a member not able to vote?

A A member can be restrained from voting only for the passing of an ordinary resolution and not for special and unanimous resolutions if they fail to pay the body corporate an amount due by that member after a court or adjudicator has given judgement or order for payment and/or if they persist in breaching conduct rules despite a court order or an adjudication order.

Chapter 3: Important Role-players

Q Can all members of a body corporate be elected as trustees?

A All members of a body corporate are trustees until the first general meeting is held to elect trustees. Where a body corporate consists of less than four members who are owners of primary sections, each member of the body corporate, or his or her representative recognised by law, is recognised as a trustee without the need to be elected to the office.

Q When is a trustee meeting valid?

A A trustee meeting is validly constituted when at least 50% of the total trustees in number are present; however, there must not be less than two trustees to form a quorum.

Q Who can be elected as a chairperson?

A A chairperson is a trustee who has been elected as chairperson by majority vote of the trustees in order to preside over trustee meetings and general meetings of the body corporate members.

Q Can a meeting be held without a chairperson?

A The chairperson is elected by trustees at the first trustee meeting after the AGM. The chairperson must preside over all the general meetings unless owners resolve otherwise. If, after 15 minutes of the commencement time of the general meeting, the chairperson is not present, unwilling or unable to function as a chairperson, the members present must elect a chairperson for said meeting.

Q What happens in the event that no unit owners are willing or able to become trustees?

A In the event that unit owners are unwilling or unable to take on the responsibilities that come with being a trustee, the owners may, by special resolution, appoint an executive managing agent. An executive managing agent is a special type of managing agent who is a property practitioner, and is appointed to perform the powers and functions of a board of trustees.

Q What is the purpose of an administrator?

A An administrator takes over the role of the trustees and manages the body corporate in place of the trustees, to the exclusion of the body corporate. An administrator is a court-appointed, independent person who is appointed when there is evidence of serious financial or administrative mismanagement of a body corporate. An administrator is appointed to ensure that a body corporate meets its legislative obligations.

Q Does an administrator get paid?

A An administrator is entitled to remuneration and payment of expenses approved by the court that appointed the administrator.

Chapter 4: Body Corporate Rules

Q What is the main difference between management rules and conduct rules?

A Management rules set out the rules regulating the appointment and removal of trustees, trustee meetings and general meetings, as well as the financial, physical and administrative management of the body corporate.

Conduct rules govern the use and enjoyment of the sections and the common property of the body corporate, including the behaviour of owners, residents and visitors to the complex.

Chapter 5: The Community Schemes Ombud Service (CSOS)

Q What is the purpose of the CSOS?

A The CSOS was established to regulate the conduct of parties within community schemes and ensure good governance; to regulate, control and quality-assure all scheme governance documentation; provide a dispute resolution service; provide stakeholder training, consumer education and awareness for property owners, occupiers and other stakeholders; and to ensure that the organisation is managed in an efficient and sustainable manner.

References

1 Section 1 of the STA and STSMA. See 'development scheme'.
2 Section 1 of the CSOSA.
3 Section 1 of the STA and STSMA.
4 Part II of the STA.
5 Section 1 of the STA and STSMA.
6 Regulation 1 of the STSMA Regulations.
7 Regulation 1 of the STSMA Regulations.
8 Section 1 of the STA and STSMA.
9 Section 1 of the STA and STSMA.
10 Sections 2(c) and 16(1) of the STA.
11 Sections 2(5) and 3(1)(t) of the STSMA.
12 Section 1 of the STA and STSMA.
13 Regulation 28 to the STA Regulations, read with Sections 5(e), 10(7) and 10(8) of the STSMA, and Sections 27(1)(a) and (2) of the STA.
14 Section 3(1)(c) of the STSMA.
15 Section 11(1)(b) of the STSMA.
16 Sections 6(6)(a) and 11(1) (a) of the STSMA.
17 Section 3(1)(f) of the STSMA.
18 Section 11(1)(c) of the STSMA.
19 Sections 11(2)(a) and (c) of the STSMA.
20 Sections 11(2)(a) and (b) of the STSMA.
21 Section 32(5) of the STA.
22 Section 32(1) of the STA.
23 Section 3(1)(c) of the STSMA.
24 Section 3 of the STSMA.
25 Sections 1 and 32 of the STA.
26 Section 2(5) of the STSMA.
27 Section 2(5) of the STSMA.
28 Section 2(1) of the STSMA.
29 Section 2(1) of the STSMA.
30 Section 2(3) of the STSMA.
31 Section 2(4) of the STSMA, read with Sections 5(3)(b) and 12(1)(a) of the STA.
32 Section 7(1) of the STSMA.
33 Section 7(1) of the STSMA.
34 Sections 2(7)(a)–(e) of the STSMA.
35 Section 3 of the STSMA.
36 Refer to Participation Quotas in Chapter 1.
37 Section 3(1)(h) of the STSMA.
38 Section 3(1)(i) of the STSMA.
39 Gustav, T., 'Reserve Fund Calculations' *Blueberry Group*, viewed 6 March 2018, from http:// blueberry. group/blog/2016/11/25/what-a-reserve-fund-means-for-sectional-title-owners.
40 Regulation 2 of the STSMA Regulations.
41 PMR 22(1) of the STSMA Regulations.
42 Sections 4(a)–(i) and 5 of the STSMA.
43 The managing agent is discussed in Chapter 3 of this Unit Owner Reference Guide.
44 Section 4(e) of the STSMA.
45 A cession of unpaid contributions in favour of the lender of the funds required is also acceptable as it is a kind of mortgage over property vested in the body corporate (debt assets).
46 This kind of leasing of common property requires a special resolution of the body corporate.
47 PMR 17 of the STSMA Regulations.
48 PMR 17(3) of the STSMA Regulations.
49 PMR 17(4) of the STSMA Regulations.
50 PMR 17(4) of the STSMA Regulations.
51 PMR 17(6)(a) of the STSMA Regulations.
52 Refer to Chapter 1 of this Unit Owner Reference Guide.
53 PMR 20(1) of the STSMA Regulations.
54 Section 1 of the STA and STSMA.
55 Section 1 of the STA and STSMA, read with Section 10(2)(a) of the STSMA.
56 Section 6(8) of the STSMA.
57 PMR 29(3)(a) of the STSMA Regulations.
58 PMR 8(3) of the STSMA Regulations.
59 PMR 28(5)(b) of the STSMA Regulations.
60 PMR 6(4)(g) of the STSMA Regulations.
61 PMR 28(8) of the STSMA Regulations.
62 Section 4(h) of the STSMA.
63 PMR 29(4) of the STSMA Regulations.
64 Section 4(e) of the STSMA.
65 Section 5(1)(g) of the STSMA.
66 PMR 28(7)(a) of the STSMA Regulations.
67 PMR 8(2) of the STSMA Regulations.
68 PMR 15(4) of the STSMA Regulations.
69 PMR 23(8) of the STSMA Regulations.
70 PMR 28(1) of the STSMA Regulations.
71 Section 5(1)(h) of the STSMA.
72 Section 10(2)(b) of the STSMA.
73 Section 11(2)(a) of the STSMA.
74 Section 11(2)(b) of the STSMA.
75 Section 11(2)(c) of the STSMA.
76 Section 2(7)(e) of the STSMA.
77 Section 4(b) of the STSMA.
78 Section 5(1)(a) of the STSMA.
79 PMR 29(1) of the STSMA Regulations.
80 Section 5(1)(a) of the STSMA, read with Section 27(2) of the STA.
81 Section 5(1)(e) of the STSMA, read with Section 27(2) of the STA.
82 Section 5(1)(c) of the STSMA, read with Section 25(1) of the STA.
83 Section 10(2)(a) of the STSMA.
84 Section 17(1)(b) of the STSMA.
85 Section 17(3)(a) of the STSMA.

86 PMR 21(2)(a) of the STSMA Regulations.
87 Section 6(8) of the STSMA.
88 Sections 11(2)(a) and (b) of the STSMA.
89 Section 5(1)(b) of the STSMA.
90 PMR 17(9) of the STSMA Regulations.
91 Section 6(6), read with Section 10(2) of the STMSA.
92 Section 6(7) of the STMSA.
93 PMR 20(7) of the STSMA Regulations.
94 Section 1 of the STSMA.
95 PMR 20(1)(b) of the STSMA Regulations.
96 PMR 20(2)(a) of the STSMA Regulations.
97 PMR 20(2)(b) of the STSMA Regulations.
98 PMR 20(2) of the STSMA Regulations.
99 PMR 20(8) of the STSMA Regulations.
100 PMR 15(3) of the STSMA Regulations. The prescribed format of the proxy notification, appointment and acceptance is Form C of Annexure 3 to the STSMA Regulations.
101 PMR 15(6) of the STSMA Regulations.
102 PMR 15(1) of the STSMA Regulations.
103 Section 6(1) and (2) of the STSMA.
104 There may be specific circumstances where shorter notice may be necessary, such as in emergency situations where time is of the essence, and where the trustees would need to decide that shorter notice is justified and reasonable. See PMR 15(7) of the STSMA Regulations.
105 PMR 15(7)(b) of the STSMA Regulations.
106 Section 6(3) of the STSMA.
107 Section 6(3) of the STSMA.
108 PMR 4(5) of the STSMA Regulations.
109 Section 6(4) of the STSMA.
110 PMR 19(2)(a) of the STSMA Regulations.
111 PMR 19(2)(b) of the STSMA Regulations.
112 PMR 19(4) of the STSMA Regulations.
113 Section 1 of the STSMA. See 'unanimous resolution'.
114 Section 6(5) of the STSMA.
115 PMR 20(6) of the STSMA Regulations.
116 PMR 15(3) of the STSMA Regulations. The prescribed format of the proxy notification, appointment and acceptance is Form C of Annexure 3 to the STSMA Regulations.
117 PMR 20(5) of the STSMA Regulations.
118 PMR 17(6)(a) of the STSMA Regulations.
119 Section 13 of the STSMA.
120 PMR 3(2) of the STSMA Regulations.
121 PMR 31(1) of the STSMA Regulations.
122 Regulation 14(1)(a) of the CSOSA Regulations.
123 PMR 5(1) of the STSMA Regulations.
124 PMR 5(2) of the STSMA Regulations.
125 PMR 6(1)–(3) of the STSMA Regulations.
126 PMR 6(4) of the STSMA Regulations.
127 Companies Act 71 of 2008.
128 PMR 7(1) and (2) of the STSMA Regulations.
129 PMR 7(2) of the STSMA Regulations.
130 PMR 7(2) of the STSMA Regulations.
131 PMR 7(3) of the STSMA Regulations.
132 PMR 7(4) of the STSMA Regulations.
133 PMR 7(5) of the STSMA Regulations.
134 PMR 7(6) of the STSMA Regulations.
135 PMR 7(6) of the STSMA Regulations.
136 Section 7(1) of the STSMA.
137 PMR 9 of the STSMA Regulations.
138 Section 8(1) of the STSMA.
139 Section 8(2)(a) of the STSMA.
140 Section 8(2)(b) of the STSMA.
141 Section 8(3) of the STSMA.
142 PMR 11(1) of the STSMA Regulations.
143 PMR 13(1) of the STSMA Regulations.
144 PMR 14(2) of the STSMA Regulations.
145 PMR 14(4) of the STSMA Regulations.
146 PMR 8(2) of the STSMA Regulations.
147 PMR 8(3) of the STSMA Regulations.
148 PMR 8(1) of the STSMA Regulations.
149 PMR 12(3) of the STSMA Regulations.
150 PMR 12(2) of the STSMA Regulations.
151 PMR 12(1) of the STSMA Regulations.
152 PMR 18(1) of the STSMA Regulations.
153 PMR 18(2) of the STSMA Regulations.
154 PMR 18(3) (a)–(i) of the STSMA Regulations.
155 PMR 28(5) of the STSMA Regulations.
156 PMR 28(6) of the STSMA Regulations.
157 PMR 28(7) of the STSMA Regulations.
158 PMR 20(6) of the STSMA Regulations.
159 PMR 15(1)(d) of the STSMA Regulations.
160 PMR 4(1)(b) of the STSMA Regulations.
161 PMR 28(1) of the STSMA Regulations.
162 PMR 28(3)(a)–(f) of the STSMA Regulations.
163 Section 16 of the STSMA.
164 Section 16(2) of the STSMA.
165 Section 16(1) of the STSMA.
166 Section 16(2)(a)(ii) of the STSMA.
167 Section 16(2)(b) of the STSMA.
168 Section 16(3) of the STSMA.
169 Section 16(4) of the STSMA.
170 Section 16(5) of the STSMA.
171 Sections 10(6)(a) and (b) of the STSMA.
172 The prescribed management and conduct rules are located in Annexure 1 and 2 of the STSMA Regulations, respectively.
173 Section 10(2)(a) of the STSMA.
174 Section 10(2)(a) of the STSMA, read with Regulation 6(6) of the STSMA Regulations.
175 Section 10(2)(b) of the STSMA.
176 Section 10(3) of the STSMA.
177 Sections 10(2)(a) and (b), read with Section 10(5) of the STSMA.
178 Section 4 of the CSOSA.
179 Section 59(a) of the CSOSA.

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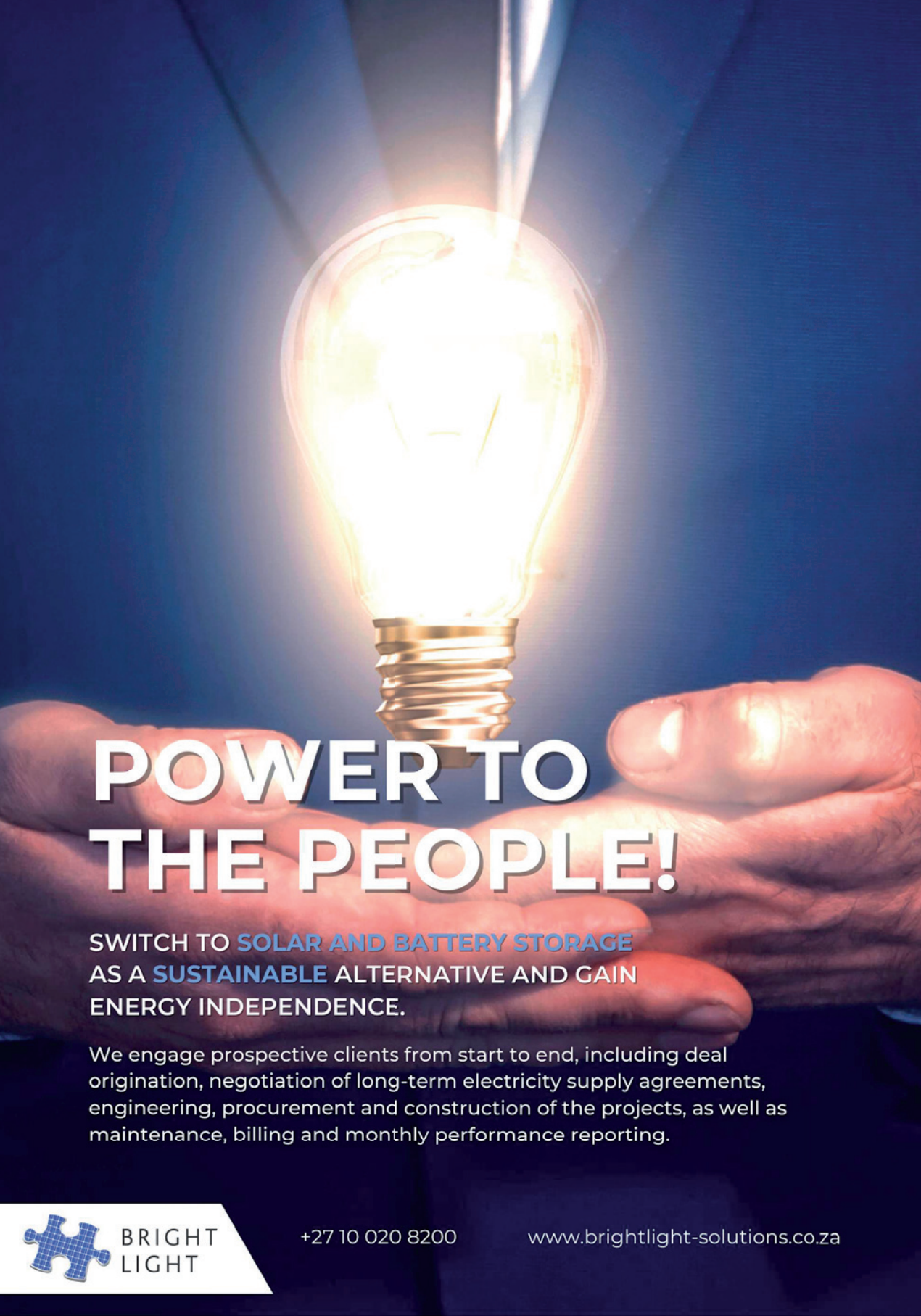
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B

SECTIONAL TITLE TRUSTEE REFERENCE GUIDE

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Introduction

If you are reading the Trustee Reference Guide, you are a trustee or a managing agent in a sectional title scheme and need more than a basic knowledge and understanding of sectional title schemes and their management. You may also be a diligent unit owner wanting to understand governing sectional title laws in more detail to potentially volunteer at the next annual general meeting (AGM) to be a trustee of your sectional title scheme and ensure you are at the forefront of protecting, managing and creating a better quality of life in your sectional title scheme.

In this Trustee Reference Guide, more detailed information will be given on the:

- Governing legislation;
- Formation of sectional title schemes;
- Important sectional title scheme management aspects;
- Unit owners and meetings;
- The trustees and chairperson;
- The managing agent;
- The administrator;
- Formation and amendment of rules; and
- The Community Schemes Ombud Service (CSOS).

To aid in refreshing your memory as needed, we have highlighted important terms that can be found in the glossary at the back of this book. You are also encouraged to review the Unit Owner Reference Guide if you would like to refresh your memory regarding any of the basic concepts that are expanded on in this Trustee Reference Guide.

1 Governing Legislation

Governing legislation is the backbone of the efficient functioning of the property sector in South Africa. The first section in this chapter gives an overview of why the Sectional Titles Act 95 of 1986 (STA) is still applicable, while emphasising the need for the Sectional Title Regulations Board and its role regarding regulation and other interesting provisions. Furthermore, the Sectional Titles Schemes Management Act 8 of 2011 (STSMA) and the Community Schemes Ombud Service Act 9 of 2011 (CSOSA) with their respective Regulations and Annexures are also discussed.

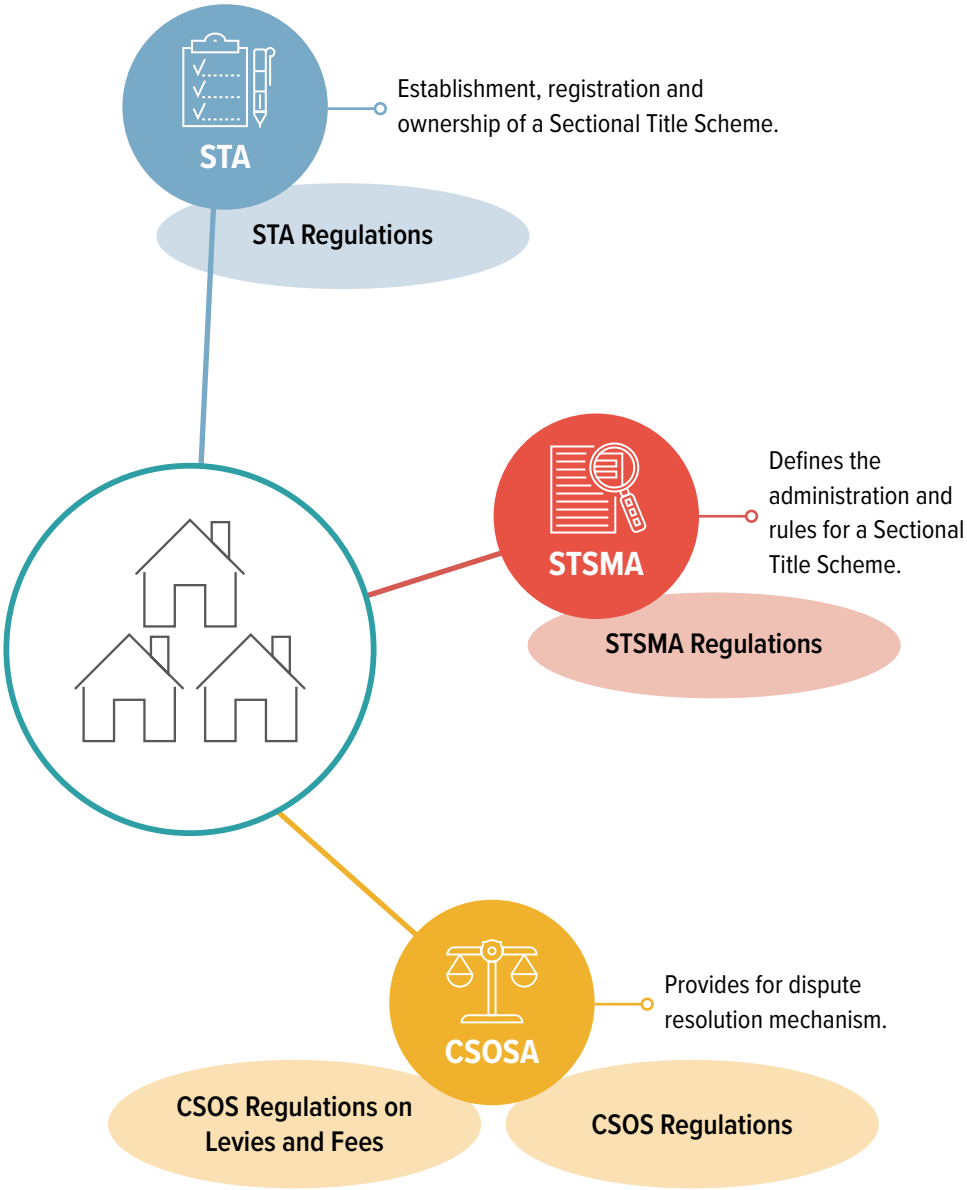


Figure 1 Diagrammatic summary of the STA, STSMA and CSOSA

1.1 The Sectional Titles Act (STA) Remains Applicable

The Sectional Titles Act 95 of 1986 (STA) is still relevant to developers and other role-players within the property sector. It is the starting point for establishing a sectional title scheme. It provides for the division of buildings into sections and common property, dealing with the acquisition and transfer of separate ownership in sections and joint ownership in common property, the registration of sectional mortgage bonds over sections and the registration of real rights in sections.[1] It also deals with the registration of rights in, and disposal of, common property.[2]

The STA contains provisions relating to the approval of development schemes,[3] the drafting and submission of draft sectional plans,[4] applications for the opening of sectional title registers, registrations of sectional plans and the effect thereof.[5] These areas are discussed briefly in Paragraphs 2.1 to 2.3 of this guide. The concept of a participation quota (PQ)[6] is first mentioned in the STA and is discussed in Paragraph 3.1 in this guide.

In Paragraph 3.4 of this guide, exclusive use areas (EUAs) in respect of certain parts of the common property[7] are discussed, together with an analysis of real and personal rights in relation thereto. Importantly, the STA still deals with the registration of transfer of ownership and other rights, specifically, the requirement of the all-important levy clearance certificate.[8] These concepts are dealt with in Paragraph 3.6.7 of this guide.

The STA also established the Sectional Titles Regulation Board, which is tasked with making recommendations to the Minister regarding regulations they may make.[9] It is also tasked with keeping the implementation and applicability of the STA under regular review, to make recommendations to the Minister in respect of any amendments or other actions that may be advisable, and to generally advise the Minister when requested.[10]

Other interesting provisions of the STA that are still applicable include:

a. The requirement to give 21 days' prior notice before the hearing of any application to Court for an order affecting the performance of any act in a deeds registry or office of the Surveyor-General (SG); and[11]

b. The exemption from liability for damages, save in the case of *mala fide* found by a Court, in respect of an act or omission of a Registrar, the SG or any local authority, or an official who is employed in any of those offices.[12]

The STA and the STSMA are specific pieces of legislation applicable to the sectional title industry and are fleshed out by the STA Regulations and STSMA Regulations and its Annexures (the Prescribed Management and Conduct Rules). The notification for the amendment of these rules must be sent to the CSOS and is Form B in Annexure 3 of the STSMA Regulations.[13] This is the prescribed form that the body corporate must lodge with the Chief Ombud if any of the management or conduct rules are to be amended or repealed.[14] If the CSOS does not issue a certificate for the rule amendments, the management or conduct rules of the body corporate are not enforceable against the members or any other parties.[15] The CSOS Regulations were implemented at the same time as the STSMA Regulations, and are discussed in Paragraph 1.2 of this guide.

The new requirement of the reserve fund and the minimum amounts to be kept therein were discussed with an example calculation in the Unit Owner Reference Guide, and is elaborated on in Paragraph 3.2.2 of this guide.[16] Regulation 3 of the STSMA Regulations provides a list of other prescribed risks that the body corporate may insure against, in terms of Section 3(1)(h) of the STSMA, and this is discussed in Paragraph 3.5 of this guide.

Annexure 3 of the STSMA Regulations is where certain prescribed forms are provided. The notification of change of body corporate address is Form A thereto, and must be used to notify the Chief Ombud, the local authority and the Registrar of Deeds of any change to the *domicilium citandi et executandi* of the body corporate, being the address for service of any process on the body corporate.[17] Proxies are appointed and accept such mandates as long as the form is substantially in accordance with Form C of the STSMA Regulations.[18]

Annexure 4 of the STSMA Regulations consists of two parts:

a. The Complaint Form, which is used to notify the body corporate and persons against whom one is making a complaint (being a unit owner, occupier or the managing agent); and
b. The Record of Body Corporate Decision, which provides a space for the body corporate's decision in relation to the complaint.[19]

1.2 Regulations to the CSOSA and their Annexures

There are two sets of Regulations to the CSOSA:

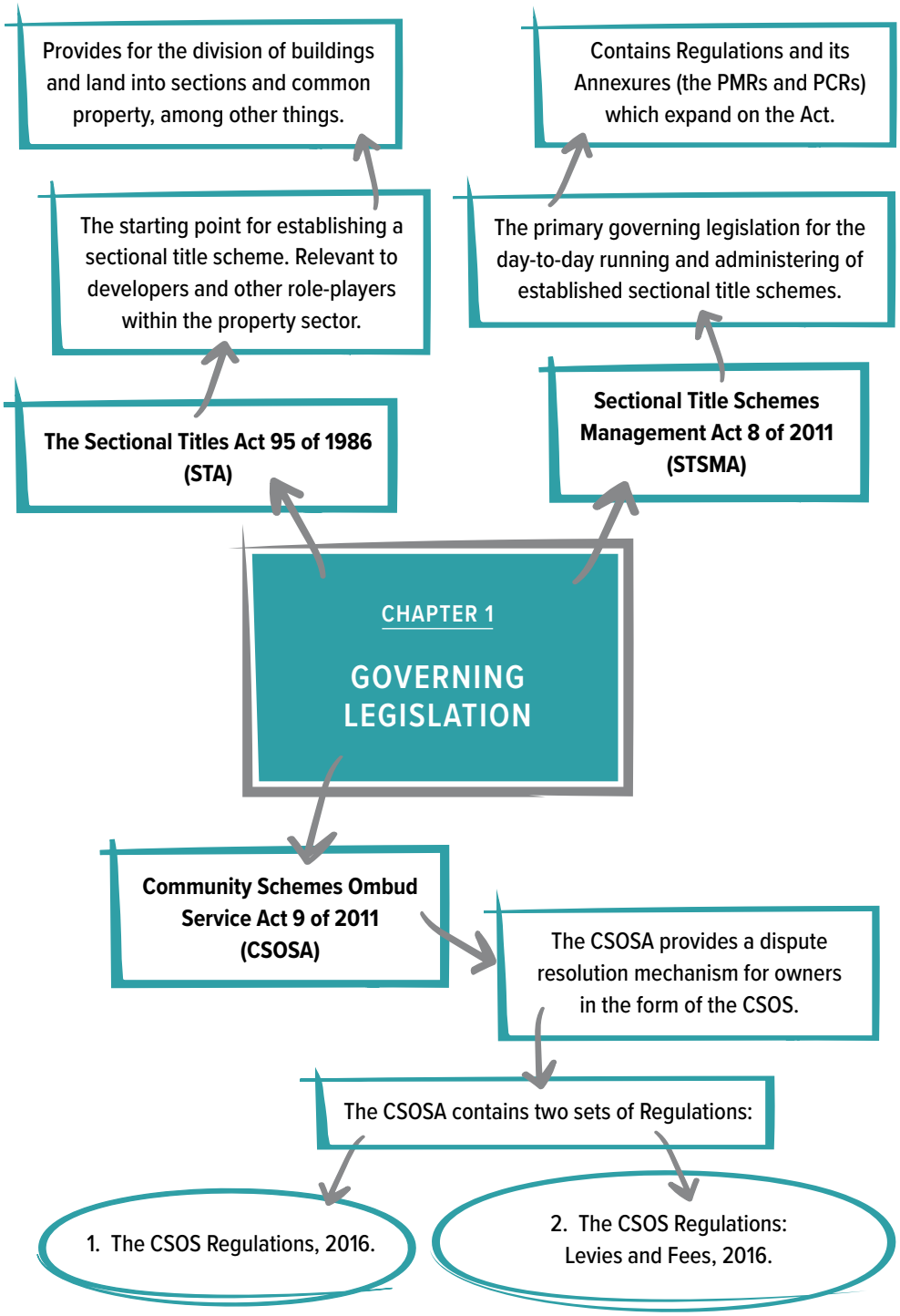
a. Those referred to as the Community Schemes Ombud Service Regulations, 2016 (CSOS Regulations); and
b. Those referred to as the Community Schemes Ombud Service Regulations: Levies and Fees, 2016 (CSOS Regulations on Levies and Fees).

The CSOS Regulations relate to the registration of a community scheme with the CSOS, which should be fully completed by all community schemes in South Africa.[20] There are two other noteworthy annexures to the CSOS Regulations. The first relates to the particulars of the community scheme and identifies that, if any of the particulars that have been submitted to the CSOS in the original submission (using Form CS1) made when registering the community scheme have changed, then Form CS1A must be used as notice of amendment.[21] The other stipulates that, on an annual basis, community schemes must file returns with the CSOS in the prescribed Form CS2 of the CSOS Regulations.[22]

The CSOS Regulations on Levies and Fees concern the levies that are payable quarterly by community schemes to the CSOS.[23] Form CS3A and 3B in the CSOS Regulations on Levies and Fees allows certain individuals and community schemes to apply for a waiver of prescribed fees, as set out in the CSOSA.[24] These subjects are discussed in Chapter 9 of this guide.

Having briefly paddled our way through the STA, STSMA, CSOSA and the Regulations to those primary pieces of legislation, Chapter 2 provides greater detail on the formation of a sectional title scheme and some interesting technical aspects thereof.

1.3 Summary


Provides for the division of buildings and land into sections and common property, among other things.
Contains Regulations and its Annexures (the PMRs and PCRs) which expand on the Act.
The starting point for establishing a sectional title scheme. Relevant to developers and other role-players within the property sector.
The primary governing legislation for the day-to-day running and administering of established sectional title schemes.
The Sectional Titles Act 95 of 1986 (STA)
Sectional Title Schemes Management Act 8 of 2011 (STSMA)
CHAPTER 1
GOVERNING LEGISLATION
Community Schemes Ombud Service Act 9 of 2011 (CSOSA)
The CSOSA provides a dispute resolution mechanism for owners in the form of the CSOS.
The CSOSA contains two sets of Regulations:
1. The CSOS Regulations, 2016.
2. The CSOS Regulations: Levies and Fees, 2016.

2 Formation of a Sectional Title Scheme

The processes and actions taken by a developer leading up to the registration of a sectional title scheme are important. From the approval of the sectional title scheme when a sectional plan is required to be drafted and submitted, to the registration of the sectional title scheme and the issuing of sectional title deeds, these technical aspects include elements of sectional title ownership that all unit owners, managing agents and other sectional title role-players should know and understand.

Given the growth of the sectional title industry, combined with various challenges commonly faced with developers, the following information should be taken into careful consideration.

2.1 Technical Aspects of Sectional Title from a Developer's Point of View

The approval of development schemes,[25] drafting and submission of sectional plans,[26] applications for the opening of sectional title registers,[27] registrations of sectional plans and the effect thereof,[28] are dealt with in the STA. These technical aspects of sectional title law guide developers and protect all role-players in the industry, as they relate to the formation of sectional title and, if incorrectly implemented, may lead to 'legacy issues' experienced by some new sectional title development schemes.

2.1.1 Approval of sectional title schemes and the drafting and submission of sectional plans

The developer of a sectional title development scheme needs to submit a draft sectional plan to the SG in terms of Section 7 of the STA.[29] A sectional title development scheme may relate to more than one building, which is either already situated, or is to be erected, on the same piece of land, or on more than one piece of land.[30] If the sectional title scheme is to be erected on more than one piece of land, such land can be either contiguous or non-contiguous, which means that they can be touching or adjacent to one another, sharing a common border or not.[31]

One further requirement is that the land in question must be registered in the name of the same person and be notarially tied at the deeds office.[32] In some cases, the developer cannot submit a draft sectional plan until certain lessees, if any, who are currently on the property, have been dealt with in terms of Section 4(3) of the STA.

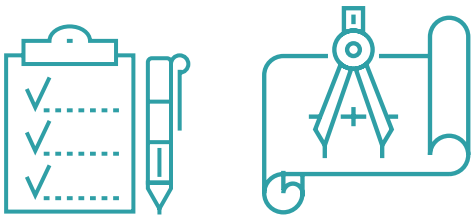


Table 1 lists the instances of condonation of non-compliance.

Table 1 Condonation of non-compliance

The developer must appoint an architect or a land surveyor who shall inspect the property and make an application to the local authority for the condonation of any non-compliance which may relate to:[33]
a. Any matter other than the proposed use, such as if the building to which the scheme relates does not comply with any operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law at the date of approval of the building plans;
b. Matters other than buildings, such as if there is non-compliance with any applicable condition of any operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law; and/or
c. The building to which the scheme relates, has not been erected in accordance with any applicable building regulations or building by-laws in operation at the date of erection.

If the above application is made, the local authority may condone such non-compliance by issuing a certificate to the applicant.[34]

A certificate of condonation may not be issued in respect of non-compliance with a national building regulation regarding the strength or stability of any building unless a deviation has been permitted or an exemption has been granted in terms of Section 18(2) of the National Building Regulations and Building Standards Act 103 of 1977.[35]

The draft sectional plan must be signed by a land surveyor or an architect, in accordance with the STA, and the numerical data, and other data thereon, shall be within the prescribed limits of accuracy.[36] If any part of the draft sectional plan relating to the delineation of an EUA, of which the boundaries are not represented by any physical features of a permanent nature, the draft sectional plan shall be prepared and signed by the land surveyor.[37] This includes any rectification of any error in the relevant diagram or general plan and location of the relevant buildings in relation thereto.[38]

If required by the Chief SG, the land surveyor or architect who has prepared the sectional plan may be required to pass a prescribed examination in connection with the preparation of draft sectional plans.[39] The SG shall not accept draft sectional plans from land surveyors or architects who have not passed said examination.[40]

Additional inclusions in the draft sectional plan are given in Table 2.

Table 2 Inclusions in the draft sectional plan

In addition to the delineation of the boundaries of the land, the buildings, and any EUAs on the relevant diagram or general plan, as well as the location of the buildings, the draft sectional plan must also:[41]
a. Indicate the name of the scheme;
b. Include a plan to scale of each storey in the buildings shown thereon;
c. Define the boundaries of each section in the buildings and distinguish each section by a number;
d. Show the floor area to the median line of the boundary walls of each section, correct to the nearest square metre, and the total of the floor areas of all the sections;[42]
e. Include an endorsed schedule specifying the PQ for each section in accordance with Section 32(1) or (2) of the STA and the total of the PQs of all sections shown thereon; and
f. Be drawn in a manner and contain such other particulars as may be prescribed.

It is conceivable that a section may not be adjacent to another part of the section in another building, and in this regard may be non-contiguous.[43] It must also be noted that the section number assigned to each section on the sectional plan **may not** be the same as the unit or door number assigned by the body corporate or managing agent in practice. However, this does not change the registered section number.

Once the draft sectional plan has been submitted to and approved by the SG, the next step is to apply for the opening of the sectional title register and to register the sectional plan, which requires the Registrar of Deeds at the deeds office to get involved.

2.1.2 Applications for the opening of sectional title registers, registrations of sectional plans and the effect thereof

Once the draft sectional plan has been approved by the SG, the developer may apply to the Registrar of Deeds, at the applicable deeds office, for the opening of the sectional title register in respect of the land and buildings in question, and for the registration of the sectional plan so approved by the SG.[44]

At the time of application to the Registrar, the developer may submit a schedule of servitudes and conditions of title burdening or benefitting the land and any other registrable conditions imposed by the developer, which schedule must be certified by a conveyancer.[45] Notably, if the schedule of servitudes and conditions contains a condition restricting the transfer of a unit without the consent of an association whose constitution provides that all members of the body corporate must be members of that

association, and that the functions and powers of the body corporate must be assigned to that association, then the developer may substitute any of the Prescribed Management Rules, when submitting the application for the opening of a sectional title register.[46] This is how a 'layered scheme', where there is an overarching Homeowners Association (HOA), is sometimes structured, and where the bodies corporate within the HOA may be governed by rules different to the Prescribed Management Rules.

The additional documents that must accompany an application to the Registrar are given in Table 3.

Table 3 Documents that accompany an application to the Registrar

In addition to the certified schedule of conditions and servitudes, the application to the Registrar shall be accompanied by the:[47]
a. Two copies of the sectional plan;
b. The title deed of the land in question;
c. Any mortgage bond encumbering the land, if any, together with the consent of the mortgagee to the opening of the sectional title register and to the endorsement of such bond to the effect that it attaches to: i. The sections and common property shown on the sectional plan; ii. The certificates of real right in respect of a registered real right of extension;[48] and iii. The certificates of real right in respect of a right of exclusive use.[49]
d. A certificate by the Chief Ombud stating that the rules contemplated in Section 10 of the STSMA have been approved;
e. Certificates of registered sectional title in the prescribed form in respect of each section and its undivided share in the common property, made out in favour of the developer;
f. Certificates of real right in respect of a registered real right of extension and/or in respect of a right of exclusive use;[50] and
g. Other documents and particulars as may be prescribed.

The procedures to be followed by the Registrar are listed in Table 4.

Table 4 Procedure followed by the Registrar

Once the above have been submitted to the Registrar and they are satisfied to proceed, the Registrar shall:[51]
a. Register the sectional plan and allocate a unique Sectional Scheme (SS) number to it;
b. Open a sectional title register in respect of the land and buildings thereon;
c. Maintain an efficient system of registration calculated to afford security of title and reference to any registered deed;
d. Issue certificates of registered sectional title to the developer in respect of each section and its undivided share in the common property, subject to any mortgage bond registered against the title deed of the land;
e. Issue certificates of real right in respect of any registered real right of extension or in respect of any registered real right of exclusive use, subject to any mortgage bond registered against the title deed of the land;[52] and
f. Make the necessary endorsements on the title deed, any mortgage bond or other documents, or in its records.

The Registrar shall then notify the SG and the local authority that the sectional plan has been registered and furnish the local authority with a copy thereof.[53] Once the sectional plan has been registered, the land and buildings shall be deemed to be divided into sections and common property, as shown on the sectional plan.[54]

The sectional plan, as well as the schedule of servitudes and registered conditions, is deemed to be part of the sectional title deed.[55] An owner's unit is subject to the servitudes, other real rights or conditions, if any, which may burden or benefit the land shown in the sectional plan.[56] Any mortgage bond, lease, other real right or condition registered on, or affecting, the land comprising the sectional plan, shall be deemed to be converted into a bond, lease, other real right or condition registered against or affecting the sections and common property shown on the sectional plan.[57]

In practice, it must be noted that in the event that the sectional title unit falls within an HOA, such as in a layered scheme, there must be a title deed restriction enforcing that the unit owner of the section in the sectional title scheme, which is within an HOA, must be a member of the HOA, and membership commences automatically on registration of transfer of the section into the unit owner's name at the Deeds Office.

Once the registration process has been completed, the developer can begin selling sections to third parties. On the transfer of the first section by the developer to a third party, a body corporate is established and certain responsibilities are required to be fulfilled by the developer.

The most important responsibility is the first general meeting, which must be convened by the developer, not more than 60 days after the establishment of the body corporate, with the members of the body corporate.[58]

2.2 Reporting of the Developer at the First General Meeting

For a holistic picture of the notice that ought to be sent out in respect of the first (inaugural) general meeting, including the various prescribed agenda items, please refer to Annexure C of of these guides.

2.2.1 Financial reporting and agenda items

At this first general meeting, the developer must furnish the members with proof of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate.[59] This evidence must then be tabled for approval at the first general meeting, with or without amendment.[60] Should there be any excess income (residue) in this regard, the developer must pay that excess over to the body corporate.[61] The first general meeting must also table a motion to confirm that the developer

has, in fact, paid over any such residue.[62] Any vote held or controlled by the developer is suspended in respect of these agenda items.[63]

The first general meeting must table a motion to confirm or vary the itemised estimate of the body corporate's anticipated income and expenses for its first financial year.[64] This is a crucial point to note as some developers may keep the levies artificially low to attract the first unit owners. However, the body corporate needs to ensure they will be able to meet their first year's financial obligations in terms of the administrative and reserve funds. The members must also determine if they would like to change the default financial year for the body corporate (which is 1 October to 30 September) and, if so, must vote on it by way of ordinary resolution.[65]

In respect of the above, the developer's financial statements relating to the management and administration of the scheme (from the date of the establishment of the body corporate to the date of notice of the first general meeting), must be tabled for approval at the first general meeting, with or without amendment.[66] The first general meeting is also required to consider a motion to appoint an auditor who will audit the evidence and financial statements referred to above.[67]

2.2.2 Other reporting and agenda items

A copy of the sectional plan and a certificate from the local authority confirming that all rates due by the developer up to the establishment of the body corporate have been paid, is required.[68] If the developer fails to comply, the developer is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years, or to both a fine and imprisonment.[69]

Furthermore, the first general meeting must table a motion to ratify or not ratify the terms of any contract entered into by the developer on behalf of the body corporate.[70] It must be noted that no debt or obligation arising from any agreement between the developer and any other person is enforceable against the body corporate.[71] Any votes held or controlled by the developer in this regard are also suspended.[72]

The election and determination of the number of trustees must also be decided, along with any imposed restrictions, directions or confirmation that there will be no imposed restrictions or directions, at the first general meeting.[73] The developer is entitled to vote on this item of business. More details regarding a trustee election are discussed in Chapter 5 of this guide.

The developer is also required to provide the body corporate with copies of:

a. All building plans approved by the local municipality, any encroachment permit or other document issued by the local municipality in respect of any improvements in the scheme;[74]
b. Plans showing the location of all pipes, wires, cables and ducts;[75]
c. The names and addresses of all contractors, subcontractors and any other persons whom the developer has employed to render services or supply materials relating to the development of the scheme;[76]
d. All warranties, manuals, schematic drawings, operating instructions, service guides, documentation from manufacturers and other similar information in respect of the construction, installation, operation, maintenance, repair and servicing of any common property or body corporate assets;[77] and
e. All records and documents that the body corporate is required to prepare and retain in terms of PMR 27 of the STSMA Regulations relating to governance.[78]

Should the developer fail to provide the body corporate with:

a. a copy of the sectional plan;
b. a certificate from the local authority to the effect that rates due by the developer are up to date until the establishment of the body corporate; and
c. proof of revenue and expenditure concerning the management of the scheme (from the date of first occupation of any unit until the establishment of the body corporate);

the body corporate must do all things necessary to obtain or have the specific documents prepared and may recover the reasonable costs incurred in doing so from the developer.[79]

Should the developer fail to call this first general meeting in terms of Section 2(8) of the STSMA, then any member of the body corporate may call the meeting and the body corporate must recover from the developer all costs reasonably incurred in ensuring compliance with the developer's obligations.[80]

The above information is crucial to understanding the formation of a sectional title deed, accompanying conditions and restrictions, as well as the reporting obligations of the developer at the first general meeting.

Sectional title schemes often find themselves in situations where the developers have outstanding contributions, for example, due to their inability to properly manage a financial plan. This may result in ambiguity regarding the treatment of outstanding contributions from a developer. The question that then arises is: 'What happens when the developer has outstanding contributions?' This is unfortunately experienced by many sectional title schemes in South Africa.

2.3 Contributions from the Developer

The developer ceases to be a member of the body corporate only when ownership in every section has been transferred to a person, other than the developer, and the developer no longer has any interest or share in the common property.[81] Any common property still registered in the developer's name, such as storerooms, parking bays and other common property areas designated as EUAs, reverts to the body corporate (bond free) at the moment that the developer ceases to own any sections within the body corporate.[82]

The obligation to pay levies stems from the ownership of sections;[83] however, a body corporate must also require a developer to contribute when the developer has reserved a registered real right of extension[84] to a common property to defray the cost of rates and taxes, insurance, maintenance, the provision of electricity and water, and any other expenses and costs that are attributable to the common property over which the developer holds a registered real right of extension.[85]

The obligation for a developer to pay levies is not automatic. It must be raised by resolution at an AGM in the same manner as levies are raised for other members of the body corporate. A developer, as unit owner, is therefore liable for levies validly raised in relation to each and every section that has been built and registered and where ownership has not yet been transferred to another person.[86]

2.3.1 A developer who has reserved a real right of extension, but does not own any units, may not need to make levy contributions

The Bloemfontein High Court considered this very situation[87] in a matter where the developer held a real right of extension over certain portions of the common property, but had not erected any buildings and accordingly, had not registered sections over the common property on which the real right of extension was held.

While the case had other contractual undertakings made by the developer, the High Court interpreted the developer's statutory obligations for contributions[88] to be separate from those of unit owners[89] and accordingly, the developer, being the holder of only a real right of extension and owning no sections, was not liable for contributions toward the administrative and reserve funds.[90]

A developer who has reserved a real right of extension over common property cannot, therefore, be held liable for ordinary levies, but only for the cost of rates and taxes, insurance, maintenance, the provision of electricity and water, and any other expenses and costs that are attributable to the common property, over which the developer has reserved a real right of extension. Furthermore, the body corporate is only entitled to recover from the developer the actual amounts that the body corporate has expended on that part of the common property, which has been reserved in terms of the real right of extension.[91]

2.3.2 A developer has developed several sections, has transferred at least one unit to a third party but has failed to register the remaining developed sections

A developer has 90 days to register a developed section.[92] If the developer fails to register the developed section within the stipulated 90 days, the developer will be liable for contributions to the reserve fund from the date on which the development of the section was completed – in other words, once the section was complete and ready for occupation.[93] The development is only ready for occupation when a certificate of occupation has been issued to the developer for the development by the local authority.[94]

2.3.3 Suing a developer for outstanding contributions

The process for suing a developer for outstanding contributions is the same as described in Paragraph 3.6.6 in respect of general levy collections. However, it is important to first determine for which contributions the developer is liable before proceeding with the levy/costs collection process and potentially incurring unnecessary, wasted legal costs.

Once the body corporate has determined what contributions the developer is liable for, it must call a general meeting where a special resolution is required in order for the body corporate to proceed to institute litigation for the collection of outstanding contributions owed by the developer.[95]

In calculating the value of votes required to constitute a quorum for a general meeting, the value of votes of the developer must not be taken into account.[96] However, the STA, the STSMA and the CSOSA are silent on the value of votes of the developer counting towards the vote on the proposed special resolution in this regard, so it is conceivable that the developer could vote against the proposed special resolution and the motion could therefore not carry, if the developer has enough sections.

This seems unfair and somewhat ridiculous, but the legislature does provide two areas of relief.

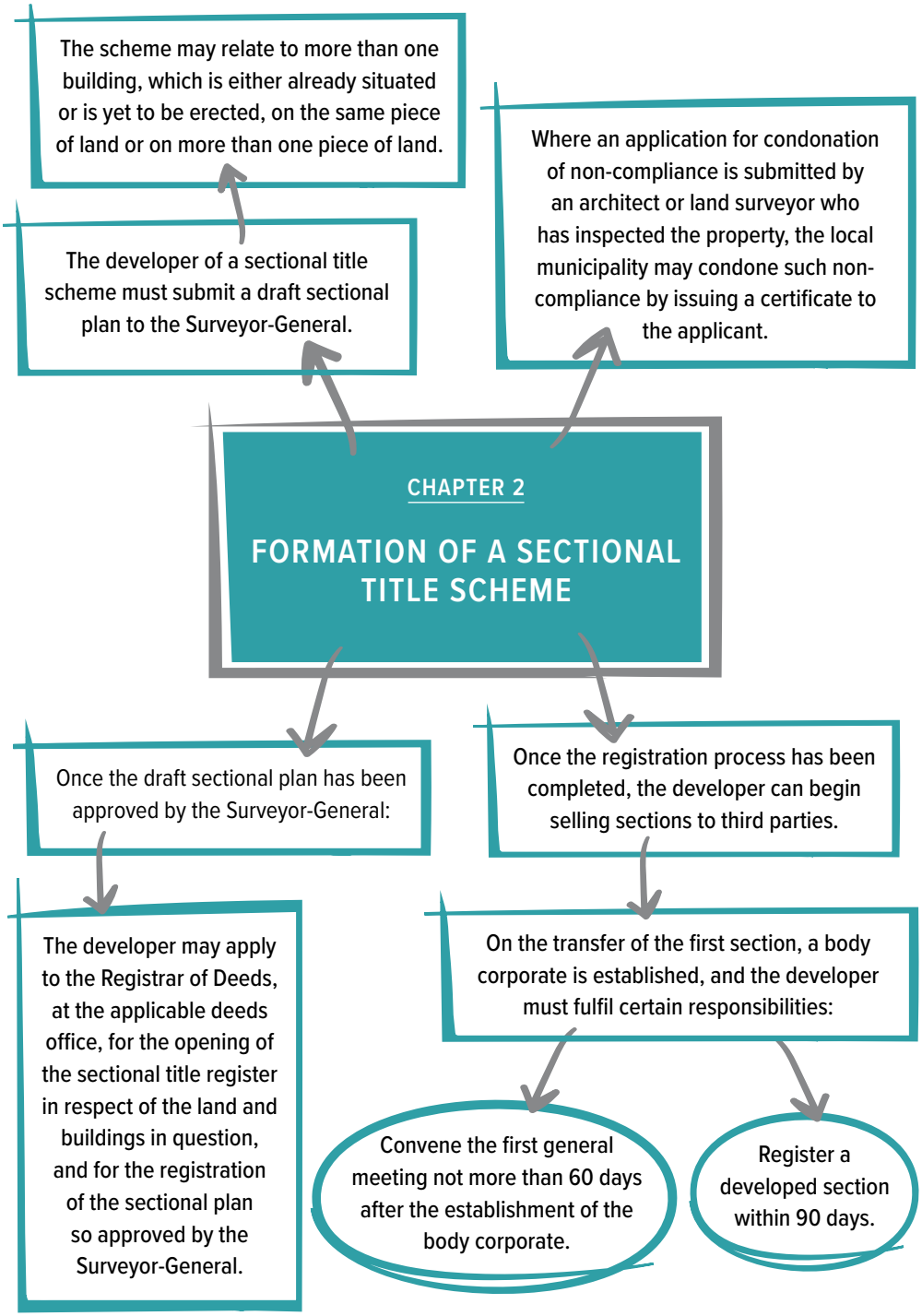
The first area of relief may be attained through an application to the CSOS for an order requiring the body corporate to call a general meeting of its members to deal with specific business,[97] or an application to the CSOS for an order declaring that a motion for resolution considered by a general meeting of the body corporate was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed.[98]

The second area of relief comes in the form of the *curator ad litem*.[99] If any unit owner is of the opinion that either they or the body corporate have suffered damages, loss or have been deprived of any benefit in respect of a matter mentioned in Section 2(7) of the STSMA and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit,[100] the unit owner must serve a written notice on

the body corporate calling on the body corporate to institute proceedings within one month from the date of service of the notice.[101] The notice must state that if the body corporate fails to institute such proceedings, an application to the court for an order appointing a *curator ad litem* will be made for the purpose of instituting and conducting proceedings on behalf of the body corporate.[102]

Having grappled with the technical aspects of sectional title development, the first general meeting and how to collect outstanding contributions from the developer, if any, Chapter 3 analyses and describes relevant scheme management concepts.

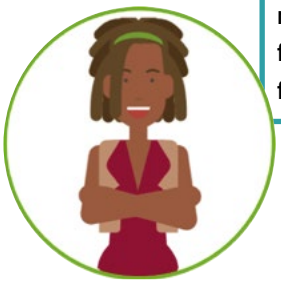
2.4 Summary


The scheme may relate to more than one building, which is either already situated or is yet to be erected, on the same piece of land or on more than one piece of land.
The developer of a sectional title scheme must submit a draft sectional plan to the Surveyor-General.
Where an application for condonation of non-compliance is submitted by an architect or land surveyor who has inspected the property, the local municipality may condone such non-compliance by issuing a certificate to the applicant.
CHAPTER 2
FORMATION OF A SECTIONAL TITLE SCHEME
Once the draft sectional plan has been approved by the Surveyor-General:
Once the registration process has been completed, the developer can begin selling sections to third parties.
The developer may apply to the Registrar of Deeds, at the applicable deeds office, for the opening of the sectional title register in respect of the land and buildings in question, and for the registration of the sectional plan so approved by the Surveyor-General.
On the transfer of the first section, a body corporate is established, and the developer must fulfil certain responsibilities:
Convene the first general meeting not more than 60 days after the establishment of the body corporate.
Register a developed section within 90 days.

3 Important Scheme Management Concepts

Sectional title scheme management refers to rules, policies and protocols that are implemented and adhered to by the trustees, in order to ensure the efficient management of the body corporate. This chapter clarifies PQ, common property maintenance, parking, real versus personal rights, and insurance and levies, as some of the most prevalent scheme management aspects.

The boundaries of a section are defined by reference to the floors, walls and ceilings of the section. The common boundary between any section and another section, or common property, shall be the median line of the dividing floor, wall or ceiling, as the case may be.[103] The windows, doors or other structure that divide a section from another section, or from common property, are considered to form part of such floor, wall or ceiling.[104]



3.1 Participation Quota (PQ)[105]

The PQ schedule of a sectional title scheme determines:

a. The value of the vote of the unit owner of a section, in any case where the vote is to be calculated in value;[106]
b. The undivided share in the common property of the unit owner of the section;[107] and
c. The share of the proportion in which the unit owner must make contributions to the administrative fund.[108]

The PQ also determines the extent of liability of a unit owner in the event of being joined to a body corporate judgement debt.[109] It must be noted that the specifications in the schedule attached to a sectional plan regarding the PQ of each section and of the total PQs of all of the sections in the scheme, shall be deemed to be correct for all purposes, unless proven to the contrary.[110]

3.1.1 Changing a PQ share

When submitting an application for the opening of a sectional title register in terms of the STA, the developer may make rules under Section 10 of the STSMA by which a different value is attached to the vote of the unit owner of any section, or the liability of the unit owner of any section to make contributions to the administration fund or pay for any additional insurance.[111] The members of the body corporate may also make such changes upon the authority of a special resolution.[112] However, if any unit owner is adversely affected by the change, their prior written consent is required and it is not possible for the body corporate to change the value of a PQ in respect of the above, until there are owners, other than the developer, of at least 30% of the units in the scheme.[113]

Sectional title scheme unit owners are entitled, under certain conditions, to make changes to their sections. Since the PQ is expressed as a percentage of a whole, any change in the area of one section changes the PQs of all of the sections in the scheme. In short, if an owner of a section wants to extend the boundaries or floor area of their section,

they will require the approval of the body corporate by way of a special resolution of its members.[114]

Changes to the PQ need to be implemented as soon as the new PQ becomes effective. In practice, the managing agent will only update the levy schedule on confirmation that the sectional title deed of the extended section has been endorsed by the relevant authority. If the management of the scheme waits until the new financial year, or the change in the levy resulting from the budget approved at the AGM, owners will be prejudiced.

3.1.2 Calculating the PQ

Total PQs of all sections shall be rounded off to exactly one hundred percent (100%).[115]

A PQ for a residential scheme is expressed as a percentage to four decimal places calculated by dividing the floor area of each owner's section, as shown on the sectional plan, by the total of all the floor areas of sections in the scheme.[116] For an example, refer to 'How to Calculate PQ' in Chapter 1 of the Unit Owner Reference Guide. For schemes which are not only residential in nature but also have commercial sections (a multi-use scheme), the PQ shall be determined by the developer, and shall also be expressed to four decimal places; but for the residential sections, the total of the quotas allocated by the developer shall be divided among them proportionately.[117]

Both the administrative and the reserve fund into which contributions from owners are made in accordance with their PQ share are discussed below.

3.2 Common Property Maintenance

Maintaining the common property is a crucial function of the body corporate, without which, diligent levy-paying owners will be adversely affected or subject to substandard living conditions, and the value of the sections in the scheme will deteriorate.

3.2.1 The administrative fund

The body corporate must perform the functions entrusted to it by or under the STSMA, or in terms of the rules, in order to establish and maintain an administrative fund that is reasonably sufficient to cover the estimated annual operating costs, specifically for the repair, maintenance, management and administration of the common property, which includes reasonable provision for future maintenance and repairs.[118] For this purpose, owners contribute to the administrative fund as determined by the body corporate and the trustees, following approval of the operating budget for the ensuing financial year at the AGM.[119]

The requirements to maintain the common property and to keep it in a state of good and serviceable repair, including any plant, machinery, fixtures and fittings used in connection with the common property, are primary functions of the body corporate.[120] Furthermore, the body corporate must maintain and repair (subject to the rights of the local municipality) any pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section, or of the common property, or in favour of one section over the common property.[121] Following from these functions, the body corporate has the power to establish and maintain suitable common property lawns, gardens and recreation facilities.[122]

3.2.2 The reserve fund

In addition to the administrative fund, the body corporate must establish and maintain a reserve fund, which must have such amounts that are reasonably sufficient to cover the cost of future maintenance and repair of common property, but not less than the amounts prescribed by the Minister.[123] Please refer to Annexure B of this guide for an explanation of how the reserve fund is calculated in accordance with PMR 2 of the STSMA Regulations. In terms of PMR 21(3)(d) of the STSMA Regulations, the moneys of the reserve fund must be invested on the authority of a trustee resolution in a secure investment with any institution referred to in the definition of 'financial institution' in Section 1 of the Financial Services Board Act.[124]

The funds that must be paid into the reserve fund are listed in Table 5.

Table 5 Funds that must be paid into the reserve fund

With the exception of the funds earmarked below, which must be paid into the reserve fund, all other body corporate income must be paid into the administrative fund:[125]
a. Any part of the annual levies designated for the reserves or the maintenance, repair and replacement plan;
b. Any amounts received under an insurance policy in respect of damage or destruction of property for which the body corporate is responsible;
c. Any interest earned on the investment of the money in the reserve fund; and
d. Any other amounts determined by the body corporate.

3.2.3 The ten-year maintenance, repair and replacement plan

One requirement of the body corporate or trustees, which is often delegated to the managing agent or another service provider, is the preparation of a written maintenance, repair and replacement plan for the common property, which must set out:[126]

a. The major capital items expected to require maintenance, repair and replacement within the next ten years;
b. The present condition or state of repair of those items;
c. The time when those items or components of those items will need to be maintained, repaired or replaced;
d. The estimated cost of the maintenance, repair and replacement of those items or components;
e. The expected life of those items or components once maintained, repaired or replaced; and
f. Any other information the body corporate considers relevant.

Thus, the annual contribution to the reserve fund for maintenance, repair and replacement of each of the major capital items must be determined according to the following formula:[127]

- A 'major capital item' is defined as wiring, lighting and electrical systems, plumbing, drainage and storm-water systems, heating and cooling systems, lifts, carpeting and furnishings, roofing, interior and exterior painting and waterproofing, communication and service supply systems, parking facilities, roadways, paved areas, security systems and facilities, and any other community and recreational facilities.[128]
- 'Estimated cost' is defined as the estimated cost to maintain, repair or replace a major capital item.[129]
- 'Past contribution' refers to the funds in the reserve fund of the body corporate in respect of the estimated cost.[130]
- 'Expected life' means the estimated number of years before it is expected that the cost of maintenance, repair and replacement of a major capital item will be incurred.[131]

Additionally, Regulation 2(a) to (c) of the STSMA Regulations provides bodies corporate with the minimum amounts required for their reserve fund. These minimum amounts are set out in Table 6.

Table 6 Minimum amounts required in the reserve fund

IF ...	... THEN
the amount held in the reserve fund at the end of the previous financial year is less than 25% of the total contributions to the administrative fund for that previous financial year,	the budgeted contribution to the reserve fund must be at least 15% of the total budgeted contribution towards the administrative fund.
the amount held in the reserve fund at the end of the previous financial year is equal to, or greater than 100%, of the total contributions to the administrative fund for that previous financial year,	no minimum contribution to the reserve fund is required.
the amount held in the reserve fund at the end of the previous financial year is more than 25%, but less than 100%, of the total contributions to the administrative fund for that previous financial year,	the budgeted contribution to the reserve fund must be at least the amount budgeted to be spent from the administrative fund on repairs and maintenance to the common property in the financial year being budgeted for.

For a practical example on the determination of minimum amounts required for the reserve fund, refer to Annexure B.

The maintenance, repair and replacement plan takes effect upon its approval by the members in a general meeting, although members may lay down conditions for the payment of money out of the reserve fund.[132] The trustees must then report the extent to which the approved maintenance, repair and replacement plan has been implemented at each AGM.[133] This maintenance, repair and replacement plan is not a once-off plan and must be **updated annually** to maintain its ten-year forecast.

The reserve fund is key to the implementation of the maintenance, repair and replacement plan of the body corporate, and the funds therein

must be used for the purposes set out in the plan.[134] Money may be paid out of the reserve fund in accordance with trustee resolutions and the approved maintenance, repair and replacement plan.[135]

The instances of an urgent maintenance, repair or replacement expense are given in Table 7.

Table 7 Urgent maintenance, repair or replacement

The trustees may also resolve that such payment is necessary for the purpose of an urgent maintenance, repair or replacement expense, which includes, without limitation, payment to:[136]
a. Comply with a court order or the order of an adjudicator;
b. Repair, maintain or replace any property that the body corporate is responsible for and where there are reasonable grounds to believe that the immediate expenditure is necessary to ensure safety and prevent significant loss or damage to persons or property;
c. Repair any property that the body corporate is responsible for when the need to repair could not have been reasonably foreseen in preparing the maintenance, repair and replacement plan; and
d. Enable the body corporate to obtain adequate insurance for property that the body corporate is required to insure.

In all cases, the trustees must report to the members on any such expenditure as soon as possible after it is made.[137] Annual financial statements must be prepared for presentation at the AGM, and must include an analysis of amounts in the reserve fund showing what amount is available for maintenance, repair and replacement of each major capital item as a percentage of the accrued estimate cost and the Rand value of any shortfall.[138] Separate books of account and bank accounts for the administrative and reserve funds must be kept by the body corporate.[139]

One of the main aspects of management within a scheme, other than the administrative and reserve funds and the common property maintenance requirements in respect thereof, is the issue of parking. It is not possible to solve problems regarding parking without specific detail about

the parking bay or garage in question. Below are the primary factors to consider when issues of parking arise within a sectional title scheme.

3.3 Parking

Due to factors such as rapid urbanisation, the ever-increasing number of vehicle owners, the limited space available for housing development and subsequent lack of available parking space in South Africa, parking is becoming an ever-increasing contentious issue. When it comes to parking, the rights and obligations of sectional title unit owners differ vastly from those of full title owners.

Parking bays in a sectional title scheme are often situated on common property, whether as unallocated common property parking bays or in the form of EUAs conferred upon particular owners. A parking bay could also be a section in a scheme when it is marked as such on the scheme's registered sectional plan. A parking bay that has been registered as a section is a 'utility section' because it is designed to be used as an accessory to a primary section.[140]

Owners acquire rights to parking in different ways depending on the nature of the parking, i.e. a common property parking bay, an EUA parking bay, or a garage/parking bay that is registered as a utility section in the sectional title scheme.

3.3.1 The right to parking in a sectional title scheme

Once a person becomes a member of the body corporate, which is on the date that the unit is registered in the owner's name in the Deeds Office, the person automatically becomes the owner, jointly with all the other owners of undivided shares in the common property, proportionate to the owner's section, in accordance with the associated PQ.

The owner therefore acquires a right to the use and enjoyment of the unallocated common property parking bays on the day on which the unit is registered in their name.

In the absence of a defined allocation of parking bays, it is easy to imagine the chaos and frustration among unit owners and visitors on a first-come, first-served basis. It is therefore required to ensure that these unallocated parking bays are assigned to, and enjoyed by, one or more owners of sections and visitors, in an organised and controlled manner.

3.3.1.1 EUA parking bays

Rights to EUAs in a body corporate can be created in the following ways:

a. By the developer when making an application for the opening of a sectional title register and the registration of the sectional plan, whereby the right to the exclusive use of such part or parts of the common property is conferred upon the owner(s) of one or more of the sections;[141]
b. The EUA is ceded by the developer to the particular owner to whom exclusive use rights are allocated, by the registration of a unilateral notarial deed of cession in the owner's favour;[142] and/or
c. By the body corporate authorised thereto by unanimous resolution of the owners.[143]

While the delineation and cession of exclusive use rights to particular owners must be upon unanimous resolution of the owners, the owners may by special resolution enter into a notarial deed of cancellation of an exclusive use right.[144]

Trustees may also resolve to allocate a common property parking bay to a specific unit for exclusive use of an owner. Trustees, for this purpose, may propose amendments to the management rules or conduct rules whereby EUAs are created. The trustees' proposal must, however, be authorised by the appropriate resolution by members of the body corporate.[145]

3.3.1.2 Parking bays as part of a section

What is clear from the above is that the owners do not **exclusively own** the parking bays on common property, whether it is bestowed as unallocated common property or via EUAs, they may have the right to the **exclusive use** of the parking bay.

Garages or parking bays can only be **owned** exclusively by an owner if they are **marked as a utility section** on the scheme's sectional plan and are referred to on the sectional title deed of that owner's section, or form part of the primary section owned by that owner. An owner acquires exclusive ownership and the right to their parking area (the garage) upon the date of registration in the deeds registry. Only the owner of the garage/parking may sell it.

Such a garage, which may be a utility section, will have a section number different from the section number of the owner's primary section. The owner of a garage that is a utility section may also hold a separate title deed in respect thereof, or it may be endorsed and be part of the same sectional title deed of the primary section in question. This depends on how the sectional title development scheme was established by the developer and how the body corporate has allocated any initially unallocated common property parking bays.

The utility section's floor area is taken into account in respect of the calculation of any levy contributions in addition to the owner's levy for his primary section, and in accordance with the utility section's PQ. A garage that is a separate utility section, and not tied to the sectional title deed of

any primary section, may be bought and sold separately from the owner's primary section, and may also be separately bonded.

3.3.2 When an owner's right to parking ceases to exist

An owner's right to parking ceases to exist in different ways depending on the nature of the parking bay and whether it is situated on common property, is subject to an EUA or is a registered utility section. We explain each in turn below.

3.3.2.1 Common property parking bays

Upon an owner's unit being sold and the transfer to a new owner being registered in the deeds registry, the previous owner's right of use and enjoyment of the common property parking bays will automatically and immediately cease to exist, as the previous owner is no longer a member of the body corporate.

3.3.2.2 EUA parking bays

The body corporate may, upon special resolution, conclude a notarial deed of cancellation of an EUA.[146] This cancellation is effected by means of a bilateral notarial deed, which is entered into between the body corporate and the holder of the EUA.[147]

Once the EUA is cancelled, this part of the land will yet again vest in the scheme as common property, which all the owners are entitled to use and enjoy, unless allocated simultaneously in one of the ways mentioned above, to another member or members of the body corporate for their exclusive use.

3.3.2.3 A garage that is a utility section

When an owner sells his garage, ownership thereof is transferred to the purchaser who then becomes the registered owner of the garage, and a member of the body corporate. The seller's right to the ownership of the garage ceases to exist on the date of registration of the transfer in

the name of the new owner. For clarity, a utility section such as a garage can be sold to a person who is not an owner of a primary section, and therefore, there could be members of the body corporate who only own utility sections and no primary sections, depending on the wording of the relevant primary sectional title deed or the separate utility sectional title deed and the sectional plan of the scheme in question.[148]

3.3.3 Insufficient parking space and possible solutions

In higher density areas, the difficulty faced by owners is far more extensive. Multi-storey buildings often have a mere single-storey parking facility. The practical solutions to this are limited.

Some common property, such as a braai or play area, may be converted into a parking area. For this purpose, the trustees could propose an improvement or alteration to common property in terms of PMR 29(2) of the STSMA Regulations. Upon request by the owners for a special general meeting (SGM), the trustees could be authorised to effect the improvement upon special resolution by the body corporate.[149]

It is obvious that this solution is not available to sectional title schemes that do not have additional and/or appropriate areas to be converted.

To convert common property is very costly. Therefore, availability and affordability should be properly considered by the members of the body corporate.

A body corporate may buy additional land to extend the common property,[150] thereby supplementing its available parking space. The body corporate may, however, only do so if duly authorised thereto in writing by all the owners. An owner who does not own a motor vehicle may feel that acquiring additional land is not in their personal best interest as they do not need additional parking space. Such an owner will, in all probability, not agree to buy additional land as this will impact on the owner's levy.

3.3.4 Unauthorised use of parking bays

A section or EUA may not be used or permitted to be used for any purpose other than what is shown, or implied on or by, the registered sectional plan.[151] Should the owner or occupier wish to use the section or EUA for other purposes, the written consent of all owners must be obtained, after which the section or EUA may be used for the consented purpose.[152]

Should any of the owners not grant consent for use of the section or EUA as requested by the owner, and the owner is of the opinion that such refusal of consent is unfairly prejudicial, unjust or inequitable to them, they may make an application to the Ombud in terms of Section 13(2) of the STSMA within six weeks after the date of such a refusal for relief.[153]

3.3.5 Unauthorised parking

An owner or occupier may not allow a vehicle to park or stand anywhere on the common property other than the parking bay allocated to their section, without the written consent of the trustees, or in cases of an emergency without such consent.[154] Such consent shall include the duration of the permission.[155] In many sectional title schemes, the visitors' parking is for use only by *bona fide* visitors and owners are not permitted to use the visitors' parking. As visitors' parking is on common property, an owner may apply to use visitors' parking for a specified period and for a specific reason and may need to pay the body corporate for the use thereof.

In this part of the Trustee Reference Guide, we discussed parking bays – some of which may be allocated to owners as exclusive use rights. These rights may be either real rights or personal rights, which will be elaborated on next.

3.4 Real Rights versus Personal Rights

Real rights are claims in things and are enforceable against everyone and all entities including government. Personal rights are only enforceable against specific persons or entities.

A **real right** is created from a relationship between two or more natural or juristic persons to enable one or more persons to have a registered legal right over an object, with possible conditions associated. Simply stated, real rights are capable of being registered in the Deeds Office and require an application for a transfer through a legal process (such as a notarial deed of cession) whereas a personal right is not registered in the Deeds Office and can be more easily changed and transferred under different conditions (such as in a simple cession agreement).

A **personal right** is created from a mutual agreement between two or more natural or juristic persons for one or more persons to have defined rights over an object, with possible conditions associated or for one or more persons to have obligations for the performance of a specified act in favour of the others. Section 27 of the STA provides for EUAs that must be registered in the deeds office and may be bonded. This right is a real right and enforceable against anybody who infringes against the right. Judge J Le Roux stated in the *Solidatus* case[156], referring to Section 27 exclusive use rights: "*In the context of the Act and the then novel concept of exclusive use areas, these rights are so closely akin to full ownership as to be virtually indistinguishable*."[157]

The developer or the owners may also make management or conduct rules in terms of Section 10 of the STSMA to confer exclusive use rights on owners.[158] Management rules require a unanimous resolution[159] and conduct rules require a special resolution.[160] The rules must contain a plan to scale, indicating the location of the EUAs.[161] The EUAs must be distinctly numbered, the purpose of the EUA must be indicated, and a schedule indicating which owners benefit from the exclusive use right must be attached.[162] These exclusive use rights, which are conferred in terms of the rules do not constitute a real right (although the rules are filed at the Ombud). They are personal rights enforceable by the holder of the exclusive use right, against the body corporate, who will be responsible for taking all reasonable measures to ensure the exclusive use of the owner or owners is achieved.

3.4.1 Rights and duties of exclusive use right holders

A holder of an EUA has the exclusive right to the use and enjoyment of the EUA and can make minor improvements to the area, as long as the minor improvements do not detract from the appearance of the section or the common property.[163] However, the holder of the exclusive use right will require the trustees' written consent to make any change to the external appearance of any EUA.[164]

Furthermore, the holder cannot extend the EUA in a way that would, in practice, constitute an extension of a section,[165] and may not do anything on the EUA that will impair the stability of another section or another EUA, or interfere with the enjoyment of other sections or other EUAs,[166] or that would have a negative effect on the value of another section or another EUA.[167] The holder may not use the EUA in a way that is a nuisance to other owners,[168] nor contravene laws or by-laws or conditions of title, which is contrary to the purpose of the EUA.[169]

Except in emergencies, reasonable notice to the holder of the exclusive use right must be given by the body corporate and the EUA holder is then obliged to give access to any person authorised in writing by the body corporate for any repairs necessary, or to ensure that the STSMA and the rules are being observed by the holder of the exclusive use right.[170] The holder must also abide by the conduct rules applicable to their EUA.[171]

The body corporate must keep an updated register of all EUAs in the scheme.[172] This register should include:

- Information on whether it was allocated in terms of Section 27 of the STA or in terms of any rules;
- Any description of the EUA;
- The unique number allocated to the EUA; and
- The purpose of the EUA.

The questions that arise in respect of EUAs are not only in relation to the manner in which they are established, which is vitally important, but also relate to who pays for the maintenance and upkeep of the EUA. In

this regard, the body corporate ought to ensure that levy contributions for EUAs are adopted and implemented as part of the budget or charge the holder of the exclusive use right for the actual expenses incurred by the body corporate in respect thereof.[173] The liability for any particular maintenance or upkeep charges may also be contained in either the rules or the deed of cession of the EUA in question.[174]

3.4.2 The importance of ensuring levy contributions on EUAs

Maintenance of an EUA is the responsibility of the body corporate unless the rules make the maintenance of the EUA the responsibility of the holder of the right. The holder of the exclusive use right is then obliged to make a contribution to the administrative fund to cover specific costs attributable to the EUA – rates and taxes, including water and electricity, maintenance and insurance of the EUA or any structures thereon.[175] In practice, a levy is not usually raised but the actual costs incurred by the body corporate are charged to the account of the holder of the EUA who must pay this amount to the body corporate.

Failure to raise an EUA levy contribution and collect EUA levies will mean that all owners pay for the maintenance of an area of the common property to which they have no right of access or enjoyment. That is patently unfair and against the intention of the STA and STSMA. It is therefore important to make sure that the body corporate collects levies on EUAs from the holders thereof, to cover the specified costs attributable to each EUA.

In respect of the above requirements, one aspect of the cost of EUA maintenance is insurance. However, this scheme management item is not so narrowly applied, as the requirement of insurance is far-reaching and applicable to several other aspects of the sectional title scheme and the management thereof. We now delve deeper into the insurance requirements applicable to bodies corporate.

3.5 Sectional Title Insurance

In the Unit Owner Reference Guide, we identified that bodies corporate are obliged to take out insurance. This is an important function of the body corporate.

Bodies corporate can be held liable for any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under the STSMA or any rule to which bodies corporate must adhere.[176]

The STSMA entrusts the body corporate with the functions of:

- **Insuring the building;[177]**
- **Taking out insurance for prescribed risks as well as non-prescribed risks determined by the owners via special resolution;[178]**
- **Utilising the money paid out by insurance to repair the damage or rebuild;[179] and**
- **Paying its insurance premiums timeously.[180]**

3.5.1 Types of insurance cover required by a body corporate

A body corporate must make sure that it is sufficiently covered and that its insurance policy contains cover for the following four components:

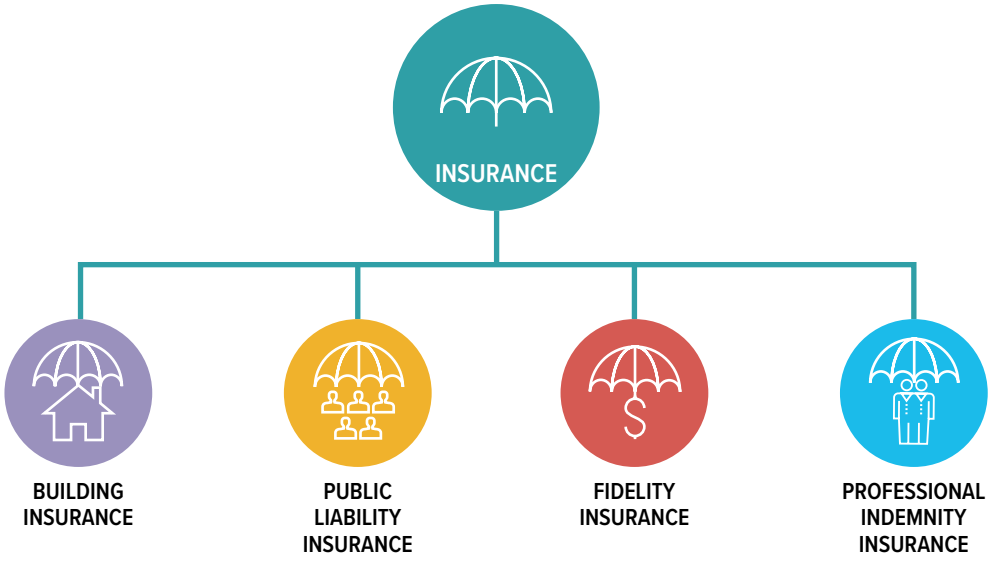


Figure 2 Diagrammatic summary of body corporate insurance components

3.5.1.1 Building insurance

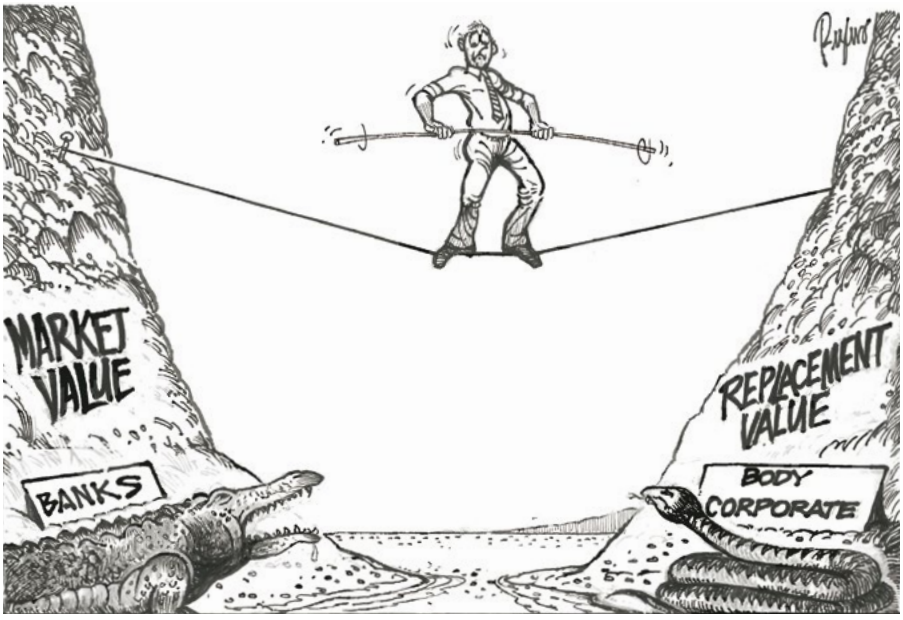
The body corporate must obtain coverage to insure its building or buildings.[181] 'Building' is defined in Section 1 of the STA and STSMA as 'a structure of a permanent nature erected or to be erected and which is shown on a sectional plan as part of a scheme'.

The body corporate must ensure that its insurance policy provides sufficient cover over the building or buildings to the replacement value thereof against fire and other prescribed risks.[182] Table 8 lists these prescribed risks.

Table 8 Prescribed risks

Lightning, explosion and smoke;
Riot, civil commotion, strikes, lock-outs, labour disturbances or malicious persons acting on behalf of or in connection with any political organisation;
Storm, tempest, windstorm, hail and flood;
Earthquake and subsidence;
Water escape, including bursting or overflowing of water tanks, apparatus or pipes;
Impact by aircraft and vehicles; and
Housebreaking or any attempt thereat.

If a building is destroyed, the replacement value is the estimate of all costs to demolish and remove the rubble and then to rebuild the building or buildings to their original state. Replacement value is **not** the same as market value or the collective value of the units as listed on a municipal valuation.[183]



Market value is the price at which a property could be sold on the market and includes the price for the land on which the building or buildings are situated.[184] It is the price that a purchaser is willing to pay for the property being sold in a private sale, or the price at the fall of the hammer at an auction. Municipal valuations are said to be largely based on market value, but this is not always the case in practice.[185]

A body corporate must obtain a replacement valuation of all buildings and improvements that it must insure, at least every three years and present such replacement valuation at the AGM.[186]

3.5.1.2 Liability insurance

A body corporate has perpetual succession and is capable of suing and of being sued in its corporate name in respect of any contract entered into by the body corporate, any damage to the common property, any matter in connection with the land or buildings for which the body corporate is liable, or for which the owners are jointly liable, and any other matter arising from its powers or the performance of its duties under the STSMA or any rules.[187]

A body corporate is obliged by legislation to control, manage and administer the common property for the benefit of all owners. A body corporate must comply with any law relating to the common property or to any improvement of land comprised in the common property,[188] to maintain all the common property and to keep it in a state of good and serviceable repair.[189] Further to this, the body corporate must maintain any plant, machinery, fixtures and fittings used in connection with the common property and sections, as well as keep them in a state of good and serviceable repair.[190]

The STSMA deems it necessary for a body corporate to take out public liability insurance to cover itself from the risk of liability that it may incur to pay compensation in respect of bodily injury to, death or illness of a person on or in connection with the common property and any damage to or loss of property that is sustained as a result of an occurrence or happening in connection with the common property.[191]

For example, a unit owner's sports car is damaged when roof tiles fall onto it when it is parked under a common property carport. The owner sues the body corporate for damages and the body corporate is found liable by a competent court. This fictional case assumes that there was no disclaimer on or near the carport or in the body corporate's conduct rules or at the entrance to the scheme. The body corporate is ordered to pay compensation to the owner.

The body corporate may well find itself in a particularly difficult financial position should it not be insured against such an incident. The amount to be insured must be determined by members in a general meeting, but cannot be less than ten million rand or any such higher amount, as may be prescribed by the Minister in any one claim, and in total for any one period of insurance.[192]

3.5.1.3 Fidelity insurance[193]

Bodies corporate also risk losing money as a result of fraud or dishonesty and therefore require coverage for this risk under their insurance policies.[194] Please note that this is not the same as the cover obtained via the Fidelity Fund Certificate issued by the Property Practitioners Regulatory Authority (PPRA) acquired by managing agents operating a trust account on behalf of the body corporate. This is additional prescribed insurance cover that the body corporate must take out with an insurer.

An agent or 'insurable person' is a person who has access to, or control over, the moneys of the body corporate, and includes the following, who in the normal course of the community scheme's affairs has access to or control over the community scheme's money.[195]

Figure 3 Minimum fidelity insurance cover formula

A list of possible insurable persons is given in Table 9.

Table 9 Insurable persons

An insurable person can be:
A scheme executive;
An employee or agent of a community scheme who has control over the money of a community scheme;
A managing agent and/or an executive managing agent; and
A contractor, employee or another person acting on behalf of, or under the direction of, a managing agent.

The minimum amount of fidelity insurance cover that a community scheme is directed to have, as prescribed by the CSOS Regulations, must be calculated as the total value of:[196]

a. The community scheme's investments and reserves at the end of its last financial year; and
b. 25% of the comunity scheme's operational budget for its current financial year.

As with liability insurance, the amount to be insured must be determined by members in a general meeting, but cannot be less than the prescribed minimum amount as calculated above.

The body corporate must ensure that their insurance policy wording is constructed in such a way that the insurer is obliged to make payment within a reasonable period, after proof of the loss has been provided, and that such a payment by the insurer is not contingent on the body corporate taking or completing criminal or civil proceedings against the insured person.[197] The question of how soon the body corporate would be able to claim from insurance and be paid out from insurance under this type of cover largely depends on the particulars of each claim, the insurer involved, and the policy wording of the relevant fidelity insurance cover.

3.5.1.4 Professional indemnity insurance

Bodies corporate are required to indemnify their trustees against claims arising as a result of any act that is not in breach of their fiduciary obligations, and which arises as a result of an official act, through professional indemnity insurance.[198] A fiduciary obligation is a commitment to act in the best interests of another. More specifically in this context, the fiduciary obligation of trustees, which arises from the STSMA, requires that the trustees will act honestly and in good faith to manage and protect the properties, money and affairs of the body corporate to the best of their abilities.[199] It must be emphasised that this insurance will not cover any act or omission of the trustee that breaches their fiduciary obligations towards the body corporate.

This type of insurance is advisable, even though it is not listed as a required insurance risk in the sectional title laws, so as to make sure the body corporate has the necessary cover to indemnify their trustees.

3.5.2 How bodies corporate take out insurance

A body corporate must table insurance as an agenda item to be discussed at the AGM.[200] At the AGM, the members consider the schedule of insurance replacement values and amend this, if required.[201] The owners then determine and vote on the following agenda items, subject to the prescribed minimums as mentioned above:[202]

a. The amount of cover required for liability insurance (by ordinary resolution);
b. The amount of cover required for fidelity insurance (by ordinary resolution); and
c. Additional insurance which is not prescribed (by special resolution).

3.5.3 Geysers

Burst geysers are a common occurrence in a community scheme. As noted above, as a prescribed risk against which bodies corporate must insure, the STSMA Regulations includes water escape, such as bursting or overflowing of water tanks, apparatus or pipes.

It is interesting to note that PMR 31 of the STSMA Regulations states that the burden to maintain and, when necessary, replace a water-heating installation (such as a geyser) is placed on the owner or, in the case where one geyser serves more than one unit owner, the serviced owners must share the burden on a *pro rata* basis.[203]

3.5.4 Additional insurance by special resolution

The owners can also resolve to take out additional insurance against other risks that are not prescribed by the STSMA or STSMA Regulations, but must do so by way of a special resolution.[204] If this happens, the body corporate must pay the additional insurance premiums for such additional insurance cover.

For example, a body corporate on the banks of a dam may own, and wish to insure, a small fishing boat that it rents out to residents. Another body corporate that has a gym on common property may wish to insure specialised, movable gym equipment against damage, loss or theft. This additional insurance must be an insurable risk relating to the land or buildings of the scheme, or it must relate to the body corporate in the performance of its functions.[205]

Furthermore, the STSMA does not preclude unit owners from taking out insurance themselves, against damages arising to their sections where such risks are **not covered** in the body corporate's insurance policy, or against risks other than damage to their section.[206] It is submitted that the monthly insurance premium for the additional insurance taken out directly by the owner must be paid by said owner.

3.5.5 Registered mortgage bondholders and insurance

The PMRs from the STSMA Regulations define a registered bondholder as *"the holder of a mortgage bond of whom the body corporate has been notified in terms of Section 13(1)(f) of the Act"* by a unit owner.[207] Registered bondholders have a clear interest over their bonded properties and therefore it follows that they are concerned with the insurance over these properties.

Should a bondholder request additional insurance over and above what is already proposed to be taken out by the body corporate, then it is submitted that the registered bondholders should make arrangements for the payment of the additional insurance requested either through the bonded owner or directly. If additional insurance is added to the body corporate's insurance policy and the additional premium is paid by the body corporate, the body corporate may recover this additional premium

expense from the relevant owner, by adding it to their levy account, with the owner's permission.

The STSMA and the STSMA Regulations recognise the above interest in that:

a. Mortgage bondholders who hold registered bonds over 25% in number of the primary sections have the right to request in writing that the body corporate obtains cover for additional risks;[208]
b. The body corporate's insurance policy must include a clause that states that the policy is valid and enforceable by a holder of a registered mortgage bond over a section or EUA in the scheme;[209]
c. The body corporate may apply the pay-out received from an insurer in respect of a claim to the holder of any sectional mortgage bond; and[210]
d. Registered mortgage bondholders can request that the body corporate records the cession of a member's interest in any of the proceeds of an insurance policy.[211] This request must be in writing and the registered bondholder must provide enough evidence to prove this interest.[212]

3.5.6 Excess amounts and the average clause

Finally, a few general points to remember about sectional title insurance are:

a. The insurance policy of a body corporate may include excess amounts.[213]
b. The insurance policy must **not** apply an 'average' clause to the whole building, but rather to the individual units or EUAs.[214]
    i. An average clause allows an insurer to claim the proportion of loss where there is a difference between the actual amount it would cost to replace an insured item, and the recorded replacement value of an item as per the insurance policy.[215] This is done in cases where an item has been undervalued and thus underinsured on the policy. For example, where a unit's

replacement value is understated on the replacement schedule in an insurance policy, and a claim is made in respect of this unit, the insurer could hold the body corporate liable for the loss calculated on a *pro rata* basis.

ii. If the application of the average clause is restricted to the individual unit or EUA, then the insurer must look at that specific unit's replacement value as stated on the policy, and cannot look at the replacement value of other units or the buildings.[216]

When any claim is made on the body corporate's insurance policy, the insurer will pay this into the nominated account of the body corporate. This is a required step for audit purposes. The body corporate will then make arrangements to pay the relevant owner, i.e. either to the owner's nominated bank account or pass a credit on the owner's levy account for the same value of the insurance pay-out.

3.5.7 Insurance-related tasks to be completed before the AGM

An insurance task list that can be used by trustees and managing agents to assist in compliance with the STSMA and the STSMA Regulations insofar as it relates to insurance for sectional title schemes can be found in Annexure D at the back of the book.

3.5.8 Insurance checklist for the body corporate insurance policy

A checklist table to assist managing agents and trustees to ensure that their body corporate insurance policy is in line with the STSMA and the STSMA Regulations can be found in Annexure E at the back of the book.

While a body corporate must take out the prescribed insurance and may take out additional insurance for other risks not prescribed, the body corporate will not be able to function adequately and in compliance with the law without validly raising and collecting levies from members.

3.6 Levies: A Comprehensive Guide

The term 'levy' or 'contribution' is not specifically defined in the STA or STSMA; however, one could define levies as an owner's share (PQ) of the amounts determined for contribution towards the administrative fund and the reserve fund.[217] The STSMA uses the word 'contribution' interchangeably with the word 'levy'.

Simply put, a body corporate must establish and maintain:

a. An administrative fund which covers the annual operating costs of the body corporate, including repairs and maintenance, rates and taxes, insurance premiums and any other duty and/or obligation;[218] and
b. A reserve fund which is intended to cover the costs of future maintenance and repair of common property.[219]

A levy is the amount that an owner must contribute towards the above funds, in proportion to their PQ share.

It must be kept in mind that the body corporate is not responsible for municipal rates and taxes for each unit. Each unit owner is liable to pay the rates and taxes for their own unit, and thereby must ensure they receive their own municipal account from the local authority.

3.6.1 Importance of levies

Levies are the lifeblood of a body corporate because a body corporate cannot perform any of the legislative functions and powers prescribed by the law without levies. For example, if a body corporate does not receive levies, it cannot:

a. Maintain or repair the common property, which includes, amongst other things, the exterior 'shell' of each owner's section, the plumbing and electrical wiring that run through the common property to each section and any boundary or security feature (a wall and/or gate) surrounding the scheme;[220] and

b. Pay any insurance premiums, staff wages or service provider fees, such as managing agent fees, attorneys' levy collection fees, or fees to a security company guarding the entrance to the common property.[221]

Given the communal nature of sectional title schemes and the obligations placed on a body corporate to administer and maintain the scheme, levies are vitally important to protect the investment/security of each member within the scheme. For example, if members of a body corporate were expected to maintain and repair the common property themselves – each member being responsible for their own part of the common property – some owners may be able to afford to paint and repair the walls of their section while others may not. In this case, even the owner who diligently maintains and repairs the exterior of their section would suffer financially on the sale of their unit, as prospective purchasers also place a financial value on the aesthetics of the entire scheme.

3.6.1.1 How levies are raised

Before a levy can be raised, the trustees, usually in conjunction with the managing agent, must prepare budgets for the administrative and reserve funds for the ensuing financial year, which contains estimates for the body corporate's anticipated income and expenditure for the next financial year.[222]

Once the budgets have been approved at an AGM, the trustees must determine and raise the annual levy to be paid by each owner according to their PQ share.[223]

The trustees raise the annual levy by way of a trustee resolution and, immediately upon the passing of the resolution, the entire annual levy becomes legally enforceable against each member of the body corporate.[224] However, in practice, the trustees will generally resolve that the annual levy be paid in monthly instalments.

Within 14 days after the approval of the budgets, the trustees must provide a written notice to each member of the body corporate notifying them of their obligation to pay the levy, the due date for levy payments, the rate at which interest will accrue on overdue levies and charges, if applicable, and the details of the dispute resolution process for disputing the contributions and charges.[225] It has been confirmed in two recent and separate High Court judgements, by two judges presiding in each case, in appeals to the High Court from the Magistrate's Court, that this notice in terms of PMR 25(1) of the STSMA is not a pre-requisite for debt enforcement, and the body corporate need not prove that this notice was sent or received because the levies accrue from the passing of the trustee resolution mentioned above.[226] It is therefore only necessary for a body corporate to prove the necessary trustee resolution.

Please note that the STA, the STSMA and the CSOSA are silent on the due date for the payment of levies, therefore the trustees' resolution and notice specified above must stipulate the due date for payment of the levy. Furthermore, this must be in line with any existing credit control policy or rule of the body corporate.

3.6.1.2 When ordinary levy income is insufficient to cover necessary expenses

It is important to note that levies are based on estimates of the anticipated income and expenditure of the body corporate, and it is conceivable that they could be insufficient to deal with the increased operational costs of the body corporate. In such a case, the trustees may, by way of a trustee resolution, either:

- Increase each members' levy contribution by a maximum of 10% at the end of the financial year;[227] or
- Raise a special levy.[228]

The body corporate may also borrow the money that the body corporate requires in the performance of its functions and the exercise of its powers, if authorised by special resolution.[229]

Where the trustees increase the levy contribution payable by each member of the body corporate, the trustees are limited to a maximum increase of 10% at the end of a financial year until the members have received notice of the new contributions due by them for the next financial year.[230] In order to effect the increase of the levy contribution payable by each member of the body corporate for the remainder of the current financial year, the trustees must send out the same notice as they would when a levy has been raised. Proof that such a notice has been sent and received is not a pre-requisite for debt enforcement as mentioned above. This increase remains in force until such time as the members receive the notice notifying them of their levy obligation for the following financial year.[231] The raising of a special levy is discussed in Paragraph 3.6.2.

3.6.1.3 When a body corporate is non-compliant

In the case of a dysfunctional body corporate that is non-compliant with the STSMA, where an AGM is not called – in some cases a body corporate can go years without an AGM – it is important to note that the members of the body corporate will continue to be liable for the payment of the levy that was raised at the last AGM, whenever that may have occurred, until such time as a new levy is properly and validly raised.[232]

For dysfunctional bodies corporate, there are options available to the members of the body corporate to ensure that the body corporate maintains compliance with its statutory obligations, such as the appointment of an executive managing agent or a court-appointed administrator. The procedures for the appointment of an executive managing agent or a court-appointed administrator were discussed in Chapter 3 of the Unit Owner Reference Guide. A more detailed analysis of the administrator application is undertaken in Chapter 7 of this Trustee Reference Guide.

3.6.1.4 Levy refunds

Levies that have been properly and lawfully raised and paid by a member of a body corporate cannot be refunded.[233]

3.6.1.5 Levies that are considered to be unfair by unit owners

If a unit owner believes that an ordinary or special levy has been incorrectly determined or is unreasonable, then that owner can lodge a dispute with the CSOS on application for an order adjusting the levy to a correct or reasonable amount, or even for its payment to be made in a different way than resolved by the trustees.[234]

3.6.2 Special levies

There are many unforeseen yet necessary expenses that may arise in a sectional title scheme, which are not catered for in the approved annual operating budget. This means that the ordinary monthly levies that are payable by the members of the body corporate may not be sufficient to address such expenses.

A special levy is an *ad hoc* levy, which is raised for the purposes of meeting a necessary expense that was not catered for in the approved annual budget, and that cannot reasonably be delayed by being included in the budget for the next financial year.[235] The STSMA and the STSMA Regulations refer to a 'special levy' as a 'special contribution'.

3.6.2.1 Who raises a special levy and how it is raised

The trustees, on the authority of a written trustee resolution, can raise a special levy.[236]

3.6.2.2 Liability for special levies

A special levy becomes due on the passing of a written trustee resolution raising the special levy.[237] In the event that the special levy is payable in monthly instalments and an owner sells their unit, the STSMA makes provision for the new owner to be liable for their *pro rata* share of the special levy from the date on which registration of transfer takes place.[238]

3.6.3 Interest on levies

There may be instances where a body corporate chooses to raise interest on overdue levies that remain unpaid, also known as arrear levies, by members of the body corporate. A body corporate would raise interest on arrear levies when, for example, a creditor of the body corporate charges interest on due but unpaid invoices.

EXAMPLE

A body corporate is situated in a crime-ridden area, which causes the members at an AGM to approve a portion of the budget for security guards. The security guard company charges interest on overdue accounts at a rate of 10% per annum, calculated and compounded monthly.

In one particular month, a few members run into financial difficulties and do not pay their monthly levy and, as a consequence, the body corporate does not have sufficient funds to pay the security company's invoice for the month, resulting in the accrual of interest on the invoice.

To avoid a shortfall in the budgeted amount for the security company's services, the body corporate may charge interest on all arrear levies.

The arrear levies, together with the interest that has accrued thereon will be recovered by the body corporate and the security company's invoices can be paid with no shortfall.

Such a shortfall would otherwise have to be covered by an increase in all levies or a special levy.

Not raising interest on arrear levies, or raising too little arrear levy interest, may act as an incentive to unit owners to avoid or ignore their levy payments. If the interest rate is too low then other debts, such as credit card and clothing store accounts, will be paid before levy contributions. The body corporate must not place itself in a position where paying unit owners are made to subsidise their neighbours who do not pay their levies.

3.6.3.1 Who can raise interest on levies

A body corporate may, on the authority of a written trustee resolution, charge interest on levies or special levies that are due but remain unpaid.[239]

3.6.3.2 Limits on the interest that can be raised

The trustees cannot resolve to raise any rate of interest on arrear levies. The interest rate on arrear levies cannot exceed the maximum rate of interest that is prescribed by the National Credit Act 34 of 2005 (NCA).[240]

Some commentators have stated that interest accruing on arrear levies would fall under the category of an 'incidental credit agreement'[241] and accordingly, the maximum rate of interest that trustees could raise on arrear levies would be 2% per month.[242] At the time of publication, there is no case law to support or contradict this view; however, the courts continue to have a discretion in the awarding of interest claims and may still reduce interest, or otherwise affect the calculation of interest by ordering the start date of interest to be different. The CSOS has also confirmed that 2% per month is in line with the NCA.

Reference to the NCA by the legislature is somewhat unusual since an arrear levy, being an unpaid levy owed to the body corporate under the sectional title laws, does not fall within the ambit of the definition of a 'credit agreement' in the NCA. Moreover, in the unreported case of *Dlamini v Body Corporate of Frenoleen*[243], which is a judgement of two High Court judges, in an appeal from the Magistrate's Court, it was held that 'levies charged by a body corporate to its members do not constitute an incidental credit agreement because the levies do not constitute an "*account tendered for goods and services provided by the body corporate to the consumer*"'.[244] This proposition has been upheld in later judgements where it was further held that 'levies and interest on them are not payable by members of a body corporate in terms of any agreement'.[245] And it was held that these levies and the interest theron are payable by virtue of an obligation imposed by the provisions of the sectional title laws.[246]

3.6.3.3 Contents of the levy statement

In practice, a levy statement is a statement that is generally sent out on a monthly basis to each member of a body corporate to reflect any amounts owing by the member, to the body corporate, in respect of levies, special levies, interest, fines and legal fees where taxed or agreed, rental and any other lawful charges, such as electricity, water and sewerage charges if the units have individual meters, which the body corporate service provider reads.

There is nothing in either the STA, the STSMA or the Regulations thereto, which obliges a body corporate, its trustees or its managing

agent, to send out monthly levy statements. However, annually, or whenever there is a change in levy, the body corporate must certify in writing, the amount determined as the contribution of each owner, the manner in which such contribution is payable, and the extent to which such contribution has been paid by each owner.[247] In practice, managing agents do send out monthly levy statements to ensure that each owner understands what they owe and what they have paid.

The levy statement, while not a peremptory obligation in terms of the STSMA or the STSMA Regulations, is an important document that should be sent out to each member of the body corporate in order to provide documentary evidence of any outstanding levies or charges that a member may owe to the body corporate – as well as providing documentary evidence of the payment of levies or charges – in a particular month. This is especially important when lodging a dispute with the CSOS or instituting legal action for the recovery of arrear levies as the adjudicator/magistrate/judge will require documentary evidence reflecting the amount owed, and how that amount is calculated.

Should a member request it, a body corporate is obliged to provide the member with a full and detailed account of all amounts that have been debited and credited to the member's account.[248] Therefore, monthly levy statements are a good proactive measure, which can and should be performed in order to ensure that this information is up-to-date and accurate at all times.

The STSMA Regulations do, as described above, oblige the trustees to send out notices to members notifying them of their obligation to pay the levy, the due date for payments of the levy, the rate at which interest will accrue on overdue levies and charges, if applicable, and the details of the dispute resolution process for disputing the levies or charges.[249] This notice is not a pre-requisite for debt enforcement, as mentioned above, but is still useful for good order and to try and obtain an early settlement of the outstanding contributions before lodging costly recovery exercises through the courts or the CSOS. The notice must be sent out:

a. Within 14 days of the acceptance of the budgets at an AGM;[250] and
b. When the trustees have increased each member's levy contribution outside of an AGM.[251]

If you are a managing agent, charging fees for debt collection, you must be registered with the Council for Debt Collectors in terms of the Debt Collectors Act 114 of 1998.

Given the evidentiary benefit of a levy statement, it is advisable that the body corporate and managing agent ensure that levy statements clearly set out each obligation separately in order to provide the reader with a clear indication of how the total levy obligation is calculated and should not include charges that are not allowed to be on the statement.

The items that can appear on a levy statement are given in Table 10.

Table 10 Items on a levy statement

The following items can appear on a levy statement:
• Monthly levy contribution;
• Special levy contribution;
• Interest on overdue contributions;
• The CSOS levy;[252]
• Fines;[253]
• Any contribution in the case of an EUA;[254]
• Rental of common property or charges relating to a service agreement between the body corporate and an owner or occupier for the provision of amenities or services to the section concerned;[255]
• Legal fees **where taxed or agreed**;[256] and
• Other charges, such as electricity, water and sewerage when the body corporate receives one bulk account and recovers usage from owners as recorded on the individual meters for each unit (usually part of the monthly levy contribution).

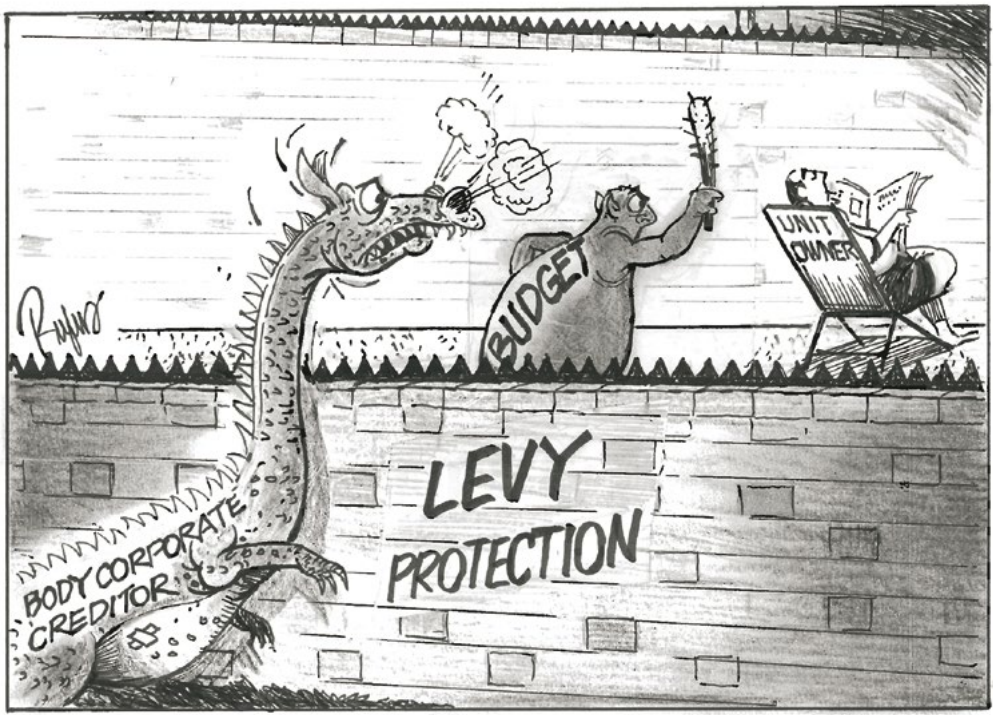
3.6.4 Monitoring levy collection

The STSMA does not stipulate the necessity for a managing agent to monitor levy collection; however, this is probably one of the most important tasks that a managing agent has, and is usually a role and responsibility delegated to the managing agent by the trustees. It is usually included in the management agreement concluded between the managing agent and the body corporate.

The most obvious reason for monitoring levy collection would be to ensure that the body corporate is fulfilling its statutory levy collection and reporting obligations for the benefit of the members. An example of this is when an owner has requested a detailed account of their levy obligations in terms of PMR 25(7) of the STMSA Regulations.

A less obvious but perhaps more important reason for monitoring levy collection is to ensure that all owners who are in arrears with their levy contributions are:

a. Notified of their arrear levies, whether by way of a formal demand or as a friendly reminder;[257] and/or



b. Handed over to levy collection agents/attorneys to ensure that any unpaid levies are recovered for the benefit of the body corporate, either through the courts or the CSOS.

The letter of demand contemplated in PMR 25(2) of the STSMA Regulations is also not a pre-requisite for debt enforcement and need not be proved as having either been sent by the body corporate or received by the levy debtor.[258] This is because the levies become accrued from the passing of a trustee resolution to this effect.[259]

The managing agent's role is important because if the levy roll is not constantly and consistently monitored and updated, an owner's arrear levies can increase to a level where they are no longer collectable, which in turn results in a shortfall of the income that was budgeted for by the body corporate, and could result in the body corporate not meeting all of its financial obligations (the estimated annual expenditure in the budget).

There are many ramifications when a body corporate cannot afford to pay its creditors; however, one of the end results could be that the remaining owners, including the paid-up owners, will be forced to subsidise the non-paying owners or face a depreciation in the value of their properties.[260]

3.6.5 Appointing collection attorneys

The body corporate has an obligation to establish and maintain an administrative and reserve fund for the proper maintenance and administration of the body corporate.[261]

Therefore, the body corporate, through its trustees, has a duty to require the members of the body corporate to make contributions to these funds.[262] Accordingly, the trustees have a legal duty to ensure that all levies are paid, and that legal action is instituted to recover unpaid contributions and lawful charges.

3.6.5.1 The benefit of handing over arrear levy debtors to collection attorneys

If a levy is not paid, the trustees may choose to proceed to obtain an adjudication award from the CSOS, where attorneys are not allowed to appear, unless agreed upon by all parties (including the adjudicator) or where the adjudicator decides that a party to the proceedings is not able to proceed with the adjudication without an attorney.[263] This process is time-consuming and the costs of drafting a dispute and attending a conciliation and adjudication are not fully recoverable, if at all, albeit those costs are significantly less than what attorneys charge for the collection of arrear levies. The trustees may also proceed to recover the outstanding amounts via the courts and are not compelled to make application to the CSOS for the recovery of outstanding contributions.[264]

The trustees would be well-advised to hand over any arrear levy debtors to levy collection attorneys. Some of the associated benefits are that:

a. The trustees do not have to use their own time – when a trustee is employed, it may not be feasible to attend conciliations and adjudications at the CSOS; and
b. The costs of litigation which are incurred by the body corporate as a result of instructing collection attorneys are, for the most part, recoverable from the defaulting member. In this regard, the STSMA Regulations provide that a member is liable for all the reasonable legal costs and disbursements that are incurred in the recovery of the member's arrear levies, as taxed or agreed by the member.[265] While the awarding of legal costs remains in the discretion of the court, PMR 25(4) of the STSMA Regulations has been held to entitle the body corporate to costs on the attorney and client scale.[266]

In the event that the debtor insists on the bill of costs being taxed by the relevant taxing master of the court in question, then the body corporate will still be liable for the balance taxed off the bill and must pay this to the attorney appointed to collect the arrear levies (if not already paid). In this regard, there will be a shortfall in the recovery of the legal fees debt.

3.6.6 The levy collection process

The collection process could form an entire book on its own, but for the purposes of this Trustee Reference Guide, the process will be summarised into the most common and important steps. Should you require any further information on this process, you are advised to contact your professional managing agent or levy collection attorney who will be able to elaborate.

3.6.6.1 The final demand[267]

In the event that a member of the body corporate fails to pay their levy on the date it becomes due, and/or in accordance with the body corporate's credit control policy, the body corporate is advised to send out a written final demand to that member. As mentioned above, this letter of demand contemplated in PMR 25(2) of the STSMA Regulations is not a pre-requisite for debt enforcement and need not be proved as having either been sent by the body corporate or received by the levy debtor. It could be sent by the body corporate to encourage early settlement of the debt with a view to avoiding protracted collection processes in either the CSOS or the courts.

The contents of a final demand are given in Table 11.

Table 11 Content of a final demand

The final demand should include the following:
a. That the member has a legal obligation to pay any overdue amount owed to the body corporate immediately, i.e. contributions/levies, charges and any interest that may have been raised on these amounts;[268]
b. If interest has been raised against the levies or charges, the final demand must include: i. The amount of interest that is owing as at the date of the letter;[269] and ii. The amount of interest that will accrue daily until the arrear levies and charges have been fully paid.[270]
c. That the body corporate intends to take legal action to recover the amounts owing by the member within **14 days** after the final demand has been delivered.[271]

After the 14-day notice period of the final demand has expired, the trustees must either lodge a dispute with the CSOS, or hand over the arrear levy debtor to levy collection attorneys. The levy collection attorneys will then institute action out of the court with the appropriate jurisdiction for judgement against that arrear levy debtor to be obtained.

3.6.6.2 Lodging a dispute with the CSOS

In order to lodge a dispute with the CSOS, the trustees must fill out an Application for Dispute Resolution Form.[272] The trustees must then attach the requisite evidence to prove that the levies are due and payable but remain unpaid.

The evidence that is required for a levy claim is given in Table 12.

Table 12 Evidence required for a levy claim

The evidence that would be required for a levy claim would include, but is not limited to:
a. Notice, minutes and attendance register of the AGM at which the operating budget was approved by the members;
b. Trustee resolution raising the levies, charges and interest following the approval of the operational budget; and
c. A comprehensive levy statement reflecting all amounts debited and credited to the member's account and reflecting the total amount outstanding.

The CSOS will then investigate the claim by asking the member to respond to the allegations made against them. If the CSOS agrees that there is indeed a dispute, the matter will be referred to conciliation.

Conciliation is the process whereby the trustee/managing agent and the arrear levy debtor meet to try to resolve the dispute with the help of a conciliator. If the dispute cannot be properly resolved, then the conciliator will refer the dispute to adjudication.

In the event that the dispute is referred to adjudication, an adjudicator will be appointed to convene a hearing between the representative of the body corporate (a trustee or the managing agent) and the arrear

levy debtor. The adjudicator will then allow each party to present their arguments and their evidence either in written submissions or in person, after which the adjudicator will conclude based on the evidence that has been presented by the parties.

In the event that the body corporate is successful at the adjudication, the representative of the body corporate can take a certified copy of the CSOS adjudication award to the court with the appropriate jurisdiction where a court file will be opened, and a case number will be allocated. This adjudication award will then be endorsed as an order of court.

Once an order of court has been made in the body corporate's favour, it is advisable to hand the matter over to attorneys who will file a certified copy with the court which has the appropriate jurisdiction and proceed with the execution process.

3.6.6.3 Judgement

In the event that the trustees elect not to lodge a dispute with the CSOS or withdraw an existing CSOS application in order to proceed to court instead, they may hand the matter over to a collection attorney for further legal action to commence.

As with the dispute process, the following should be provided to the levy collection attorney:

a. Notice, minutes and attendance register of the AGM at which the operating budget was approved by the members;
b. Trustee resolution raising the levies, charges and interest following the approval of the operational budget; and
c. A comprehensive levy statement reflecting all amounts debited and credited to the member's account, and reflecting the total amount outstanding.

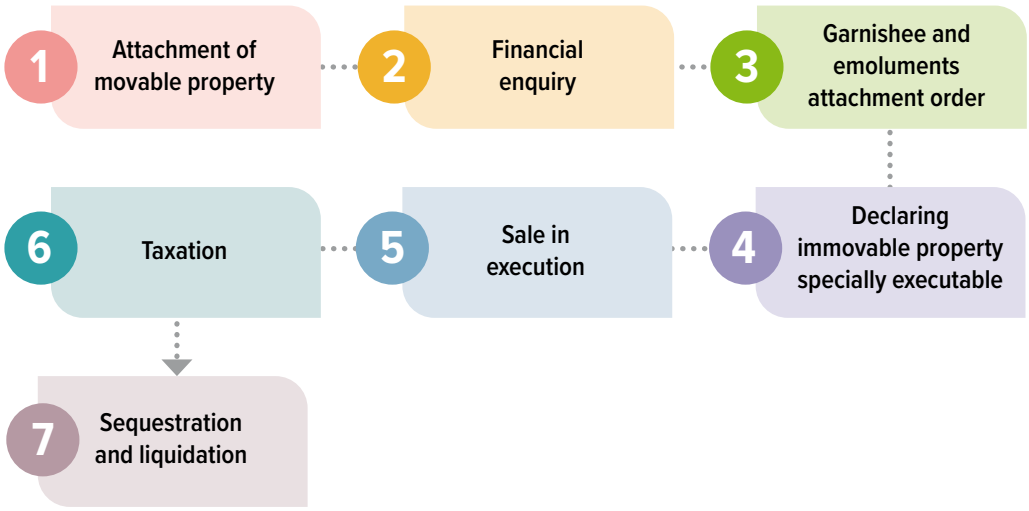
The attorney will then draft, issue and serve summons commencing action against the arrear levy debtor out of the appropriate court having jurisdiction. In the event that the arrear levy debtor does not defend the matter in the requisite time provided by the rules of the applicable court, the attorney will apply for default judgement. This type of judgement is enforceable; however, the nature of a default judgement is that it can be rescinded by the same court should the arrear levy debtor be able to show that they do have a defence to the claim, and that there was no wilful default.[273]

In the event that the arrear levy debtor does defend the matter, they will serve a notice of intention to defend, notifying the body corporate and the court that they intend to defend the matter. The arrear levy debtor will serve and file their plea setting out their defence to the body corporate's claim. The matter will then proceed to trial where a court will take all evidence into account and decide, on a balance of probabilities, whether to grant judgement or to dismiss the body corporate's claim, after hearing evidence from witnesses.

Once judgement has been granted, whether by default or after trial in a defended action, the levy collection attorneys will then proceed with the execution process.

3.6.6.4 The execution process

The execution process can vary depending on the particular facts of each case, and the jurisdiction of the court out of which action was instituted, but generally the processes summarised below will have to be followed.



1 Attachment of movable property

Once judgement has been granted, the body corporate can instruct the sheriff to attach the arrear levy debtor's movable property – furniture, electronics, and other non-essential moveable apparatus – to be sold at a public auction. The proceeds will be applied toward the judgement debt. If the value of the movable property is not sufficient to satisfy the judgement debt, then the attorneys will proceed to the next step in the execution process.

2 Financial enquiry

A financial enquiry is where the arrear levy debtor will be called to court to provide evidence, in front of a magistrate, of their income and expenditure in order to determine their financial status and whether they can afford to settle the judgement debt, either in full or by way of instalments.

3 Garnishee and emoluments attachment order

Where an arrear levy debtor can pay the judgement debt in monthly instalments, it is possible to bring an application for an emoluments attachment order whereby an amount decided by a magistrate will be taken off the arrear levy debtor's salary by their employer and paid directly to the body corporate's account.

Where an arrear levy debtor does not reside at the unit for which judgement was obtained, and if they receive rental from a tenant, the court can order that the tenant pays the monthly rental, in full or in part, into the body corporate's account directly instead of to the arrear levy debtor. It must be noted that in some cases, once a garnishee order is obtained, the courts may be reluctant to proceed any further with the collection process if the court is of the view that the collection of the arrear levies has been resolved by the garnishee order.

4 Declaring immovable property specially executable

Declaring immovable property specially executable is the last resort in the ordinary execution process for a body corporate to recover the arrear levies owed by the arrear levy debtor, and is lengthy and complicated as it requires judicial oversight and the setting of a reserve price for residentially zoned properties. An application declaring immovable property specially executable allows a judgement creditor, in this case the body corporate, to instruct the sheriff to attach and sell, by way of public auction, the unit that is owned by the arrear levy debtor.

5 Sale in execution

Once a property has been declared specially executable, the sheriff of the court will advertise and sell the unit that is owned by the arrear levy debtor, by way of a public auction. The proceeds of the sale will, as with movable property, be applied towards the amounts owed to certain secured creditors of the unit owner and towards the judgement debt. It is important to note that for registration of transfer to take place

in the name of the purchaser – the winning bidder at the public auction – the purchaser – must settle the full outstanding arrear levies so that a levy clearance certificate can be issued.[274] This must be included in the conditions of sale as well.

It is common for the property sold in execution to fetch less than its market value as a result of outstanding rates and taxes, and the mortgage bond, which are required before transfer can take place, and the general nature of a public auction. The mortgage bond holder could, for example, *veto* the sale in execution if the proceeds from the sale are not enough to extinguish the mortgage bond. In this regard, it is strongly advisable to set a reserve price with the auctioneer in the case of a private auction (if not already set by the court), or in agreement with other secured creditors or in the conditions of sale in the case of a public auction.

6 Taxation

After judgement has been granted and after each step of the execution process, or at the end of the collection actions, the trustees should request the body corporate's attorneys to tax the bills of costs, unless the costs have been agreed with the debtor (or the purchaser of the unit at the sale in execution). The attorneys will present a full schedule of all legal costs – fees and disbursements – to a taxing master of the relevant court having jurisdiction, who then determines what legal fees and disbursements the body corporate is reasonably allowed to claim from the arrear levy debtor.[275] A taxed bill of costs is like a judgement or court order for the amount taxed and owing by the judgement debtor, and can be executed on in the same manner as described above. This is usually done simultaneously with the judgement on the action to recover the levy debt. The taxed bill of costs also attracts interest at the *mora* rate in terms of the Prescribed Rate of Interest Act.[276]

Taxation is an important part of the collection process as legal fees and disbursements cannot be added onto a member's account unless the member has agreed to it, or the legal fees and costs have been taxed.[277]

7 Sequestration and liquidation

Sequestration for natural persons and liquidation of juristic entities are considered extraordinary steps in the levy collections process, where a creditor petitions the court to wind up the affairs of a debtor and is the most extreme avenue to collect arrear levy debt owed by a member to a body corporate.

In practice, if a member of a body corporate commits an act of insolvency, the body corporate could bring a sequestration (for natural persons) or liquidation (for juristic persons) application; however, a body corporate generally brings such an application against a member of the body corporate when the arrear levies are high in comparison to the market value of the unit itself, there is a registered mortgage bond over the unit and the proceeds from the sale of the unit are not likely to cover the mortgage bond and the arrear levies, both of which are required in order for transfer to take effect.[278]

The reason for the above is that, as mentioned earlier, if a mortgage bond is registered over a unit and the body corporate proceeds by way of a sale in execution, the bank has the right to *veto* the sale if the proceeds from the sale are not enough to extinguish the mortgage bond.

If the unit is sold in execution for a price less than the value of the underlying debt owed to the body corporate, or if the legal fees owing in respect of the levy collection process are not fully recovered from the sale, these 'losses' may translate into a shortfall of the income in the body corporate's annual budget, which will likely have to be subsidised by the paying owners through a special levy, unless there are surplus funds in the body corporate's bank account, or a loan is taken out by the body corporate.[279]

It is advisable that a **legal fees contingency fund** should be a budgeted item in the proposed annual operating budget of the body corporate to cover any shortfalls in the recovery of legal fees, and/or the body corporate should take out a reliable credit facility to cover these shortfalls as and when they happen and reduce the need for special levies or sharp increases in the ordinary monthly levy.

To further avoid such a loss, a body corporate may institute sequestration proceedings where the body corporate would be paid first for arrear levies via the levy clearance certificate[280] as the arrear levies are considered to be a cost in the realisation of the assets subject to sequestration,[281] effectively ranking the body corporate higher than a bank for the sectional mortgage bond and on an equal footing to the local authority, for the last two years of rates and taxes owing by the unit owner in respect of the section. The body corporate would only have to prove a benefit to the bank,[282] which is usually cents in the Rand, compared to a normal forced sale situation in which the bank holds the right to *veto* a sale.

There are two main risks to a body corporate that trustees must be aware of before petitioning a court to sequestrate or liquidate a member:

a. Being the petitioning creditor, the body corporate would be liable for contributions into the debtor's estate, if required;[283] and
b. The costs involved in sequestration are not levy-collection costs and accordingly cannot form part of the levy clearance certificate for recovery purposes.[284]

The decision to sequestrate or liquidate a member who is in arrears with their levies cannot be taken lightly. It is an extreme measure, which has its own risks to the body corporate.

3.6.7 The levy clearance certificate

Section 15B(3)(a)(i)(aa) of the STA requires that a levy clearance certificate, as it is commonly known in the industry, is issued before the Registrar of Deeds can register the transfer of a sectional title unit.

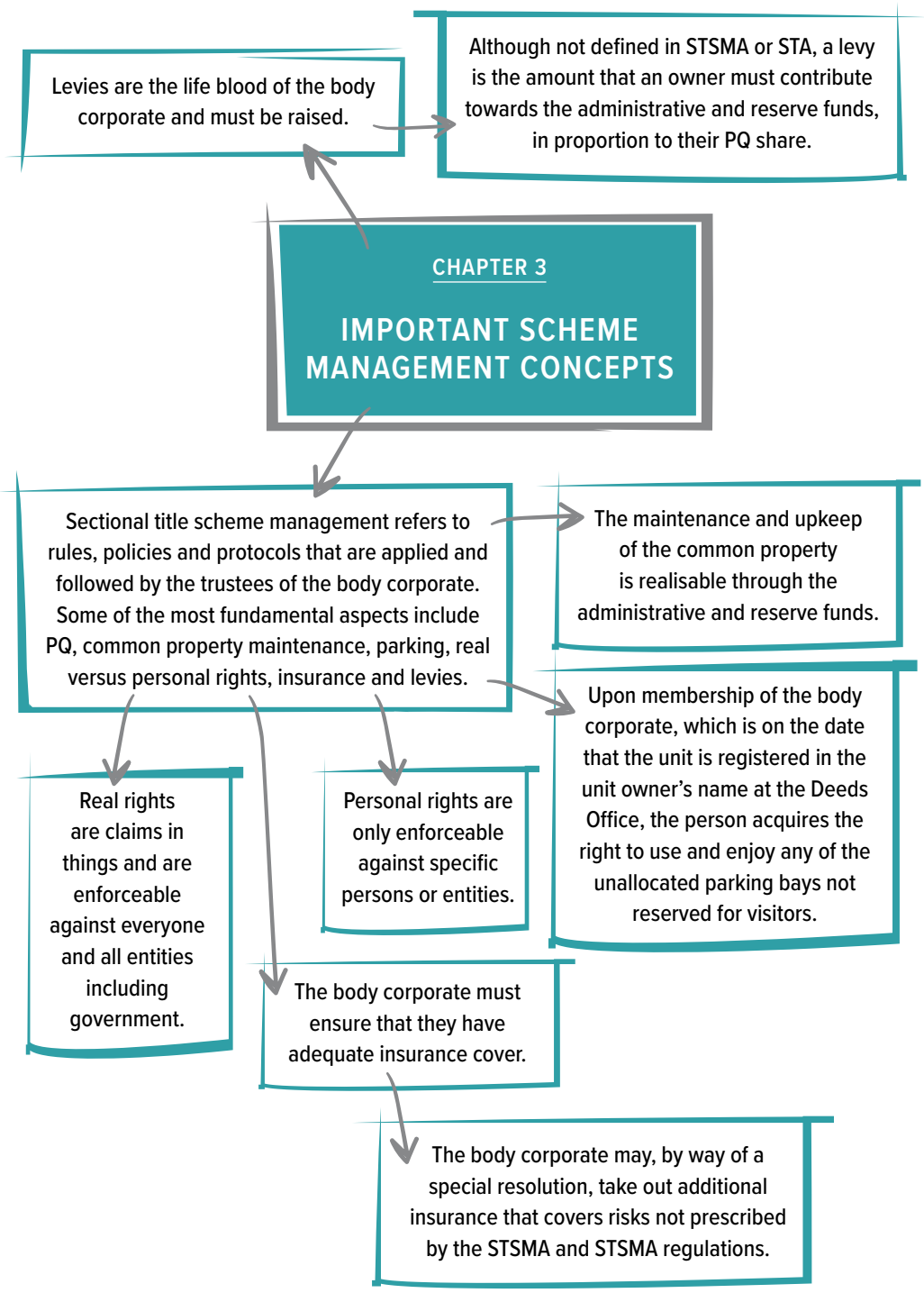
This provision provides that the Registrar of Deeds cannot register the transfer of a unit, where a body corporate is deemed to have been established, unless a conveyancer provides a certificate that confirms the body corporate has certified, as at the date of registration of transfer of the unit, all moneys owed to the body corporate have either been paid by the

transferor, or that provision has been made for the payment of all moneys owed to the satisfaction of the body corporate.

This provision has been called an 'embargo'[285] as it creates an effective preference for bodies corporate in respect of the collection and settling of arrear levies in sequestration and liquidation proceedings.[286] The preference provided to a body corporate is similar to the preference provided to the local municipality for the last two years of municipal service charges (the rates clearance certificate),[287] that is, the costs of settling the arrear levies owed to a body corporate, by a debtor in liquidation or sequestration, is a cost in the realisation or cost in the administration of the insolvent estate. This means that:

a. If the arrear levies are not settled in full, the body corporate cannot be compelled to provide a levy clearance certificate, effectively providing the body corporate with the right to *veto* any sale, whether in a normal sale, forced sale or even sequestration/liquidation proceedings brought by some other creditor;[288] and
b. If the body corporate is the petitioning creditor, it will have to contribute to the costs of a sequestration/liquidation.[289]

3.7 Summary


Levies are the life blood of the body corporate and must be raised.
Although not defined in STSMA or STA, a levy is the amount that an owner must contribute towards the administrative and reserve funds, in proportion to their PQ share.
CHAPTER 3
IMPORTANT SCHEME MANAGEMENT CONCEPTS
Sectional title scheme management refers to rules, policies and protocols that are applied and followed by the trustees of the body corporate. Some of the most fundamental aspects include PQ, common property maintenance, parking, real versus personal rights, insurance and levies.
The maintenance and upkeep of the common property is realisable through the administrative and reserve funds.
Upon membership of the body corporate, which is on the date that the unit is registered in the unit owner's name at the Deeds Office, the person acquires the right to use and enjoy any of the unallocated parking bays not reserved for visitors.
Real rights are claims in things and are enforceable against everyone and all entities including government.
Personal rights are only enforceable against specific persons or entities.
The body corporate must ensure that they have adequate insurance cover.
The body corporate may, by way of a special resolution, take out additional insurance that covers risks not prescribed by the STSMA and STSMA regulations.

4 Unit Owners and Meetings

Whilst the day-to-day business of a sectional title scheme is generally conducted by trustees and the managing agent, the power within a sectional title scheme is wielded by the unit owners and this is done at body corporate meetings. In this chapter, the role of co-owners within a scheme and the importance of body corporate meetings are demonstrated with explanations on the required notices, agendas and resolutions.

4.1 The Role of Co-owners of a Unit in a Scheme

When there is more than one registered owner of a unit, a co-ownership is formed, meaning that all the registered unit owners of a unit are co-liable and, as such, have obligations towards the unit, jointly and severally. When a unit is co-owned, no portion of the unit may be extended or altered without the consent of all owners.

All the registered owners must agree on the way in which the unit is to be used and how the contribution towards the expenses and running costs of the unit will be shared. For example, if there are two owners of a single unit and the agreed share in the contributions is 50/50, then each owner is liable equally. In this situation, it must be noted that the body corporate will raise the levy against the unit directly and the unit owners will decide amongst themselves how the levy will be paid. This is not the responsibility of the body corporate, and each co-owner of the unit is liable for the levy jointly and severally.

At a meeting, members may be represented by proxy provided that the same person represents a maximum of only two members.[290] When two or more persons are entitled to exercise one vote jointly, that vote may be exercised only by one person, who may or may not be one of them, jointly appointed by them as their proxy.[291]

4.2 Importance of Body Corporate Meetings

Attending body corporate meetings as a unit owner, ensures that you have your voice heard on important motions that are tabled at the meeting, which could, and most likely will, affect your proprietary rights in respect of your section and undivided share in the common property and could also affect the way in which the body corporate manages the common property.

Depending on the nature of the motions tabled at the meeting in question, the outcome of the meeting could also affect the way in which the trustees manage the body corporate. Rules could be changed, which could have been affected by your vote, and your absence could result in an outcome you do not necessarily agree with. Certain actions or motions that are important for the well-being of the community scheme, may have been thwarted by owners who were against them and you could have affected that outcome by being present in person or by proxy and voting.

Certain body corporate business cannot be exercised without active owner involvement. Whether your section is your primary residence or an

investment property, you have a responsibility, not only to yourself, but to your fellow owners and the residents within the body corporate, to assist in the management of the community scheme. It is highly recommended that you do not let body corporate business be concluded, or fail to be carried out, due to your lack of active involvement.

4.3 Short Notice of Meetings

There are times when trustees are permitted to issue short notice of a meeting and times when this is not permitted.[292]

Circumstances may arise where it is necessary to provide shorter notice than is prescribed by the PMRs. It is vital to know and understand how a short notice of a meeting can be implemented so that urgent issues can be dealt with. It is even more important to know and understand when shorter notice is not permitted. We list the standard notice periods below and then explain the requirements for short notice, when the short notice is permitted and when the short notice is prohibited.

4.3.1 Summary of standard notice periods

First let us look at a snapshot of the standard notice period requirements for body corporate meetings. The standard notice period for the different meetings is given in Table 13.

Table 13 Standard notice periods for meetings

Meeting	Standard Notice Period
Trustee meeting	7 days[293]
General meeting	14 days[294]
General meeting at which a special resolution or unanimous resolution will be proposed and voted on	30 days[295]
General meeting at which a special resolution for alterations and improvements will be proposed and voted on, if called by a unit owner in terms of PMR 29(2) of the STSMA Regulations	30 days[296] (this notice period cannot be shortened)
General meeting at which a special resolution for the installation of pre-paid meters will be proposed and voted on	60 days[297] (this notice period cannot be shortened)

4.3.2 When short notice can be given for a trustee meeting

In cases of urgency, a trustee may give short notice of a trustee meeting as is reasonable in the circumstances.[298]

4.3.3 When short notice can be given for a general meeting

A general meeting may be called at shorter notice in two instances:

a. The trustees can resolve that a general meeting is called on seven days' notice. This can only be achieved if the trustees resolve that a shorter notice period is necessary due to the urgency of the matter.

The reasons for this urgency must be laid out in their resolution.[299] To assist you, we have created a template trustee resolution attached to this Trustee Reference Guide as Annexure F; or

b. A general meeting may be called on less than 14 days' notice if this is agreed to in writing by all persons entitled to attend.[300]

4.3.4 When short notice is not permitted

A body corporate cannot shorten the 30-day notice period where necessary alterations or improvements to the common property have been proposed.[301] A body corporate cannot shorten the 60-day notice period where the installation of pre-paid meters has been proposed.[302]

4.3.5 Vote validation

Contrary to popular belief, a vote taken at a meeting is not invalidated by a failure to provide proper notice of the meeting to a person who is entitled to notice.[303] As long as the body corporate made a reasonable effort to give notice to a person who is entitled to receive the notice, a vote taken at a general meeting will remain valid unless set aside by the CSOS on application or the High Court on review.[304]

4.3.6 Special and unanimous resolutions passed via 'round robin'

Special or unanimous resolutions may be tabled for member approval, in writing, and are colloquially known as 'round robin' resolutions.

In some cases, bodies corporate may consider passing resolutions via round robin when a unanimous resolution or special resolution is urgently required or more practical. Convening an SGM to pass the proposed unanimous or special resolution may be less practical if there are few members.

If the body corporate elects to obtain a special or unanimous resolution in writing, this increases the threshold to obtain approval for the motion to be passed , depending on the number of unit owners involved.

a. The special resolution in writing must be passed by at least 75% of **all** the members of the scheme, calculated both in value and in number, including any co-owners who are entitled to exercise their vote jointly with other co-owners for a particular section.[305] On the other hand, a special resolution passed at an SGM only requires 75% of the members, present in person or represented, at the general meeting;[306] and
b. The unanimous resolution in writing would need to be passed by **all** members of the scheme, whereas a unanimous resolution can be passed at a general meeting at which at least 80% of the members are present, in person or represented, and all of those present then vote in favour of the resolution.[307] See the note regarding abstention of vote under 'unanimous resolution' on page 35.

Generally, the quorum required for a special resolution at a general meeting is one third (33.3%) of the members in value, or two thirds (66.7%) of the members in value if there are fewer than four primary sections, or a body corporate with less than four members.

But if fewer than 50% of the membership attend a general meeting at which a special resolution was passed, then the resolution can be adopted but it cannot be implemented for a period of one week, unless it is resolved by the trustees to be reasonably necessary to prevent damage or loss.[308]

Should the special resolution or unanimous resolution be tabled for approval via a round robin process in writing, instead of at a general meeting, there is no requirement for a notice period. However, the members should be afforded a reasonable opportunity to consider and vote on the proposed resolution and be given a time to provide their written response.

a. Once 75% (calculated in value and in number) of all the members of the body corporate have exercised their vote in writing and in favour of the **special resolution**, then the resolution is passed; and
b. Once 100% of all members of the body corporate have exercised their vote in writing and in favour of the **unanimous resolution**, then the resolution is passed.

If a notice period is set and that notice period has elapsed without obtaining the proposed resolution, the process must start afresh. In respect of new owners buying into the scheme in the middle of a notice period, that new owner does not benefit from an extended notice and must adhere to the initial notice period.

4.4 Drafting Meeting Notices and Agendas

In the Unit Owner Reference Guide, we discussed how the notice of a meeting must be provided to its members.[309] When sending the notice of a meeting, the agenda of the meeting together with copies of documents that the members should consider, and a proxy appointment form must be attached to the notice.[310]

To assist you, we have created templates of the notices and agendas for the following meetings:

a. The first (inaugural) general meeting notice and agenda;[311]
b. The AGM notice and agenda;[312] and
c. The SGM notice and agenda.[313]

Please see Annexures C, G and H at the back of the book.

4.5 Understanding Quorum

A quorum is the minimum number of eligible persons who must be present at a meeting to make the proceedings at the meeting valid. Without a quorum, no meeting can take place.

Unit owners and trustees should participate in various forms of meetings within their sectional title scheme to discuss issues, make decisions and interact with their fellow unit owners and trustees. PMR 19(1) of the STSMA Regulations confirms that business must not be transacted at any general meeting if a quorum is not present or represented.

a. **The quorum for a general meeting is either two thirds of the total unit owners calculated in value (if the sectional title scheme has fewer than four primary sections or less than four members) or one third of the total unit owners calculated in value (for any other scheme).**[314]

b. **The quorum for a trustee meeting is 50% of the trustees in number, but there must be at least two trustees.**[315]

When a quorum is calculated in value, each unit owner represents the PQ share allocated to the sections registered in that unit owner's name or in accordance with a rule made in terms of Section 10(2) of the STSMA, therefore, the quorum is calculated using the PQ share of the members present in person, or by valid proxy at the meeting.[316]

To assist with the calculation of a quorum at a general meeting or a trustee meeting, an attendance register reflecting each unit owner's or trustee's information, is usually presented at the entrance of the meeting for signature. Before the meeting can proceed, the signatures and the corresponding PQs on the attendance register are then reckoned in accordance with the STSMA requirements for unit owner meetings, whereafter it is confirmed whether a quorum is present or not.

If a quorum is not met within 30 minutes of the appointed time, the meeting will be adjourned to the same day in the next week at the same place and time.

If on the day to which the meeting is adjourned a quorum is not present within 30 minutes from the time appointed for that adjourned meeting, the unit owners entitled to vote and present in person or by proxy constitute a quorum.

4.5.1 How a quorum is calculated

PMR 19(2) of the STSMA Regulations confirms that when calculating a quorum at a general meeting, the value represented by each of the unit owners present in person, or represented, must be used. If Table 14 below represents the attendance register of the general meeting, then the quorum will be equal to 75%, which is more than the quorum requirements.

Table 14 Example of a quorum for a general meeting

Section no	Unit owner	SQM	PQ value	Proxy signature if unit owner represented by proxy	Unit owner signature if present in person
1	Mr Van Der Merwe	50 m²	12,5%	VDMerwe	
2	Ms Khumalo	50 m²	12,5%		Khumalo
3	Mr Naidoo	50 m²	12,5%		
4	Ms Nel	50 m²	12,5%	Nel	
5	Mr Mbobo	50 m²	12,5%		Mbobo
6	Ms Khumalo	50 m²	12,5%		Khumalo
7	Mr Van Der Merwe	50 m²	12,5%	VDMerwe	
8	Ms Reddy	50 m²	12,5%		
		400 m²	100%	3	3

On the other hand, if one wants to determine if a quorum is met at a trustee meeting, it has to be calculated in number.[317] If Table 15 represents the attendance register of the trustee meeting, then the quorum will be equal to 40% [(2 ÷ 5) x 100)], which is less than the 50% quorum requirement.

Table 15 Example of a quorum for a trustee meeting

Section no	Unit owner	SQM	PQ value	Presence if calculated in number	Trustee signature
1	Mr Van Der Merwe	50 m²	12,5%	1	
2	Ms Kumalo	50 m²	12,5%	1	
3	Mr Naidoo	50 m²	12,5%	1	
4	Ms Reddy	50 m²	12.5%	1	
5	Ms Nel	50 m²	12,5%	1	
				5	**2**

It is recommended that the calculation of a quorum must always be included in the attendance register at a general meeting or trustee meeting, as this will assist the body corporate with the calculation of votes whenever a vote has to be taken in respect of any proposed resolution that can be adopted by a body corporate, and will record that the meeting was validly constituted.

4.6 Format of a Proxy Form

The format of a proxy notification, appointment and acceptance form is prescribed by the STSMA and the STSMA Regulations.[318] The legislature has assisted bodies corporate by making a required template available in Annexure 3 to the STSMA Regulations. This document is labelled 'Form C'. For ease of reference, we have included this template in Annexure I at the back of the book.

4.7 Drafting, Recording and Implementing Resolutions

In this chapter, we will discuss the ways that one should propose, draft, record and implement certain resolutions at a sectional title scheme and home owners association level.

In general, a resolution is a record of a decision made, or the official expression of an opinion or will, by members of a group or juristic person, in the act of decision-making. It is a formal way of ensuring that the group of which the members are a part can make the decision that is intended to be made, at a point in time, and to have a decision recorded and implemented, in terms of applicable rules or regulations. This is more necessary in regulated environments, such as companies, in terms of the Companies Act,[319] or for bodies corporate, in terms of the STA and the STSMA. Resolutions are a typical part of business, and they are a vital part of community scheme management.

Since resolutions play such a crucial role they must be proposed, drafted and recorded correctly. The vote, or approval process, must be properly recorded so that the outcome of the proposed resolution can be known and outwardly displayed to stakeholders who rely on those resolutions. Without a properly proposed and drafted resolution, together with a properly recorded outcome of the vote on that resolution, the implementation thereof can be brought into question.

Although the following is the approach taken in the Companies Act, it is a useful approach to all resolutions in any environment because it fully describes what is required for a draft resolution to achieve its purpose. A proposed resolution or motion must be expressed with sufficient clarity and specificity, and must be accompanied by sufficient information or explanatory material to enable a person who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the proposed resolution.[320]

4.7.1 How to propose and draft a community scheme resolution

The way in which a resolution should be proposed and drafted depends on the type of resolution in question and the type of organisation or group in which the resolution is meant to be proposed. For an explanation of the different types of resolutions in sectional title schemes, see Chapter 2 of the Unit Owner Reference Guide.

This chapter focuses on community scheme resolutions, such as those for bodies corporate and home owners associations, and not resolutions of the board of trustees or directors – the executive committees of bodies corporate and home owners associations, respectively. For explanations in respect of the drafting, recording and implementation of trustee resolutions, see Paragraph 5.2 of this Trustee Reference Guide.

A proposed resolution is a motion at a meeting. It is no longer required that a motion be seconded at a general meeting.[321] To draft a motion, it must be worded in such a way that acceptance or approval thereof will lead to the implementation of the resolution and the action leading to the implementation of the motion. The action following the implementation of the resolution must be directly linked to the proposed resolution, as worded and voted upon. It must, therefore, be worded correctly in relation to the motion that is tabled to achieve the desired outcome behind the

resolution, if approved. It is imperative that the proposed resolution is correctly worded to be effective and lawful.

The way in which a proposed resolution ought to be drafted is, therefore, dependent on the intention and subject of the proposed resolution itself. For example, a special resolution tabled for the body corporate to borrow funds needs to be worded differently to a unanimous resolution required for the body corporate to amend the management rules of the sectional title scheme.

4.7.2 The notice and agenda as part of proposing and drafting resolutions

To propose a special resolution or a unanimous resolution, the body corporate must provide all the members with 30 days' prior written notice of the meeting where this special or unanimous resolution will be tabled for a vote, unless the rules of the body corporate provide for shorter notice.[322] The body corporate may call a general meeting on seven days' written notice if the trustees have resolved that short notice is necessary due to the urgency of the matter, and clearly set out the reasons for this urgency, except in respect of the installation of pre-paid meters and alterations or improvements to common property.[323] Furthermore, a general meeting can be called on fewer than 14 days' written notice if this is agreed in writing by all persons entitled to attend the meeting.[324]

For general meetings at least 14 days' written notice is required to be given to all the members, all registered bondholders, all holders of future development rights and the managing agent.[325]

Such a notice must either be delivered by hand to a member, sent by pre-paid registered post to the address of a member's section in the relevant sectional title scheme, or to a physical address in South Africa that a member has chosen in writing to receive such notices.[326] In addition, it may also be sent to a member via fax or email, which does not exclude the notice that must also be delivered either by hand or pre-paid registered post.[327] However, if a member elects in writing to receive all notices only via a specified email address, then that would suffice.[328]

It must be noted that the body corporate need not hold an SGM to consider a resolution if all members waive their right to the meeting and consent to the resolution in writing, provided that if there is more than one person who is jointly entitled to exercise a vote, all of those persons must waive the right to the meeting and consent to the resolution in writing.[329] A similar provision exists in respect of an AGM.[330]

Despite the above, if proper notice is not given timeously, or at all, to a person who is entitled to receive it, the vote taken at the meeting is not invalidated as a result thereof, as long as the body corporate can prove that it made a reasonable attempt to deliver the notice.[331] Furthermore, if all persons entitled to receive notice agree to waive their right to notice, voting at a general meeting may proceed despite the lack of notice as generally required.[332] Proof of notice of the meeting or waivers of notice are part of the order of business at any general meeting, which is often overlooked.[333]

If it is proposed at a general meeting that a trustee should be removed from office, which is possible by ordinary resolution of a general meeting, the intention to vote on the proposed removal must be specified in the notice convening the meeting.[334] Similarly, the members at a general meeting may remove the chairperson from office if notice of the meeting contains a clear statement of the proposed removal.[335] Although, even if passed at the meeting, this does not automatically remove the chairperson from the office of trustee.[336] In these circumstances, it is submitted that notice is definitely required if the general meeting is to propose such a resolution to remove a trustee or the chairperson from office.

The trustees determine the agenda for a general meeting, which must contain a general description of the nature of all business and a description of the matters that will be voted on at the meeting, including the proposed wording of any special or unanimous resolution.[337] The notice of a general meeting must be accompanied by the agenda setting out the order of business to be discussed, as listed below.[338] In the case of a first general meeting, the developer must include with the notice of the first general meeting, an agenda that must set out at least all of the motions as listed in PMR 16(2) of the STSMA Regulations. Table 16 lists the order of business at a general meeting.

Table 16 Order of business at a general meeting[339]

a. Confirmation of proxies, nominees and other persons representing members and the issuing of voting cards, if any;
b. Determination of a quorum for the meeting;
c. The election of a chairperson for the meeting, if necessary;
d. Presentation of proof of notice of the meeting or the waiver of notice of the meeting;
e. Approval of the agenda;
f. Approval of the minutes from the previous general meeting, if any;
g. Any unfinished business from the previous meeting;
h. Any motions or matters for discussion received from members or bondholders who request a meeting in terms of PMR 17(4) of the STSMA Regulations;
i. A report on the lodgement of any amendments to the scheme's rules adopted by the body corporate;
j. Any new or further business to be dealt with;
k. Directions or restrictions given to or imposed on trustees; and
l. Dissolution of the meeting.

It must be kept in mind that members are not allowed to raise new motions and topics on the agenda when the trustees have already determined the agenda.[340] Moreover, the chairperson of the meeting must maintain order, regulate the orderly expression of views and guide the members and other participants through the agenda in accordance with the common law of meetings, and ensure that all motions and amendments are proposed within the scope of the notice and powers of the meeting.[341]

In general, registered bondholders, holders of future development rights and the managing agent may attend general meetings and speak on any matter on the agenda, but in those capacities, they are not entitled to propose a motion or to vote.[342]

The trustees can call a general meeting whenever they see fit.[343] However, the trustees must call a general meeting if members entitled to 25% of the total PQs of all sections, or the holders of mortgage bonds over not fewer than 25% in number of all the primary sections, deliver to the body corporate a written and signed request for an SGM.[344] For this type of meeting, members or the bondholders who requested the meeting must include one or more motions or matters to be tabled for discussion with their request, and these motions or matters must be included, without amendment, in the agenda of the meeting (see point h above).[345]

The chairperson of the meeting must ensure that all proposed motions and amendments are within the scope of the notice and the powers of the meeting.[346]

4.7.3 Recording the outcome of a proposed body corporate resolution

Resolutions are a component of the governance documents and records of the sectional title scheme. The trustees must compile minutes of each general meeting and distribute these minutes to the persons entitled to notice of the relevant meeting as soon as reasonably possible, but not later than **seven days** after the date of the meeting.[347] The body corporate must prepare and update the text of all resolutions, including trustee resolutions, and the results of the voting on all motions.[348] The task of recording and storing minutes is usually a delegated responsibility of the trustees to the managing agent.

If any of the items of business that require body corporate member approval at an AGM, or at any adjournment of the general meeting, are not approved, the resolution taken not to approve the relevant document must state the reasons for the non-approval, and the body corporate must have the document revised and resubmitted at another general meeting for approval as soon as reasonably possible, until it is approved.[349]

Records of the outcomes of the relevant motions, in cases of an AGM, are very important and should be the standard for all general meetings, except for the requirement that they should be revised and resubmitted since not all documents submitted must eventually be approved by

resolution of the body corporate. The practice of recording the reasons for the non-approval of a motion is emphasised.

Copies of resolutions that deal with changes to the common property, including any exclusive use rights conferred on members, may be obtained and kept by the body corporate.[350] It is submitted that these are enormously important resolutions and must be kept and updated by the body corporate as good practice, notwithstanding that the wording of the legislation is not mandatory.

4.7.4 Implementation of community scheme resolutions

Generally, as soon as the community scheme or executive committee is empowered by a resolution to implement a specified resolution, then they must carry out the necessary actions to implement the said resolution. There are, however, some limitations placed on the timing of the implementation of certain resolutions taken by the body corporate, and some resolutions are only valid and take effect after a specified period of time.

Remember that a special resolution passed at a general meeting by members who hold less than 50% of the total value of all members' votes cannot be implemented – no action can be taken to implement that resolution – for one week after the meeting, unless the trustees resolve that there are reasonable grounds to believe that immediate implementation is necessary to ensure the safety of, or prevent significant loss, or damage to, the scheme.[351] During the **seven days** following such a trustee resolution, members holding at least 25% of the total votes of all members in value may, by written and signed request delivered to the body corporate, require the body corporate to hold an SGM to reconsider the said resolution.[352] If the demand for an SGM to reconsider the resolution is delivered to the body corporate, then the trustees must not implement the resolution unless it is once again passed by special resolution or a quorum is not present within 30 minutes of the time set for the requested meeting.[353]

If a unanimous resolution would have an unfairly adverse effect on any member, the resolution is not effective and cannot be implemented unless that member consents in writing within seven days from the date of the resolution.[354]

If the resolution in question relates to the remuneration of trustees who are not members, the reward, whether monetary or otherwise, must be approved by a resolution of the body corporate as part of the budget for the scheme's administrative fund.[355] This would be a pre-condition to the implementation of such a resolution.

A levy clearance certificate is only valid and binding if it is on the authority of a trustee resolution and signed by two trustees, or the managing agent.[356] Other documents signed on behalf of the body corporate can only be valid and binding if they are signed on the authority of a trustee resolution, by two trustees, or one trustee and the managing agent.[357] If the body corporate resolution is such that it instructs or directs specified trustees and/or the managing agent to sign the relevant document, then an additional trustee resolution would not be required.

But what happens if a proposed resolution that is vital to the good governance or business of the community scheme, is not implemented by the executive committee? The other question that arises is whether a resolution can be invalidated or rendered void for any reason.

4.7.5 Failure to obtain a proposed resolution, or to implement or invalidate a resolution

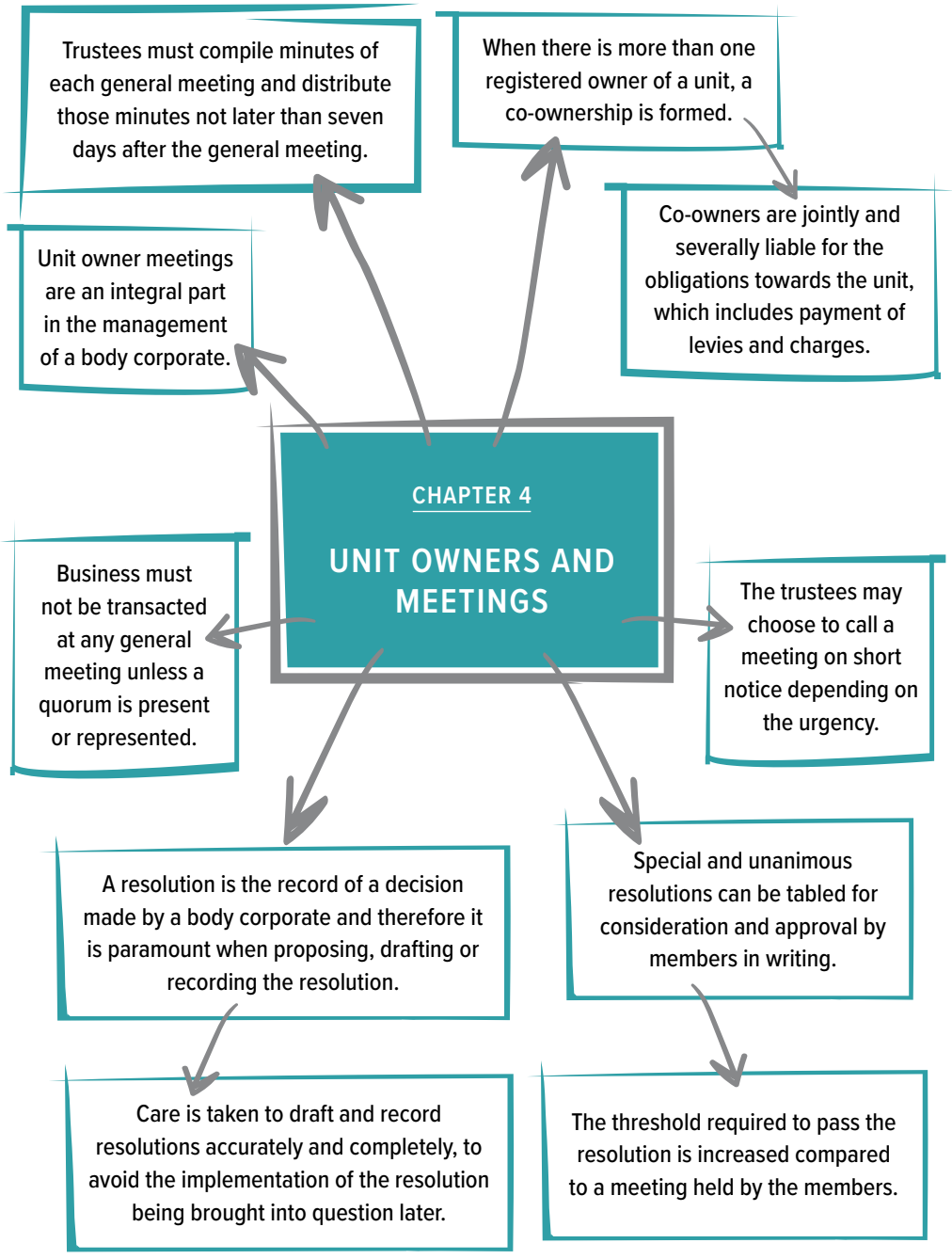
Interestingly, there is some relief that can be sought by the body corporate or a unit owner if they were unable to obtain a special or unanimous resolution – they may approach the Chief Ombud for relief in terms of the CSOSA.[358]

If any part of the meeting procedures mentioned above do not comply with the relevant legislation, the CSOS has the power to grant relief in terms of an application made to it, and to order that a resolution that was purportedly passed by a meeting of the board of the executive committee, or at a general meeting of the association, was void or is invalid.[359]

If there was unreasonable opposition at a general meeting to a proposed resolution, the CSOS could order that the motion as was originally proposed, or a variation of the motion proposed, shall be enforced.[360]

On the other hand, if the resolution that was passed at a meeting unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers, the CSOS could order that that resolution is void.[361]

4.8 Summary


Trustees must compile minutes of each general meeting and distribute those minutes not later than seven days after the general meeting.
When there is more than one registered owner of a unit, a co-ownership is formed.
Co-owners are jointly and severally liable for the obligations towards the unit, which includes payment of levies and charges.
Unit owner meetings are an integral part in the management of a body corporate.
CHAPTER 4
UNIT OWNERS AND MEETINGS
Business must not be transacted at any general meeting unless a quorum is present or represented.
The trustees may choose to call a meeting on short notice depending on the urgency.
A resolution is the record of a decision made by a body corporate and therefore it is paramount when proposing, drafting or recording the resolution.
Special and unanimous resolutions can be tabled for consideration and approval by members in writing.
Care is taken to draft and record resolutions accurately and completely, to avoid the implementation of the resolution being brought into question later.
The threshold required to pass the resolution is increased compared to a meeting held by the members.

5 The Trustees and Chairperson

While the unit owners are the ultimate powerhouse of the body corporate, the trustees are elected to run the day-to-day operations of the body corporate, as prescribed in the STSMA Regulations and the rules of the body corporate. Refer to Chapter 3 of the Unit Owner Reference Guide to revise the appointment of trustees and the election of the chairperson. In this chapter, we explore the procedure to remove a trustee and chairperson from office, the importance of the trustee resolution and the trustees' fiduciary responsibility to the body corporate, as well as the remuneration of trustees and the application of the Property Practitioners Act[362] (the PPA).

All members are trustees until the end of the first general meeting which is held to, among other things, elect trustees after the establishment of the development scheme.[363]

5.1 The Removal of Trustees

The management rules dictate the way in which a body corporate should be managed and administered.[364] Thus it is vital that unit owners and trustees understand the contents thereof in order to perform their duties. The management rules deal with the appointment and removal of trustees. A trustee can be removed from office by ordinary resolution at a general meeting, provided the intention to vote on the proposed removal was specified in the notice convening the meeting.[365]

Please refer to Paragraph 2.4 of the Unit Owner Reference Guide for a refresher on ordinary resolutions and the steps to be implemented.

5.2 Drafting a Trustee Resolution

Trustees, as the executives of the body corporate, are tasked with the day-to-day management of the scheme. This means that they need to meet regularly to discuss governance issues and take resolutions. When drafting a trustee resolution, the resolution must confirm that a meeting between trustees of a body corporate was held. The resolution should indicate the date, time and place where the meeting was held. The trustee resolution should also indicate that they, the trustees, are duly appointed and authorised to enter into a particular agreement. In general, a trustee resolution must record the decisions made by the trustees. This type of

resolution is a formal way of ensuring that decisions are recorded and implemented in line with applicable rules or regulations. Matters on which trustees may make resolutions are given in Table 17.

Table 17 Matters on which trustees may make resolutions

a. Levy members by raising a special contribution when additional income is required;[366]
b. Increase the contribution by up to 10% for the period between the end of the financial year and when the new contribution becomes payable;[367]
c. Charge interest on overdue amounts;[368]
d. Invest moneys into the body corporate reserve fund;[369]
e. Enter into some contracts;[370]
f. Join organisations and subscribe to services;[371]
g. Delegate trustee duties;[372]
h. Approach the Ombud for relief; and[373]
i. Set the dates for future trustee meetings with a standard agenda.[374]

5.3 Trustee Round Robin Resolution

A trustee resolution can be taken by round robin, as discussed in Paragraph 4.3.6. It must be sent to all of the trustees and signed by the majority but cannot be taken by fewer than two trustees. Such a resolution is valid and effective, as if it had been passed at a meeting of the relevant trustees duly convened and held.

5.4 Trustee Liability

A trustee stands in a fiduciary relationship to their body corporate,[375] which means that they must act honestly and in good faith.[376] The elected trustees of a body corporate exercise the powers and functions of the body

corporate, as well as directions and restrictions given by the members of the body corporate. A trustee must exercise the duties entrusted to them in a way that best suits the interests of the body corporate, without abusing or exceeding them.

Trustees must avoid any material conflict of interest in relation to the body corporate. Should a trustee have any direct or indirect material interest in a contract of the body corporate and/or any business related to the body corporate, they must notify their fellow trustees as soon as they are aware of the interest.[377] As such, a trustee must not be present at, or take part in, the considerations or decisions of a matter in which the trustee has any direct or indirect personal interest.[378]

If a trustee acts in breach of this fiduciary relationship, they will, in their personal capacity, be liable to the body corporate for any loss suffered by the body corporate as a result of their breach, or for any economic benefit they received as a result of their breach.[379]

However, if the members of the body corporate become aware of the material facts and approve a trustee's conduct in writing, it will not constitute a breach of the trustee's fiduciary relationship to the body corporate, unless the trustee has exceeded their powers. The body corporate must indemnify a trustee, who is not the scheme's managing agent, against all costs, losses and expenses arising as a result of any official act by the trustee, which is not in breach of the fiduciary relationship to the body corporate.[380]

The body corporate must insure against the risk of loss of their funds that may be as a result of any act of fraud or dishonesty committed by a trustee.[381]

5.5 The OHS Act Requirements and Practical Implementation

Trustees should ensure compliance with the Occupational Health and Safety Act[382] ('the OHS Act') and its Regulations when appointing an external third party to undertake any work on the common property. When the trustees appoint any third party to undertake maintenance and/or repairs on the property of the scheme, the trustees are required to

ensure that the contractor assumes the responsibility for risk assessment and compliance with regard to the safety standards required by the OHS Act.

A body corporate must comply with any law relating to the common property or to any improvement of land comprised in the common property.[383] The trustees can prepare an indemnity form, which must be completed by each contractor appointed by the body corporate. Such a form, if drafted well, would serve to indemnify the body corporate from any death, bodily injury, illness, or other damage caused by or during the contractors' duties. The trustees should also ensure that contractors appointed by individual owners complete the same indemnity form. We suggest that this indemnity form be contained in the body corporate rules and/or the application for renovations and alterations, and be conspicuously placed at the entrance to the complex, and at other relevant areas.

The OHS Act assigns the responsibility to the board of trustees of a body corporate to provide and maintain a safe and healthy work environment that is without risk to employees and others.[384] This duty can be delegated to another person by the trustees or to one of the trustees directly.[385] Whenever a trustee does, or omits to do, any action that is a contradiction to the OHS Act, the board of trustees could be held accountable.[386] After being appointed by the board of trustees, the delegate will be legally bound to help and assist the board of trustees

with safety management over the common property. Remember that **the board of trustees may delegate responsibility but not accountability**.[387] Nevertheless, the appointed delegate will be responsible for the management of occupational health and safety matters on the common property, as assigned by the board of trustees.

To facilitate effective safety management on the common property of a sectional title scheme, the roles and responsibilities of the board of trustees should be clearly defined, documented and communicated. In order to meet this responsibility, the appointed delegate should familiarise themselves with all statutory requirements stipulated by the OHS Act. The intention of the OHS Act is to enforce an official legal structure within the body corporate. These prescribed structures largely assist with the proper delegation of health and safety responsibilities within the sectional title environment.

When the board of trustees or managing agent, on the authority of the board, appoint any third party to undertake maintenance and/or repairs on the common property, the trustees are required to ensure that the contractor assumes the responsibility for risk assessment and compliance with safety standards, as required by the OHS Act. Not adhering to this legislation may result in a fine or imprisonment or both.[388]

The OHS Act is applicable not only for the appointment of a contractor, but also any employees of the body corporate tasked to maintain any part of the common property, as well as any person who may be impacted by the work performed by the contractor and/or employees of the body corporate. The common property is a 'workplace' as it is a premises or place where a person performs work in the course of their employment.[389]

The body corporate ought to have an indemnity declaration at the entrance to the common property for public indemnity, and this should be incorporated into any agreement entered into between the body corporate and any contractor or other employee. One cannot be indemnified for gross negligence or wilful/reckless actions on the part of the body corporate, though this should be made clear within the agreement between the body corporate and any contractor or employee. An appropriate indemnity declaration should be discussed with a relevant lawyer or insurance company.

The board of trustees carry a duty and a responsibility to implement certain actions when construction takes place on the common property.[390] The designer and contractor have their own duties to perform, therefore, the board of trustees, designer and contractor must keep a copy of a construction work permit on hand when performing the work that they have been issued and assigned.[391]

The trustees must be aware of what type of work is covered by the Regulations to the OHS Act, such as the Construction Regulations, and not just use the OHS Act itself as broad coverage for all types of work. Construction work means any work in connection with:[392]

a. The construction, erection, alteration, renovation, repair, demolition or dismantling of or addition to a building or any similar structure; and
b. The construction, erection, maintenance, demolition or dismantling of any bridge, dam, canal, road, railway, runway, sewer or water reticulation system, or the moving of earth, clearing of land, the marking of excavation, piling, or any similar civil engineering structure or type of work.

Normally, an OHS plan/programme is developed, implemented and maintained by the body corporate – one that is uniquely applicable to the specific common property within the scheme and activities performed thereon. It is important that the body corporate be able to prove the various aspects of their plan/programme in the case of a claim, so documenting of such is helpful as it may be required to provide proof of facts in this regard. The body corporate must have written policies and procedures for the management of the OHS plan/programme. This ensures that the body corporate is working from the standard procedures and understands the requirements when engaging with workers and contractors on the common property of the sectional title scheme.

5.6 Remuneration of Trustees

The body corporate must reimburse trustees for all disbursements and expenses that they incur in the fulfilment of their duties and when exercising their powers as trustees of the body corporate.[393]

Trustees who are members are entitled to be rewarded for their services to the body corporate, whether monetary or otherwise, but only if so determined by special resolution of the body corporate.[394] Trustees who are not members of the body corporate may be rewarded for their services as such, but only if that reward is approved by an ordinary resolution of the body corporate and forms part of the budget for the scheme's administrative fund.[395]

With the enactment of the Property Practitioners Act (PPA) which came into force on 1 February 2022, the definition of 'property practitioner' includes any person who, for remuneration, manages a property on behalf of another.[396] The Property Practitioners Regulations[397] goes further, and includes a 'scheme executive' as defined in the CSOS Regulations, as a 'managing agent' and therefore a property practitioner for purposes of the PPA.[398] A 'scheme executive' is defined as a person who is a trustee, director, or another person who exercises executive control of a community scheme.[399] Therefore, a trustee who is remunerated for their services to the body corporate, is a property practitioner, within the definitions contained in the PPA and Property Practitioner Regulations, and must therefore register as a property practitioner and comply with the applicable terms thereof.

5.7 The Chairperson

The election, appointment and responsibilities of the chairperson of the board of trustees is dealt with in Paragraph 3.3 of the Unit Owner Reference Guide. In this guide, the removal of a chairperson is discussed, as well as the steps that must be taken if there is no chairperson at a meeting.

5.7.1 How to remove a chairperson

A chairperson cannot be removed without due processes being followed. The removal can be done at a trustee meeting by the trustees, or by the members at a general meeting.

In order for the removal of the chairperson to be effectively finalised, it must first be clearly stated in the notice of the meeting that there is a proposed removal of the chairperson.[400]

It must, however, be noted that removing the chairperson from such position does not automatically have the same effect on his or her position as a trustee. In other words, the person will remain a trustee for that body corporate, unless also specifically removed as a trustee.[401]

When the chairperson ceases to be a chairperson, it becomes the responsibility of the trustees to elect someone as a replacement.[402] The newly appointed person will then function in that office as a chairperson until the previous chairperson's term of office ends and has the same voting rights at trustee meetings.[403] Essentially, the new chairperson replaces the previous chairperson, they receive the same voting rights as their predecessor and the term of the new chairperson continues from where the previous chairperson's term ended. The new chairperson's term does not start anew from when they replace the previous chairperson.[404]

A meeting **cannot** be held without a chairperson. The members must vote someone into the position of chairperson before the meeting commences, even if such elected person is only elected for that particular meeting.[405]

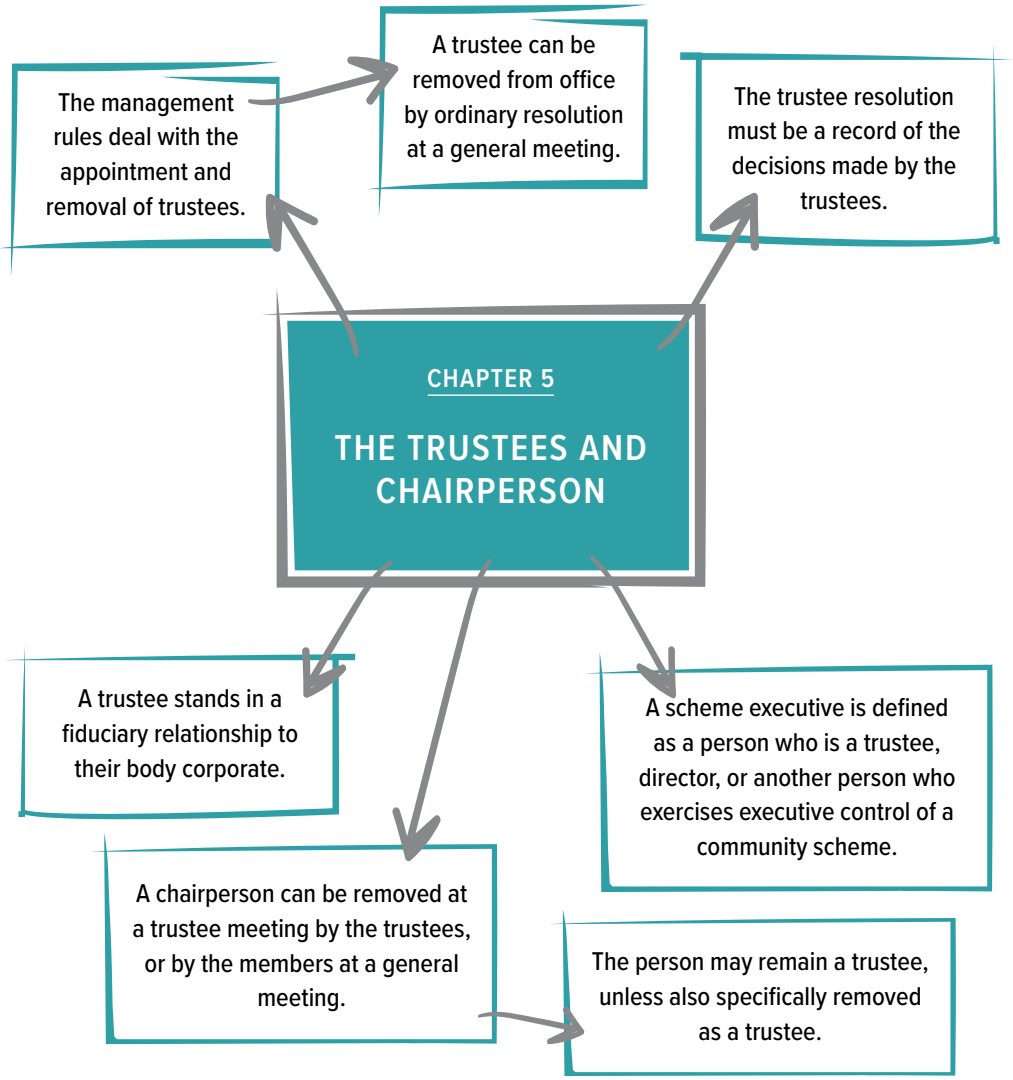
5.7.2 When there is no chairperson at a meeting

A chairperson is elected by the trustees by way of a majority vote, at the first trustee meeting after an AGM. The chairperson must preside over all the general meetings unless the owners resolve otherwise.[406] The chairperson is entrusted with ensuring that meetings are conducted in a proper manner that allows all who are present and who are entitled to speak, to raise conversation regarding matters forming part of the agenda.

The chairperson must allow all stakeholders an opportunity to have their views heard in a fair manner and must, therefore, be impartial.[407]

The chairperson will remain and function as a chairperson until the next AGM is held.[408] If, after **15 minutes** of the commencement time of the meeting, the chairperson is not present or the chairperson is unwilling or unable to function as a chairperson, the members present must elect a chairperson for said meeting.[409]

5.8 Summary



6 The Managing Agent

The financial, administrative, physical management, as well as the day-to-day business of a scheme can be a burdensome task, especially in larger sectional title schemes. This is why a body corporate often elects to appoint a managing agent.[410]

The trustees of a body corporate may resolve to appoint a managing agent by way of a trustee resolution. However, a managing agent must be appointed if required by:

a. A registered mortgagee of 25% of the primary sections in number; **or**
b. By an ordinary resolution by members of the body corporate.[411]

When the body corporate enlists the services of a managing agent, it is important that both parties ensure that the written management agreement entered into complies with requirements as set out in the STSMA Regulations.[412]

EXAMPLE

A management contract states that the managing agent is authorised to negotiate on behalf of the trustees with contractors for the maintenance of the common property but is silent on who will be responsible to supervise such contractors when employed.

A plumber is appointed to repair the scheme's pool pump. The plumber needs to dig a trench to expose the pipe from the pool to the pump house in order to repair the problem, but does not fill in the trench before leaving. A visitor to the scheme trips and falls into the exposed trench and is injured.

Since supervision of contractors was not specified as a responsibility of the managing agent in their contract with the body corporate, the visitor would then have a claim against the body corporate for injury. Furthermore, PMR 28(5) of the STSMA Regulations provides that the managing agent is appointed to fulfil specified management services under the supervision of the trustees.

This is why bodies corporate are required to have public indemnity insurance and suitable disclaimers.

6.1 Period of Appointment

A management agreement entered into may not be for a period longer than three years.[413]

There is no required minimum period stipulated, but it is suggested that the three-year period will allow for consistency in the management of a scheme.

6.2 Breach of Contract

If a body corporate elects to appoint a managing agent, then the managing agent must be appointed to perform specified financial, secretarial, administrative or other management services under the supervision of the trustees.[414]

The scenario described in the 'Example' block above is important because the role and the liability of a managing agent are often misunderstood. A management agreement should be as detailed as possible in an attempt to avoid confusion regarding the duties and responsibilities of a managing agent. In this regard, a detailed management agreement should also set out the procedure to be followed when there is a breach.

There are numerous dispute resolution procedures that may be included/agreed to in a management agreement, but the management agreement should at least provide for the obligation on the aggrieved party to notify the offending party of the breach in writing, and to allow a period, usually 14 days, in which the offending party is given the chance to correct the breach before the aggrieved party proceeds with appropriate legal action.

In addition to the standard remedies provided by law, such as a claim for damages or specific performance, there are alternative remedies which, if applicable, the parties may consider, for example:

a. A managing agent must be a **registered property practitioner** and thus comply with the Property Practitioners Act[415] and its Regulations, which has its own disciplinary process to deal with complaints against managing agents. If the managing agent is a member of a professional body, e.g. the National Association of Managing Agents (NAMA), then that professional body may also have their own disciplinary processes for dealing with complaints against their members.
b. In limited situations, an Application for Dispute Resolution may be submitted to the CSOS for:[416]
    i. An order requiring a managing agent to comply with the terms of a person's contract of appointment and any applicable code of conduct or authorisation; **or**

ii. An order declaring that the association does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated.

6.3 Cancellation of Contract

There are two ways in which a management agreement may be cancelled without liability or penalty, regardless of any provision of the management agreement or any other agreement to the contrary:[417]

a. By the body corporate on two months' notice, if the cancellation is first approved by a special resolution passed at a general meeting; **or**
b. By the managing agent on two months' notice.

If the body corporate or the trustees elect to cancel or refuse to renew a management agreement when it expires, in terms of the provisions set out in the actual agreement itself, only an ordinary resolution is required.[418]

In the event that the management agreement is cancelled, the managing agent must deliver to the body corporate, within ten days, all the records it holds for the body corporate.[419]

6.4 Old Contracts versus New Three-year Management Agreements

Before the STSMA came into effect on 7 October 2016, the previous PMRs provided that a management agreement would have an initial period of one year, and that it would be automatically renewed at the end of that initial period if the body corporate failed to notify the managing agent of its cancellation. This meant that if the body corporate failed to send a cancellation notice timeously, the management agreement would be automatically renewed, and while the body corporate was still capable

of cancelling the agreement, it could still be held liable for damages resulting from early cancellation.

While this automatic renewal is no longer provided for in the current legislation, it may still be consented to in a management agreement. A management agreement may not endure for a period longer than three years, and may be cancelled, without liability or penalty, despite any provision of the management agreement or other agreement to the contrary.[420]

This legislative amendment, which removes the provision of automatic renewals, does not affect the validity of older agreements, but does now allow for bodies corporate to cancel management agreements, with automatic renewal clauses, without being penalised or being held liable for any damages suffered by the managing agent due to early termination. A practical example of this follows.

EXAMPLE

A contract between a body corporate and its managing agent states that a certain managing agent is appointed for a term of four years, whereafter, if the agreement is not cancelled by the body corporate, it will continue to be automatically renewed on an annual basis. It also states that the body corporate will be liable for a penalty on early cancellation of the agreement to the value of R1 000.00 for every month that is left in the managing agent's term of appointment.

After four and a half years, the body corporate decides to cancel the agreement and to appoint a new managing agent. The existing managing agent states that the body corporate cannot cancel the agreement now as the agreement was renewed for another year and there are still six months left of that year. If they want to cancel, the body corporate will be liable for the penalty amount of R6 000.00 (R1 000 x 6 remaining months). In their defence, the body corporate can rely on PMR 28(7) of the STSMA Regulations to cancel the agreement without liability of a penalty payment.

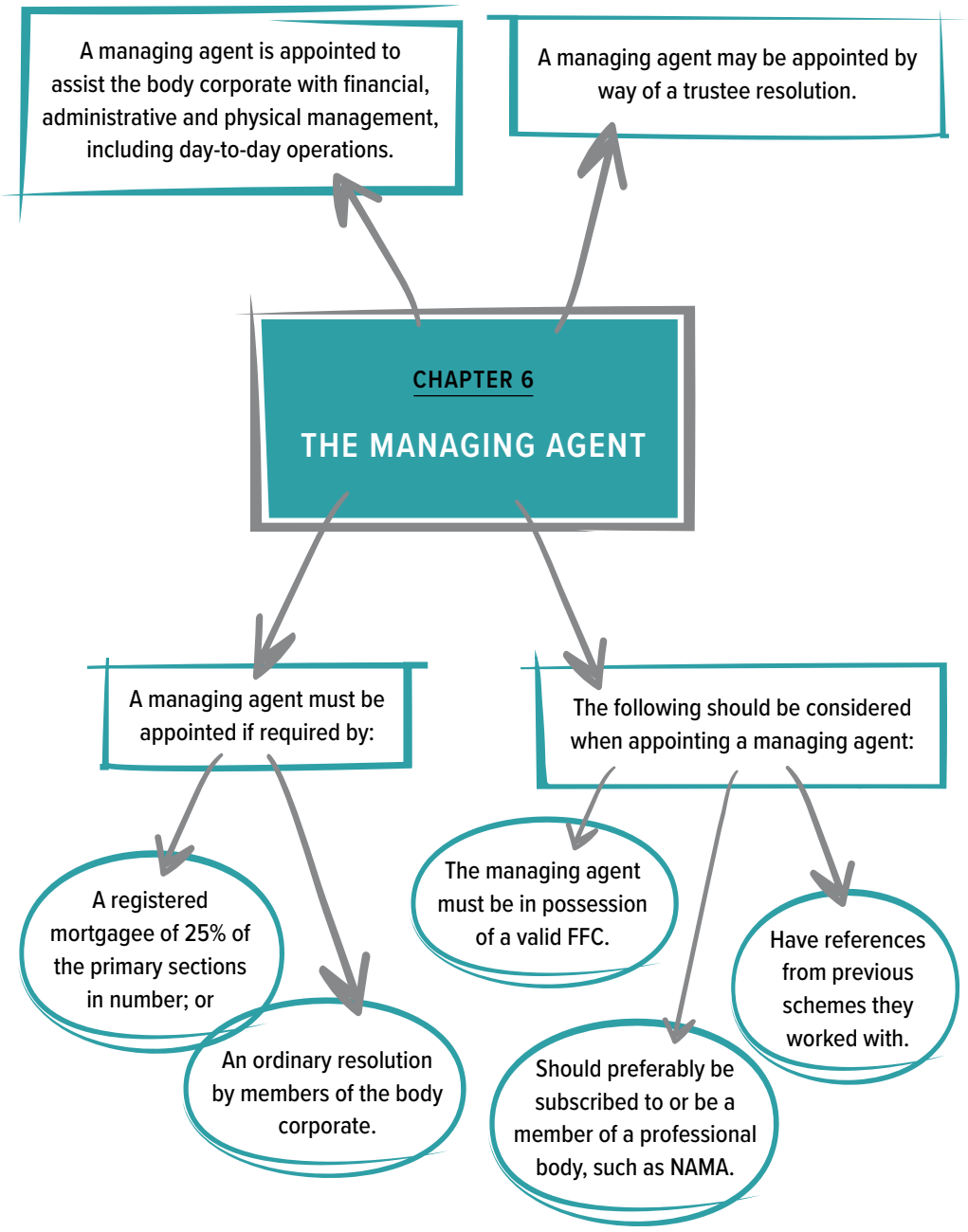
6.5 Factors to Consider when Choosing a Managing Agent

Managing agents may be appointed to perform specified financial, secretarial, administrative or other management services under the supervision of the trustees.[421] Managing agents can also engage in contract negotiations with service providers and other contracted staff to assist with the upkeep of the common property and internal mediation processes before disputes are escalated to the CSOS.

All these services come at a cost, so it is important to review the associated costs for services required by the scheme and, rather than looking to find the least expensive managing agent, look at eliminating unnecessary services from their offering. Good governance of the scheme is crucial to maintain the value of the community scheme.

When considering accreditation of your managing agent, ask if they hold a valid fidelity fund certificate from the PPRA and if they are members of recognised bodies in the industry, such as NAMA. You can also ask for references from previous sectional title schemes they have managed and find out how they managed specific responsibilities regarding important services rendered, such as financial management of the scheme, how they communicated money spent and if they met the expectations of the scheme in terms of their signed contract. Finally, ensure that the contract sets out all the performance expectations clearly.

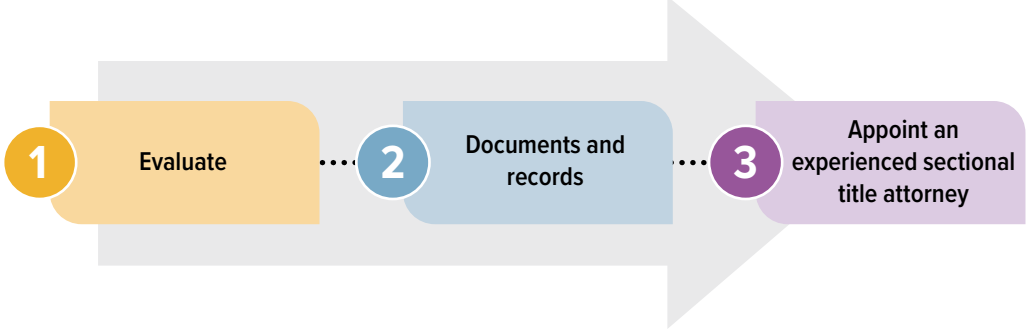
6.6 Summary


A managing agent is appointed to assist the body corporate with financial, administrative and physical management, including day-to-day operations.
A managing agent may be appointed by way of a trustee resolution.
CHAPTER 6
THE MANAGING AGENT
A managing agent must be appointed if required by:
A registered mortgagee of 25% of the primary sections in number; or
An ordinary resolution by members of the body corporate.
The following should be considered when appointing a managing agent:
The managing agent must be in possession of a valid FFC.
Should preferably be subscribed to or be a member of a professional body, such as NAMA.
Have references from previous schemes they worked with.

7 The Administrator

A body corporate, the local municipality, a judgement creditor of the body corporate and a unit owner, or a person with a registered real right over a unit, can apply for the appointment of an administrator. This chapter includes a practical step-by-step legal guide to appointing an administrator from the perspective of a body corporate or unit owner.

7.1 Appointing an Administrator



1 Evaluate

A magistrate's court[422] may appoint an administrator, for a fixed period, on such other terms and conditions as it deems fit, if there is evidence of serious financial or administrative mismanagement of a body corporate, and if there is a reasonable probability that the body corporate will be able to meet its legislative obligations should it be placed under administration.[423] Examples of serious financial mismanagement are given at the end of this chapter.

It is important to carefully evaluate any evidence of serious financial or administrative mismanagement for the following reasons:

a. Both the application to court and the services of an administrator will be expensive. Bringing such an application should only be considered when all other attempts to resolve the problems have been exhausted.
b. An administrator steps into the shoes of the body corporate to manage and run the body corporate, to the **exclusion of the body corporate**.[424] In other words, the administrator can make decisions without input from anyone else, including the members of the body corporate. The mandate of the administrator can be limited to specific powers in the court order, with the remainder reserved for execution by the board of trustees, if any. The application to court therefore needs to **specify the exact duties, functions and powers** that the administrator will be given.

2 Documents and records

The appointment of an administrator is seen as a 'last-resort' measure to resolve problems and a court will be reluctant to grant such an order unless evidence justifying such a request is provided. The evidence needed can vary depending on the type of problem, as well as the magistrate hearing and deciding on the matter. The following should be included in an application:

a. Previous attempts made by the applicant to resolve the problems faced by the body corporate. The decision on whether or not to grant the order appointing an administrator is heard by way of an application and not a trial. As such, 'hard evidence' or written evidence forms the basis of the application to court. It is therefore

imperative that all information be recorded in writing so that it can be attached to the application papers. Such information includes minutes of meetings, letters sent and affidavits from parties confirming the nature of the body corporate's alleged mismanagement; and

b. Proof of notification of the application to all parties with a material interest in the body corporate's management. Due to the serious nature of the application, it would be best to provide written evidence showing that a notification of the intention to bring this application was given to all parties involved. These parties would include, but may not necessarily be limited to, all the owners and the managing agent.

3 Appoint an experienced sectional title attorney

Again, due to the seriousness and possible far-reaching effects of this application, professional assistance should be treated as a requirement even though it is not prescribed by law. Attending to Steps 1 and 2 before approaching an attorney and having this information at hand, would allow the attorney to have a much better understanding of the situation and cut down the need for additional consultations.

An attorney can be approached earlier, but doing the groundwork first could result in a lower legal fees bill, provide clarity on what solutions are required and outline what needs to be asked for in the application to court.

A suitable attorney who is experienced with sectional title law can also assist with the selection of an administrator to be nominated in the application papers. There may even be some attorneys willing to act as administrators if appointed by a court.

7.2 Serious Financial Mismanagement

The STSMA sets out the obligations/requirements for the financial management of a scheme, which are quite extensive.[425] While "*serious financial mismanagement*" is not defined in the STSMA, failure to comply with any of these requirements is a contravention of the STSMA, which could result in unforeseen and detrimental consequences, and could be considered by a court to constitute serious financial mismanagement, as this example demonstrates.

EXAMPLE

The establishment and maintenance of the administrative fund[426] and the reserve fund[427] create the foundation on which the determination of levies is based, which, as explained earlier, are of vital importance.

However, the trustees of Shamble Heights Body Corporate gave in to the pressure of the members not to increase the levy amount for the required written maintenance, repair and replacement plan for the common property[428] or for the required public liability insurance,[429] as they have always done their own maintenance and there has never been an issue with visitors before.

Then one day, a delivery man sustains extensive injuries from falling debris in the stairwell. Upon investigation, it is found that the falling debris was due to spalling, which is structural in nature and is affecting the stability of the building.

The delivery man successfully obtains a judgement against the body corporate for the damages incurred for the eight weeks spent in hospital, and the loss of the use of his right arm. There is no insurance cover for this claim, and if the body corporate does not have reserve funds to pay this claim, they will have to raise a special levy or run the risk of the delivery man obtaining judgement for damages against the body corporate, and then bringing a further court application[430] making all owners responsible for a portion[431] of the judgement debt in their personal capacities if it remains unsatisfied.

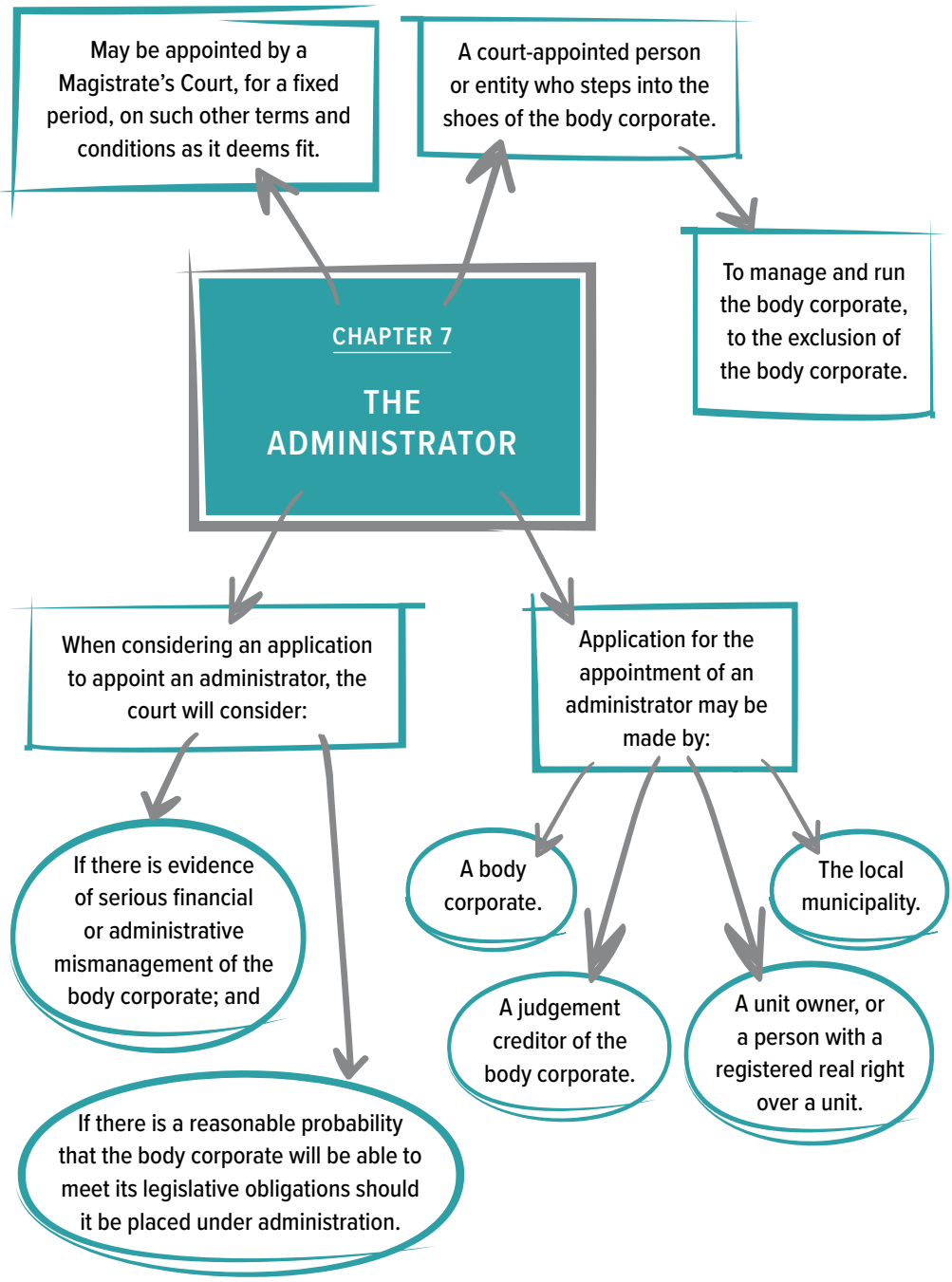
In addition to the above:

a. There are no funds to address the spalling problem;
b. The majority of owners refuse to pay another special levy because they simply do not have the money;
c. The insurance company found out about the problem and is about to cancel its policy due to non-compliance with the STSMA; and
d. The trustees are unable to obtain the required special resolution in order to borrow money[432] to deal with the problem, as the members refuse to accept liability because they believe it was another party's fault.

There is effectively now a stand-off between the members and trustees. It is at this stage that the appointment of an administrator should be considered. There is clear contravention of the STSMA and there is no possibility of the parties resolving the matter among themselves.

There are numerous other examples that could be used to illustrate what issues may constitute 'serious financial mismanagement'. However, given that the term is not defined, if you as an owner, trustee or managing agent are in doubt, it would be best to seek professional advice.

7.3 Summary


May be appointed by a Magistrate's Court, for a fixed period, on such other terms and conditions as it deems fit.
A court-appointed person or entity who steps into the shoes of the body corporate.
To manage and run the body corporate, to the exclusion of the body corporate.
CHAPTER 7
THE ADMINISTRATOR
When considering an application to appoint an administrator, the court will consider:
If there is evidence of serious financial or administrative mismanagement of the body corporate; and
If there is a reasonable probability that the body corporate will be able to meet its legislative obligations should it be placed under administration.
Application for the appointment of an administrator may be made by:
A body corporate.
A judgement creditor of the body corporate.
A unit owner, or a person with a registered real right over a unit.
The local municipality.

8 Formation and Amendment of Rules

8.1 Formation of Rules

As provided for in the STSMA, a scheme must be regulated and managed by means of rules. The use of the word 'must' in the relevant section of the STSMA imposes a mandatory obligation for a body corporate to be managed as such.[433] Neither the developer nor the trustees have a discretion whether the scheme is to be regulated and managed by its rules or not.

The STSMA furthermore obliges a body corporate to be regulated and managed by these rules as from the date of establishment of the body corporate, which is the first date on which a unit in the scheme is sold to a third party.[434]

The body corporate rules, which comprise management rules and conduct rules, must provide for regulation, management, administration, and the use and enjoyment of both sections and common property.

Management rules deal with issues related to the management and administration of the body corporate, whereas conduct rules deal

with issues that tend to be more related to the behaviour of residents, restrictions on pets and parking.

The PMRs and Prescribed Conduct Rules (PCRs) found in Annexures 1 and 2 of the STSMA Regulations respectively, are the standard rules in terms of which a body corporate must be regulated and managed if the rules have not been substituted, added to, amended or repealed, as provided for in the STSMA.

The PMRs and PCRs apply to sectional title schemes registered as from 7 October 2016, which is the date on which the STSMA came into effect.

Any amendment of the management rules and/or conduct rules must be approved by the Chief Ombud. Below is a list of previously identified rules that may need to be removed from the community schemes rules as they are regarded by the CSOS as being non-compliant, although this list is not exhaustive:[435]

a. Prohibition on the slaughtering of animals for ritual purposes;
b. Disconnection of electricity or essential services for non-payment of levies;
c. Imposition of penalties without due process;
d. Issuing of penalties equal to or more than double the applicable monthly levy;
e. Termination of a lease agreement by or at the instance of trustees or eviction of tenants;
f. Use of specific, accredited or registered service providers;
g. Referral of disputes to private arbitration;
h. Interest rates that are in contravention of the NCA and its Regulations; and
i. Any discriminatory rules against any person, particularly domestic workers.

It is interesting to note that the CSOS first published these undesirable rules in 2018 under Circular 1 of that year and included that the issuing of speeding limitations and speeding fines within a community scheme would also be undesirable. At the time of publication of Circular 1 of 2018, on 1 August 2018, the Full Bench decision of the High Court was in force, and this decision prohibited the issuing of speeding fines and limitations.

However, this prohibition was later overturned by the Supreme Court of Appeal as discussed in Paragraph 8.3 below. The later CSOS Circular 1 of 2019, and then the new Circular 1 of 2021, has removed the reference to speeding fines and limitations, and these are therefore no longer undesirable as long as they comply with the judgement discussed in Paragraph 8.3.

This begs the question of what power or force these circulars and practice directives have in law. A practice directive is issued in terms of Section 36 of the CSOSA and is supposed to be issued by the Chief Ombud in regard to any matter pertaining to the operation of the Service and is supposed to direct the performance of any act in the operation of the CSOS, and provide clarity on implementation. There is no provision in the CSOSA or CSOS Regulations relating to 'circulars'. Notwithstanding that the above rules are undesirable to the CSOS, a decision to reject amendments to rules by community schemes may be challenged in a court of law on the basis of the constitutionality and legality thereof, or reviewed in terms of the Promotion of Administrative Justice Act[436] (PAJA).

The amendments of management rules and conduct rules are given in Table 18.

Table 18 Amendment of management rules and conduct rules

By	Management rules	Conduct rules
The developer	The PMRs may be substituted, added to, amended or repealed by the developer to the extent prescribed by Regulation, when submitting an application for the opening of a sectional title register.	The PCRs may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register.
The body corporate	After establishment of the body corporate, the management rules may be substituted, added to, amended or repealed upon unanimous resolution by the body corporate.	After the establishment of the body corporate, the conduct rules may be substituted, added to, amended or repealed upon special resolution by the body corporate.

It would be much easier for a body corporate to amend its conduct rules than its management rules, due to the lower threshold required for a special resolution in contrast to the requirements for obtaining a unanimous resolution for the amendment of management rules.

The amended conduct rules may not be irreconcilable with any PMR.[437] The management rules or conduct rules must be reasonable and must be equally applied to all owners.[438]

8.2 Amendment Procedure

The procedure for the amendment of management rules and conduct rules follows.[439]

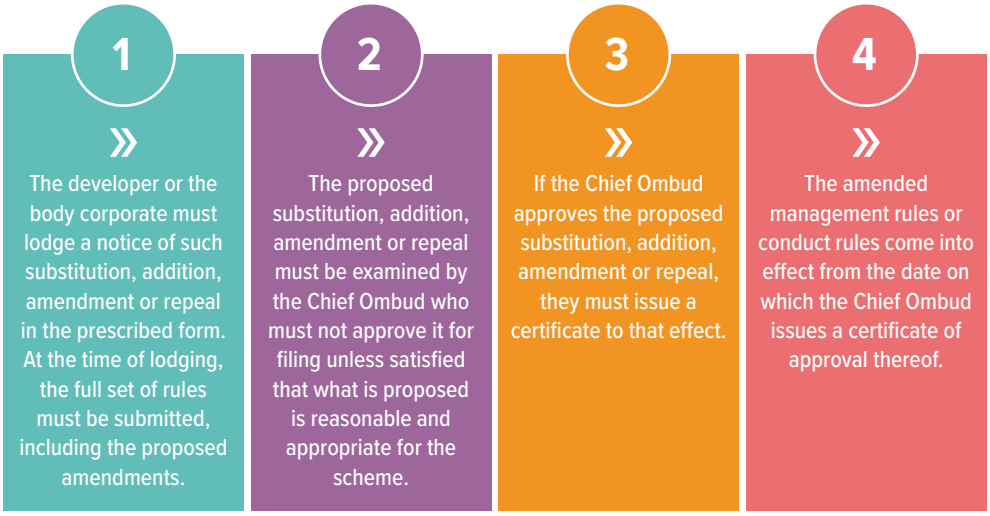


Figure 4 Management and conduct rules amendment procedure

Any rules made under the STA are deemed to have been made under the STSMA.[440] Rules made under the STA will therefore remain in force, in as far as they are not irreconcilable with the provisions of the STSMA.[441]

8.3 Fines and Penalties

The Prescribed Management and Conduct Rules in the STSMA Regulations do not contain penalties or fines against members for the contravention thereof, but this does not mean that sectional title schemes cannot contemplate and enforce fines and penalties against members or their visitors or employees. Without a system of fines, the scheme's rules could easily be ignored and a state of anarchy could exist. Fines are therefore potentially a good deterrent, if imposed fairly and proportionately in the circumstances.

The fines that are imposed must be reasonable and before they can be imposed on a member, the body corporate must allow the member to state their case in relation to the fine and its cause. The *audi alteram partem* principle is a rule of natural justice that, simply put, means 'listen to the other side'. The trustees of a body corporate must first hear the other side before judging or ruling that a penalty in terms of the rules is justifiable. It is advisable to send a warning letter stating that the fine is to be imposed, which presents an opportunity for the member to remedy the breach or give representations at a trustees' meeting or in writing to the trustees.

The amount of each fine and the circumstances that can lead to the fine being imposed against a member should be clearly set out in the rules and cannot be deviated from by the trustees when they are contemplating the imposition of the fine on any resident.

In addition, the trustees must ensure that the rules or proposed fines are not in conflict with any legislation, including by-laws and/or other rules of the body corporate, as this would not be appropriate and could render the imposition of the fine unlawful. If any fines or penalties are positioned in proposed amendments to the rules and presented to the CSOS, but then rejected by the CSOS, it is possible to challenge that finding in terms of the principles of legality and in terms of the PAJA, if the CSOS are not correct in rejecting the proposed fine or penalty.

8.4 Speeding on Common Property

The question often arises whether the body corporate of a sectional title scheme or the HOA of a property estate may implement and enforce speeding 'rules' on the common property within the development. In this Trustee Reference Guide, *Mount Edgecombe Country Club Estate Management Association Two (RF) NPC v Singh*[442] ('the *Singh* case') and the National Road Traffic Act[443] ('the NRTA') are used to answer the question about speeding on common property.

In the *Singh* case, the HOA issued speeding fines to the daughter of one of the owners in the estate and the fines were levied against the owner's account with the HOA. When the owner did not pay the fines, his family's access to the roads within the estate was suspended and litigation ensued.

The 'road rules' of the HOA were challenged by the owner in the High Court of Pietermaritzburg and it was contended that the HOA was purporting to enforce certain traffic officer functions as were properly defined in the provisions of the NRTA, since the roads were 'public roads' as defined in the NRTA. The High Court ultimately decided that the contractual nature of the relationship between the HOA and its members meant that the owners voluntarily purchased property residing in the estate and therefore subjected themselves to the rules of the HOA. This decision was then successfully appealed to a Full Bench of the same High Court, before three judges ('the Full Bench'), which decided in favour of the owners and held that the HOA was attempting to enforce a public power without authority by enforcing the NRTA. The HOA appealed this to the Supreme Court of Appeal (SCA), and the SCA found in favour of the HOA on the 28 March 2019, overturning the Full Bench's decision on the road rules as detailed below.

The Full Bench analysed various provisions of the NRTA, and other relevant legislation, including:

a. The definition of a public road;[444]

b. The duty to control traffic on public roads which is a power given to traffic officers;[445]
c. The power of the Minister of Transport, or the Minister's authorised delegate, or the local authority, or an employee of the local authority, to prescribe and cause to be displayed certain road traffic signs for public roads for controlling traffic thereon;[446]
d. The power of the Minister to:
    i. Prescribe speed limits for public roads, or sections thereof, in an urban area, other than a freeway, currently regulated at 60 kilometers per hour;[447] and
    ii. To increase or decrease the speed limit that is generally applied to a specific class of vehicle.[448]
e. The power of the Member of the Executive Council (MEC)[449] to authorise any association or club to display any road traffic signs, subject to certain conditions;[450] and
f. That operating a vehicle in excess of the prescribed limit is an offence and is dealt with in terms of Schedule 3 of the Criminal Procedure Act ('the CPA').[451]

The pertinent definition worth noting is that of a '**public road**' which is: 'Any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access …'[452]

The Full Bench held that, "*the effect of all this is that the NRTA, read with the relevant provisions of the CPA, provides that only peace officers, who may also be traffic officers, are empowered and entitled to police public roads with regard to all questions of speeding*". The SCA decided that this argument was not sustainable and concluded that the roads in the estate were **not public roads** and were, indeed private roads. It stated that the test to be applied is whether a section of the public at least commonly uses the area or has a right of access, which is different to access by invitation, either direct or implied. The SCA adopted this interpretation from two cases: *S v Coetzee*[453] and *S v Rabe*.[454]

The SCA further held that in terms of the township approval for the estate "*the owner was to construct the roads to the satisfaction of the*

local authority and that the owner of any unit within the township shall have a right of general access subject to whatever rules, conditions or restrictions as are laid down from time to time by the HOA for the purpose of ensuring proper control and administration of the use and enjoyment thereof".[455] The general public certainly did not have access to the roads of the estate due to the heavy security in place and multiple and varied access protocols required to gain entry.[456]

The SCA went further and stated that even if the roads were public roads, the finding of the Full Bench that the road rules for enforcement of speeding were still not sustainable. The Full Bench had held that the HOA's road rules clearly had public law content, involving the exercise of public power and functions of several State officials and structures, such as the local authority, traffic officers, the office of the Directorate of Public Prosecutions (DPP) and the courts, in carrying out the administration of justice. This was not accepted by the SCA, and it was upheld that the contractual relationship between the HOA and the owner was instructive, in that the road rules sought to be enforced, such as speeding, were between the HOA and the owner and not any third party – it was a private contractual arrangement between the owner and the HOA.[457] If a third party who was invited or permitted access to the estate roads by the owner, were to speed in excess of the speed limit thereon, the owner would be responsible for the fine so imposed therefor, and not the third party.[458]

The SCA ultimately held that there was no conflict between the private contractual provisions operating between the HOA and the owners within the estate, and that these are enforceable against the owners only.[459]

Although the *Singh* case dealt with an HOA and the roads situated therein, the SCA's reasoning on the private contractual nature of the rules is noteworthy, and the same reasoning would apply to a sectional title body corporate and its common property, generally. Therefore, it is not necessary to delve deeper into the definition of 'public road' and unpack its components. The conduct rules of a body corporate, which may include restrictions on the speed limit below the national limit of 60 km/h, and enforcement thereof, is permissible in terms of penalty fines against the owners.

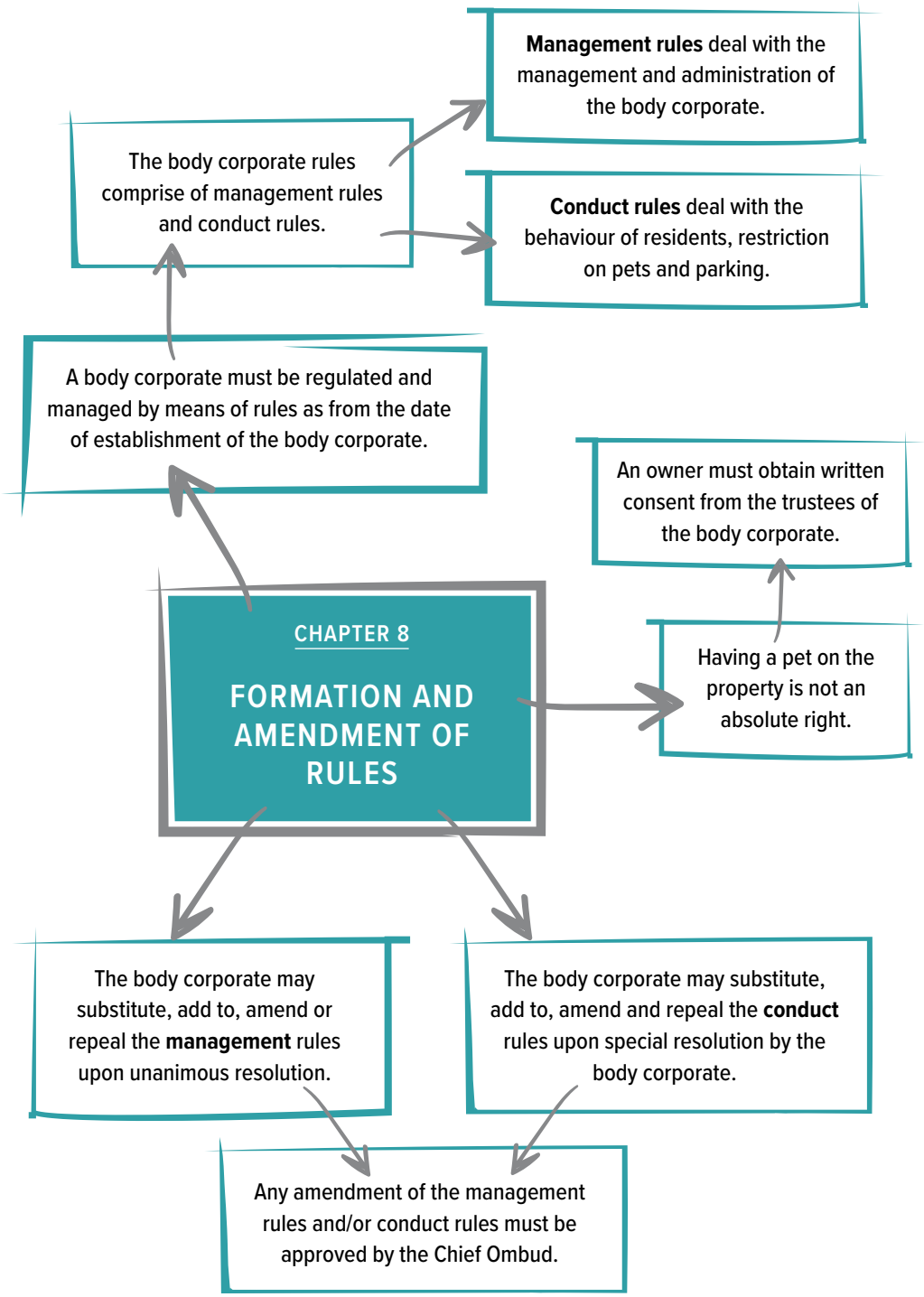
8.5 Pets and Bodies Corporate

Having a pet on the property is not an absolute right. In order for an owner to be able to lawfully keep a pet on the property, they need written consent from the trustees of the body corporate.[460] Trustees may not unreasonably withhold such consent.[461] The trustees have to act in the best interest of the scheme and decisions taken should reflect this even when pets are involved.

When an owner has a disability and, as such, lives and requires the assistance of a guide dog, such a person will be considered to have the consent of the trustees to keep such a dog on the property.[462] This dog will have to be accompanied when it is on the common property to ensure that it does not become a nuisance to the other occupiers or cause a disturbance.[463]

The trustees may impose any reasonable conditions for the pet to stay on the property.[464] When such conditions are breached, the trustees will then be in a position to withdraw their consent.[465]

8.6 Summary


Management rules deal with the management and administration of the body corporate.
The body corporate rules comprise of management rules and conduct rules.
Conduct rules deal with the behaviour of residents, restriction on pets and parking.
A body corporate must be regulated and managed by means of rules as from the date of establishment of the body corporate.
An owner must obtain written consent from the trustees of the body corporate.
CHAPTER 8
FORMATION AND AMENDMENT OF RULES
Having a pet on the property is not an absolute right.
The body corporate may substitute, add to, amend or repeal the **management** rules upon unanimous resolution.
The body corporate may substitute, add to, amend and repeal the **conduct** rules upon special resolution by the body corporate.
Any amendment of the management rules and/or conduct rules must be approved by the Chief Ombud.

9 The Community Schemes Ombud Service (CSOS)

Prior to the establishment of the CSOS, the regulatory framework for community schemes was largely fragmented. There was no regulatory body to deal with complaints and disputes. For a number of years, Government received a myriad of complaints from owners of properties located in community schemes. For some time, the Department of Rural Development and Land Reform entertained some of the complaints, including articulating policies intended to have such complaints resolved. That mechanism had its rewards but was over-shadowed by a regulatory vacuum and limited attention placed on such disputes among owners and between owners and community scheme executives. The only legal recourse available to unit owners to address their complaints, was through arbitration or the courts, which is costly and time-consuming, and so emphasised the need for the CSOS to be established.

This chapter explains the calculation of the CSOS levies, payments and dispute resolutions.

9.1 Calculation of the CSOS Levies

All community schemes[466] have the obligation to collect a prescribed monthly CSOS levy from every unit owner within the scheme, and to pay this levy to the CSOS on a quarterly basis.[467] If the sectional title scheme is within an HOA, there are two levies that must be paid to the CSOS: one for the sectional title scheme based on its membership, and one for the HOA based on its membership, which includes the membership of the sectional title scheme.[468]

The CSOS Regulations on Levies and Fees provide an example similar to Table 19 below to illustrate how the CSOS levy is to be calculated for each unit owner.[469]

Table 19 The CSOS levy calculated on monthly levies

CSOS Levies Calculator			Scheme CSOS Levy
Unit number	**Scheme levy**	**Unit CSOS levy**	**R300.00**
1	R500.00	R –	
2	R1 000.00	R10.00	
3	R1 500.00	R20.00	
4	R2 000.00	R30.00	
5	R2 500.00	R40.00	
6	R3 000.00	R40.00	
7	R3 500.00	R40.00	
8	R4 000.00	R40.00	
9	R4 500.00	R40.00	
10	R5 000.00	R40.00	

However, these calculations are not always so simple. The practice directives published by the CSOS have advised that the portion payable for special levies or levies payable in regard to the maintenance of EUAs, need to be excluded from the calculation of the CSOS levy.[470]

It is the responsibility of the scheme to pay the CSOS on time to avoid penalities and interest.[471] The CSOS is listed as a Public Recipient with FNB, Capitec, ABSA and Standard Bank. The payment procedure for each Bank is shown in Annexure A of the CSOS Practice Directive on Payment of Levies and Fees.[472] The scheme registration number must be quoted as the payment reference to ensure the payments are easily identified and correctly allocated to the scheme's account. To get a registration/reference number, the body corporate must contact the CSOS at registration@csos.org.za. Once the levy is paid, proof of payment must be emailed to levypayment@csos.org.za and sectionaltitle@csos.org.za.[473]

These are payable on a quarterly basis:[474]

- Quarter 1 (1 April – 30 June);
- Quarter 2 (1 July – 30 September);
- Quarter 3 (1 October – 31 December); and
- Quarter 4 (1 January – 31 March).

Those who pay the levy annually can do so in advance on the 31st March.[475]

Non-payment will attract interest calculated at a rate as prescribed by the NCA or as determined by the CSOS from time to time.[476] According to CSOS, non-payment of the CSOS levies constitutes non-compliance with a directive issued in terms of the CSOS and is therefore a criminal offence.[477] Being found guilty of such a crime can result in both a fine and/or imprisonment for a period not exceeding five years.[478] If the person is found guilty of such a crime for a second or subsequent time, this can result in both a fine and/or imprisonment for a period not exceeding ten years.[479]

If a unit owner falls into **one** of the categories below, they qualify to apply for discount or exemption from their monthly CSOS levy:[480]

a. Owns an individual unit where the scheme levy does not exceed R500.00 per month;
b. Receives a South African Social Security Agency (SASSA) grant; or
c. Is a person residing in a scheme for retired persons who are in frail care, or who are in assisted living or Mid Care Living.

Any person, or category of persons, who does not fall within the qualification criteria as contained in the practice directive, can also apply for discount and/or a waiver from their CSOS monthly levy by completing

Form CS3A (if the application is for an individual) or Form CS3B (if the application is for a community scheme), and follow the procedure set out in the practice directive.[481]

It is clear from the above how important the awareness and understanding of the practice directives can be, and therefore, a summary of other practice directives published by the CSOS is provided in the next sub-chapter.

9.2 Payments to the CSOS, Invoicing and Receipts

The procedure to be followed when making payments to the CSOS is set out in Paragraphs 4 and 5 of the CSOS Practice Directive No. 4 of 2022, which was issued on 4 February 2022.

From these paragraphs, it is made clear that it is the responsibility of the community scheme to ensure that the CSOS receives the quarterly payment, by emailing the proof of payment to sectionaltitle@csos.org.za and levypayment@csos.org.za with the correct reference number e.g. Reg/16/KZN/000001.

Non-receipt of a receipt statement or reference number from the CSOS does not excuse the community scheme from paying their CSOS levies on their due dates.[482]

CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees provides the contact details of the official who must be contacted if the scheme has not yet been issued with a reference number or registration number.[483]

The issuing of receipt statements to community schemes has commenced and is ongoing, and will reflect all payments made and balances due by a community scheme.[484]

It is important to note that, in the event of under payment, an invoice will be issued for the amount due and will attract interest at the rate prescribed by the National Credit Act No. 34 of 2005 and/or as determined by the CSOS from time to time.[485]

A community scheme is liable for the full payment of their quarterly CSOS levy, irrespective of whether a unit owner paid their scheme levy or not.[486]

9.3 The CSOS Dispute Resolution

CSOS Practice Directive No. 1 of 2019 was issued on 1 August 2019 and provides further information on the procedures and content requirements for dispute resolution applications. A summary on some of the items is provided in Paragraph 9.3.1, but it is important to read through this entire practice directive, which is available on the CSOS website.[487]

There were also two subsequent amendments to this practice directive on 23 June 2020 and on 2 December 2021. These must be read in conjuction with the initial CSOS Practice Directive No. 1 of 2019.

In the first amendment, several changes took place in relation to the manner in which conciliations and adjudications are dealt with, i.e. no longer face-to-face but rather on written submissions by the parties, due to the pandemic. Some commentators have queried whether these amendments were lawful and recommended that all hearings should be held face-to-face again since the pandemic restrictions have largely subsided in all other aspects of life.[488] The first amendment also dealt with general meetings and trustees' meetings taking place virtually rather than face-to-face.

In the second amendment, the application fees and the adjudication fees have been waived for all dispute resolution applications and adjudications, and further clarifications were provided in respect of the procedures for conciliation and adjudication as well as for urgent applications to the CSOS.

9.3.1 The application and internal dispute resolution

To apply to the CSOS for assistance with an internal dispute resolution, the applicant will need to download a copy of the Dispute Resolution Application form, which can be downloaded from the CSOS website.[489]

Certain information and/or proof must be included in the application:

a. The details that lead to the dispute;
b. Confirmation that the legislative requirements have been met e.g. the applicant is a party to or affected materially by the dispute;[490]
c. Confirmation that the internal dispute resolution process has been exhausted, alternatively provide reasons why an internal dispute resolution process could not be followed;[491] and
d. If the applicant is represented, full particulars and contact details of the representative must be disclosed, including the capacity in which the representative acts e.g. trustee, managing agent, etc.[492]

The Dispute Resolution Application and any annexures thereto can be typed or handwritten as long as they are clear and legible.[493]

9.3.2 Relief sought

The relief sought must fall within the scope of the prayers for relief set out in Section 39 of the CSOSA. The categories under which a dispute may fall are:

a. Financial issues;
b. Behavioural issues;
c. Scheme governance issues;
d. Meetings;
e. Management services;
f. Works in respect of private and common areas; and
g. General and other issues.

There is a new form for an application for condonation for the late submission of an application to the CSOS, mentioned in Paragraph 7.3 of the CSOS Practice Directive No. 1 of 2019.[494]

9.3.3 Administration of application

Once the Dispute Resolution Application form is completed and signed, it can be submitted by way of email, registered post or by hand at the regional office within the area of jurisdiction of the community scheme.[495]

Should the CSOS accept the application, they will proceed to forward a letter to the applicant acknowledging receipt.[496] Since the amendment to Practice Directive No. 1 of 2019 on 2 December 2021, there are no longer any application or adjudication fees payable to the CSOS.

9.3.4 Enforcement of adjudication order

Section 56 of the CSOSA confirms that the adjudication order made for the payment of an amount of money can be enforced in the Magistrate's or High Court as if it were a judgement handed down by that court.

An adjudication order for specific performance may only be enforced by the High Court.[497]

If the party against whom the adjudication order is granted fails to comply with the order by the implementation date, the party in whose favour the adjudication order was granted must approach the CSOS to obtain the relevant documentation that will allow them to approach the court for the enforcement of the order.[498]

The party in whose favour the adjudication order was granted has to file the following documentation with the Clerk of the Magistrate's Court and/or the Registrar of the High Court:[499]

a. A copy of the adjudication order certified by the Ombud as a true copy, if the original order cannot be allocated;
b. Any relevant form(s) required by the Magistrate's or High Court to be completed; and
c. The court order to be endorsed by the Clerk of the Magistrate's Court and/or Registrar of the High Court.

The relevant Clerk or Registrar will then allocate a case number and issue a court order that the party, in whose favour the order was granted, can submit to the relevant sheriff for execution.[500]

9.3.5 Appealing or reviewing an adjudication order or dispute resolution process

If any of the parties are not satisfied with the adjudication order granted in their matter, they have the right to lodge an application for appeal in the High Court of South Africa **on a question of law only**.[501] In terms of Section 57(2) of the CSOSA, an appeal against an adjudication order must be lodged within 30 days after the date of the delivery of the adjudication order.

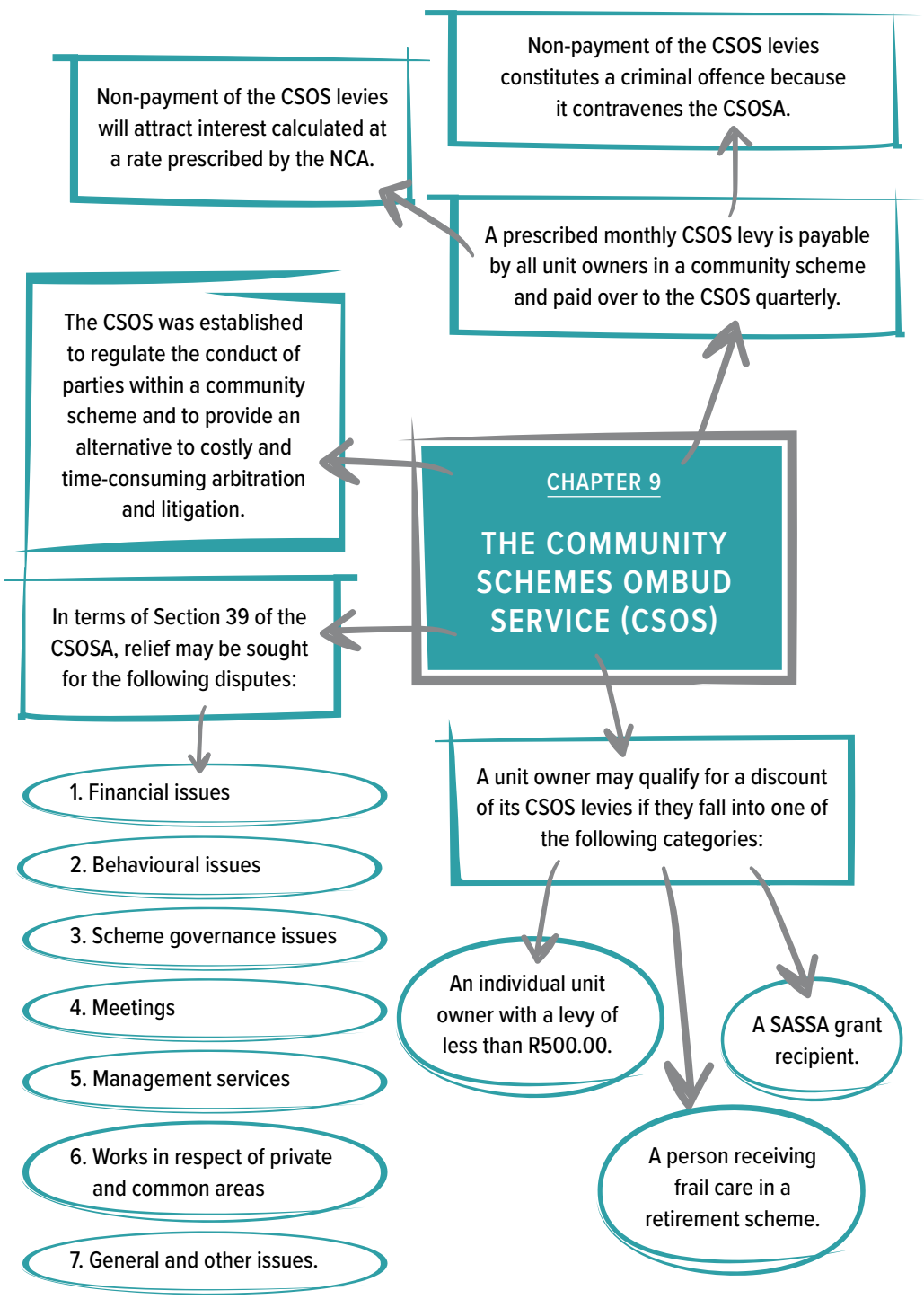
At the moment, the appeal process is different depending on the jurisdiction out of which the appeal will be launched. For example, in Johannesburg, the High Court may have a different approved process compared to Cape Town as per its own practice directives and case law emanating out of those courts. Until such time as there is one uniform method of launching CSOS appeals in all of the High Court divisions, there will remain contrasting positions across the High Courts.

In the recent case of *Ncala v Park Avenue Body Corporate*[502] (the *Park Avenue* case), the Johannesburg High Court (two judges presiding) handed down judgement on 9 May 2022, in which the court held that the High Court has no inherent jurisdiction to condone the late filing of an appeal against a CSOS adjudication order.[503]

Alternatively, the unsatisfied parties may be able to follow the review process in terms of the provisions of Rule 53 of the Uniform Rules of Court, to review the dispute resolution process and/or the adjudicator's decision under the common law, or to review the dispute resolution process and/or the adjudicator's decision in terms of the PAJA.

It is imperative to ensure that the legal practitioners representing the trustees, managing agent or body corporate, who are instructed to prosecute the appeal, follow the correct procedure as laid down by the High Court having jurisdiction over the CSOS appeal, and that the appeal is lodged timeously, to avoid the appeal being dismissed or lapsing.

9.4 Summary


Non-payment of the CSOS levies will attract interest calculated at a rate prescribed by the NCA.
Non-payment of the CSOS levies constitutes a criminal offence because it contravenes the CSOSA.
A prescribed monthly CSOS levy is payable by all unit owners in a community scheme and paid over to the CSOS quarterly.
The CSOS was established to regulate the conduct of parties within a community scheme and to provide an alternative to costly and time-consuming arbitration and litigation.
CHAPTER 9
THE COMMUNITY SCHEMES OMBUD SERVICE (CSOS)
In terms of Section 39 of the CSOSA, relief may be sought for the following disputes:
1. Financial issues
2. Behavioural issues
3. Scheme governance issues
4. Meetings
5. Management services
6. Works in respect of private and common areas
7. General and other issues.
A unit owner may qualify for a discount of its CSOS levies if they fall into one of the following categories:
An individual unit owner with a levy of less than R500.00.
A SASSA grant recipient.
A person receiving frail care in a retirement scheme.

Conclusion

The Trustee Reference Guide was designed to help trustees gain a deeper understanding and knowledge of sectional title schemes and their management, and the sectional title laws that govern sectional title schemes. We trust that this guide will help you protect, manage and create a better quality of life for all residents in your sectional title scheme. For high-level sectional title management information, refer to the Managing Agent Reference Guide.

Feel free to offer feedback on the Trustee Reference Guide on: https://www.tracslearning.co.za/contact-us.

FAQs

Chapter 1: Governing Legislation

Q What is the difference between the STA and STA Regulations and the STSMA and STSMA Regulations?

A The Sectional Titles Act 95 of 1986 (STA) establishes the mechanisms by which sectional title schemes can be developed and, therefore, regulates how persons can own parts of a property (a section), and undivided shares in common property. The STA sets out how to control separate ownership in sections and joint ownership in common property as well as the transfer of ownership in those sections. On the other hand, the Sectional Titles Schemes Management Act 8 of 2011 (STMSA) and the STSMA Regulations deal with the management and control of the sectional title scheme and specify the rights and duties of the body corporate, owners, trustees and other role-players, including the rules associated with the physical, financial and administrative management of the body corporate.

Chapter 2: Formation of a Sectional Title Scheme

Q When is a body corporate established?

A A body corporate is established on the transfer of the first section by a developer of a sectional title scheme to a third party. Ultimately, in the event that the developer transfers one section, the owner of that section becomes a member of the body corporate and, as more sections are transferred, the members of the body corporate increase in number.

Q What does it mean for a body corporate to have perpetual succession?

A Perpetual succession means that the body corporate will continue to exist forever, unless legally wound up and dissolved. In this instance, the body corporate will continue to exist in perpetuity. Furthermore, the perpetual succession of a body corporate means that the body corporate can sue and be sued in its name in respect of any contract entered into by the body corporate, any damage to the common property or any matter in connection with the land and buildings for which the body corporate is liable.

Chapter 3: Important Scheme Management Concepts

Q How do you calculate the participation quota (PQ) share?

A The PQ is expressed as a percentage to four decimal places calculated by dividing the floor area of each owner's section, as shown on the sectional plan, by the total of all the floor areas of all sections in the scheme.

$$PQ = \frac{\text{Floor area of a section in } m^2}{\text{Total floor area of all sections in } m^2} \times 100$$

Q Can the levy contribution (amount) of each unit owner differ across units?

A Yes. The terms 'levy' and 'contribution' are not defined in the STA or the STSMA but are understood to mean an owner's share of the amounts determined and levied on the owners for their financial contribution towards the administrative fund and the reserve fund. A levy is the amount that an owner must contribute towards the respective funds in proportion to their PQ share.

Q How much interest can be charged on unpaid levies?

A The interest rate on arrear levies cannot exceed the maximum rate of interest that is prescribed by the National Credit Act 34 of 2005. It is generally accepted that the maximum rate of interest that may accrue on arrear levies, on the authority of a trustee resolution, would be 2% per month, calculated and compounded monthly.

Q Can a unit owner get a refund on their levies?

A Levies that have been properly and lawfully raised and paid by a member of a body corporate cannot be refunded.

Q What type of insurance cover is required by a body corporate?

A A body corporate is required to have the following type of insurance:

- Building insurance;
- Liability insurance;
- Fidelity insurance; and
- Professional indemnity insurance.

Chapter 4: Unit Owners and Meetings

Q When there are co-owners of a unit, is each owner's vote at a meeting considered separately?

A Co-owners of a section are entitled to exercise one vote jointly. The joint vote can only be exercised by one person who may or may not be one of them, jointly appointed by them as their proxy.

Q What is a round robin special or unanimous resolution, and when can they be passed?

A Special or unanimous resolutions, which are set out for member approval in writing, are colloquially known as round robin resolutions. These are usually passed when a unanimous resolution or special resolution is urgently required or when fewer than two members are able to attend a general meeting to pass the resolution.

In order for a special resolution in writing to be passed, at least 75% of all members of the body corporate calculated in both value and in number, including any co-owners who are entitled to exercise their vote jointly with other co-owners of a particular section, must vote in favour of the special resolution.

In order for a unanimous resolution to be passed in writing, it must be passed by all members of the body corporate.

Q What is a quorum?

A 'Quorum' refers to the minimum number of eligible persons who must be present at a meeting in order for the proceedings to be valid. A meeting cannot take place without a quorum being met. Business must not be transacted at any general meeting if a quorum is not present.

The quorum for a general meeting is either two thirds of the total unit owners calculated in value (if the sectional title scheme has fewer than four primary sections or fewer than four members) or one third of the total unit owners calculated in value (for any other scheme).

Chapter 5: The Trustees and Chairperson

Q When does a member become a trustee?

A All members are trustees until the first general meeting is held to elect trustees after the establishment of the body corporate. Trustees may or may not be members of the body corporate who have been elected by the members in general meeting, in order to run the day-to-day operations of the body corporate, in respect of the physical, financial and administrative management of the scheme, as prescribed by the STSMA Regulations and the rules of the body corporate.

Q When is a document valid and binding on the body corporate?

A When it is signed, on the authority of a trustee resolution, by two trustees or the managing agent for levy clearance certificates; or by two trustees, or one trustee and the managing agent for any other document.

Q Can a meeting be held without a chairperson?

A No. The chairperson is elected by trustees at the first trustee meeting after the AGM. The chairperson must preside over all the general meetings and trustee meetings unless owners resolve otherwise. If, after 15 minutes of the commencement time of the general meeting, the chairperson is not present, unwilling or unable to function as a chairperson, the members present must elect a chairperson for said meeting.

Chapter 6: The Managing Agent

Q What is the purpose of a managing agent and what is their role?

A The managing agent is responsible for the financial, administrative, and physical management as well as the day-to-day business of a scheme under the supervision of the trustees, and as lawfully delegated to them by the trustees, in accordance with trustee resolutions or in terms of the underlying management agreement between the managing agent and the body corporate.

Q When can a management agreement be cancelled?

A A management agreement may be cancelled without liability or penalty in two instances. Firstly, by the body corporate on two months' notice, if the cancellation is first approved by a special resolution passed at a general meeting. Secondly, a management agreement may be cancelled by the managing agent on two months' notice.

In addition to the above, the body corporate or trustees may, by ordinary resolution, cancel the management agreement in accordance with its terms, or refuse to renew the management agreement when it expires.

Q What is the prescribed term for a management agreement?

A A management agreement may not endure for a period longer than three years.

Chapter 7: The Administrator

Q Who may appoint an administrator?

A A magistrate's court may appoint an administrator if there is evidence of serious financial or administrative mismanagement of a body corporate, and if there is reasonable probability that the body corporate will be able to meet its legislative obligations should it be placed under administration.

Q Who can apply for an administrator's appointment at court?

A A body corporate, the local municipality, a judgment creditor of the body corporate and a unit owner, or a person with a registered real right over a unit, can apply for the appointment of an administrator.

Chapter 8: Formation and Amendment of Rules

Q When can a body corporate change the management rules and the conduct rules?

A It would be much easier for a body corporate to amend its conduct rules than its management rules. A body corporate may change the management rules upon unanimous resolution. On the other hand, the body corporate may change the conduct rules upon special resolution. Any amendment of the management and/or conduct rules must be approved by the Chief Ombud.

Q Can sectional title schemes impose fines and penalties for the contravention of management and/or conduct rules by members?

A Yes. While the PMRs and PCRs in the STSMA Regulations do not contain penalties or fines against members for the contravention thereof, sectional title schemes are allowed to impose fines and penalties for the contravention of management and/or conduct rules. Any fines/penalties imposed must be reasonable and not in conflict with any legislation. It is imperative for the body corporate to allow the contravening member to state their case prior to a fine or penalty being imposed.

Q Can a unit owner keep a pet in a sectional title scheme?

A Having a pet on the property is not an absolute right. In order for an owner to be able to lawfully keep a pet on the property, they need written consent from the trustees of the body corporate. This consent may not be unreasonably withheld. Where consent is given to have a pet on the property, the trustees may impose any reasonable conditions. When these conditions have been breached, the trustees may withdraw their consent.

Chapter 9: The Community Schemes Ombud Service (CSOS)

Q Who can community schemes or unit owners report their complaints to when there is a dispute?

A The regulatory body that has been established to deal with disputes is the Community Schemes Ombud Service (CSOS). Their details are located here: https://csos.org.za/contact-us.

Q How do you apply to the CSOS for assistance with an internal dispute resolution?

A To apply for assistance, the applicant will need to download a copy of the Dispute Resolution Application form from the CSOS website and fill out the relevant information. The Dispute Resolution Application and any annexures thereto can be typed or handwritten but must be clear and legible. You can access the form here: https://csos.org.za/wpcontent/uploads/2020/04/ApplicationforDisputeResolutionForm_02.pdf.

References

1 The long title of the STA.
2 The long title of the STA.
3 Section 4 of the STA.
4 Section 5 of the STA.
5 Sections 11 to 13 of the STA.
6 Section 1(1), read with Section 32 of the STA. See "participation quota".
7 Section 27 of the STA.
8 Section 15B(3)(a)(i)(aa) of the STA.
9 Section 54(1)(a) of the STA.
10 Sections 54(1)(b) and (c) and 55 of the STA.
11 Section 56 of the STA.
12 Section 57 of the STA.
13 Regulation 5(2) of the STSMA Regulations.
14 Section 10(5)(a) of the STSMA.
15 Section 10(5)(c) and (d) of the STSMA, read with Paragraph 7.3 of the CSOS Circular No. 1 of 2021 – Amendment of rules in terms of the STSMA.
16 Regulation 2 of the STSMA Regulations.
17 Regulation 5(1) of the STSMA Regulations. This is a specific function of the body corporate as required in terms of Section 3(1)(o) of the STSMA.
18 Regulation 5(3) of the STSMA Regulations. This is discussed in Section 4.6 of this Trustee Reference Guide.
19 This is a record of the internal dispute resolution process that was followed which is more fully discussed in Chapter 9 of this Trustee Reference Guide.
20 Form CS1 of the CSOS Regulations read with Section 59(b)(iii) of the CSOSA.
21 This must be accompanied by a special resolution of the body corporate in relation to those amended particulars.
22 Form CS2 of the CSOS Regulations read with Section 59(b)(i) and (ii) of the CSOSA.
23 Regulation 11 of the CSOS Regulations, read with Regulation 2 of the CSOS Regulations on Levies and Fees, and with Section 59(a) of the CSOSA.
24 Regulation 4(3) of the CSOS Regulations on Levies and Fees.
25 Section 4 of the STA.
26 Section 5 of the STA.
27 Section 11 of the STA.
28 Sections 12 and 13 of the STA.
29 Section 4(1) of the STA.
30 Section 4(2) of the STA.
31 Section 4(2) of the STA.
32 Section 4(2) of the STA.
33 Section 4(5)(a) to (c) of the STA.
34 Section 4(5) of the STA.
35 Section 4(5) of the STA.
36 Section 5(1) of the STA.
37 Section 5(1) read with Section 5(3)(a) of the STA.
38 Section 5(1) read with Section 5(3)(a) of the STA, and the Land Survey Act 8 of 1997.
39 Section 5(2) of the STA.
40 Section 5(2) of the STA.
41 Section 5(3)(a) to (h) read with Sections 5(4) and (5) of the STA.
42 Sections 5(4) and (5) of the STA.
43 Section 5(6) of the STA.
44 Section 11(1) of the STA.
45 Section 11(2) read with Section 11(3)(b) of the STA.
46 Regulation 6(4) of the STSMA Regulations.
47 Section 11(3) of the STA.
48 Section 25(1) of the STA.
49 Section 27(1) of the STA.
50 Section 25(1) of the STA.
51 Section 12(1)(a) to (g) of the STA.
52 Sections 25(1) and 27(1) of the STA.
53 Section 12(2) of the STA.
54 Section 13(1) of the STA.
55 Section 13(2) of the STA.
56 Section 13(2) of the STA.
57 Section 13(3) of the STA.
58 Sections 2(1) and (8)(a) of the STSMA.
59 Section 2(8)(c)(iii) of the STSMA.
60 PMR 16(2)(c)(i) of the STSMA Regulations.
61 Section 2(9) of the STSMA.
62 PMR 16(2)(e)(ii) of the STMSA Regulations.
63 PMR 16(3) of the STSMA Regulations.
64 PMR 16(2)(b) of the STSMA Regulations.
65 PMR 21(1) of the STSMA Regulations.
66 PMR 16(2)(c)(ii) of the STSMA Regulations.
67 PMR 16(2)(f) of the STSMA Regulations.
68 Section 2(8)(c)(ii) of the STSMA.
69 Section 2(10) of the STSMA.
70 PMR 16(2)(d) of the STSMA Regulations.
71 Section 15(2) of the STSMA.
72 PMR 16(3) of the STSMA Regulations.
73 PMR 16(2)(g) and (h) of the STSMA Regulations read with Section 7(1) of the STSMA.
74 PMR 16(4)(a) and (b) of the STSMA Regulations.
75 PMR 16(4)(c) of the STSMA Regulations read with Section 3(1)(r) of the STSMA.
76 PMR 16(4)(d) of the STSMA Regulations.
77 PMR 16(4)(e) of the STSMA Regulations.

78 PMR 16(4)(f) read with PMR 27 of the STSMA Regulations.
79 PMR 16(5) of the STSMA Regulations read with Section 2(8) of the STSMA.
80 PMR 16(6) of the STSMA Regulations.
81 Section 2(2) of the STSMA read with Sections 25(1) and 34(2) of the STA.
82 Section 27(1)(c) of the STA.
83 Sections 3(1)(a) to (c), (e) and (f) of the STSMA, when read together, refer to the levying of a contribution (toward the administrative and reserve fund) by unit owners according to their respective PQs.
84 Section 3(1)(d) of the STSMA read with Section 25(1) of the STA.
85 Section 3(1)(d) of the STSMA.
86 This is because, as above, Sections 3(1)(a) to (c), (e) and (f) of the STSMA, when read together, refer to the levying of a contribution (toward the administrative and reserve fund) by owners according to their respective PQs.
87 *Goldex 16 (Pty) Ltd v Body Corporate of Waterford Golf and River Estate SS139/2006 and Another* (3979/2016) [2017] ZAFSHC 173 http://www.saflii.org/za/cases/ZAFSHC/2017/173.html Accessed: 22 July 2022.
88 Section 3(1)(d) of the STSMA.
89 The contributions required of owners in terms of Sections 3(1)(a) to (c), (e) and (f) of the STSMA.
90 *Goldex* case Paragraph 39.
91 *Goldex* case at Paragraph 30.
92 Section 25(5A) (b) of the STA.
93 This is in terms of Section 25(5A)(b) of the STA; however, the Honourable Mr Justice J Daffue in the *Goldex* case at Paragraph 32 comments that this may in fact be an oversight. This is cogent reasoning given the fact that that in terms of Section 34(1) of the STA a developer is an owner and accordingly, when read with Section 3(1), a developer should be liable for contributions in respect of both the administrative fund (Section 3(1)(a) of the STSMA) and the reserve fund (Section 3(1)(b) of the STSMA) so it makes little sense to only make the developer liable for contributions toward the reserve fund if the developer does not register the developed section within ninety days, whereas if the developer does register the section within the prescribed ninety days, the developer would be liable for contributions in respect of both the administrative fund and the reserve fund.
94 Section 14(1)(a) of the National Building Regulations and Building Standards Act 103 of 1977.
95 Section 2(7)(e) of the STSMA.
96 PMR 19(2) of the STSMA Regulations.
97 Section 39(4)(a) of the CSOSA read with Section 6(9) of the STSMA.
98 Section 39(4)(d) of the CSOSA read with Section 6(9) of the STSMA.
99 Section 9 of the STSMA.
100 Section 9(1)(a) of the STSMA.
101 Section 9(2)(a) of the STSMA.
102 Section 9(2)(a) and (b) of the STSMA.
103 Section 5(4) of the STA.
104 Section 5(5)(a) of the STA.
105 Refer to Section 1 of the Unit Owner Reference Guide for a refresher on the definition of PQ.
106 Section 11(1)(a) of the STSMA.
107 Section 32(3) of the STA read with Section 11(1)(b) of the STSMA.
108 Section 11(1)(c) of the STSMA.
109 Sections 15 and 11(1)(c) of the STSMA.
110 Section 32(5) of the STA.
111 Section 11(2)(a) read with Sections 3(1)(a) and (b) and Section 14(1) of the STSMA.
112 Section 11(2)(a) read with Sections 3(1)(a) and (b) and Section 14(1) of the STSMA.
113 Section 11(2)(a), (b) and (c) of the STSMA.
114 Section 24(3) of the STA read with Section 5(1)(h) of the STSMA.
115 Regulation 5(2)(e) of the STA Regulations.
116 Section 32(1) of the STA.
117 Section 32(2)(a) of the STA.
118 Section 3(1)(a) of the STSMA.
119 Sections 3(1)(e) and (f), (2) of the STSMA, read with PMRs 17(6)(j)(iv) and 25(1) of the STSMA Regulations.
120 Section 3(1)(l) and (q) of the STSMA.
121 Section 3(1)(r) of the STSMA.
122 Section 4(d) of the STSMA.
123 Section 3(1)(b) of the STSMA.
124 This is reference to the now repealed Financial Services Board Act 97 of 1990. This former Act was repealed by the Financial Sector Regulation Act 9 of 2017 (the FSRA). "Financial institution" is now defined in two principal Acts of Parliament, including, the Financial Markets Act 19 of 2012 (the FMA) and the FSRA. Unfortunately, Parliament did not update the STSMA at the same time or subsequently. It is submitted that the definition of "financial institution" in both the FSRA and the FMA is applicable here.
125 PMR 24(3) of the STSMA Regulations.
126 PMR 22 of the STSMA Regulations.
127 PMR 22(2) of the STSMA Regulations.
128 PMR 2(1)(i) of the STSMA Regulations.
129 PMR 2(1)(e) of the STSMA Regulations.
130 PMR 2(1)(l) of the STSMA Regulations.
131 PMR 2(1)(f) of the STSMA Regulations.

132 PMR 22(3) of the STSMA Regulations.
133 PMR 22(4) of the STSMA Regulations.
134 PMR 24(2) of the STSMA Regulations.
135 PMR 24(5)(a) of the STSMA Regulations.
136 PMR 24(5)(b) of the STSMA Regulations.
137 PMR 24(5)(b) of the STSMA Regulations.
138 PMR 26(1)(c)(iv) of the STSMA Regulations.
139 PMR 26(1)(b) of the STSMA Regulations.
140 Regulation 1(f) of the STSMA Regulations.
141 Section 27(1)(a) read with Section 5(3)(f) of the STA.
142 Section 27(1)(b) of the STA.
143 Section 5(1)(e) of the STSMA read together with Section 27(2) of the STA.
144 Sections 5(1)(e) and (f) of the STSMA read together with Sections 27(2) and (5) of the STA.
145 Sections 10(2) and (7) of the STSMA.
146 Section 5(1)(f) of the STSMA read together with Section 27(5) of the STA.
147 Section 5(1)(f) of the STSMA read together with Section 27(5) of the STA.
148 Please note that only **primary** sections (i) can be used as service addresses for any legal process as per PMR 4(5) of the STSMA Regulations, (ii) are considered for purposes of establishing a board of trustees in terms of PMR 17(4)(b) of the STSMA Regulations; and (iii) are considered for purposes of a quorum calculation in terms of PMR 19(2) of the STSMA Regulations. Furthermore, only the holder of mortgage bonds over not less than 25% in number of all the **primary** sections can call a general meeting. Utility sections are not contemplated in these areas.
149 PMR 29(2)(c) of the STSMA Regulations.
150 Section 5(1)(d) of the STSMA.
151 Section 13(1)(g) of the STSMA.
152 Section 13(1)(g) of the STSMA.
153 Section 13(2) of the STSMA.
154 PCR 3(1) of the STSMA Regulations.
155 PCR 3(2) of the STSMA Regulations.
156 *Body Corporate of the Solidatus SS No. 23/90 vs De Waal and others* 1997 (3) All SA 91 (T).
157 Body Corporate of the Solidatus SS No. 23/90 vs De Waal and others 1997 (3) All SA 91 (T).
158 Section 10(7) of the STSMA.
159 Section 10(2)(a) of the STSMA.
160 Section 10(2)(b) of the STSMA.
161 Section 10(8)(a) of the STSMA.
162 Section 10(8) of the STSMA.
163 PCR 5(1) of the STSMA Regulations.
164 PCR 5(1) of the STSMA Regulations.
165 PMR 30(g) of the STSMA Regulations.
166 PMR 30(d) of the STSMA Regulations.
167 PMR 30(e) of the STSMA Regulations.
168 Section 13(1)(e) of the STSMA.
169 PMR 30(c) and (f) of the STSMA Regulations.
170 Section 13(1)(a) of the STSMA.
171 PMR 3(2) of the STSMA Regulations.
172 PMR 27(2)(c)(ii) of the STSMA Regulations.
173 Section 3(1)(c) of the STSMA.
174 Section 3(1)(c) of the STSMA.
175 Section 3(1)(c) of the STSMA.
176 Section 2(7)(d) of the STSMA.
177 Section 3(1)(h) of the STSMA.
178 Section 3(1)(i) of the STSMA.
179 Section 3(1)(j) of the STSMA.
180 Sections 3(1)(a)(iii) and (k) of the STSMA.
181 Section 3(1)(h) of the STSMA.
182 Section 3(1)(h) of the STSMA read with Regulation 3 of the STSMA Regulations.
183 Addison, M., 2017. The Sectional Title Insurance Guide. 5th ed. Cape Town: Addsure https://addsure.co.za/stationery/st-insurance-guide.pdf. Accessed: 22 July 2022.
184 Addison, M., 2017. The Sectional Title Insurance Guide. 5th ed. Cape Town: Addsure. https://addsure.co.za/stationery/st-insurance-guide.pdf Accessed: 22 July 2022.
185 Department of Cooperative Governance and Traditional Affairs, 2019. 'How are municipal property rates determined?' [Online] Available at: http://www.cogta.gov.za/?p=963. Accessed: 22 July 2022.
186 PMR 23(3) of the STSMA Regulations.
187 Section 2(7)(a) to (d) of the STSMA.
188 Section 3(1)(p) of the STSMA.
189 Section 3(1)(l) of the STSMA.
190 Section 3(1)(q) of the STSMA.
191 PMR 23(6)(a) and (b) of the STSMA Regulations.
192 PMR 23(6) of the STSMA Regulations.
193 PMR 23(7) of the STSMA Regulations read with Regulation 15 of the CSOS Regulations.
194 Regulation 15(1) of the CSOS Regulations.
195 Regulation 15(2) of the CSOS Regulations.
196 Regulation 15(3) of the CSOS Regulations.
197 Regulation 15(4) of the CSOS Regulations.
198 PMR 8(4) of the STSMA Regulations.
199 Section 8 of the STSMA.
200 PMR 17(6)(j)(iii) of the STSMA Regulations.
201 PMR 17(6)(j)(ii) of the STSMA Regulations.
202 PMR 17(6)(j)(iii) read with PMR 23(6) to (8) of the STSMA Regulations.
203 It must be noted that the selected plumber for geyser repairs or installments must maintain and show compliance with the applicable SANS (South African National Standard) and provide a Certificate of Compliance.
204 PMR 23(8) of the STSMA Regulations.
205 PMR 23(8) of the STSMA Regulations.
206 Section 14(1) and (2) of the STMSA.
207 PMR 2(1)(o) of the STSMA Regulations read with Section 13(1)(f) of the STSMA.
208 PMR 23(1)(a)(iii) of the STSMA Regulations.

209 PMR 23(1)(d) of the STSMA Regulations.
210 Section 3(1)(j) of the STSMA.
211 PMR 23(5) of the STSMA Regulations.
212 PMR 23(5) of the STSMA Regulations.
213 PMR 23(1)(e) of the STSMA Regulations.
214 PMR 23(1)(c) of the STSMA Regulations.
215 Merriam Webster. 2019. Definition of 'Average Clause'. [Online]. Available at: https://www.merriamwebster.com/dictionary/average%20clause. Accessed: 22 July 2022.
216 Paddock, G., 2005. The Sectional Title Survival Guide. Cape Town: Ascot Press.
217 Sections 3(1)(a), (b) and (c) read with Sections 3(1)(e) and (f) of the STSMA.
218 Section 3(1)(a)(i) to (iv) of the STSMA.
219 Section 3(1)(b) of the STSMA.
220 Section 3(1)(a)(i) of the STSMA.
221 Section 3(1)(a)(iii) and (iv) of the STSMA.
222 PMR 26(1)(e) of the STSMA Regulations.
223 Section 3(1)(e) and (f) read with Section 7(1) of the STSMA, and PMR 17(6)(j)(iv) of the STSMA Regulations.
224 Section 3(2) of the STSMA.
225 PMR 25(1)(a) to (d) of the STSMA Regulations.
226 *Body Corp of Kleber v Obakeng and Malebo Judgment* (2021/A3094) Johannesburg High Court at Paragraphs 12 and 13 https://www.tracslearning.co.za/wp-content/uploads/2022/09/Body-Corp-of-Kleber-v-Obakeng-and-Malebo-Judgment-09-Nov-21-Johannesburg-High-Court.pdf. See also *Body Corporate of Central Park v Mosa* (24-Nov-21) Johannesburg High Court at Paragraph 27 https://www.tracslearning.co.za/wp-content/uploads/2022/09/Body-Corporate-of-Central-Park-v-Mosa-24-Nov-21-Johannesburg-High-Court.pdf
227 PMR 21(3)(b) of the STSMA Regulations.
228 PMR 21(3)(a) of the STSMA Regulations, read with Sections 3(3) and (4) of the STSMA.
229 Section 4(e) of the STSMA.
230 PMR 21(3)(b) of the STSMA Regulations.
231 PMR 21(3)(b) of the STSMA Regulations.
232 PMR 25(3) of the STSMA Regulations.
233 PMR 21(2)(b) of the STSMA Regulations.
234 Section 39(1)(c) of the CSOSA.
235 Section 3(4) of the STSMA read with PMR 21(3)(a) of the STSMA Regulations.
236 Section 3(4) of the STSMA read with PMR 21(3)(a) of the STSMA Regulations.
237 Section 3(3) of the STSMA.
238 Section 3(3) of the STSMA.
239 PMR 21(3)(c) of the STSMA Regulations.
240 PMR 21(3)(c) of the STSMA Regulations.
241 Maree, T., 'Demanding your interest – a new era for sectional titles', https://www.derebus.org.za/demanding-interest-new-era-sectional-titles/ Accessed: 23 February 2022.
242 National Credit Act Regulations, 'Review of Limitations on Fees and Interest Rates Regulations', viewed 23 February 2022 from https://www.ncr.org.za/documents/pages/Acts/SKM_C284e15110908440.compressed.pdf at page 4 of 6. Johlene Wasserman from CSOS further confirmed in her training presentation on the *CSOS Amendment of Rules* https://csos.org.za/wp-content/uploads/2021/08/CSOS-RULES2022.pdf (slide 29 – point 25) that interest charged on arrear levies can be charged at the discretion of the Trustees in terms of PMR 21(3)(c) of the STSMA Regulations, but it is subject to a maximum of 24% per annum.
243 *Dlamini v Body Corporate of Frenoleen* [2010] JOL 25145 (KZP).
244 *Body Corporate of Frenoleen* Paragraph 11.2.
245 *Mitchell v Beheerliggaam RNS Mansion*s 2010 (5) SA 75 (GNP) at Paragraph 20.
246 *Beheerliggaam RNS Mansions* at Paragraph 20.
247 Section 3(5)(a) to (c) of the STSMA.
248 PMR 25(7) of the STSMA Regulations.
249 PMR 25(1) of the STSMA Regulations.
250 PMR 25(1) of the STSMA Regulations.
251 PMR 21(3)(b) of the STSMA Regulations.
252 The CSOS levy is a compulsory levy provided for in Section 59 of the CSOSA read with Regulation 11 of the CSOS Regulations.
253 This is dependent on whether or not the rules of a body corporate make provision for fines, and due process has been followed.
254 Section 3(1)(c) of the STSMA provides for contributions in respect of EUAs and includes provision for including the proportionate share of rates, taxes, electricity and water. This provision also allows for the contribution to be charged to the owner concerned in terms of the rules of a body corporate.
255 Section 4(h) of the STSMA.
256 PMR 25(4) and (5) of the STSMA Regulations.
257 PMR 25(2) of the STSMA Regulations.
258 *Body Corporate of Kleber* case at Paragraphs 12 and 13 and Body Corporate of Central Park case at Paragraph 27.
259 Sections 3(2) and (3) of the STSMA.
260 This is a worst-case scenario; however, if a body corporate does not have sufficient funds to maintain the common property, the common property will eventually fall into a dilapidated state which will ultimately affect the market value of each of the units in the scheme.
261 Sections 3(1)(a) and (b) of the STSMA.
262 Sections 3(1)(c) and 7(1) of the STSMA.

263 Section 52 of the CSOSA read with Regulation 20 of the CSOS Regulations.
264 *Body Corporate of Central Park* case at Paragraph 25.
265 PMR 25(4) of the STSMA Regulations.
266 *Body Corporate of Central Park* case at Paragraph 38.
267 PMR 25(2) of the STSMA Regulations.
268 PMR 25(2)(a) of the STMSA Regulations.
269 PMR 25(2)(b)(i) of the STSMA Regulations.
270 PMR 25(2)(b)(ii) of the STSMA Regulations.
271 PMR 25(2)(c) of the STSMA Regulations.
272 The Application for Dispute Resolution Form can be found at https://csos.org.za/wp-content/uploads/2019/11/ApplicationforDisputeResolutionForm_02.pdf, last accessed on 23 July 2022.
273 The full requirements for a rescission application are beyond the scope of this Trustee Reference Guide. In particular, the requirements of which the arrear levy debtor will have to satisfy the court, have not been addressed. In practice, rescissions of default judgements are granted more often than not, and accordingly the trustees must ensure that they and the body corporate's attorneys have followed all legal procedures properly in order to minimise the prospects of success of any rescission application, if opposed.
274 See 'the embargo provision' below, which discusses Section 15B(3)(a)(i)(aa) of the STA in more detail (it provides for a levy clearance certificate to be issued before transfer can take place).
275 PMR 25(4) of the STSMA Regulations.
276 Prescribed Rate of Interest Act 55 of 1975.
277 PMR 25(4) read with PMR 25(5) of the STSMA Regulations.
278 Acts of insolvency are listed in Section 8 of the Insolvency Act 24 of 1936 (the 'Insolvency Act'). If a member of a body corporate is in arrears with their levies and commits one of the listed acts of insolvency (or is actually insolvent), the body corporate may petition the court for the sequestration of the member (Section 9 read with Section 8 of the Insolvency Act).
279 There is some debate within the industry whether or not trustees can compromise the claim of a body corporate by accepting less than the debt owed to the body corporate without a unanimous resolution of the members, as this could be considered as administrative action reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 or in terms of the common law. Furthermore, with regard to the authority of trustees to compromise a levy claim of the body corporate 'a unanimous resolution of all the members of the body corporate, giving their consent to compromise the claim' would be required, according to a recent High Court judgement (two judges presiding). Some legal commentators remain of the view that the body corporate, even by unanimous resolution, has no legislative power to accept less than the face-value of arrear levies, which poses some obvious practical difficulties such as when the only willing purchaser (winning bidder) offers a purchase price which is less than the arrear levies. This is discussed in more detail in the Managing Agent Reference Guide.
280 See *Barnard NO v Regspersoon van Aminieen 'n ander* 2001 (3) SA 975 (SCA), found at http://www.saflii.org/za/cases/ZASCA/2001/47.pdf, last accessed on 23 July 2022.
281 *Body Corporate of Empire Gardens v Sithole and another* (240/2016) [2017] ZASCA 28 found at http://www.saflii.org/za/cases/ZASCA/2017/28.html, last accessed on 23 July 2022 at Paragraph 12.
282 *Body Corporate of Empire Gardens* case at Paragraphs 11 to 13.
283 *First Rand Bank Limited v Master of the High Court (Pretoria), Body Corporate of Victory Park and Others* (53071/2016) [2018] ZAGPPHC 806 at Paragraphs 38 and 39, found at http://www.saflii.org/za/cases/ZAGPPHC/2018/806.html, last accessed on 23 July 2022.
284 *Body Corporate of Victory Park* case at Paragraphs 38 and 39.
285 *Nel v Body Corporate of the Seaways Building & another* 1996 (1) SA 131 (A); Willow Waters Homeowners Association (Pty) Ltd v Koka (768/13) [2014] ZASCA 220.
286 *Nel v Body Corporate of the Seaways Building & another* 1996 (1) SA 131 (A); *Barnard NO v Regspersoon van Aminieen 'n ande*r 2001 (3) SA 975 (SCA); *Willow Waters Homeowners Association (Pty) Ltd v Koka* (768/13) [2014] ZASCA 220; *Body Corporate of Empire Gardens v Sithole & another* (240/2016) [2017] ZASCA 28.
287 Section 118(1) of the Local Government: Muncipal Systems Act 32 of 2000.
288 This concept does have its limitations, though, as in certain circumstances the body corporate may be forced to make a compromise and/or to sign all the necessary documentation required to effect the transfer of the unit to the new owner, in a situation where not all of the amounts allegedly owing to the body corporate have been paid, such as in the case of *Body Corporate Marsh Rose v Steinmuller and Others* (A5002/2020) [2021] ZAGPJHC 440 (23 September 2021), found at http://www.

saflii.org/za/cases/ZAGPJHC/2021/440.html, last accessed on 23 July 2022. This case is going on appeal to the Supreme Court of Appeal, so we have not heard the last of this matter.
289 *Body Corporate of Victory Park* case at Paragraphs 38 and 39.
290 Section 6(5) of the STSMA.
291 PMR 20(7) of the STSMA Regulations.
292 PMR 29(2) and (4) of the STSMA Regulations.
293 PMR 11(1) of the STSMA Regulations.
294 PMR 15(1) of the STSMA Regulations.
295 Section 6(2) of the STSMA.
296 PMR 29(2) of the STSMA Regulations.
297 PMR 29(4) of the STSMA Regulations.
298 PMR 11(1)(a) of the STSMA Regulations.
299 PMR 15(7)(a) of the STSMA Regulations.
300 PMR 15(7)(b) of the STSMA Regulations.
301 PMR 15(7)(a) read with PMR 29(2) of the STSMA Regulations.
302 PMR 15(7)(a) read with PMR 29(4) of the STSMA Regulations.
303 PMR 15(8) of the STSMA Regulations.
304 PMR 15(8) of the STSMA Regulations.
305 Section 1 of the STA and STSMA. See 'special resolution'.
306 Section 1 of the STA and STSMA. See 'special resolution'.
307 Section 1 of the STA and STSMA. See 'unanimous resolution'.
308 PMR 19(2) read with PMR 20(9) of the STSMA Regulations.
309 Section 2.4 of the Unit Owner Reference Guide. See 'Notices for Body Corporate Meetings'.
310 PMR 15(3) of the STSMA Regulations.
311 PMR 16(2) of the STSMA Regulations.
312 PMR 17(6)(j) of the STSMA Regulations.
313 PMR 17(6) of the STSMA Regulations.
314 PMR 19(2) of the STSMA Regulations.
315 PMR 13(1) of the STSMA Regulations.
316 PMR 19(2) of the STSMA Regulations.
317 PMR 13(1) of the STSMA Regulations.
318 Regulation 5(3) of the STSMA Regulations. It is also mentioned in PMR 15(3)(c) and 20(5) of the STSMA Regulations.
319 Companies Act 71 of 2008.
320 Section 65(4) of the Companies Act 71 of 2008.
321 PMR 20(1)(a) of the STSMA Regulations.
322 Section 6(2) of the STSMA.
323 PMR 15(7)(a), read with PMR 29(2) and (4) of the STSMA Regulations.
324 PMR 15(7)(b) of the STSMA Regulations.
325 PMR 15(1)(a) to (d) of the STSMA Regulations.
326 Section 6(3) of the STSMA.
327 Section 6(4) of the STSMA.
328 PMR 4(5) of the STSMA Regulations.
329 PMR 17(9) of the STSMA Regulations.
330 PMR 17(2) of the STSMA Regulations.
331 PMR 15(8) of the STSMA Regulations.
332 PMR 15(9) of the STSMA Regulations.
333 PMR 17(6)(d) of the STSMA Regulations.
334 PMR 6(4)(g) of the STSMA Regulations.
335 PMR 12(5) of the STSMA Regulations.
336 PMR 12(5) of the STSMA Regulations.
337 PMR 17(7)(a) and (b) of the STSMA Regulations.
338 PMR 15(3)(a) of the STSMA Regulations.
339 PMR 17(6) of the STSMA Regulations.
340 PMR 17(7) of the STSMA Regulations.
341 PMR 18(3)(a) and (b) of the STSMA Regulations.
342 PMR 15(5) of the STSMA Regulations. Such persons are not entitled to attend a general meeting or any part thereof if the members resolve that their presence would unreasonably interfere with the interests of the body corporate or any person's privacy.
343 PMR 17(4) of the STSMA Regulations.
344 PMR 17(4)(a) and (b) of the STSMA Regulations. If the trustees fail to call a meeting thus requested in this manner within 14 days of delivery of the request, the members or the bondholders concerned are entitled to call the meeting.
345 PMR 17(5) of the STSMA Regulations.
346 PMR 18(3)(b) of the STSMA Regulations.
347 PMR 9(e) read with PMR 27(2)(a) of the STSMA Regulations.
348 PMR 27(2)(a)(iii) and (iv) of the STSMA Regulations.
349 PMR 17(8) of the STSMA Regulations.
350 PMR 27(3)(c) of the STSMA Regulations.
351 PMR 20(9)(a) of the STSMA Regulations.
352 PMR 20(9)(b) of the STSMA Regulations.
353 PMR 20(10)(a) and (b) of the STSMA Regulations.
354 Section 6(8) of the STSMA.
355 PMR 8(3) of the STSMA Regulations.
356 PMR 10(1)(a) of the STSMA Regulations, read with Section 15B(3)(i)(aa) of the STA.
357 PMR 10(1)(b) of the STSMA Regulations.
358 Section 6(9) of the STSMA.
359 Section 39(4)(c)(i) to (ii) of the CSOSA.
360 Section 39(4)(d) of the CSOSA.
361 Section 39(4)(e) of the CSOSA.
362 Act 22 of 2019.
363 PMR 5(1) of the STSMA Regulations.
364 Section 10(2) of the STSMA.
365 PMR 6(4)(g) of the STSMA Regulations.
366 PMR 21(3)(a) of the STSMA Regulations.
367 PMR 21(3)(b) of the STSMA Regulations.
368 PMR 21(3)(c) of the STSMA Regulations.
369 PMR 21(3)(d) of the STSMA Regulations.
370 PMR 21(3)(e) of the STSMA Regulations.
371 PMR 21(3)(f) of the STSMA Regulations.
372 PMR 21(3)(g) of the STSMA Regulations.
373 PMR 21(3)(h) of the STSMA Regulations.
374 PMR 11(2) of the STSMA Regulations.

375 Section 8(1) of the STSMA.
376 Section 8(2)(a) of the STSMA.
377 Section 8(2)(b) of the STSMA.
378 PMR 6(3) of the STSMA Regulations.
379 Section 8(3) of the STSMA.
380 PMR 8(4) of the STSMA Regulations.
381 PMR 23(7) of the STSMA Regulations.
382 Act 85 of 1993.
383 Section 3(1)(p) of the STSMA.
384 Section 16(1) of the OHS Act.
385 Section 16(2) of the OHS Act.
386 Section 37 of the OHS Act.
387 Section 16(2) of the OHS Act.
388 Section 38 of the OHS Act.
389 Section 1 of the OHS Act. See 'workplace'.
390 Regulation 5 of the Construction Regulations, 2014. These Regulations are promulgated in terms of the OHS Act.
391 Regulations 6 and 7 of the Construction Regulations.
392 Regulation 1 of the Construction Regulations.
393 PMR 8(1) of the STSMA Regulations.
394 PMR 8(2) of the STSMA Regulations.
395 PMR 8(3) of the STSMA Regulations.
396 Section 1 of the PPA. See subparagraph (c) of the the definition of "property practitioner".
397 2022.
398 Regulation 1.22.3.2 of the Property Practitioners Regulations.
399 Regulation 1 of the CSOS Regulations. See the definition of "scheme executive".
400 PMR 12(5) of the STSMA Regulations.
401 PMR 12(5) of the STSMA Regulations.
402 PMR 12(6) of the STSMA Regulations.
403 PMR 12(6) of the STSMA Regulations.
404 PMR 12(6) of the STSMA Regulations.
405 PMR 18(2) of the STSMA Regulations.
406 PMR 12(3) read with PMR 18(1) of the STSMA Regulations.
407 Section 3.3 of the Unit Owner Reference Guide for more information on the Chairperson's roles and responsibilities.
408 PMR 12(4) of the STSMA Regulations.
409 PMR 18(2) of the STSMA Regulations.
410 Section 4(a) of the STSMA.
411 PMR 28(5) of the STSMA Regulations.
412 PMR 9(d) read with PMR 28(6) of the STSMA Regulations.
413 PMR 28(7) of the STSMA Regulations.
414 PMR 28(5) of the STSMA Regulations.
415 Act 22 of 2019.
416 Section 39(5) of the CSOSA.
417 PMR 28(7) of the STSMA Regulations.
418 PMR 28(8) of the STSMA Regulations.
419 PMR 27(7) of the STSMA Regulations.
420 PMR 28(7) of the STSMA Regulations.
421 PMR 28(5) of the STSMA Regulations.
422 Section 16(1) of the STSMA.
423 Section 16(2)(a) and (b) of the STSMA.
424 Section 16(3) of the STSMA.
425 Sections 3 and 4 of the STSMA read with PMRs 21 to 26 of the STSMA Regulations.
426 Section 3(1)(a) of the STSMA.
427 Section 3(1)(b) of the STSMA.
428 PMR 22(1) of the STSMA Regulations.
429 PMR 23(6) of the STSMA Regulations.
430 Section 15 of the STSMA.
431 Section 15 of the STSMA is an application whereby a judgement creditor applies to court to join all owners to the judgement debt of the body corporate, in proportion to each owner's PQ share or whatever share has been determined by the rules of the body corporate in terms of Section 10(2) of the STSMA.
432 Section 4(e) of the STSMA.
433 Section 10(1) of the STSMA.
434 Section 10(1) of the STSMA.
435 Annexure 'A' of CSOS Circular 1 of 2021 on *Amendment of Rules in terms of the STSMA*.
436 Act 3 of 2000.
437 Section 10(2)(b) of the STSMA.
438 Section 10(3) of the STSMA.
439 Section 10(5) of the STSMA.
440 Section 10(12) of the STSMA.
441 Section 10(11) of the STSMA.
442 (323/2018) [2019] ZASCA 30; 2019 (4) SA 471 (SCA) (28 March 2019), found at http://www.saflii.org/za/cases/ZASCA/2019/30.html, last accessed on 23 July 2022.
443 National Road Traffic Act No. 93 of 1996.
444 Section 1 of the NRTA.
445 Section 3I(g) of the NRTA.
446 Sections 56(1), (2), 57(1) and (3)(a) of the NRTA.
447 Section 59(1) of the NRTA read with Regulation 292(a) of the NRTA Regulations.
448 Section 59(3) of the NRTA.
449 The MEC, in terms of the NRTA and as defined in Section 1 thereof, is a member of the Executive Council appointed in terms of Section 132 of the Constitution of the Republic of South Africa, 1996, and who is responsible for road traffic matters, or any other person authorised by the MEC to exercise any power or perform any duty or function which such MEC is empowered or obliged to exercise or perform in terms of the NRTA.
450 Section 57(6) of the NRTA.
451 Criminal Procedure Act 51 of 1977.
452 Section 1 of the NRTA. See 'public road'.
453 1970 (2) SA 445 (E).
454 1973 (2) SA 305 (C).
455 The *Singh* case, Paragraph 13.
456 The *Singh* case, Paragraphs 14, 15 and 17.
457 The Singh case, Paragraph 19 .

458 The *Singh* case, Paragraph 20.
459 The *Singh* case, Paragraph 24.
460 PCR 1(1) of the STSMA Regulations.
461 PCR 1(1) of the STSMA Regulations.
462 PCR 1(2) of the STSMA Regulations.
463 PCR 1(2) of the STSMA Regulations.
464 PCR 1(3) of the STSMA Regulations.
465 PCR 1(4) of the STSMA Regulations.
466 Section 1 of the CSOSA. See 'community scheme'.
467 Section 59 of the CSOSA read with Regulation 2 of the CSOS Regulations on Levies and Fees.
468 Paragraph 8 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
469 Regulation 2(1) of the CSOS Regulations on Levies and Fees read with Paragraphs 6.3 and 6.4 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
470 Paragraph 6.5 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
471 Section 59(a) of the CSOS, read with Regulation 11 of the CSOS Regulations, and Paragraphs 6.2 and 12.1 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
472 CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
473 Paragraphs 5.9 and 5.11 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
474 Paragraph 10.2 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
475 Paragraph 10.3 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
476 Paragraph 11.1 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
477 Paragraph 11.2 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees, read with Section 34(1)(b) of the CSOSA.
478 Section 34(1)(b) of the CSOSA.
479 Section 34(2) of the CSOSA.
480 Paragraph 6.1 of the CSOS Practice Directive No. 4 of 2022 on the Waiver of Levies and Fees. This is reaffirmed in Paragraph 13 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees. https://csos.org.za/wp-content/uploads/2022/02/Practise-Directive-on-Waiver-of-Levies.pdf.
481 Paragraph 7.1(a) of the CSOS Practice Directive No. 4 of 2022 on the Waiver of Levies and Fees. Form CS3A can be found on the CSOS website at https://csos.org.za/wp-content/uploads/2019/12/Formcs3aWAIVERINDIVIDUALS2018.pdf and Form CS3B can be found on the CSOS website at https://csos.org.za/wp-content/uploads/2019/12/Formcs3bWAIVERSCHEMES2018.pdf.
482 Paragraph 9.5 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
483 Paragraph 5.3 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
484 Paragraph 9.3 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
485 Paragraph 9.4 read with Paragraph 11.1 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
486 Paragraph 12.4 of the CSOS Practice Directive No. 4 of 2022 on the Payment of Levies and Fees.
487 https://csos.org.za/wp-content/uploads/2021/12/AMENDMENT-TO-PRACTICE-DIRECTIVE-2019-FOR-SIGNATURE.pdf
488 A Freitas dos Santos "Is the current CSOS dispute resolution process lawful?" Paddocks Press: Volume 17, Issue 5 accessible at https://www.paddocks.co.za/paddocks-press-newsletter/is-the-current-csos-dispute-resolution-process-lawful.
489 https://csos.org.za/wp-content/uploads/2020/04/ApplicationforDisputeResolutionForm_02.pdf.
490 Section 38(1) of the CSOSA.
491 Paragraph 9.2 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
492 Paragraph 5.11 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
493 Paragraph 5.4 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
494 See also Section 41 of the CSOSA.
495 Paragraph 5.2 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
496 Paragraph 13.2 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
497 Paragraph 31.2 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
498 Paragraph 31.1 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
499 Paragraph 31.4 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
500 Paragraph 31.5 of the CSOS Practice Directive No. 1 of 2019 on Dispute Resolution.
501 Section 57(1) of the CSOSA.
502 (A3029/2019) ZAGPJHC (9 May 2022). This recent case is marked as reportable by the court, but has not yet found its way into the law reports or onto the SAFLII website, hence there is no law report citation at this time.
503 *Park Avenue* case Paragraphs 143 to 146.

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C

SECTIONAL TITLE MANAGING AGENT REFERENCE GUIDE

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Introduction

If you are reading the *Managing Agent Reference Guide*, you are a managing agent in a sectional title scheme and need an advanced understanding of sectional title schemes and their management, particularly in interpreting the laws that govern them. You may also be a diligent trustee wanting to understand governing sectional title laws in more detail to ensure that you are at the forefront of protecting, managing and maintaining a good administrative level within your sectional title scheme.

In this *Managing Agent Reference Guide*, more detailed information will be given on:

- The Property Practitioners Act;
- The law of meetings;
- Sectional title scheme finances;
- Executive managing agents;
- Sectional title scheme rehabilitation;
- Levies and the law;
- Airbnb;
- The Protection of Personal Information Act (POPIA); and
- Selected case notes for managing agents.

We have highlighted important terms that can be found in the glossary at the back of this book. You are also encouraged to review the *Unit Owner Reference Guide* and *Trustee Reference Guide* if you would like to refresh your memory regarding any of the concepts that are expanded on in this *Managing Agent Reference Guide*.

The Property Practitioners Act

Written by Fausto Di Palma

This chapter covers selected implications and commentary on the Property Practitioners Act[1] (PPA) that pertain specifically to managing agents.

The PPA and the Property Practitioners Regulations (PP Regulations) have repealed and replaced the Estate Agency Affairs Act[2] (EAAA).[3] The PPA was signed into law by President Cyril Ramaphosa on 19 September 2019 and published in the *Government Gazette* on 3 October 2019, but only came into force on 1 February 2022.[4] It is from this date, 1 February 2022, that all property practitioners must comply with the PPA.

Property practitioners in South Africa should use this new dispensation as an opportunity to improve their service delivery and business. Change is inevitable, and it is how one responds to change that differentiates one from the crowd.

In this chapter, we deal with the purpose and objects of the PPA, how managing agents are defined as property practitioners, the fees payable by property practitioners, the Fidelity Fund Certificate (FFC), as well as the statutory duties of and restrictions on property practitioners. We also touch on the ramifications of non-compliance with the PPA and PP Regulations, which is an offence.

1.1 Purpose and Objects of the PPA

The objects of the PPA are to, amongst other things, provide for:
The regulation of property practitioners and to provide for transformation of the property practitioners' sector and property market;[5]
The continuation of the Estate Agency Affairs Board (EAAB) as the Property Practitioners Regulatory Authority (Authority);[6]
The continuation of the Estate Agents Fidelity Fund as the Property Practitioners Fidelity Fund (Fidelity Fund);[7]
The education, training and development of property practitioners and candidate property practitioners, and the licensing of property practitioners;[8] and
A just and equitable legal framework for managing property.[9]

The question of whether managing agents are property practitioners or not has been discussed and debated at multiple levels and can now be considered settled.

1.1.1 Managing agents, and some of their employees, are property practitioners

'Property' is defined as immovable property, and any interest, right or duty associated with it in relation to, amongst other aspects, managing the immovable property, and any rights, obligations, interests, duties or powers associated with or relevant to such property.[10]

The definition of a **property practitioner** is particularly wide.[11] For the purposes of this chapter, the following subparagraph of the definition of property practitioner is emphasised: a property practitioner includes any person who for remuneration manages a property on behalf of another.[12]

The PPA does not define 'manage' or 'managing' but in the literal and usual grammatical meaning of the words, given the text, context and purpose of the PPA, they mean 'to control or be in charge of something': in this case, immovable property.[13]

'Managing agent' is defined in several sources:

In the Community Schemes Ombud Service Act[14] (CSOSA), it refers to any person who provides management services to a community scheme for reward;[15]

In the Sectional Titles Schemes Management Act Regulations[16] (STSMA Regulations), it refers to any person who provides scheme management services to a body corporate, for reward, whether monetary or otherwise, including any person who is employed to render such services;[17] and

In the PP Regulations, it refers to:

- Any person who manages property as referred to in subparagraph (a)(i) of the definition of 'property practitioner' in the PPA;[18] and
- Any person who carries out any activity referred to in subparagraph (c) of the definition of 'property practitioner' in the PPA;[19] and
- Includes a managing agent in terms of Prescribed Management Rule (PMR) 28 of the STSMA Regulations.[20]

The reference to subparagraph (a)(i) of the definition of 'property practitioner'[21] refers to any activities relating to the auction or sale of a property. It is understood that managing agents are not commonly involved in the sale of property from a management perspective, or otherwise, so this is most likely a reference to estate agents as they are generally involved in the sale of property.

'Scheme management service' means any financial, secretarial, administrative or other service relating to the administration of a scheme.[22]

The PP Regulations do go further to include a 'scheme executive' as defined in the CSOS Regulations, as a 'managing agent' and therefore a property practitioner for the purposes of the PPA. A 'scheme executive' is defined as a person who is a trustee, director, or another person who exercises executive control of a community scheme. Therefore, a trustee who is remunerated for their services to the body corporate, is a property practitioner, within the definitions contained in the PPA and PP Regulations, and must therefore register as a property practitioner and comply with the applicable provisions thereof.

In view of the above, managing agents, and their employees, provide management services under the supervision of trustees, and some managing agents and their employees, perform specified financial, secretarial and administrative services to community schemes, for reward,

and as such, they do fall under the ambit of the definition of 'property practitioner' and consequently are required to register and comply with the provisions of the PPA and the PP Regulations.

Some managing agents have argued that they, and/or their employees, are not property practitioners as they hold the view that they do not manage property according to PMR 28(5) of the STSMA Regulations, whereby their duties relate to the performance of specified financial, secretarial and administrative services. However, PMR 28(5) also states that managing agents can perform other management services under the supervision of the trustees, and so it is submitted that all managing agents, and their employees who render such services, must comply with the PPA and the PP Regulations. Moreover, the definition of 'managing agent' in the PP Regulations refers to the whole of PMR 28 and not just PMR 28(5),[23] nor do the PP Regulations provide for specific exclusions for managing agents, or their employees, who happen to perform other management services, or only one or more of the standard financial, secretarial and administrative services contemplated for community schemes.

The PPA and PP Regulations, however, do make provision for an application to the Authority for exemption from compliance with the PPA, or from compliance with specific provisions of the PPA.[24] This is covered later in this chapter.

Employees of a managing agent, such as administrators, bookkeepers and other similar support staff are not property practitioners since they do not render such services, and therefore these staff members do not need to be the subject of exemption applications since they are not considered to be property practitioners within the prescribed definition.

Some managing agents, at the time of drafting this chapter, have reportedly been successful in applying to the Authority for exemption from compliance with the PPA. Since the details of any exemption being applied for and/or granted is wholly dependent on the facts and circumstances of those cases, managing agents and other potentially affected persons should approach the Authority for more information. The following provisions of the PPA and PP Regulations are also applicable to managing agents and their employees rendering such a service if they have not successfully applied for exemption from these provisions.[25]

1.2 Provisions of the PPA that Apply to Property Practitioners

1.2.1 Fees payable

Managing agents as property practitioners are liable to pay the prescribed application fee for an FFC and any amount that the Minister of Human Settlements may determine from time to time by notice in the *Gazette*, after consultation with the Minister of Finance and the Board of the Authority.[26]

Every property practitioner who is a natural person shall, as of the calendar year 2020, also pay to the Authority a levy of R2 340 set for the period of three years; or in the alternative, if so permitted by the Authority, pay R780 per annum.[27] While the PP Regulations state "*as of the calendar year 2020*," this appears to be a clerical error that was not corrected after

the initial 2020 draft PP Regulations were compiled, because the PPA and PP Regulations only came into force on 1 February 2022. It is submitted that this should read "*as of the calendar year 2022*".[28]

In addition, every property practitioner who is a natural person shall, upon first becoming registered as a property practitioner, pay a contribution of R400 to the Fidelity Fund.[29]

The aforementioned fees are subject to escalation as per changes in the Consumer Price Index (inflation) from 1 April of each year.[30]

1.2.2 The Fidelity Fund Certificate

Property practitioners must hold a valid, industry-specific[31] Fidelity Fund Certificate (FFC), as well as a valid tax clearance certificate[32] and a valid BEE certificate.[33]

If a property practitioner is a juristic entity, such as a company, close corporation, trust or partnership, every director of the company, every member of the close corporation, every trustee of the trust, and every partner of the partnership, and any other persons who are employed by a property practitioner and perform any acts referred to in the definition of a property practitioner,[34] are also required to hold a valid FFC, and to be registered as a property practitioner with the Authority.[35]

It is important to note that every business operation carrying out the activities of a property practitioner must hold a separate FFC from that of the natural persons.[36] And no person or entity may act as a property practitioner unless they comply with the provisions of the PPA and have been issued with an FFC.[37] Table 1 lists the reasons for non-issuance of an FFC.

Fidelity Fund Certificate
Tax Clearance Certificate
BEE Certificate

Table 1 Reasons for non-issuance of an FFC

Not every person is entitled to receive an FFC. The Authority may not issue an FFC to any person who:[38]
Is not a South African citizen and does not lawfully reside in the Republic;
Has, at any time in the preceding five years, been found guilty of contravening the PPA, the EAAA, or any similar legislation in any other jurisdiction;
Has been found in any civil or criminal proceedings by a court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty, or of any other offence for which such person has been sentenced to imprisonment without the option of a fine;
Is of unsound mind;
Has, at any time in the preceding five years by reason of improper conduct, been dismissed from a position of trust;
Is an unrehabilitated insolvent;
Is not in possession of a valid tax clearance certificate;
Has been prohibited by any legislation, enacted in the Republic or elsewhere, from practising as a property practitioner or from occupying a position of trust, including any juristic person to whom the disqualifications mentioned above may apply (with the necessary changes required by the context);
Has been found guilty by a competent tribunal or a court of law of unfairly differentiating, distinguishing or excluding directly or indirectly anyone on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; and/or
Is not in possession of a valid BEE certificate.[39]

Where natural persons apply for exemption from either or both of the provisions relating to the valid tax clearance certificate or valid BEE certificate, such exemptions should ordinarily be granted.[40] Applications for exemption from these two documentary requirements may be submitted simultaneously with any application for the registration of a property practitioner, for an FFC, or for the renewal of an FFC.[41] Importantly, the PP Regulations also provide that, other than for sole proprietors, all property practitioners who are natural persons

will be deemed to have applied for exemption from providing a valid tax certificate or valid BEE certificate, when making an application for an FFC.[42]

Additionally, an FFC cannot be issued by the Authority to any property practitioner who does not comply with the prescribed standard of training and who does not have the practical experience determined by the Authority.[43] The Authority still needs to determine the qualification standards, course materials and professional designation examinations, and will have to do so in good-faith consultations with representative bodies in the various industries, including how these will be different for principal and non-principal property practitioners.[44]

Once all the relevant natural and juristic persons have been granted a valid FFC by the Authority, the holder must state that they are *"Registered with the PPRA"*[45] on all relevant letterheads and marketing materials pertaining to a property practitioner.[46] It is also advisable to put this on your website as a property practitioner.

Any agreement in connection with a property transaction, to which the property practitioner is a party, must contain a clause in the following terms:

> *"[Insert name of property practitioner as defined in the agreement] hereby warrants the validity of his/her/its Fidelity Fund Certificate as at the date of signature of this Agreement."*[47]

A property practitioner is also obliged to display their valid FFC prominently in every place of business from where they conduct property transactions, to enable consumers to easily inspect it, and it is an offence to contravene this requirement.[48] The property practitioner must not display or use a lapsed FFC.[49] Upon the request of any relevant party, a property practitioner must provide an FFC or a certified copy thereof.[50]

Property practitioners must reapply for their FFC every three years.[51] Failure to apply for an FFC when required shall result in a penalty amount of R125.00 per month until such non-compliance is rectified, which penalty is limited to the prescribed annual levy payable to the Authority as updated from time to time.[52]

There still appears to be some uncertainty in the industry with regard to who is required to obtain an FFC and who does not require an FFC, such as when considering employees of the managing agent who do not render services of a property practitioner; or where no trust monies are being managed; or in the case of remunerated trustees, directors, and other role-players in the community scheme industry. There are differing schools of thought and therefore different interpretations of the PPA and PP Regulations. This uncertainty and these varying interpretations appear to stem from the very wide application of the definition of "property practitioner" and the practical effects thereof, and from how the PPA and PP Regulations have been drafted, which are cumbersome to traverse. Industry role-players should implore the Authority to clarify this by lobbying for amendments to the PPA and PP Regulations. It would not be ideal for the industry to wait for a court to decide who is and who is not a property practitioner requiring an FFC to operate.

1.2.3 The difference in cover between the Fidelity Fund, fidelity insurance and professional indemnity insurance

The Fidelity Fund is a statutory (public) insurance fund, which insures persons against losses suffered as a result of theft of trust monies committed by a property practitioner who was in possession of an FFC at the time of the theft,[53] or the failure of a property practitioner to comply with provisions relating to the opening, accounting, and distribution of funds, and the auditing of a trust account.[54]

Fidelity insurance is additional private insurance that a community scheme must take out to insure against the risk of loss of money belonging to the community scheme suffered as a result of the act, fraud or dishonesty of the 'insurable person'.[55] An 'insurable person' is either a scheme executive, employee or agent of the community scheme who has control over the money (i.e. a managing agent), or a contractor or employee acting under the direction of the managing agent.[56]

In comparison, professional indemnity insurance is private insurance obtained by persons to protect themselves against losses suffered as a result of professional negligence, or a breach of the mandate of a person such as a property practitioner, who charges a fee for specified services.

1.2.4 Accounts and records of property practitioners

Table 2 Accounts to be opened and records to be kept by a property practitioner

A property practitioner must:[57]
Open and keep one or more separate trust accounts, with specific reference to Section 54 of the PPA, with a bank registered in terms of the Banks Act[58], and immediately thereafter appoint an auditor, and notify the Authority of the details pertaining to the trust account and the auditor.
After opening a trust account, the property practitioner must notify the Authority of:[59] • The financial institution; • Branch and branch code; • Name of account holder; • Account number; and • Type of account.
After appointing an auditor, the property practitioner must notify the PPRA of:[60] • Full name; • Independent Regulatory Board of Auditors certificate number; • Business, postal and email addresses; and • Telephone and mobile phone numbers.
Immediately upon receipt of trust money, ensure that same is deposited in the relevant trust account, and **have the trust account audited** within six months after the final date of the financial year;[61]
Keep separate accounting records for all accounts and balance all accounts at intervals of not more than one month;[62] and
Annually confirm or update their auditor details with the Authority.[63]

Property practitioners may be exempted from keeping a trust account if, for example, that property practitioner has never received any trust monies and that property practitioner submits to the Authority an affidavit in the prescribed form in terms of which they, amongst other things, undertake not to receive trust funds after such date of affidavit.[64] Regulation 2 of the PP Regulations sets out the parameters of these exemptions and specifies that a property practitioner shall not be required to operate a trust account in respect of a body corporate where the funds of that body corporate are held in a bank account opened in the name of the body

corporate concerned in terms of PMR 21(4)(a) of the STSMA Regulations.[65] **There is an error** in the drafting of the PP Regulations at Regulation 2.6 thereof, where reference is made to 'Section 21(4)(a)' of the STSMA. There is no such Section in the STSMA, and this can only be a reference to PMR 21(4)(a) of the STSMA Regulations, as previously stated, in relation to the bank account of the body corporate.

Additionally, property practitioners must keep a record of the documents shown in Table 3 for a period of five years, from the date of the document, or the probable date of the document, and must upon request forthwith provide the Authority with a legible certified copy of that document.[66]

Table 3 Documents to be recorded and stored by a property practitioner

The documents are:
• All documents exchanged with the Authority;
• If applicable, correspondence with employers or franchisors;
• Any agreement incidental to carrying on the business of a property practitioner;
• Any agreement, mandate, mandatory disclosure form or other document relating to the financing, sale, purchase or lease of a property;
• Any advertising or marketing material related to carrying on the business of a property practitioner; and
• Any other document prescribed by the Minister.

1.2.5 The code of conduct and other duties of property practitioners

In addition to the duty of keeping the above accounting records and other documents, and generally complying with the PPA and PP Regulations, there are other specified duties in the Code of Conduct of Property Practitioners, which are applicable to all property practitioners.[67] These duties are listed in Table 4.

Table 4 Duties of a property practitioner

Amongst other duties, a property practitioner:
Shall not conduct business or omit to do any act which is contrary to the integrity of property practitioners in general;
Shall protect the interests of their client at all times to the best of their ability and with **due regard to the interests of all parties concerned**;
Shall not accept a mandate if it requires a specialised skill or knowledge that they do not have, or where they have not completed the required qualifications, unless **assisted by a person** who has the required skill and knowledge and this is disclosed to the client in writing;
Shall not wilfully or negligently fail to perform any work or duties with such a degree of care and skill as might reasonably be expected of a property practitioner;
Shall not use a front company, close corporation or third party to do anything that would not be permissible for them to do if they were operating as a property practitioner; and
Shall not solicit or influence a person for whom they are holding trust monies to pay over the interest on those monies deposited or invested in terms of Sections 54(1) or (2) of the PPA.

1.2.6 Regulation and inspection of property practitioners

As mentioned, the Authority functions to regulate, amongst other areas, the conduct of property practitioners in managing immovable property.[68] The PPA empowers any person, in a prescribed form, to lodge a complaint with the Authority against any property practitioner regarding financing, marketing, management, letting, hiring, sale or purchase of immovable property.[69]

Inspections can also take place, at any reasonable time and without prior notice, and without a search warrant, to determine if the provisions of the Authority are being complied with by the property practitioner.[70] The inspector can enter the business premises, but not the private residence, of the property practitioner, without a search warrant, and may require the property practitioner to produce their FFC, or any other book, record or document relating to the inspection and in the control of the

property practitioner.[71] In the case where a property practitioner conducts business at their private residence, the inspector must notify the property practitioner in writing and in advance before conducting the inspection, and set out the details of the inspection.[72]

1.2.7 Limitation on relationships with other property market service providers

The PPA places a restriction on property practitioners from entering into any arrangement, formally or informally, whereby a consumer is obliged or encouraged to use a particular service provider, including an attorney, to render any service in respect of any transaction of which that property practitioner was the effective cause.[73] **No remuneration, payment or consideration in respect of such services rendered will be payable to the said service provider by the consumer, and if paid, may be recouped with interest.**[74] A person who, within one month of being requested to do so, fails to repay any such remuneration payment or consideration together with interest is guilty of an offence.[75]

Exemptions from the provisions of Section 58(1)(b) of the PPA mentioned above, should be granted in circumstances where it can be shown on a balance of probabilities that such will be to the benefit of consumers or members of the public or in circumstances where good and sufficient cause exists for such exemption.[76]

It is submitted that the community scheme should set out a list of preferred service providers as an agenda item tabled for approval at the annual general meeting, and framed as an instruction to the scheme executives and managing agent to use those approved service providers. Other ways to protect oneself as a property practitioner, may be to request the inclusion of a warranty in the relevant service provider's contract with the community scheme, or over email correspondence, or in the applicable scheme executives' or community scheme's resolutions, to the extent that the service provider and the community scheme, represented by the scheme executives, **warrant that they were not obliged or encouraged to use a particular service provider**.

1.2.8 Ramifications of non-compliance with the PPA as a property practitioner

Non-compliance with the PPA as a property practitioner can result in imprisonment for a period of up to ten years and/or fines, depending on the proven infringement.[77]

Furthermore, the PP Regulations contain a schedule of 'minor' and 'substantial' contraventions of certain provisions of the PPA.[78] For example, it is classified as a 'minor' offence, attracting a maximum fine of R5 000, for a property practitioner who has an annual turnover of less than R2.5 million to omit to subject their accounting records to an independent review by a registered accountant.[79] A property practitioner must also retain all trust money deposited with them until they are lawfully entitled to that money or a portion thereof, otherwise it is a 'substantial' offence, which can attract a maximum fine of R40 000.[80]

2 The Law of Meetings

2.1 Definition of a Meeting

The Oxford Learner's Dictionary,[81] defines a meeting as "*an occasion when people come together to discuss or decide something*". The Cambridge Dictionary,[82] takes the definition of a meeting a step further and defines it as "*a planned occasion when people come together, either in person or online (using the internet), to discuss something*".

The question now is, how do these definitions fit within the sectional title environment?

The STSMA and the STSMA Regulations both require that all decisions in respect of the financial, physical and administrative management of a body corporate must be proposed to and voted on either by the unit owners or the trustees. Most of the time, these decisions are proposed and voted on at meetings whether in person or virtually and, if a meeting is not possible, by way of round robins, i.e. in writing.

The STSMA and STSMA Regulations make provisions for these types of meetings as well as the decisions that can be made at these meetings, and the requirements that need to be met.

This chapter details these requirements and how a managing agent can ensure that they are met.

2.2 Regulation of Meetings

There are a number of resources that regulate meetings and decisions in the context of a sectional title scheme:

The Sectional Titles Act 95 of 1986 (STA);
The Sectional Titles Schemes Management Act 8 of 2011 (STSMA);
The Sectional Titles Schemes Management Regulations, 2016 (STSMA Regulations);
Annexure 1 of the STSMA Regulations: The Prescribed Management Rules (PMRs);
Annexure 2 of the STSMA Regulations: The Prescribed Conduct Rules (PCRs);
The rules of the body corporate, in addition to the PMRs and PCRs;
The Community Schemes Ombud Service Act 9 of 2011 (CSOSA);
Directions and/or restrictions imposed by unit owners;
The common law of South Africa; and
Rulings by the chairperson.

2.3 Meeting Requirements and Ensuring They are Met

2.3.1 Notice periods

Each type of meeting and their associated notice periods are listed below.

Inaugural AGM

"A developer must convene a meeting of the members of the body corporate not more than 60 days after the establishment of the body corporate."[83]

AGMs

*"... the body corporate must hold an annual general meeting **within four months** of the end of each **financial year**."*[84]

*"... at least **14 days'** written notice of a general meeting specifying the place, date and hour of the meeting must be given ..."*[85]

*"The body corporate must **at least 30 days prior to a meeting** of the body corporate where a **special resolution or unanimous resolution** will be taken, give all the members of the body corporate written notice specifying the proposed resolution, except where the rules provide for shorter notice."*[86]

"A general meeting may be called:

*a. on **7 days' notice** if the trustees have resolved that **short notice** is necessary due to the **urgency** of the matter and [have] set out their **reasons** for this resolution; provided that the trustees must not take such a resolution in regard to a meeting referred to in rule 29(2) or (4);*

*b. on **less than 14 days' notice**, if this is **agreed** to in writing by all persons entitled to attend."*[87]

*"The body corporate may propose to make **alterations** or **improvements** to the common property that are **reasonably necessary**; provided that no such proposal may be implemented until all members are given at least **30 days'** written notice with details of ..."*[88]

*"A body corporate may on the authority of a special resolution **install separate pre-payment meters** on the common property to control the supply of water or electricity to a section or exclusive use area; provided that all members and occupiers of sections must be given at least **60 days' notice** of the proposed resolution with details of all costs associated with the installation of the pre-payment system and its estimated effect on the cost of the services over the next three years."*[89]

SGMs

"*... at least **14 days'** written notice of a general meeting specifying the place, date and hour of the meeting must be given ...*"[90]

"*The body corporate must at least **30 days prior to a meeting** of the body corporate where a **special resolution or unanimous resolution** will be taken, give all the members of the body corporate written notice specifying the proposed resolution, except where the rules provide for shorter notice.*"[91]

"*A general meeting may be called:*

a. *on **7 days' notice** if the trustees have resolved that **short notice** is necessary due to the **urgency** of the matter and [have] set out their reasons for this resolution; provided that the trustees must not take such a resolution in regard to a meeting referred to in Rule 29(2) or (4);*
b. *on **less than 14 days' notice**, if this is **agreed** to in writing by all persons entitled to attend.*"[92]

"*The body corporate may propose to make **alterations** or **improvements** to the common property that are **reasonably necessary**; provided that no such proposal may be implemented until all members are given at least **30 days'** written notice with details of ...*"[93]

"*A body corporate may on the authority of a special resolution **install separate pre-payment meters** on the common property to control the supply of water or electricity to a section or exclusive use area; provided that all members and occupiers of sections must be given at least **60 days' notice** of the proposed resolution with details of all costs associated with the installation of the pre-payment system and its estimated effect on the cost of the services over the next three years.*"[94]

Trustee Meetings

"*A trustee may at **any time** call a meeting of trustees by giving all other trustees not less than **seven days' written notice** of the time and place of the meeting and by setting out an agenda for the meeting, provided that:*

a. *in cases of **urgency** a trustee may give such **shorter notice** as is **reasonable** in the circumstances; and*
b. *notice **need not be given** to any trustee who is **absent from the Republic** unless the meeting is one referred to in sub-rule (5), but notice must be given to any replacement trustee appointed for that trustee.*"[95]

2.3.2 Agendas

The notice of a general meeting must always be accompanied by an agenda, a copy or comprehensive summary of any document that is to be considered or approved by the unit owners at the intended meeting, and a proxy form in its prescribed format.[96]

The notice must also specify the place, date and time of the meeting in question.[97]

2.3.2.1 First general meeting

The notice of the first general meeting in terms of Section 2(8) of the STSMA,[98] as prepared by the developer, must include:[99]

- An agenda in accordance with PMR 16(2);
- The documents as referred to in PMR 16(2) and Section 2(8)(c) of the STSMA; and
- A comprehensive summary of the rights and obligations of the body corporate under the policies and contracts as referred to in PMR 16(2)(d).

The checklist provided in Annexure C contains all the agenda items and documents listed above.

2.3.2.2 Annual general meetings and special general meetings

The order of business, also better known as the points to include in the agenda of AGMs and SGMs, are determined by the trustees.[100]

The agenda must include:[101]

- The required order of business as set out in PMR 17(5) and 17(6);[102]
- A description of the general nature of all business; and
- A description of the matters that will be voted on at the meeting, including the proposed wording of any special or unanimous resolution. This is a proposed resolution containing sufficient detail so that the recipient understands what will be tabled and voted on at the meeting.

2.3.2.3 Trustee meetings

Written notice of the time and place of the meeting and the agenda must be provided to all trustees in accordance with the notice periods given in Paragraph 2.3.1.

There are no required agenda points listed in the sectional title legislation for trustee meetings, but there is confirmation on what the general powers and duties of trustees are, which will provide guidance. The general powers and duties of trustees are listed in Table 5.

Table 5 General powers and duties of trustees

Trustees are required to:[103]
Meet to carry out the body corporate's business, adjourn and otherwise regulate their meetings as they think fit, subject to the provisions of the STSMA, the PMRs and PCRs, and the common law of meetings;
Exercise the body corporate's powers and functions assigned and delegated to them in terms of Section 7(1) of the STSMA in accordance with resolutions taken at general meetings and at meetings of trustees;
Apply the body corporate's funds in accordance with budgets approved by members in general meetings; and
Appoint any agent or employee in terms of Section 4(a) of the STSMA in terms of a duly signed written contract.

Trustees can also, by written resolution, set the dates and standard agenda for their future meetings. The delivery of a copy of this resolution will be considered as adequate notice of all the meetings as set out therein.[104]

If a unit owner, registered mortgagee or the holder of a future development right requests, in writing, notice of trustee meetings, the trustees must deliver to that person a copy of the notice of a meeting, the resolution referred to above, if applicable, with a notice of any adjournment of such a meeting.[105] The body corporate may recover the costs of delivery from that person.[106]

2.3.3 Location

The locations required for AGMs and SGMs are discussed below.

2.3.3.1 AGMs and SGMs

In terms of PMR 15(4) of the STSMA Regulations, a general meeting must be held in the local municipal area where the scheme is situated, unless the unit owners decided otherwise. Should the unit owners decide otherwise, this decision must be confirmed by way of a special resolution.

Following the recent limitation on in-person gatherings as a result of the National State of Disaster, in response to the Covid-19 pandemic, sectional title schemes continued to convene their meetings virtually, which is allowed in terms of PMR 17(10) of the STSMA Regulations. This rule states that a body corporate may make arrangements for attendance at AGMs or SGMs by telephone or any other method, as long as the method selected:

- Is accessible to all unit owners and persons entitled to attend the meeting in question;
- Permits all persons participating in the meeting to communicate with each other during the meeting; and
- Permits the chairperson to confirm, with reasonable certainty, the identity of the participants.

2.3.3.2 Trustee meetings

There is no specific requirement in respect of the location of an 'in-person' trustee meeting; however, PMR 11(5) of the STSMA Regulations states that trustees may convene their meeting by telephone or other method, on the condition that the method chosen:

- Is accessible to all trustees and other persons entitled to attend the meeting;
- Permits all persons participating in the meeting to communicate with each other during the meeting; and
- Permits the chairperson to confirm, with reasonable certainty, the identity of the participants.

2.3.4 Recipients and delivery

2.3.4.1 AGMs and SGMs

The persons entitled to receive written notice of an AGM and/or SGM are:[107]

- All unit owners;
- All registered bond holders;
- All holders of future development rights; and
- The managing agent.

The delivery of these notices, subject to the method that the unit owners choose, must be:[108]

- Hand-delivered to you, the managing agent, and to all the other unit owners; or
- Sent by pre-paid registered post to every property owner's section; or
- Sent by pre-paid registered post to the address of the property owner's choice.

When a body corporate delivers a notice by pre-paid registered post or by hand, they can also send the meeting notice by email or fax.[109]

2.3.5 Meeting attendance

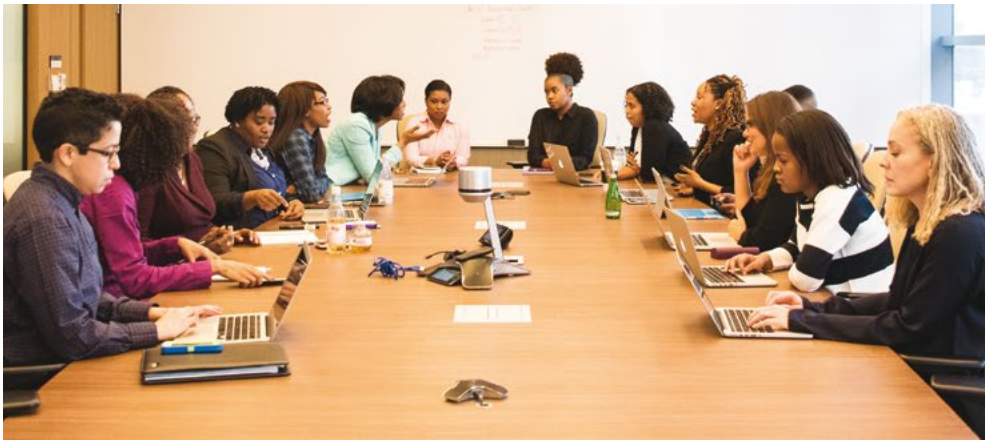
2.3.5.1 AGMs and SGMs

Other than unit owners, trustees and the chairperson, the following persons are also allowed to attend AGMs and SGMs:[110]

- Registered bondholders;
- Holders of future development rights; and
- The managing agent.

These persons may also speak on any matter on the agenda, but they are not, in those capacities, entitled to propose any motion or to vote.[111] They will not be allowed to attend any part of an AGM or SGM if the unit owners resolve that their presence would unreasonably interfere with the interests of the body corporate or any person's privacy.[112]

If a unit owner cannot attend an AGM or SGM, they can submit a proxy form authorising someone else to represent them at the said meeting.[113]



As the managing agent, you need to remember that the following rules apply in respect of proxies:

- The person appointed as proxy cannot act as a proxy for more than two members;[114]
- The notification by a unit owner of the appointment of a proxy must be in accordance with the prescribed Form C of Annexure 3 of the STSMA Regulations;[115]
- The appointed proxy does not have to be a unit owner, but cannot be the managing agent, an employee of the managing agent or the body corporate; and[116]
- If two or more unit owners are entitled to exercise one vote jointly, the proxy must be appointed by all of them.

2.3.5.2 Trustee meetings

Unit owners, registered bondholders, holders of future development rights and the managing agent may attend trustee meetings and may speak on any matter on the agenda, but they are not entitled to propose any motion or to vote.[117]

These persons are not entitled to attend the parts of the trustee meetings that deal with:[118]

- Discussions of contraventions of the STSMA or rules; or
- Any other matters in respect of which the trustees resolve that the presence of any such persons would unreasonably interfere with the interests of the body corporate or any person's privacy.

2.3.6 Who can chair a meeting?

From the establishment of the body corporate until the end of the first general meeting, the developer or the developer's nominee is the chairperson of the trustees.[119]

At the commencement of the first meeting of trustees after an AGM, at which trustees have been elected and whenever else necessary, the trustees must by majority vote elect a chairperson from among their number.

2.3.7 Quorums

2.3.7.1 Requirements

Often, the managing agent of a body corporate will be required to attend AGMs and SGMs and assist with the governance requirements of these meetings. One of these governance requirements is to ensure that a quorum is present, and that the meeting is duly constituted.

AGMs and SGMs

In order for business to be transacted at an AGM or SGM, the following quorum requirement needs to be met:[120]

- If a scheme has less than four primary sections or if a body corporate has less than four unit owners, a quorum will be met if the unit owners who are entitled to vote and hold **two thirds** of the total votes of the unit owners **in value**, are present.
- For any other scheme, a quorum will be met if the unit owners who are entitled to vote and hold **one third** of the total votes of the unit owners **in value**, are present.
- If no quorum is present within 30 minutes of the starting time of the meeting, the meeting must be adjourned to the **same day of the week** in the **next week** at the **same place** and **time**.[121] If on the day to which the meeting is adjourned, a quorum is not present within 30 minutes of the starting time of the meeting, the unit owners who are entitled to vote and are present in person or by proxy constitute a quorum.[122]

Trustee meetings

The quorum required for trustee meetings is 50% in number, but not less than two trustees.[123] If no quorum is present, the remaining trustee or trustees may continue to act, but only to:[124]

- Appoint replacement trustees to make up a quorum; or
- Call a general meeting.

If no quorum is present within 30 minutes of the starting time of the meeting, the trustees present, but not less than two, must adopt interim resolutions in respect of each item on the agenda,[125] these resolutions will not take effect unless it is confirmed:[126]

- At the next trustee meeting at which a quorum is present; or
- By written resolution signed by all the trustees.

At least two persons must be present at an AGM or SGM unless all the sections in the scheme are registered in the name of one person.[127]

When calculating the value of votes required to constitute a quorum, the value of votes of the developer must not be taken into account.[128]

For the purposes of establishing a quorum, the value of votes of any sections registered in the name of the body corporate must not be taken into account and the body corporate must not be considered to be a unit owner.[129]

When votes are calculated in value, each member's vote is calculated either as the total of the quotas allocated to the sections registered in that unit owner's name, or in accordance with a rule made in terms of Section 10(2) and 11(2) of the STSMA, whichever is applicable.[130] This is also applicable to the calculation of a quorum.

When votes are calculated in number, each unit owner has one vote.[131]

2.3.7.2 Quorum calculation

AGMs and SGMs

Table 6 Scenario A: No quorum, so they have to adjourn the meeting

Unit	Owner name	SQM	PQ %[132]	Present at meeting?	Quorum calculations
1	Developer	200 m²	10%	✓	Excluded
2	Mr X	200 m²	10%		
3	Mrs Y	200 m²	10%		
4	Mr A	200 m²	10%		
5	Mr and Mrs E	200 m²	10%		
6	Body corporate	200 m²	10%	✓	Excluded
7	Mrs B	200 m²	10%	✓	10%
8	Mr and Mrs C	200 m²	10%		
9	Body corporate	200 m²	10%	✓	Excluded
10	Mrs B	200 m²	10%	✓	10%
		2 000 m²	**100%**		**20% out of 70% (member representation) = 28.6%**

Table 7 Scenario B: Quorum present, but if a special resolution is proposed at this meeting, PMR 20(9) will apply (see 2.3.8.1 below)

Unit	Owner name	SQM	PQ %[133]	Present at meeting?	Quorum calculations
1	Developer	200 m²	10%	✓	Excluded
2	Mr X	200 m²	10%	✓	10%
3	Mrs Y	200 m²	10%		
4	Mr A	200 m²	10%		
5	Mr and Mrs E	200 m²	10%		
6	Body corporate	200 m²	10%	✓	Excluded
7	Mrs B	200 m²	10%	✓	10%
8	Mr and Mrs C	200 m²	10%		
9	Body corporate	200 m²	10%	✓	Excluded
10	Mrs B	200 m²	10%	✓	10%
		2 000 m²	**100%**		**30% out of 70% (member representation) = 42.9%**

Table 8 Scenario C: Quorum present

Unit	Owner name	SQM	PQ %[134]	Present at meeting?	Quorum calculations
1	Developer	200 m^2	10%	✓	Excluded
2	Mr X	200 m^2	10%	✓	10%
3	Mrs Y	200 m^2	10%	✓	10%
4	Mr A	200 m^2	10%	✓	10%
5	Mr and Mrs E	200 m^2	10%		
6	Body corporate	200 m^2	10%	✓	Excluded
7	Mrs B	200 m^2	10%	✓	10%
8	Mr and Mrs C	200 m^2	10%	✓	10%
9	Body corporate	200 m^2	10%	✓	Excluded
10	Mrs B	200 m^2	10%	✓	10%
		2 000 m^2	**100%**		**60% out of 70% (member representation) = 85.7%**

Trustee meetings

Table 9 Scenario A: No quorum – can proceed with interim resolutions

Trustee	Owner name	Present at meeting?	Quorum calculations
1	Mr X	✓	1
2	Mrs Y		
3	Mr A	✓	1
4	Mrs C		
5	Mrs B		
Quorum in number			2 out of 5
Quorum in %			**40%**

Table 10 Scenario B: Quorum present

Trustee	Owner name	Present at meeting?	Quorum calculations
1	Mr X	✓	1
2	Mrs Y	✓	1
3	Mr A	✓	1
4	Mrs C	✓	1
5	Mrs B		
Quorum in number			4 out of 5
Quorum in %			**80%**

2.3.8 Voting

2.3.8.1 Requirements for resolutions

AGMs and SGMs

There are three levels of resolutions in terms of which a unit owner can cast their vote at AGMs and SGMs. These three levels and their requirements to be successfully passed are:[135]

- **Ordinary resolution**: Requires a **majority** of the votes of the unit owners present or validly represented by proxy at the meeting, calculated in **value**;
- **Special resolution**: Requires **75%** of the votes of the unit owners present or validly represented by proxy at the meeting, calculated in **value** and in **number**; and
- **Unanimous resolution:** Requires **100%** of the votes of the unit owners present or validly represented by proxy at the meeting, calculated in **value** and in **number**. (See note regarding abstention of vote under 'unanimous resolution' on page 35.)

If a unanimous resolution is to be adopted at an AGM or SGM, there is an exception to general quorum requirements in that **80%** of the unit owners must be **present or validly represented** by proxy at such a general meeting.

PMR 20(9)(a) of the STSMA Regulations confirms that if a **special resolution** is passed at an AGM or SGM where unit owners who hold **less than 50% of the total value** of votes are present:

- The body corporate must not take any action to implement that resolution for one week after the meeting, **unless** the trustees resolve that there are reasonable grounds to believe that immediate action is necessary to ensure safety or to prevent significant loss or damage to the community scheme.

Trustee meetings

A motion at a trustee meeting will be successfully passed if the **majority** of the trustees, present and voting, vote in favour thereof.[136] If the votes are tied, the chairperson has the casting vote.[137]

2.3.8.2 Voting considerations

AGMs and SGMs

- The issuing of voting cards is a requirement in law and votes by hand are no longer accepted;[138]
- If two or more unit owners are entitled to exercise one vote jointly, that vote may be exercised only by one person, who may or may not be one of them;[139]
- A unit owner will not be entitled to vote in respect of an ordinary resolution if they fail to pay the body corporate any amount due after being ordered by a court or adjudicator to do so;[140]
- A unit owner will not be entitled to vote in respect of an ordinary resolution if they continue to breach a conduct rule after being ordered by a court or adjudicator to refrain from breaching that rule;[141]
- All unit owners will be entitled to vote in respect of special and unanimous resolutions; and[142]
- For the purposes of any vote, the values of votes of any sections registered in the name of the body corporate are considered abstentions.[143]

Trustee meetings

- A trustee is disqualified from voting in respect of any proposed or current contract or dispute with the body corporate to which the trustee is a party;[144]
- A trustee is disqualified from voting in respect of any other matter in which the trustee has any direct or indirect personal interest.[145]

2.3.8.3 Calculating votes

Scenario A: The trustees presented an ordinary resolution for voting at the AGM. This is illustrated in Table 11.

Table 11 Recording the attendance and voting in Scenario A

Unit	Owner name	PQ %[146]	Present at meeting?	Quorum	Vote – Ordinary Resolution	Vote in value
1	Developer	10%	✓	Excluded	No	
2	Mr X	10%	✓	10%	Yes	10%
3	Mrs Y	10%	✓	10%	Yes	10%
4	Mr A	10%				
5	Mr and Mrs E	10%				
6	Body corporate	10%	✓	Excluded	Excluded	
7	Mrs B	10%	✓	10%	Yes	10%
8	Mr and Mrs C	10%				
9	Body corporate	10%	✓	Excluded	Excluded	
10	Mrs B	10%	✓	10%	Yes	10%
		100%		40% out of 70% (member representation) = 57.7%		40% out of 50% present at the meeting and allowed to vote
						80% voted in favour

Scenario A result: The ordinary resolution was passed successfully as the majority voted in favour thereof.

Scenario B: The trustees presented a special resolution for voting at the AGM. This is illustrated in Table 12.

Table 12 Recording the attendance and voting in Scenario B

Unit	Owner name	PQ %[147]	Present at meeting?	Quorum	Vote – Special Resolution	Vote in value	Vote in number
1	Developer	10%	✓	Excluded	No		
2	Mr X	10%	✓	10%	Yes	10%	1
3	Mrs Y	10%	✓	10%	Yes	10%	1
4	Mr A	10%	✓	10%	Yes	10%	1
5	Mr and Mrs E	10%	✓	10%	Yes	10%	1
6	Body corporate	10%	✓	Excluded	Excluded	Excluded	Excluded
7	Mrs B	10%	✓	10%	Yes	10%	1
8	Mr and Mrs C	10%					
9	Body corporate	10%	✓	Excluded	Excluded	Excluded	Excluded
10	Mrs B	10%	✓	10%	Yes	10%	Excluded
		100%		60% out of 70% (member represen-tation) = 85.7%		60% out of 70% present at the meeting and allowed to vote	5 out of 7 present at the meeting and allowed to vote
						85.71%	**71.43%**

Scenario B result: The special resolution was not passed successfully as the vote in number was less than 75%.

Scenario C: The trustees presented a special resolution for voting at the AGM. This is illustrated in Table 13.

Table 13 Recording the attendance and voting in Scenario C

Unit	Owner name	PQ %[148]	Present at meeting?	Quorum	Vote – Special Resolution	Vote in value	Vote in number
1	Developer	10%	✓	Excluded	Yes	10%	1
2	Mr X	10%	✓	10%	Yes	10%	1
3	Mrs Y	10%					
4	Mr A	10%					
5	Mr and Mrs E	10%					
6	Body corporate	10%	✓	Excluded	Excluded	Excluded	Excluded
7	Mrs B	10%	✓	10%	Yes	10%	1
8	Mr and Mrs C	10%					
9	Body corporate	10%	✓	Excluded	Excluded	Excluded	Excluded
10	Mrs B	10%	✓	10%	Yes	10%	Excluded
		100%		30% out of 70% (member represen-tation) =42.9%		40% out of 40% present at the meeting and allowed to vote	3 out of 4 present at the meeting and allowed to vote
						100%	**75%**

Scenario C result: The special resolution passed in number and in value. As the quorum was less than 50%, the special resolution must be implemented in accordance with PMR 20(9)(a), as explained in Paragraph 2.3.8.2.

Scenario D: The trustees presented a unanimous resolution for voting at the AGM. This is illustrated in Table 14.

Table 14 Recording the attendance and voting in Scenario D

Unit	Owner name	PQ %[149]	Present at meeting?	Quorum	Quorum in number	Vote – Unanimous Resolution	Vote in value	Vote in number
1	Developer	10%	✓	Excluded		Yes	10%	1
2	Mr X	10%						
3	Mrs Y	10%						
4	Mr A	10%	✓	10%		Yes	10%	1
5	Mr and Mrs E	10%	✓	10%		Yes	10%	1
6	Body corporate	10%	✓	Excluded		Excluded	Excluded	Excluded
7	Mrs B	10%	✓	10%		Yes	10%	1
8	Mr and Mrs C	10%	✓	10%		Yes	10%	1
9	Body corporate	10%	✓	Excluded		Excluded	Excluded	Excluded
10	Mr G	10%	✓	10%		Yes	10%	1
		100%		50% out of 70% (member represen-tation) = 71.4%	5 out of 7 (member represen-tation)		60% out of 60% present at the meeting and allowed to vote	6 out of 6 present at the meeting and allowed to vote
							100%	**100%**

Scenario D result: Although all those present and entitled to vote voted in favour of the unanimous resolution, it was not passed successfully because the quorum was less than 80%.

2.3.9 Minute taking

The body corporate has an obligation to fulfil certain tasks in respect of the administrative management. One of these administrative tasks is the preparation and updating of the minutes of AGMs, SGMs and trustee meetings.[150] Despite the fact that PMR 9(e) of the STSMA Regulations specifically allocates the duty to compile and distribute the minutes to the trustees, it is often found that this task is allocated to the managing agent.

As the minutes of meetings form part of the governance documents and records of a body corporate, they must include the following information:[151]

- Date, time and place of the meeting;
- Names and roles of the persons present, including details of the authorisation of proxies or other representatives;
- Text of all resolutions; and
- Results of the voting on all motions.

Once the minutes are prepared, they must be distributed to all persons entitled to receive notice of the meeting concerned as soon as possible, but not later than seven days after the date of that meeting.[152] The minutes will then be presented for approval at the next meeting. For example, if they are minutes of the previous trustee meeting, they will be presented for approval by the trustees at the next trustee meeting.

2.4 Requiring a Resolution when a Meeting is not Possible

A managing agent and/or trustees are often faced with situations where it is impossible to get a meeting arranged or, due to the busy schedules of unit owners and trustees, meetings almost never meet the quorum requirements.

PMR 14(4)(b) of the STSMA Regulations provides an alternative for trustee meetings and confirms that trustees can put resolutions to a vote by a notice sent to each trustee, which contains the text of any proposed

resolutions and instructs the trustees to indicate their agreement to the resolution by their signature, which signatures must be received by the body corporate before expiry of the closing date specified in the notice. The standard majority vote is applicable for passing a resolution in this way.

An alternative for AGMs and SGMs is the election to have special or unanimous resolutions approved by unit owners in writing. If the body corporate chooses to forego a meeting and proposes a special or unanimous resolution in writing, then:

- A special resolution, will be passed if a minimum of 75% of ALL unit owners of the body corporate, calculated in value and in number, vote in favour of the proposed resolution;[153]
- A unanimous resolution will be passed if ALL unit owners vote in favour of the proposed resolution.[154]

Remember that the threshold to obtain approval for the motion is higher in this case than in the case of a meeting.

2.5 When a Resolution is not Passed Successfully

If any of the items of business requiring unit owner approval are not approved at an AGM or any adjournment of the meeting, then the resolution **not** to approve the relevant documents must include the reasons for non-approval.[155] The body corporate must then have the document revised and submit it at another general meeting, an AGM or SGM, for approval as soon as is reasonably possible, until it is approved.[156]

2.6 Retention of Meeting Records

The trustees are ultimately responsible for the governance of the body corporate's documents and records. However, this obligation is often delegated to the managing agent in terms of the management agreement.

The current sectional title legislation does not specifically address the period for which records of meeting minutes and/or minute books must be retained. Despite the lack of this specification, the current legislation does imply that the body corporate must keep a record of all meeting minutes in perpetuity through the following PMRs of the STSMA Regulations:

*"**18. Chairperson***

(3) A chairperson must:

*ensure that the scheme's rules, the **minute books** and any other documents relevant to the items of business on the agenda are available at the meeting.*

27. Governance documents and records

*(2) The body corporate must **prepare** and **update** the following records:*

***Minutes of general** and **trustee meetings**, including the following information:*

(i) The date, time and place of the meeting;

(ii) The names and roles of the persons present, including details of the authorisation of proxies or other representatives;

(iii) The text of all resolutions; and

(iv) The results of the voting on all motions.

*(4) On receiving a **written request**, the **body corporate** must **make the records** and **documents** referred to in this rule **available for inspection** by, and provide copies of them to:*

(a) A member;

(b) A registered bondholder; or

(c) A person authorised in writing by a member or registered bondholder.

*(5) The body corporate must **comply** with a request for inspection or copying under this rule within **10 days** unless the request is in respect of the rules, in which case the body corporate must comply with the request within five days.*

*(6) The body corporate **may charge a fee** for a copy of a record or document other than the rules, provided that the fee is not more than the reasonable cost associated with the process of making the copy, and the body corporate may refuse to supply the copy until the fee is paid.*

*(8) The **records** referred to in this rule **must be in writing** or in a **form** that can be easily **converted to writing**."*

The obligation and importance to keep proper records of the minutes of meetings and the decisions recorded at these meetings is further motivated by the CSOS in the CSOSA,[157] as parties with a material interest can apply to them for certain relief. Proper records of the minute books will assist the body corporate in proving their case, should a claim for the relief as quoted below[158] be made against them.

> "***39. Prayers for relief***
>
> *An application made in terms of Section 38 must include one or more of the following orders:*
>
> *(4) In respect of meetings:*
>
> *(a) An order requiring the association to call a general meeting of its members to deal with specified business;*
>
> *(b) An order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened;*
>
> *(c) An order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association:*
>
> *(i) was void; or*
>
> *(ii) is invalid;*
>
> *(d) An order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed; or*
>
> *(e) An order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.*
>
> *(7) In respect of general and other issues:*
>
> *(a) An order declaring that the applicant has been wrongfully denied **access to information or documents**, and requiring the association to **make** such information or documents **available** within a specified time."*

Following due consideration of the above-mentioned provisions and the old PMR 34(2) of the STA Regulations,[159] it is recommended that a body corporate retain records of their meeting minutes and resolutions in perpetuity or until the body corporate is dissolved.

3 Sectional Title Scheme Finances

3.1 Budgets

Levies are the financial lifeblood of all bodies corporate. The entire financial future and success of a body corporate can be directly linked to their levies.

Levies calculated according to the participation quotas (PQs), are solely the mathematical result of the body corporate budget. The body corporate budget ultimately dictates the financial success and future of a body corporate.

The importance of the body corporate budget can never be over-stressed as a large percentage of any financial difficulties experienced by a body corporate can be traced back to a problem with their budget.

3.1.1 Applicable provisions of the Sectional Title Schemes Management Act

The applicable provisions of the Sectional Title Schemes Management Act for Sections 3, 4, 5 and 11 are detailed in the following paragraphs.

3.1.1.1 Section 3[160]

This section of the STSMA deals with the functions of the body corporate and forms the platform on which body corporate funds are raised and controlled. It provides that the functions of the body corporate shall include:

> **Section 3(1)(a)[161]**
> *"To establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs:*
> - *For the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs);*
> - *For the payment of rates and taxes and other local municipality charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land;*
> - *For the payment of any insurance premiums relating to the building or land; and*
> - *For the discharge of any duty or fulfilment of any other obligation of the body corporate."*

This subsection establishes the items that must be contained in a body corporate budget.

> **Section 3(1)(b)[162]**
> *"To establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister."*

Section 3(1)(c) deals with the owner's responsibility to make the necessary contributions to the fund:

Section 3(1)(c)[163]
"To require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs."

Section 3(1)(d)[164]
"To require from a developer who is entitled to extend the scheme in terms of a right reserved in section 25(1) of the Sectional Titles Act, to make such reasonable additional contribution to the funds as may be necessary to defray the cost of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or parts."

Section 3(1)(e)[165]
"To determine the amounts to be raised for the purposes of paragraphs (a), (b) and (c)."

Section 3(1)(f)[166]
"To raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections."

This confirms how the budget converts into the individual levies of each owner, in terms of their PQ share.

Section 3(1)(g)[167]
"To open and operate an account with any registered bank or any other financial institution."

Section 3(1)(h), (i), (j) and (k)[168]

These sections relate to the required insurance for the body corporate and payment thereof.

Section 3(2)[169]

"Liability for contributions levied under any provision of subsection (1), save for special contributions contemplated in subsection (4), accrues from the passing of a resolution to that effect by the trustees of the body corporate ..."

This identifies the mechanism for the implementation and recovery of levies within a body corporate.

Section 3(3) to (6)[170]

"(3) Any special contribution becomes due on the passing of a resolution in this regard by the trustees of the body corporate levying such contribution and may be recovered by the body corporate by an application to an Ombud, from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of such ownership.

(4) "Special contribution", for the purposes of this section, means any contribution levied under subsection (1) other than contributions which arise from the approval of the estimate of income and expenditure at an annual general meeting of a body corporate, determined to be a contribution to be levied upon the owners during the current financial year.

(5) The body corporate must, annually or whenever there is a change in levy, certify in writing:

(a) The amount determined as the contribution of each owner;

(b) The manner in which such contribution is payable; and

(c) The extent to which such contribution has been paid by each owner.

(6) The body corporate is, for the purposes of effecting any insurance under sub-section (1)(h), considered to have an insurable interest for the replacement value of the building and must, for the purposes of effecting any other insurance under that subsection, be considered to have an insurable interest in the subject matter of such insurance."

3.1.1.2 Section 4[171]

This subsection of the STSMA deals with the powers of bodies corporate. Section 4(g) reads:

> *"... to invest any moneys of the fund referred to in Section 3(1)(a) and subsections 4(e) and (f)."*

3.1.1.3 Section 5[172]

This section of the STSMA deals with the fact that the functions and powers of a body corporate are to be performed and exercised by the trustees.

> **Section 5(1)(i)[173]**
> *"In addition to the body corporate's main functions and powers under Sections 3 and 4, the body corporate may generally exercise any power and perform any function conferred or imposed on the body corporate in terms of this Act or the Sectional Titles Act."*

3.1.1.4 Section 11[174]

This section of the STSMA deals with the utilisation and amendment of the PQs and the impact this could have on the voting rights of owners and contributions made by the owners.

> **Section 11(1)(c)[175]**
> *"Subject to subsection (2), the quota of a section must determine subject to Section 3(1)(b), the proportion in which the owner of the section must make contributions for the purposes of Section 3(1)(a) or may in terms of Section 14(1) be held liable for the payment of a judgement debt of the body corporate of which he or she is a member."*
>
> **Section 11(2)(a)[176]**
> *"Subject to Section 3(1)(b), the developer may, when submitting an application for the opening of a sectional title register in terms of the Sectional Titles Act, or the members of the body corporate may by special resolution, make rules under Section 10 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of Section 3(1)(a) or 14(1) is modified."*

Given that an owner's contribution requirement could have been amended to something other than the PQ, it is vitally important that the trustees check and confirm what each owner's required contributions are in terms of the STSMA and PMRs applicable to that sectional title scheme.

3.1.2 Applicable provisions of the Prescribed Management Rules (PMRs)

Before considering these provisions, it is important to note that these rules can be changed, so various bodies corporate could in fact have different rules.

The rules mentioned hereunder are the standard rules as found in Annexure 1 to the STSMA Regulations prescribed by the Minister, hereafter referred to as 'Prescribed Management Rules' (PMRs).

3.1.2.1 PMR 25[177]

PMR 25 of the STSMA Regulations confirms the contributions and charges.

> *"(1) The body corporate must, as soon as possible but not later than 14 days after the approval of the budgets referred to in rule 17(6)(j)(iv) by a general meeting, give each member written notice of the contributions and charges due and payable by that member to the body corporate, which notice must:*
>
> *(a) State that the member has an obligation to pay the specified contributions and charges; and*
>
> *(b) Specify the due date for each payment; and*
>
> *(c) If applicable, state that interest at a rate specified in the notice will be payable on any overdue contributions and charges; and*
>
> *(d) Include details of the dispute resolution process that applies in respect of disputed contributions and charges.*
>
> *(2) If money owing is not paid on the dates specified in the notice referred to in sub-rule (1), the body corporate must send a final notice to the member, which notice must state:*
>
> *(a) That the member has an obligation to pay the overdue contributions and charges and any applicable interest immediately; and*

(b) If applicable:

(i) The interest that is payable in respect of the overdue contributions and charges at the date of the final notice; and

(ii) The amount of interest that will accrue daily until the payment of the overdue contributions and charges; and

(c) That the body corporate intends to take action to recover the amount due if the overdue contributions and charges and interest owing are not paid within 14 days after the date the final notice is given.

(3) Subject to rules 21(3) (a) and (b), after the expiry of a financial year and until they become liable for contributions in respect of the next financial year, members are liable for contributions in the same amounts and payable in the same instalments as were due and payable by them during the past financial year.

(4) A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear amounts due and owing by such member to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.

(5) The body corporate must not debit a member's account with any amount that is not a contribution, or a charge levied in terms of the Act or these rules without the member's consent or the authority of a judgement or order by a judge, adjudicator or arbitrator.

(6) The body corporate must in its annual financial statements account for all contributions and any other charges debited to members' accounts.

(7) On request in writing by a member, the body corporate must make available a full and detailed account of all amounts debited and credited to the member's account with the body corporate."

3.1.2.2 PMR 9[178]

PMR 9(c) confirms that one of the general powers and duties of trustees are to:

"... apply the body corporate's funds in accordance with budgets approved by members in general meetings."

3.1.2.3 PMR 26(1)(a) to (d) and (f)[179]

"A body corporate must:

(a) Keep proper books of accounts that:

(i) Record all its income, expenditure, assets and liabilities;

(ii) Disclose all amounts recovered from members by the body corporate or any managing agent or other service provider acting on its behalf;

(iii) Include individual accounts for each member; and

(iv) Contain all other information necessary to allow members to assess the body corporate's financial situation and their financial situation in regard to the body corporate.

(b) Keep separate books of account and bank accounts for its administrative and reserve funds referred to in sections 3(1)(a) and (b) of the Act.

(c) Prepare annual financial statements for presentation at the annual general meeting, which statements must include analyses of the:

(i) Amounts due to the body corporate in respect of contributions, special contributions and other charges, classified by member and the periods for which such amounts were owed;

(ii) Amounts due by the body corporate to its creditors generally and prominently disclosing amounts due to any public authority, local municipality or other entity for services including, without limitation, water, electricity, gas, sewerage and refuse removal, classified by creditor and the periods for which such amounts were owed;

(iii) Amounts advanced to the body corporate by way of levy finance, a loan, in terms of a guarantee insurance policy or otherwise, setting out the actual or contingent liability of the body corporate and the amounts paid by the body corporate and by any member in terms of such arrangement;

(iv) Amounts in the reserve fund showing the amount available for maintenance, repair and replacement of each major capital item as a percentage of the accrued estimated cost and the rand value of any shortfall;

(v) Premiums and other amounts paid and payments received by the body corporate and any member in terms of the insurance policies of the body corporate and the expiry date of each policy; and

(vi) Amounts due and payable to the Community Schemes Ombud Service.

> *(d) Prepare a maintenance, repair and replacement plan in accordance with rule 22 for presentation at the annual general meeting; and*
>
> *(f) Prepare a report adopted by the trustees reviewing the affairs of the body corporate during the financial year for presentation at the annual general meeting."*

3.1.2.4 PMR 26(1)(e)[180]

PMR 26(1)(e) highlights that the estimate of expenses must include a reasonable provision for reserve funds.

> *"(e) Prepare budgets for the administrative and reserve funds comprising itemised estimates of the anticipated income and expenses during the next financial year for presentation at the annual general meeting ..."*

3.1.2.5 PMR 26(2) to (5)[181]

> *"(2) On the application of any member, registered bondholder or of the managing agent, the body corporate must make all or any of the books of account and records available for inspection and copying.*
>
> *(3) The body corporate must ensure that all the body corporate's books of account and financial records are retained for a period of six years after completion of the transactions, acts or operations to which they relate.*
>
> *(4) Unless all the sections in the scheme are registered in the name of one person, the body corporate must present audited financial statements to a general meeting for consideration within four months after the end of the financial year.*
>
> *(5) The audit of a body corporate's annual financial statements:*
>
> *(a) Must be carried out by an independent auditor who has not participated in the preparation of the annual financial statements or advised on any aspect of the accounts of the body corporate during the period being reported on;*
>
> *(b) Need not be carried out in accordance with any recognised financial; reporting framework of guidelines for financial accounting;*
>
> *(c) Must include opinions as to whether or not:*
>
> *(i) The annual financial statements accurately reflect the financial position of the body corporate for the financial year under review, with such qualifications and reservations as the auditor considers necessary;*

(ii) The body corporate has complied with the accounting requirements set out in rules 21, 24 and this rule 26, with a specific description of any failure to comply with such requirements;

(iii) The books of account of the body corporate have been kept and its funds have been managed so as to provide a reasonable level of protection against theft or fraud; and

(iv) The financial affairs of the body corporate appear to be effectively managed;

(d) Must be completed within four months of the end of the body corporate's financial year."

3.1.2.6 PMR 17(6)(j)(iv) read with PMR 15(3)(b)[182]

PMR 17(6)(j)(iv)

"If the meeting is an annual general meeting, approve the budgets for the administrative and reserve funds for the next financial year."

PMR 15(3)(b)

"The notice of a general meeting must be accompanied by at least a copy or comprehensive summary of any document that is to be considered or approved by members at the meeting."

3.1.3 Estimating increases in expenditure items

The key component to any budget lies in the word 'estimate'. The budget is an estimate of the expected expenditure for the ensuing year. Unless you are in possession of a reliable crystal ball, budgeting cannot be considered an exact science. However, with the correct approach, fairly accurate budgets can be calculated.

3.1.3.1 Fixed percentage approach

In this approach, the trustees apply a fixed percentage increase to the previous year's expenditure to calculate the increase in expenditure anticipated for the ensuing year.

This percentage may have been obtained from:

- The managing agent whose experience and current sectional title property portfolio, has yielded certain averages over the years;
- The prevailing inflation rate or even the consumer price index; and/or
- The increase in body corporate salaries.

Whatever the source, various risks and inaccuracies exist with this approach. Some of these risks include the following:

- Not all expenditure items increase at the same rate. Even if an average is applied, this approach could yield an inaccurate result. Example: A body corporate has high security needs and the security expense forms a large percentage of the body corporate's total expenditure. Assume that the fixed average percentage increase implemented was 5% but the actual security expenses increased by 15%. This would result in a 10% under-budget on security, which results in the total budget being too low.
- Bodies corporate, like fingerprints, are unique. Each body corporate has unique circumstances, such as the age, finishings and facilities of the building and common property. As such, it would be almost impossible to develop a comparative standard average. Assume that the above was not true and that most bodies corporate were similar in nature and circumstances. Even if an average was applied over an entire portfolio of sectional title schemes, it would result in some sectional title schemes being above and some below the stated average. Hence, this approach may result in 80% of the sectional title schemes being correctly increased and 20% wrongly increased. The owners in those 20% wrongly increased sectional title schemes are not going to have much confidence in this approach.
- This approach does not factor in potential reductions in any of the previous year's expenditure. A classic example would be a body corporate that had experienced an abnormal once-off expense. If a fixed average is applied to these figures, the result will be a budget that is inaccurately over by the increase on the abnormal expense in addition to the capital amount of that expense, which will not occur in the next financial year.

3.1.3.2 Historic approach

In this approach, trustees utilise the same percentage as the previous year. This approach is often implemented where a successful budget, for a given financial year, had been achieved. In addition to encountering the same risks and flaws listed in Paragraph 3.1.3.1, problems with this approach include the following:

- Besides the obvious guarantees in life being death and taxes, the next most likely occurrence is inflation. This approach makes no allowance for inflation. It could be argued that if the previous year had yielded a positive result, then perhaps inflation had been worked in somehow. This is still an assumption, however, and given the serious nature of budgets and their implications for all members, this approach amounts to a gamble, which a body corporate cannot afford.
- This approach is extremely popular with bodies corporate as it automatically provides a mostly stable and known increase for the ensuing year. The risk is that if any shortfalls do occur, they will have to be made up in the next financial year plus the additional amendment to prevent the same shortfall from occurring again. This would unfavourably result in a double increase in levies in one financial year.

3.1.3.3 Justified approach

Another firm favourite with bodies corporate and managing agents is the justified approach. In this approach, the trustees begin with the answer and work backwards. That is, the trustees begin with the level of levies they wish to implement for the ensuing year and then implement the increases to the various expenses to achieve these levies.

The critical flaw with this approach is that the increases are not based on the type, nature or requirements of the individual expenses but rather on a predetermined level of income. That is, the level of levies the owners and trustees wish to pay rather than the level of levies they should be paying.

3.1.3.4 Correct approach

There is no shortcut to accurate budgeting and, as such, the budgeting process should include the following actions:

Table 15 Actions needed for an accurate budget

Each item of expenditure must be separately investigated and assessed. The assessment should include:
Discussions with the relevant service providers to ascertain what increases can be expected. For example, the local municipality should be contacted to ascertain what increases in rates and taxes are going to be levied during the next financial year; and
Ensuring if any of the expenses are likely to reduce. For example, if the body corporate replaced the passage light fittings the previous year, will they need to replace them again this year? If not, that budget item should be reduced accordingly.
One of the most serious errors in budgeting is the omission of any known expense. Extreme care should be taken to fully ascertain and understand all the previous years' expenditure and assess whether any of these expenses will recur in the next financial year and to what extent.
The tricky aspect in budgeting is trying to assess what new, unknown expenditure is likely to occur in the next financial year. Once again, maintenance is a prime example of this problem. Budgets often either over-provide or are hopelessly short on maintenance estimates. However, despite the lack of the proverbial crystal ball, there are various investigations that could assist in assessing the ensuing year's maintenance requirements. These include: • Discussions with the trustees to understand all proposed maintenance projects for the upcoming year; • The establishment of a ten-year maintenance plan as well as the financial implications thereof; • Inspecting, assessing and recording the state of repair of the common property; and • Obtaining reliable estimates on the projected maintenance items envisaged for the ensuing year.

3.1.4 Implications of under-budgeting

Why is accurate budgeting so crucial for bodies corporate?

Body corporate budget = body corporate income and reserves.

The following implications arising from an incorrect budget should be considered.

3.1.4.1 Inactive/Non-aggressive creditors

A major issue experienced by poorly managed bodies corporate is the immense debts these sectional title schemes accumulate. How and why does this position arise?

The source of the problem can always be traced to poor budgeting. Consider a body corporate that under-budgets, which leads directly to a financial deficit for that year. A deficit position indicates that some creditors were not paid. As with any business enterprise experiencing cash problems, all available cash is directed to maintain priority services, such as electricity, water, security and the like.

After the payment of essential services, any surplus funds are directed towards aggressive creditors. Consider the local hardware supplier to the body corporate. If they are not paid timeously, complaints to the trustees and managing agent begin to stream in. This is quickly followed by legal action. As a result, this creditor is prioritised and paid from any available income.

Another creditor who gains priority is one that implements expensive costs and fees, coupled with aggressive collection actions in the event of non-payment. Although the local municipalities do implement severe interest and collection fees against any arrear accounts, the problem is that they do not always engage in any aggressive collection actions.

This tends to result in all body corporate cash shortfalls translating into the non-payment of non-aggressive creditors.

At the next AGM, the owners apply the same percentage increase or no increase, to the levies as the year before and the whole cycle begins

again. Eventually, the debts of the body corporate reach ridiculous levels as can be witnessed in many bodies' corporate currently.

Section 15 of the STSMA states:

> *"(1) (a) If a creditor of a body corporate has obtained judgement against the body corporate, and such judgement, notwithstanding the issue of a writ, remains unsatisfied, the judgement creditor may, without prejudice to any other remedy he or she may have and subject to paragraph (c), apply to the court which gave the judgement, for the joinder of the members of the body corporate in their personal capacities as joint judgement debtors in respect of the judgement debt.*
>
> *(b) Upon such joinder, the judgement creditor may recover the amount of the judgement debt still outstanding from the said members on a pro rata basis in proportion to their respective quotas or a rule made in terms of Section 10(2).*
>
> *(c) Any member of the body corporate who has paid the contributions due by him or her in terms of Section 3(1)(c) to the body corporate in respect of the same debt prior to the judgement against the body corporate may not be joined as a joint judgement debtor in respect of the judgement debt.*
>
> *(2) No debt or obligation arising from any agreement between the developer and any other person is enforceable against the body corporate."*

3.1.4.2 Special levies

Special levies are raised by the trustees, in terms of Section 3(3) and (4) of the STSMA, as and when additional income is required by the body corporate in the performance of its duties and functions.

The main concern pertaining to special levies is the owners' ability to fund these levies. Within any body corporate, the owners have various financial positions.

- Owners who are sufficiently affluent and have ample ability to pay any special levy if and when the body corporate requires it; and
- Owners who are on pension or who battle to meet normal monthly expenses. The introduction of a special levy could lead to disastrous circumstances for both this owner and the body corporate.

EXAMPLE

The pensioner example:

- The body corporate requires a special levy due to poor budgeting to pay an outstanding creditor;
- Most of the owners pay the levy, but 20% of the owners do not or cannot;
- This means the creditor of the body corporate, who is both expensive and aggressive, is then not fully repaid. As a result, the creditor continues charging the body corporate interest and penalties. In addition, the creditor institutes legal action against the body corporate to recover the outstanding debt;
- The body corporate, which has no cash, now has additional, unbudgeted expenses to pay;
- To collect the outstanding special levies, the body corporate must appoint legal representatives. These representatives must be paid throughout the collection process, whereas the recovery of the representatives' fees is only achieved once the legal debts have been taxed and are recovered. This leads to further cash-flow problems for the already cash-strapped body corporate;
- The pensioner is now being sued, with interest being added to the debt, for payment of the special levy. The pensioner could not afford the special levy, so they would certainly not be able to afford the additional interest and final legal and other collection costs as well;
- This could then lead to the pensioner's unit being placed under sale in execution (SIE); and
- In addition, the other owners need to input further levies to fund the interim cash shortfall, which could lead to more owners defaulting on their levy payments.

This is perhaps an extreme scenario, but entirely possible.

There are a number of other problems that could arise when raising special levies:

- Loss of faith in the management structures that caused the bad budget and resulted in the need for a special levy; and
- The delays experienced in implementing and collecting special levies could cause further problems. For example, if income is urgently required to fund an unexpected expense, such as a repair

to a damaged main sewer pipe in the middle of the driveway. Raising and collecting a further special levy would definitely compound the problems.

3.1.5 Presentation and explanation of the budget at the AGM

The budget is usually the most contentious prescribed item on the AGM agenda. The budget, coupled with the resultant effect on the levy for the ensuing year, have caused many heated debates.

By implementing three simple strategies, the trustees and/or managing agent can save themselves and the other members of the body corporate a lot of frustration.

3.1.5.1 Preparation of proof

In Paragraph **3.1.3.3 Justified approach**, the importance of investigating and calculating the budget was discussed and highlighted. Once again, this approach and hard work pay huge dividends when the trustees and/or the managing agent present the budget at the AGM. It is fairly easy to generate confidence and approval when sufficient rationale and information is presented in support of any proposal.

The best method of presenting a budget is to begin with the explanation and then proof of the known expenditure, such as having a copy of the current auditor account and a letter from the auditor stating the estimated increase for the ensuing year. Even the most contentious owners would experience difficultly rejecting these facts and not approving this expenditure item.

Another benefit of delivering written evidence of an expense is that it removes the trustees' involvement in the equation. Often budgets are perceived by the other owners to be the result of the opinions and attitudes of the trustees and/or the managing agent. By offering this level of evidence and transparency, the trustees and/or the managing agent are likely to gain the confidence, approval and respect of the owners.

3.1.5.2 Popularity versus need

The presentation of a valid, well-researched and convincing budget does not automatically ensure that it will gain approval from the owners. This is usually because, nine times out of ten, the result of the budget is an increase in levies and the minute you touch an owner's pocket, attitude and logic change. The old adage, "There are none so blind as those who will not see," comes into play.

The argument now turns away from rationale and motivation to finance and affordability. An owner with financial pressures is unlikely to vote in favour of any levy increase, irrespective of the sound reasoning attached thereto. Spurred on by their own financial situations, these owners often object to any proposed increase in levies and attempt to gain support from the other owners present. Once again, if the budget has been well prepared and motivated, it will be difficult for these unwilling owners to substantiate their arguments.

Regrettably, some trustees allow a quest for popularity to cloud their judgement during these confrontations. As such, they tend to allow compromises and implement lower increases than were originally calculated and recommended. As noted in Paragraph **3.1.4.2 Special levies**, for pensioners who own a unit in a sectional title scheme, but battle to meet their monthly expenses, this is a recipe for disaster which may have a negative ripple effect for all owners and should be avoided.

3.1.5.3 Profit versus need

One budget argument that is difficult to defend against cash-strapped owners relates to the 'necessary quantums' required for reserve funds. Historically, this has caused many a debate in cash-strapped bodies corporate. However, with the amendments to the STSMA and specifically Regulation 2 of the STSMA Regulations, which sets out a required formula many of these aggressive debates have been avoided. That said, some of the debate has now shifted to members not wanting to adhere to these formulas.

In some affluent bodies corporate, owners have argued that they would rather retain the extra money in their personal capacities, than form a contingency fund, on the basis that should the body corporate ever require additional income, they would be willing and able to make the necessary contributions at that time.

The flaws with this approach are as follows:
It assumes that the financial position of all members is equal. That is, all members are equally affluent, willing and able to immediately pay a special levy on demand. This is generally not the case;
It assumes a static and stable financial position for each owner. For example, even if all members were equally affluent today, who is to say this position will remain constant in a year's time when the levy contribution is required. Consider the possibility that one of the owners could have been recently retrenched, and between jobs, when the special levy is demanded. His or her ability to fund the special levy at this point is questionable; and
Maintenance is a cancer – the longer you delay maintenance, the worse it gets. Consider a ceiling panel that has been damaged by a water leak. If the required repairs are undertaken immediately, then only one panel would need replacement. However, by delaying the required repairs, it is likely that the water leak will spread to a second and perhaps even a third panel. Thus, delaying the repairs could cost the body corporate three times more.

3.1.5.4 Increasing the levy

The moment of truth has arrived, and the owners wait with bated breath for the proposed increase in levies for the ensuing year. The trustees and/or the managing agent would be well advised to prepare themselves to respond to the following responses.

If the body corporate has levy debtors

The contentions from the paying owners will be that the levy debtors must be collected before any levy increase. Owners who pay their levies are exceptionally sensitive, rightly so, to subsidising non-paying unit owners. Depending on the budget, this contention could be correct or incorrect. For example, if the levy debtors equalled the outstanding creditors, including the costs, then there would be minimal impact on the budget and they should adopt the new levy. If there are no creditors, then

in effect, the paying owners have subsidised the non-paying owners, and any further increase in levies is a further subsidisation of these owners. In this scenario, the trustees should rather expedite the collection of the arrear levies and delay the increase in levies if at all possible. Factors to additionally consider regarding levy debtors include:

- **Maintenance**: Had the levy debts been recovered, it is entirely possible, assuming no creditors, that this income could be used to offset this expense. This would result in a decrease in the levies. As such, the paying owners could object to the levy increase on this basis. However, if in fact the levy debts were equal to or less than any outstanding creditors, then this argument would not be valid. In that case, even if the debts were immediately paid, the resulting income would be needed to expunge the outstanding creditors and could not be used to reduce the maintenance expense.
- **A form of mediation**: Even if there were no creditors and assuming the body corporate had done all in its power to collect the levy debt, it is widely acknowledged that arrear levy collections are both lengthy and costly. Given that without maintenance things go from bad to worse, and more expensive, it would be in the interests of all owners if the levy increase were approved.

Opposing factions amongst owners

Often decisions within bodies corporate are governed by political reasons and not business acumen. A good example is when there are opposing factions within the same body corporate. The reasons behind the feuding owners usually range from the sublime to the ridiculous. However, no matter the reason, the result is usually that as one group puts forward a proposal, it is immediately objected to by the other group. The objection in this scenario is purely political and rarely regards the merits of the particular issue. This is clearly not the correct approach to adopt in the determination of the future levies for the body corporate.

The best course of action in this situation is to play the political game and entrench democracy. That is, put the issue to the vote. Those with the most votes win. If the majority of owners vote for a nil increase in levies, then there is not much that can be done at the AGM. In this case, other rights and options contained in the STSMA and PMRs, should be implemented to ensure the correct levels of levies. This includes approaching the CSOS.

Stability of investment

A fairly good 'ace' to employ when the trustees are experiencing difficulty in getting an increase in levies approved, is to fight fire with fire. Objections to levy increases are generally financially motivated, so the trustees should offset the negative impact of the levy increase against a positive result from the increase. Consider a R50 increase in levy per unit per month. The owners would need to pay R600 more in levies for that financial year. Most owners would incorrectly consider this R600 as lost income or at best a grudge purchase. The trustees should prove that the value of the units, under proper financial management, would increase substantially more than the increase in the levy. This action would then show the owners that they are not losing their money but rather investing it at favourable rates of return for long-term use as well as re-sale value for units within the sectional title scheme.

Affordability issues

Regrettably, in some bodies corporate, the trustees may encounter the situation where an owner just cannot afford the levies. This could be as a result of a number of reasons, for example:

- The owner has recently been retrenched;
- The owner has just been through a divorce; or
- The interest rates have increased, and an owner has over-extended themselves when purchasing their unit.

Irrespective of how valid the reasons may be, there is nothing the trustees can do to assist this owner without impacting on the other owners and the financial stability of the body corporate. Leniency and implementing the correct levies are generally mutually exclusive. I do acknowledge that this is an academic view, supported by legislation, but may not be the best approach in every case. How a body corporate could or should deviate from this approach is a tricky question. Let's consider the following. In an extremely poor body corporate, there is a budget item for garden maintenance. If by unanimous resolution the owners decided to cancel the garden service and thereby reduce their levies, then surely this is acceptable? Well, it does not adhere strictly to the legislation, but who will object? The answer may lie in the interests of the bondholders. By removing the garden service, it is likely that the value of the units would be negatively affected.

3.1.6 Tricks, traps and the law

There are a number of tricks and traps relating to body corporate budgets and levies that owners, trustees and managing agents should be aware of.

3.1.6.1 Budgets compiled by developers

In the marketing phase of a sectional title development, the developer wears two hats. On the one hand, he or she represents the seller whose goal is to sell the units as quickly and profitably as possible. A major factor in sectional title sales is the levy amount. The lower the levy, the more attractive the unit, so it is in the seller's interest to ensure the lowest

levy possible. On the other hand, as the owner of all the sections, the developer is initially the sole representative of the body corporate and, as such, should ensure that the levies are sufficient to meet all the current and future needs of the body corporate.

The result of this conflict of interests reveals itself at the second AGM of the body corporate. If the developer manages the conflict well, then the levy increase for the ensuing year will be in line with industry norms. If the conflict was poorly managed, the levy increase will be substantially more than the industry norms. The owners and the managing agent should be aware of this conflict of interests and attempt to address the issue, if necessary, at the first AGM when the initial budget will be adopted and ratified.

3.1.6.2 Timing and implementation of budgets

PMR 17(1) states that the AGM of a body corporate must be held within four months of a body corporate's financial year end.[183] Bearing in mind that the body corporate's financial statements need to be finalised before the notice for the AGM can be sent out,[184] many bodies corporate experience difficulty in meeting this deadline.

Assume that a body corporate complies with this requirement and holds their AGM four months into their new financial year. The budget adopted at the AGM will only be implemented in the fifth month of the new financial year. This means the income requirements of the new budget are already five months short of the amount of the increase. The effect of this is that a larger increase needs to be implemented, at the AGM, on the remaining seven months to compensate for the first five months. To overcome this situation in the future, trustees could make use of the provision to increase the levies at commencement of the financial year.[185]

One way to address this problem is by implementing an increase in levies at the previous AGM for the first five months leading up to the next AGM. Thus, the new budget is implemented for that financial year and an increase is approved for the first five months of the next financial year.

Whatever the decision or agreed course of action, the owners and the managing agent must be aware of this timing dilemma and manage the body corporate finances accordingly.

3.1.6.3 Increasing levies between AGMs

A minor technical point, which some bodies corporate fall foul of, is that levies cannot be raised between AGMs. The reason for this is that, at the AGM, a budget, which includes the anticipated levies, is set and approved for the ensuing financial year.

3.1.6.4 Separating fixed common costs from the levy

Some bodies corporate have identified and removed from their budgets various fixed common expenditure. For example, in some areas, the local authorities charge a fixed fee, per unit, for refuse removal. Given that the charge and benefit of this expense are not based on the PQ, some bodies corporate believe they are justified in charging each unit owner in the same manner.

Theoretically, this approach appears correct; however, technically, it is incorrect.

As noted above levies are:

- Calculated incorporating all expenditure of the body corporate; and
- Specifically, as noted in the STSMA Section 3(1)(a)(ii): "*... other local municipality charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land*".

Therefore, a body corporate must allocate all expenditure to each owner in their PQ share and not in terms of fixed costs per unit.

3.1.6.5 Trustees resolution and notification of levies

The STSMA requires that the trustees must pass a resolution indicating the value of the levies as well as at which time they shall become due and payable by the owners.[186]

PMR 25(1) states that the body corporate must notify the owners, in writing, within 14 days after the AGM of the contributions due by them and the relevant instalment payments, if applicable.[187]

The point to note, given the above requirements, is that these are defined actions required by the STSMA and PMRs to be implemented by the trustees, the absence of which could not only invalidate the levies, but also lead to other problematic consequences, at a later time.

3.1.6.6 Interest charged on arrear levies

The trustees are entitled to implement an interest charge on any unpaid levies.[188]

Once again, to ensure the validity of the interest charges, the decision and applicable rate must be resolved by the trustees either at a trustee meeting or in writing.[189] If no record exists of the decision to charge interest, and the applicable rate at that time, this could invalidate any such charges.

3.1.6.7 Insurance placement and payment

This budget item could cause a conflict of interest to arise. This is due to many managing agents either operating an internal insurance broking operation or they are given incentives by insurance companies for each policy placed by them. The best course of action in these circumstances is disclosure. The managing agent should fully disclose to the body corporate any and all benefits or relationships enjoyed as a result of the placing of the body corporate insurance.

Another consideration regarding insurance is that the insurance values of the units should include the value of the common property.

Many insurance policies exclude the value of the common property from the value of the units. Although the separation is not a problem, from an insurance point of view, it can affect mortgage bond applications.

The reason for this is that the mortgagees use the insurance values of the units in their assessment procedures. If the insurance unit value excludes the proportionate value of the common property, this could reduce the viability and extent of the home loan a potential unit owner could receive.

Another situation to monitor regarding insurance, is if there are any thatch structures on the common property. This is due to these structures being subject to special criteria and costs in insurance policies. The insurance policy requirements regarding maintenance of fire equipment and other common property facilities, must be fully understood by the trustees to obviate any repudiation of claims due to any breach thereof.

3.1.6.8 Maintenance

Many sectional title schemes are currently implementing preventative maintenance programmes. These are in addition to routine repairs and maintenance, as well as future maintenance programmes and their related requirements.

Some maintenance companies are offering fixed maintenance contracts that cover all the routine maintenance items. This enables bodies corporate to budget more accurately and reduces the risks of abnormal routine maintenance costs.

3.1.6.9 Water

Unlike electricity, water is generally not metered per unit and hence cannot be billed or recovered from the individual unit owners. However, due to the gross misuse of water and the inequality of the PQ system to recover this expense, many bodies corporate have resorted to installing individual water meters per unit. This has fairly serious short-term financial implications but more than pays for itself in the long term.

3.1.6.10 Managing agent fees

The hiring and firing of managing agents has often been a contentious issue within sectional title schemes. This is, in part, due to PMR 28 and its requirements relating to the appointment and removal of a managing agent.[190]

PMR 28(7) states that the management agreement may not endure for a period longer than three years and may be cancelled, without liability or penalty, despite any provision of the management agreement or other agreement to the contrary, by the body corporate on two months' notice, if the cancellation is first approved by a special resolution passed at a general meeting, or by the managing agent on two months' notice.[191]

PMR 28(8) states that the body corporate or trustees may by ordinary resolution cancel the management agreement in accordance with its terms or refuse to renew the management agreement when it expires.[192]

3.1.6.11 Expenditure items commonly found in a body corporate budget

The following expenditure items are commonly found in a body corporate budget.

Insurance	Refuse removal
Repairs and maintenance	Cleaning materials
Rates and taxes	Telephone and fax
Audit fees	Security
Water	Contingency
Common property electricity	Managing agent
Domestic effluent	Salaries and wages

3.2 Investments

The STSMA and PMR requirements with regard to investments are listed in the following paragraph.

3.2.1 What the STSMA and PMRs require

Section 4(g) of the STSMA states that the body corporate has the power to:

> *"Invest any moneys of the fund referred to in Section 3(1)(a)."*
>
> **PMR 21(3)(d)**[193]
> *"The body corporate may, on the authority of a written trustee resolution, invest any moneys in the reserve fund referred to in Sections 3(1)(b) of the Act in a secure investment with any institution referred to in the definition of "financial institution" in Section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990)."*
>
> **PMR 21(4)**[194]
> *"The body corporate must ensure that all money received by the body corporate is deposited to the credit of an interest-bearing bank account, in the name of the body corporate, or that is a trust account opened in terms of either the Estate Agency Affairs Act, 1976 (Act No. 112 of 1976), or the Attorneys Act, 1979 (Act No. 53 of 1979)."*
>
> **PMR 24(3)(c)**[195]
> *"The following amounts must be paid into the reserve fund: any interest earned on the investment of the money in the reserve fund."*

3.3 Body Corporate Financial Statements

The Format Requirements in terms of the Act and Rules with regard to body corporate financial statements are given below.

3.3.1 Format and requirements in terms of the Act and Rules

3.3.1.1 Requirements of the STSMA

The STSMA contains no direct requirements regarding financial statements.

3.3.1.2 Requirements of the PMRs

PMR 2(1)(c) provides that:[196]

> "*Auditor means a person accredited to perform an audit in terms of the Auditing Professions Act, 2005 (Act No. 26 of 2005).*"

PMR 16(2)(c)(ii)[197]
This requires that the agenda for the first general meeting of members must include at least a motion to approve, with or without amendment, the developer's financial statements relating to the management and administration of the scheme from the date of establishment of the body corporate to the date of notice of the first general meeting referred to in sub-rule (1).

PMR 16(2)(f)[198]
This requires that the agenda for the first general meeting of members must include a motion appointing an auditor to audit the evidence and financial statements, referred to in sub-rule (2)(c).

PMR 17(6)(j)(v)[199]
The AGM must consider the financial statements.

PMR 17(6)(j)(vi)[200]

This requires the appointment of an auditor to audit the annual financial statements, unless all the sections in the scheme are registered in the name of one person.

PMR 25(6)[201]

> *"The body corporate must in its annual financial statements account for all contributions and any other charges debited to members' accounts."*

PMR 26(1)[202]

Subparagraph (1) requires the body corporate to maintain proper books of account and records to fairly explain the financial position and transactions of the body corporate. This includes:

- A record of all its income, expenditure, assets and liabilities;
- All amounts recovered from members of the body corporate or any managing agent or other service provider acting on its behalf;
- Individual accounts in respect of each member; and
- All other information necessary to allow members to assess the body corporate's financial situation and their financial situation in regard to the body corporate.

Subparagraph (3) requires:

> "*the body corporate must ensure that all the body corporate's books of account and financial records are retained for a period of six years after completion of the transactions, acts or operations to which they relate*."[203]

PMR 26(1)(c)[204]
A body corporate must prepare annual financial statements for presentation at the AGM.

PMR 26(5)(a) to **(d)** specify in detail how, who, what and when pertaining to the audit of the body corporate's annual financial statements.[205]

3.3.2 Recommended additional monthly accounting requirements

In addition to the books and records noted in PMR 26, the trustees should also consider implementing the following accounting exercises.

3.3.2.1 Year-to-date budget analysis

To monitor the performance of the budget, the trustees should track each expense on a monthly basis. This allows trustees to ascertain what portion of the budget has been spent and what portion remains available to be spent at any point during the year.

Any shortfalls in the budget can also be quickly identified and any necessary corrective action can be timeously implemented. This information can also assist in drafting the following year's budget.

3.3.2.2 Debtors and creditors analysis

All debtors and creditors balances should be monitored monthly. Specific attention should be paid to all interest, penalties and other charges, either paid or charged as the case may be.

The recovery of the levy debtors must be strictly implemented in accordance with the approved credit control policy. Creditor repayment should be structured and timed to ensure uninterrupted provision of services to the body corporate.

If the managing agent is employed to assist in the debt collection process and paid accordingly, then the trustees must ensure that they have been registered as debt collectors in terms of the Debt Collectors Act.[206] Furthermore, all of the managing agent's actions, services and charges must comply with the conditions of this Act. It must be noted that if the managing agent only issues the levy statements and is not involved in the collection of arrear levies, then they do not have to register as a debt collector.

Credit control policies

Each body corporate must develop and approve a standard credit control policy that governs the collection of arrear levies. Components of a good credit control policy include that:

- It should be endorsed and approved by the owners at a general meeting;
- It should indicate the time allowed and procedures followed prior to the implementation of collection procedures;
- It should define and quantify all collection charges and procedures;
- It should offer the levy debtor the opportunity to reconcile their accounts with the body corporate's representatives prior to any collection actions being implemented; and
- It must be equally applied to all levy debtors.

Some prudent managing agents have even incorporated this policy into their management agreements. That is, they are authorised, in terms of their management agreement, to immediately implement the standard credit control policy without having to first obtain instructions from the trustees. This promotes the efficient and effective collection of arrear levies as well as minimises acrimonious attitudes towards the trustees, who are often blamed for implementing the credit control policy.

3.3.3 Expenditure approval and payment procedures

Many arguments arise between trustees and the managing agent when standard procedures regarding the approval and payment of expenses have not been established.

Some trustees implement a hands-on approach and, as such, want to be directly involved in the approval of all monthly expenditure prior to payment. A second approach is where the trustees approve any set of monthly expenses, such as insurance, and then allow the managing agent to pay these independently each month. These trustees then focus only on the variable expenses.

A third approach is where the trustees leave the monthly expenditure entirely in the hands of the managing agent and merely receive a report at the end of each month. This approach should be avoided as it leads to arguments after the fact. The first approach tends to be very time consuming and difficult to implement as trustees are not always available on a monthly basis to implement the necessary approvals. Thus, the second approach is generally seen as the most efficient.

3.3.4 Selection, appointment and control of sub-contractors and service providers to the body corporate

As with the collection of arrear levies, the trustees should establish a standard policy regulating the selection and appointment of sub-contractors and other service providers appointed by the body corporate.

Generally, the managing agent is tasked with the selection of potential service providers. The trustees should ensure that three written quotes are obtained before making any appointment. All three quotes should be kept on record in the event that queries are raised regarding the appointment of the service provider. If none of the quotes are satisfactory or if the trustees are aware of other similar service providers, then the managing agent should be instructed to secure additional quotes.

All appointments of service providers should be approved at duly constituted trustees' meetings and minuted accordingly. If large sums of

money are involved, the trustees should refer the quotes to a general meeting for decision-making. This should be done irrespective that a directive or restriction has not been placed on the trustees in terms of Section 7(1) of the STSMA.

The monitoring and control of service providers is generally left to the trustees, especially if the services are being rendered at the sectional title scheme. Some managing agents will supervise and control the various service providers at an additional fee. This is, however, not a given requirement of the managing agent and so the expectation should be clarified beforehand.

3.3.5 Financial statements

The financial statements are a direct indication of the financial stability and integrity within a body corporate.

Although historic in nature, the financial statements remain active information in the decision-making process of potential members in the sectional title scheme, as well as financial institutions who offer mortgage bond finance and/or who have already issued mortgage bonds in the sectional title scheme. As such, it is imperative that the trustees ensure that they accurately reflect the financial position of the body corporate as at the date of issue.

3.3.5.1 Income and expenditure statement

The main benefit of this statement, other than identifying each item of income and expenditure transacted for that financial year, is the benefits gained by comparing it to the budget as well as the previous year's statement. By analysing these comparisons, the trustees could:

- Improve the accuracy of the following year's budget;
- Identify the various financial strengths and weaknesses of the body corporate. For example, if water usage has increased dramatically, it may benefit the body corporate to consider implementing individual water meters;
- Identify wasted costs and areas where savings could be made; and
- More accurately assess and motivate the required levies for the following year.

The main item on this statement is whether a surplus or a deficit was made for that financial year. If a deficit was made, this could be the result of one or more of the following reasons:

- The budget was incorrectly calculated;
- Abnormal expenses were incurred; or
- Levy increases were not implemented or were too low.

Irrespective of the reason, a deficit position also reveals that the trustees did not remedy the income shortfall during that financial year. Thus, the deficit will need to be addressed in the new budget for the next financial year.

An interesting item to look for is if any taxation was paid. If taxation was paid, this means that the body corporate received interest or income from some investment, which is always a good sign.

3.3.5.2 Balance sheet

Body corporate balance sheets are probably the easiest to understand of all financial entities. They rarely, if ever, exceed one typed page.

Assets

Generally, a body corporate will not own any fixed assets. In exceptional circumstances, one encounters bodies corporate that own property or other fixed assets. A body corporate's current assets are mainly:

- Levy debtors;
- Cash; and
- Cash investments.

Equity and liabilities

Once again, it is rare that a body corporate will have any long-term liabilities. Perhaps if they owned property, they may have a mortgage bond. The owner's equity is generally in the form of levy surpluses, if any. The current liabilities are mainly in the form of accounts payable and taxation.

Implications of the balance sheet

Although body corporate balance sheets may be simple, their impact is far-reaching. Other than the owners within the sectional title scheme, there are two other parties who have a direct interest in the body corporate balance sheets, being the potential purchasers of units (members) in the sectional title scheme and mortgagees (bondholders).

Potential purchasers of units in the sectional title scheme

Requesting a copy of the body corporate balance sheet is a standard procedure for any prudent purchaser of sectional title property. This is due to the purchase of sectional title property not merely including the bricks and mortar of the unit but also the purchase of that body corporate's financial position. Many purchasers of sectional title units ignore this fact to their peril. In a newspaper article, a sectional title property owner was quoted as "going to lose everything" due to the debts of his body corporate.

The reason for this was that the body corporate in which he had purchased a unit, owed a huge debt to the local municipality. The trustees had not budgeted correctly or even raised a special levy to address this debt. As a result, the levy clearance certificate issued for the transfer of the unit did not take this debt into account. This meant that the owner had not only paid for his unit but now also had to pay his PQ share of the outstanding debt.

Given that a sectional title property includes the financial status of the body corporate, it follows that the financial status could affect the sales price of a unit. Considering the example above, had the purchaser known of the debt to the municipality, and understood the implications thereof, it would have been very unlikely that he would have been willing to pay the same purchase price.

Even if the balance sheets do not indicate large creditors, other factors, such as low reserves or no investment funds, can also affect value. Consider a body corporate that has low contingencies and has not recently undertaken large maintenance projects. This means that special

levies will probably have to be raised sometime in the near future. In this situation, the prudent purchaser will once again rightly use this as motivation to reduce the purchase price.

Even in the case where there are large numbers of levy debtors, the unit value could be affected. The reason for this is that the prudent purchaser would be concerned that only a portion of the owners are paying their levies, so the paying owners are subsidising the non-paying owners. In addition, when some owners do not pay their levies, this leads to income shortfalls that must be addressed by special levies. The result is that the scheme becomes less attractive and thus potential purchasers either require a discount to compensate for this problem or worse, choose to purchase elsewhere.

Mortgagees (bondholders)

Other entities that monitor the financial performance of bodies corporate are the financial institutions that provide mortgage bonds to sectional title schemes. It has become common practice for mortgagees to call for copies of the body corporate balance sheets as part of their application procedure. However, in the past, potential purchasers merely wanted to confirm that the body corporate was in a solvent position, i.e. that the body corporate's liabilities did not exceed their assets.

This position has now changed for prudent purchasers, and they now analyse any debtor and creditor balances as well. This is due to these balances also having the potential to negatively impact the potential purchaser.

If the mortgagee was to attach the owner's unit to repay the bond, any and all outstanding levies would first have to be settled before the bond is repaid. As such, the mortgagees are becoming more and more concerned with bodies corporate whose balance sheets indicate large debtor or creditor balances.

In addition, it is not only the granting of new home loans that is at stake, but also whether the financial institution has already granted bonds in that sectional title scheme. If so, their bond agreements allow them to reduce their bonds in line with any reduction in the valuation of

the unit. This would mean that the mortgagor would have to immediately refund the difference if required by the mortgagee.

Auditors report

This is a fairly standard document and generally states:

- That the financial statements remain the responsibility of the body corporate trustees;
- That the scope of the audit was in accordance with South African Auditing standards;
- That, in their opinion, the financial statements fairly present, in all material respects, the financial position of the body corporate for the stated period in accordance with generally accepted accounting practice; and
- If there are any qualifications or concerns regarding the above.

4 Executive Managing Agents

4.1 What is an Executive Managing Agent?

The role of an executive managing agent (EMA) was introduced in October 2016 when the STSMA[207] came into effect.

PMR 2(1)(g) of the STSMA Regulations defines an **executive managing agent** as a managing agent who has been appointed to carry out all the functions and powers of the trustees, in terms of PMR 28. The definition, duties and functions of an EMA, as set out in the STSMA Regulations makes it apparent that an EMA's roles and responsibilities go beyond those of a traditional managing agent.

An EMA steps into the shoes of the trustees and deals with the day-to-day decision-making of the body corporate, and is ultimately both the administrative and executive arm of the body corporate.[208]

PMR 28 deals with the appointment, duties and obligations as well as the termination of an EMA.[209]

4.2 Appointment of an Executive Managing Agent

PMR 28 deals with the manner in which a body corporate can appoint an EMA and provides a body corporate with two ways in which it may proceed with such an appointment, for an EMA to take over the functions and powers of the trustees.

4.2.1 Appointment by special resolution

PMR 28(1) states that a body corporate may, by special resolution, appoint an EMA to perform the functions and exercise the powers that would otherwise be performed and exercised by trustees.

In order to obtain a special resolution to appoint an EMA, the body corporate must give consideration to the definition of a special resolution.

In terms of the STSMA, **a special resolution** means a resolution:

a. Passed by at least 75% calculated both in value and in number, of the votes of the members of a body corporate who are represented at a general meeting; or
b. Agreed to in writing by members of a body corporate holding at least 75% calculated both in value and in number, of all the votes.[210]

The body corporate will therefore need to call a general meeting, giving the members adequate notice.[211] Such a notice should include the special resolution to be considered and voted on, to appoint an EMA.

In addition to the requirement to obtain a special resolution, the body corporate must further consider all relevant requirements for a successful meeting including a quorum[212] and voting.[213]

4.2.2 Appointment by the Community Schemes Ombud Service

Should the body corporate be unsuccessful in obtaining a special resolution, in terms of PMR 28(1), or should they wish to take an alternative

route, the STSMA Regulations provide the body corporate with an option to apply to the CSOS for the appointment of an EMA.[214]

The requirement to make such an application is contained in PMR 28(2) which states that the members, entitled to 25% of the total PQs of all sections, may apply to the CSOS for the appointment of an EMA.

Such an order by the CSOS will take effect immediately and therefore the application to the CSOS should include the proposed management agreement with the person/company prepared to accept the appointment as the EMA.[215]

Upon successfully obtaining a special resolution or an order from the CSOS, for the appointment of an EMA, the body corporate must proceed to enter into a management agreement with the respective EMA. The requirements for such a management agreement are discussed in Paragraph 4.3.

4.3 Executive Managing Agent Agreement, Term and Termination

On appointment of an EMA, the body corporate would enter into a management agreement with the EMA. The management agreement must comply with the requirements as may be set out in the STSMA Regulations.[216]

The management agreement must set out the scope of the EMA's mandate and include details such as the remuneration payable by the body corporate to the EMA in respect of the services provided. There is no set remuneration fee and therefore the amount is dependent on and agreed between the EMA and the body corporate.

Considering the EMA's fiduciary obligation, to the members of the body corporate, it will be beneficial to include the details of the EMA's professional indemnity insurance.

The STSMA Regulations state that a management agreement may not endure for a period longer than three years, and may be cancelled, without liability or penalty, despite any provision of the management agreement or other agreement to the contrary:

a. By the body corporate on two months' notice, if the cancellation is first approved by a special resolution passed at a general meeting; or
b. By the managing agent on two months' notice.[217]

In addition, the trustees or the body corporate may, by ordinary resolution, cancel the management agreement in accordance with its terms or refuse to renew the management agreement when it expires.[218]

Within ten days following the cancellation of the management agreement, the EMA must hand over all accounting books and records of the body corporate in their possession or control. These records must be in writing or in a form that can be easily converted to writing.[219]

4.4 Duties and Functions of an Executive Managing Agent

Table 16 Duties and functions of an EMA

PMR 28(3) sets out the duties and functions in terms of which an EMA:
Is subject to all the duties and obligations of a trustee under the STSMA and the rules of the body corporate;
Is obliged to manage the body corporate with the required professional level of skill and care;
Is liable for any loss suffered by the body corporate as a result of not applying such skill and care; and
Has a fiduciary obligation to every member of the body corporate.

An EMA is further required to arrange for the inspection of the common property, at least every six months, and must report to the members on the administration of the body corporate at least every four months.[220]

4.5 Reporting Responsibilities of an Executive Managing Agent

One of the responsibilities of an EMA is to provide the members of the body corporate with a report on the administration thereof, at least every four months.[221] Table 17 lists the minimum requirements for inclusion in the EMA reports.

Table 17 PMR 28(4) minimum requirements for inclusion in the EMA reports

The proposed repairs to and maintenance of the common property and assets of the body corporate, within the next four months;
Matters the EMA considers relevant to the condition of the common property and the assets of the body corporate;
The balance of each of the administrative and reserve funds of the body corporate, on the date of the report, as well as a reconciliation statement for each fund; and
For the period since the appointment of the EMA or from the date of the last report: a. The expenses of the body corporate, including repair, maintenance and replacement costs; and b. A brief description of the date and nature of all decisions made by the EMA.[222]

4.6 Difference between an Administrator, the Trustees and a Managing Agent

4.6.1 Administrator

There are several differences between the appointment, duties and obligations as well as the remuneration and termination of an EMA and those of an administrator.

Section 16 of the STSMA states who may make an application to a Magistrate's Court for the appointment of a suitably qualified and independent person to serve as the administrator of the body corporate.[223] When faced with such an application, the Magistrate's Court may place a body corporate under administration if it finds evidence of serious financial or administrative mismanagement, as well as a reasonable probability that an administrator would be able to assist the body corporate to meet its obligations and be managed in terms of the legislative requirements.[224]

An administrator's duties and powers will be contained in the Magistrate's Court order and will be exercised to the exclusion of the body corporate.[225] The administrator may therefore decide to implement increased levies, raise special levies and enforce rules, amongst other things, without having to involve the members of the body corporate.

In contrast, an EMA's powers and duties are subject to any restrictions and directions imposed by the members of the body corporate, as well as the provisions of the STSMA and body corporate rules.

Like an EMA, an appointed administrator also has reporting responsibilities. Although the required report is similar in nature to that of an EMA, an administrator's reporting obligation is only to the CSOS,[226] unlike an EMA who is obligated to report to all members of the body corporate.[227]

Only the Magistrate's Court can decide on the fees that may be charged by the administrator during his/her term. The fees will be included

in the Magistrates' Court order and will be payable by all members of the body corporate apportioned in terms of PQ of their sections.

Lastly, in terms of Section 16(5)(a) of the STSMA, an administrator's term is set out in the respective Magistrate's Court order and can only be terminated following the lapse of time or by the Magistrate's Court itself. Similarly, the Magistrate's Court may, on application, extend the term of the administrator's appointment, amend the terms of the appointment and make an order for the payment of costs.[228]

4.6.2 Trustees

The appointment, election and replacement of trustees is set out in PMR 7, and is different to the process to be followed by a body corporate for the appointment of an EMA.

As discussed, an EMA steps into the shoes of and takes over the duties and responsibilities of the trustees – as a result, the appointment of trustees may not be necessary.[229] However, circumstances may arise in which the EMA's appointment includes restrictions on what aspects of the body corporate's administration, finances and management the EMA must oversee and control. In this event, the body corporate may elect to appoint a board of trustees to oversee and manage the functions and duties that have been specifically excluded in the management agreement.

The duties and obligations of trustees, as per the relevant legislation, are the same as those duties and obligations of an EMA.[230] Both an EMA and the trustees must act in good faith and in the interest and for the benefit of the body corporate. The difference in the fiduciary positions lies in the fact that the trustees have a fiduciary responsibility towards the body corporate, whereas the EMA's fiduciary obligation is to every member of the body corporate. Furthermore, unlike trustees, an EMA is not afforded the statutory indemnification afforded to trustees, against all costs, losses and expenses which may arise as a result of an official act that is not in breach of their fiduciary obligations,[231] and an EMA is therefore liable to the body corporate for any such loss.

An EMA's remuneration is in the sole discretion of the parties to the management agreement. In the case of trustee remuneration, the body

corporate needs to reimburse them only for disbursements and expenses actually and reasonably incurred while carrying out their duties as a trustee, unless the trustee is:

- A member of the body corporate and is granted remuneration if determined so by a special resolution; or
- Not a member of the body corporate, and his/her remuneration has been approved by a resolution of the body corporate, as part of the administrative fund budget.[232]

Unlike an EMA who can be appointed by a body corporate in terms of PMR 28, trustees are elected at the first AGM and then at each subsequent AGM.[233] Consequently, a person ceases to be a trustee at each AGM and can only regain his/her position as a trustee if nominated and elected for the position for the upcoming year.

4.6.3 Managing agent

By definition, an EMA is not the same as a managing agent, which is defined as any person who provides a body corporate with management services, whether monetary or otherwise, including any person who is employed to render such services.[234]

The STSMA Regulations allow for a body corporate to appoint a managing agent to perform specified financial, secretarial, administrative and management services, under the supervision of the trustees.[235]

When appointing an EMA, the body corporate may choose to appoint a separate managing agent, in which event the two will perform separate functions, as if there were a board of trustees and a managing agent.

Because the EMA takes over the roles and functions of the trustees, the managing agent will take instructions from and report to the EMA. The EMA will therefore work very closely with the managing agent and a good, cooperative and trusting relationship is therefore of vital importance.

However, it is not necessary for a separate managing agent to be appointed as the EMA is allowed to perform the functions of a managing agent as well. That said, certain circumstances may call for these services to be provided by different parties.

4.7 When to Appoint an Executive Managing Agent

When a body corporate is in financial difficulty and/or when members find themselves in a body corporate where there is no one willing to accept and take on the responsibilities of a trustee, the appointment of an EMA may be the quickest and most cost-effective solution.

Each member of a body corporate should want to protect their investment and ensure that the body corporate is administered and managed in an effective and efficient manner.

When considering an EMA, a body corporate must perform a due diligence to ensure that it chooses a professional and experienced EMA who can add value and assist the body corporate to function successfully in terms of the legislation.

A body corporate may consider applying to a Magistrate's Court to be placed under administration but appointing an EMA can be an easier, less expensive and smoother process than that. Taking into consideration the differences between an administrator and an EMA in Paragraph 4.6.1, it is evident that an EMA provides members with an opportunity to be part of the decisions and to be aware of actions taken by the EMA.

When appointing an EMA, a body corporate may be faced with certain challenges, as illustrated in Table 18.

Table 18 Challenges a body corporate may face when appointing an EMA

Choosing and appointing an expert, knowledgeable EMA with the resources and capacity to perform the required role;
Ensuring the EMA has an FFC and professional indemnity insurance, as the STSMA does not provide an EMA with the indemnity provided to conventional trustees; and
Obtaining a special resolution, or alternatively the support of members, entitled to 25% of the total PQs of all sections, to approach the CSOS for the appointment of an EMA.

Despite these potential obstacles, the appointment of an EMA can add value to a body corporate that is faced with financial distress or with no owners willing to spend the time and accept the duties and responsibilities of trustees. Table 19 illustrates how an EMA can safeguard each member's property investment, and Table 20 gives further advantages of appointing an EMA.

Table 19 How an EMA can safeguard each member's property investment

The body corporate will be managed and administered in an effective and diligent manner, which ensures good governance, legislative compliance, effective management and planning;
The EMA has an obligation to inspect the common property and must ensure that proposed repairs and maintenance are performed within the budget of the body corporate; and
The reporting obligations provide transparency to all members.

Table 20 Further advantages of appointing an EMA

The members do not give over full control to the EMA and may place certain restrictions on the EMA's duties and obligations;
It is faster and less expensive than the appointment of an administrator;
A management agreement may be terminated in terms of the STSMA, and the body corporate is therefore not bound by a specific term set out in a court order, as is the case with an administrator; and
It eliminates the potential personal liability of individual trustees who may not have the expertise and capacity to manage the body corporate with skill and care.

4.8 The CSOS: Panel of Executive Managing Agents

The CSOS has found that many bodies corporate who wish to appoint an EMA, do not know who to consider for the appointment. The CSOS therefore formulated a panel of EMAs from a list of interested managing agents who applied to be placed on the panel.

This panel list was therefore created to assist bodies corporate in considering and choosing potential EMAs and is not an exhaustive list of potential EMAs.[236] The CSOS trained and educated all the current panellists regarding their roles and responsibilities towards a body corporate.

It remains in the body corporate's discretion to appoint an EMA they deem to be experienced, professional and capable of administering and managing the body corporate in an effective and efficient manner.

It is important for an EMA to ensure that he or she has the knowledge, experience and capacity to take on the responsibilities of an EMA. The EMA must be registered as a managing agent, obtain an FFC and have professional indemnity insurance cover due to his or her fiduciary duty towards the body corporate, for which he or she has been appointed, to administer and manage.

4.9 Property Practitioners Act: Code of Conduct

In addition to the duties and functions as set out in the STSMA,[237] an EMA must adhere to and comply with the Code of Conduct of Property Practitioners[238] which is contained in the PPA.[239]

For more information on the responsibilities and duties set out in the PPA, refer to Chapter 1 of this guide.

5 Sectional Title Scheme Rehabilitation

According to the various deeds registries, there are currently approximately 75 000 registered sectional title body corporate schemes throughout South Africa.

Studies undertaken by TRACS, Sectional Title Solutions (Pty) Ltd, as well as press articles and reports from sectional title managing agents, all indicate that a growing number of these schemes are experiencing severe financial and/or managerial difficulties. Some of the reasons for these difficulties are detailed below.

5.1 Lack of Sectional Title Ownership Knowledge

The day-to-day affairs of a sectional title body corporate are controlled by the trustees and the managing agent, if one has been appointed. But the STA, STSMA and the CSOSA and their Regulations, most notably the PMRs and PCRs do not require a trustee to possess any set of defined sectional title knowledge, expertise or experience. A trustee need not even own a section in the sectional title scheme. Thus, it is possible that a person who has never owned a sectional title unit, has no sectional title knowledge, expertise or experience, and no business skill can be elected as a trustee. It is entirely possible that this individual may be one of a group of other people, the others as inexperienced as the first (the trustees), who could be in control and manage the affairs of a body corporate that operates a budget of more than a few million rand per year.

The financial principles of a body corporate are generally the same as any commercial business, and as with any business, if they are not correctly managed and controlled the business will fail.

5.2 Non-adherence to Legislations

Given the crime statistics in South Africa, it is fairly apparent that many South Africans tend to display a relaxed attitude to obeying laws. Consider the enormous number of traffic violations currently prevalent on South African roads. The next public transport vehicle we see obeying the traffic laws, will be the first!

Unfortunately, this lawless attitude has also found its way into sectional title schemes, despite the provisions of the sectional title legislation which clearly regulate who, what, when and how the body corporate should conduct its affairs. These provisions tend to be blatantly ignored and breached.

5.3 Examples

EXAMPLE

Implementation of a Deficit Budget

One of the prescribed items on the AGM agenda of a body corporate is the consideration and approval of the budget,[240] which in turn, with the PQs,[241] determine the levies for each section for the ensuing year.

Section 3(1)(c) of the STSMA clearly requires that a body corporate **must** raise sufficient funds to meet all expenditure for the financial year. In addition, Section 3(1)(b) provides further that the budget must include a provision for reserves.[242]

Sounds simple enough, but in reality, owners often fail to adequately increase their levies, on an annual basis, to meet inflationary pressures on body corporate expenditure. Not only do these owners completely disregard the legal obligations required by the STSMA and PMRs but by so doing, place their body corporate in serious financial jeopardy.

EXAMPLE

Holding of the AGM Timeously

Another simple requirement contained in PMR 17(1) is that the body corporate must hold their AGM within four months after their financial year end.[243] As simple as this seems, numerous bodies corporate fail to comply with this requirement.

The two examples noted above are not serious contraventions; however, they clearly illustrate that very little cognisance is given to the details and requirements of the various Acts and PMRs within sectional title schemes to ensure the correct and sustainable management of the scheme to the benefit of all owners.

A major contributing factor to these lawless actions is that while trustees have fiduciary obligations,[244] there is very little accountability. In the examples given above, this is despite having breached the various requirements of the various Acts and PMRs, none of the trustees, managing agents and or owners will generally incur any punishment or penalties whatsoever.

5.4 Rampant Non-payment of Levies

Non-payment of levies, specifically in lower-income sectional title schemes, is often linked to a lack of sectional title knowledge. Many levy-defaulting owners claim that when they purchased their sectional title unit they were advised, and made fully aware, of the required bond repayments, but were not advised of, nor did they know about, levy payments.

As true as this statement may be, it must be clearly understood that the percentage of these 'non-advised' defaulting owners is insignificant compared to those who willingly and knowingly do not pay their levies. Two main groups emerge amongst owners who willingly and knowingly do not pay their levies:

5.4.1 Property investors

These are owners who do not occupy their units and rent them to tenants for investment purposes. Having collected the rental, these owners simply fail to pay their levies to maximise their returns. In essence, these owners are using the body corporate and its facilities to make money at the financial detriment of their co-owners.

This levy non-payment scenario is often encountered with units that have been purchased at a sale-in-execution auction. Any investor can sign the sale agreement at the auction and tender a small deposit to secure the transaction. From the date of the auction, the investor is given full occupation of the property and, as such, immediately places a tenant in the unit. The investor is then required, within a specified time, to forward the balance of the purchase price or suitable guarantees and to sign the necessary transfer documentation. It is at this point that the problems begin as the investor may now deploy delaying tactics and delay the registration process for as long as possible. Eventually, after lengthy delays and much dispute, the sheriff is forced to cancel the sale. Now the bigger problem emerges as:

- During this entire time the investor has collected all rental payments made by the tenant but has paid no levies to the body corporate.

- Even after the sale has been cancelled the investor's tenant remains in occupation, which illegal occupation and required eviction now become the problem of the new purchaser. Sale-in-execution auctions do not guarantee vacant occupation. The new owner, being a law-abiding citizen, now has a long and expensive road ahead to achieve the necessary eviction of the investor's tenant. All the while, the investor's tenant remains in occupation and continues paying him the rental. Unfortunately, the above process has been identified by unscrupulous entities as an opportunity to make easy money and, as such, can be found to exist at property sale-in-execution auctions throughout the country.
- If this is now combined with owners who may be experiencing cash-flow issues or having their own reasons for not paying their levies, this can result in severe cash flow problems for the body corporate and may lead to the financial failure of the body corporate.

5.4.2 Disgruntled owners

These include:

- Owners who believe that if other owners do not pay their levies, why should they? Why should the paying owners continue to subsidise the financial shortfall resulting from the non-paying owners? This then leads to the paying owners joining the non-paying 'band-wagon' forcing the body corporate into further financial distress.
- Owners who have unresolved queries on their accounts and refuse to make payment until their queries have been resolved.
- Owners who see no value, or do not understand the value, in paying their levies. For example, some of the services to the scheme may need to be terminated or stalled, such as security or even electricity.

No matter what the reason is for levies not being paid, levies are the life-blood of all bodies corporate and the non-payment and/or subsequent non-collection of levies are by far the single greatest factor in financially distressed bodies corporate.

5.4.3 Apathy of owners

There is a widespread perception amongst owners of sectional title properties that once they close their front door anything that happens on the other side of that door is someone else's problem. A major indication of owner apathy can be gauged by the attendance at body corporate general meetings. Bodies corporate frequently experience difficulty in obtaining the necessary quorums at their general meetings. This problem has been exacerbated by new legislation limiting the number of proxies to two per person.[245]

Non-attendance of owners at the AGM negatively impacts on the stability and viability of the body corporate as the strategic, financial and managerial future of the body corporate is left to a small group of individuals with no contribution from the balance of the unit owners. This is just bad news and worse news is to follow.

Assume, in a perfect situation, that despite the lack of a quorum and having postponed the meeting, as required by the various Acts and PMRs, the few owners present at the adjourned meeting do in fact make the correct decisions. No harm done, right? Not necessarily, because as with any decision taken by a few, which impacts on the many, this often leads to implementation problems. The reasons for this are:

- The majority of owners who were not present at the AGM are not likely to read the minutes of the meeting either. This means they will not understand the rationale or reasoning behind the decisions taken and are likely to oppose the implementation; and
- Having not given their input or consent to the decisions taken, owners who did not attend the meeting will feel excluded and powerless and will not generally support or abide by the meeting's decisions.

Assume that the small number of members present allow their decisions to be influenced by their personal attitudes, or worse still, personal gain. In that event, the likelihood of the decisions being in the best interests of all the members of the body corporate is very unlikely.

Owner apathy not only affects attendance and decisions taken at general meetings. Unfortunately, it also extends to owners' willingness to serve as trustees. Serving as a trustee is often considered to be an unpaid, thankless task that carries fiduciary responsibilities, and in extreme

cases can potentially render the trustee personally liable for various acts or omissions during their term of office as a trustee. This problem is further exacerbated within financially distressed bodies corporate as the trustees are often required to make difficult and unpopular decisions to financially rehabilitate the scheme. These decisions can include tough debt collection measures.

Even within stable and functioning bodies corporate, owners are generally unwilling to participate in body corporate affairs for fear of conflict with their neighbours. The end result of this apathy is that bodies corporate often find themselves with trustees who are not equipped with the necessary skills and abilities to execute their functions and duties as prescribed by the various Acts and PMRs. Worse still, is where the only unit owners serving, or willing to serve, as trustees are those who have hidden personal agendas and/or are enjoying a direct or indirect financial gain despite this being a breach of their fiduciary duties.

5.5 Levels of Scheme Distress and Key Performance Indicators

Having considered a few of the reasons why and how sectional title schemes fall into distress, it is important to understand that the definition of a 'distressed scheme' is any sectional title scheme that does not comply fully with the sectional title legislation. The question now arises as to whether there are different levels of distress. For example, is a body corporate that is financially insolvent more or less distressed than a body corporate that has not conducted an AGM for the past three years?

The answer to this question is much like testing for pregnancy. That is, either you are pregnant, or you are not. You cannot be half or partially pregnant. Applying this to a sectional title scheme means either the sectional title scheme is in distress, or it is not. Clearly this approach is somewhat idealistic and not very practical, and we venture that, based on the above, every sectional title scheme in the country would be in distress. It would be prudent to form some understanding of the key performance indicators affecting sectional title schemes and how these indicators could be used to denote various levels of sectional title scheme distress.

5.5.1 Key performance indicators for bodies corporate in financial/managerial distress

Figure 1 lists the key performance indicators for bodies corporate in financial/managerial distress.

Figure 1 Key performance indicators

1. **Insurance**
   The body corporate must have placed and paid for the relevant insurance as stipulated in Section 3(1)(h) of the STSMA and PMRs 3 and 23 of the STSMA Regulations.

2. **Annual general meeting (AGM)**
   The body corporate must have held their AGM in terms of PMR 17(1).[246] Minutes of these meetings must be produced and made available to owners.

3. **Audit**
   The body corporate must ensure that the financial statements have been audited in terms of PMR 26(5) and made available to all owners.[247]

4. **Body corporate creditors**
   No body corporate creditor must have resorted to legal action to recover any outstanding debts.

5. **Levy debtors**
   The body corporate must have implemented a defined and recorded credit control policy and collection process against any owner who is in arrears with their levies. These policies and processes must be implemented timeously and uniformly amongst all levy debtors.

6. **Trustees**
   There must be at least two trustees, correctly appointed,[248] in office at all times.

7. **Budget**
   An annual budget must have been drafted, presented at the AGM and approved for that financial year, as required by PMR 17(6)(j)(iv).[249]

8. **Levy billing/collection**
   The levies for the current financial year must have been formulated, approved, correctly implemented, billed and collected.[250]

9. **Essential services**
   There must not have been any disruption, for any reason attributable to the body corporate, to any of the essential services, such as the supply of water and electricity, lift maintenance and so on.

10 **Common property**
No portion of the common property must present a health or injury hazard.

11 **Participation quotas (PQs)**
The body corporate must have implemented the PQs as prescribed.[251]

12 **Body corporate records**
The body corporate must ensure that the following records have been compiled and are accessible to all owners:[252]

- Minutes of all general and trustees' meetings including all special and unanimous resolutions taken;
- Any and all CSOS approved management and conduct rules, as well as ensuring the implementation of these rules;
- A register containing the details of all registered owners in the scheme;
- A copy of the sectional plans as well as confirmation of the integrity and validity of these plans. This is done to ensure that no alterations, extensions or amendments to the sections, common property and/or exclusive use areas have been made that have not been correctly recorded on these plans;
- Previous financial statements and records for the past six years, including the levies due by each owner to ensure the accurate and timeous issuing of levy clearance certificates; and
- Confirmation and record of the body corporate service address (*"domicilium citandi et executandi"*).[253]

13 **Credit control policy**
Establishment and confirmation of a uniform **credit control policy** and implementation thereof.

14 **Trustee meetings and duties**

- The correct convening and holding of trustees' meetings in accordance with the STSMA and the PMRs;
- Ensuring that the remaining powers and the duties of the body corporate and trustees have been correctly implemented and executed.[254]

15 **Ten-year maintenance plan**
The compilation and implementation of a **ten-year maintenance plan** for the scheme as well as the resultant financial implications thereof.

16 **Appointment of a managing agent**
Irrespective of the size, nature, financial stability or intellectual, management or administration ability of owners, in our view all sectional title schemes should appoint a professional managing agent to manage their body corporate affairs. This may appear extreme; however, even in the case of a two-unit sectional title scheme, it is our view that even if the managing agent has a significantly truncated appointment for marginal fees, they should be appointed.

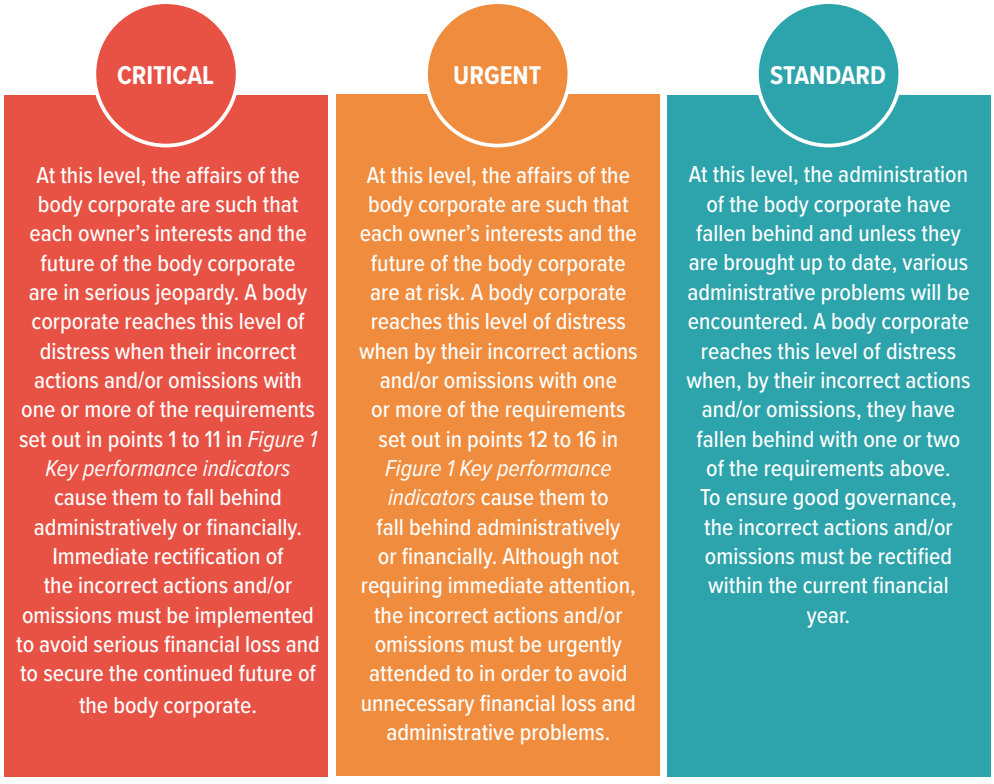
Experience has shown that no matter how diligent or experienced the owners or trustees are, sooner or later the administration of self-managed schemes breaks down.

The main reasons for the breakdown are:
- Internal conflict between owners;
- Apathy of owners to be involved in body corporate matters; or
- Involved and diligent owners who sell their units and leave the scheme are generally replaced by less diligent or caring owners.

5.5.2 Levels of administrative distress in body corporate schemes

In broad terms, the key performance indicators can be used to divide distressed bodies corporate into three levels, as illustrated in Figure 2.

Figure 2 Levels of administrative distress



5.5.3 Summary

Having identified some of the key performance indicators applicable to sectional title schemes and using these to differentiate between levels of administrative/financial distress experienced by sectional title schemes, one concern remains.

Consider the following example:

EXAMPLE

Body corporate A has not held an AGM for the past three years. However, due to the diligent efforts of their managing agent, the financial and administrative affairs of the body corporate appear stable. Experience has shown that such a body corporate could continue along this path for many more years without dire consequences.

The question is, "Why would this body corporate be considered to be in a **critical level** of distress?" Experience has also shown that a body corporate's failure to adhere strictly to the various Acts and PMRs becomes a problem sooner or later.

Consider a practical example involving the above scenario:

An owner innocently queries his levy account on the basis that his levy is greater than his neighbour's levy, who owns an identical unit. Investigation into the matter reveals that:

- Three years ago, when the last AGM was held, the insurance replacement schedules presented at the AGM had indicated that his section's PQ differed to that of his neighbour's; and
- The PQ contained in the insurance schedules had been used by the managing agent to calculate the levies.

Having engaged the services of an attorney to defend the legal action against him for arrear levies, it is discovered that a typing error had occurred in the drafting of the insurance replacement schedule and that, according to the current sectional plans, his section's PQ is in fact the same as his neighbour's. Thus, the body corporate had in fact overcharged the unit owner for the past three years.

The consequences are now as follows:

- The overcharged levies must be refunded immediately;
- The legal fees of the owner, to defend the arrear levy claim, are to be paid by the body corporate plus their own legal fees need to be paid;
- All interest and collection charges are also to be refunded;
- The above refunds now cause a cash flow shortage and creditors are not paid.

To correct this situation the body corporate must raise a special levy:

- The special levy places an unexpected financial burden on the unit owners, some of whom cannot afford the special levy and hence fall into arrears; and
- The non-payment of the special levy results in various creditors not being paid in full and, as such, they resort to legal action against the body corporate to recover the outstanding claims.

To add insult to injury, an already cash-strapped body corporate must now:

- Engage legal representation to manage the legal action against them; and
- Institute legal action against the owners in arrears to recover the balance of the special levy to repay the creditors – none of which the body corporate can afford to implement.

The body corporate now enters an ever-declining spiral which, if left unchecked, could result in dire consequences for all the owners in that sectional title scheme. This example highlights that what many may have considered to be a functioning body corporate, was in reality a nightmare waiting to be revealed.

This is an extreme example with many assumptions being made. However, it offers a clear indication that it just takes one omission or bad action to plunge a body corporate into administrative distress. As such, a body corporate which does not **fully** comply with the various Acts and PMRs can be viewed as a ticking time bomb waiting to explode.

5.6 Establishing a Foundation

Before the rehabilitation of a body corporate can commence, it is vital to establish a secure foundation from which to launch the required processes and procedures. Failure to do so could result in either:

- A 'crisis management' situation within the body corporate; or
- A non-sustainable rehabilitation resulting in an unstable body corporate that could, at any time, fall back into administrative distress.

To build this foundation, the body corporate must ensure that all the records of the body corporate have been obtained or reconstructed, if necessary.

5.6.1 Body corporate records

5.6.1.1 General meetings and trustee meeting minutes

This assumes that a neat and complete minute book is available on the takeover of the body corporate affairs. Within administratively distressed bodies corporate this is not usually the case. Table 21 illustrates the procedure for retrieving the minutes of meetings.

Table 21 Procedure for retrieving minutes

Ensure that the previous managing agent, if there was one, is not withholding any documentation. If not, then enquire if they have copies of the minutes as part of their other records or correspondence with owners. If the previous managing agent cannot produce any minutes, then the body corporate must approach the unit owners.
Send a circular to the unit owners enquiring if any of them have kept copies of any minutes as part of their personal records.
Contact the auditor and enquire if they have any minutes as part of their records.
Contact the body corporate attorneys, if any, and enquire if any copies of the minutes form part of any collection or other legal actions taken or as ancillary documentation within their records.
Contact the various mortgagees holding bonds over any of the units and request any copies of the minutes they may have as part of their records. This could prove to be a successful contact, especially if any of the mortgagees had notified the body corporate of their interests and by so doing would have required the body corporate to furnish them with the minutes.
If the above actions yield no minutes, then it would be prudent for the trustees to draw this to the attention of all the unit owners and to establish a new minute book from that date.

5.6.1.2 Financial statements

All previous financial statements, going back six years should be obtained. In the absence of this information, the actions noted above should be followed with emphasis being placed on the current and previous auditors.

In addition to the financial statements, the trustees must secure any and all monthly financial records pertaining to the body corporate. This includes all the current monthly income and expenditure accounts as well as source documentation.

In the absence of current monthly or annual financial information, the current auditor of the body corporate should be notified, and their assistance gained to reconstruct the financial affairs of the body corporate from the last audited accounts and/or the body corporate bank statements.

5.6.1.3 Bank accounts

The same steps given in 5.6.1 should be implemented here. In addition, any and all changes in signatories, if necessary, must also be implemented.

5.6.1.4 Budgets

The trustees should obtain the last year's budget. It would not be necessary to go back more than a year, as budgets prior to this would yield outdated financial information. In addition, the financial statements would contain actual financial data for earlier periods. It is more important that the trustees ensure that they have a current budget on which the current levies are being raised and collected.

In the absence of a current budget, the trustees would immediately draft a budget, based on the current expenditure and required income. Any additional income required would be implemented by way of a special levy. An SGM should be called to have the budget approved in the interim.

5.6.2 Debtors and creditors accounts

5.6.2.1 Debtors

It is vital that the trustees gain an understanding of all the debtors. It is not enough to provide balances only, as these can be queried and contested. Without the relevant historic data, there would be no proof of their validity. This would negatively impact on any attempt to recover these debts. To avoid this scenario, the trustees should do everything in their power to collect any and all data pertaining to the debtors considering levy arrears only. If no information exists on the outstanding balances, then the trustees should:

- Immediately convene a general meeting at which this position is made known to the members and a collection policy and process is agreed;
- Instruct the current auditors to begin reconstructing the levy accounts from all available records; and
- Follow the steps noted in 5.6.1 to reconstruct the accounts.

5.6.2.2 Creditors

At this point, the priority is identification, not repayment. The trustees must ensure that all creditors have been identified, contacted and notified of the body corporate details. In the absence of any creditor information, the trustees must begin by identifying all services being rendered to the body corporate. They should then:

- Implement the steps noted in 5.6.1; and
- Maintain ongoing contact with the holder of the previous *domicilium* address for the body corporate to check for any legal notices or correspondence from creditors.

5.6.3 Management and conduct rules

The management and conduct rules form the cornerstone for the management of the body corporate and as these may have been amended, a body corporate in administrative distress may not conform to the standard

management and conduct rules contained in Annexures 1 and 2 of the STSMA Regulations. The trustees must ensure that they are in possession of a copy of the latest rules, which can be obtained from the CSOS and/or the relevant deeds registry where the scheme was established prior to the STSMA. The trustees should then confirm if there have been any amendments from the standard rules.

When the CSOS records are not complete, the body corporate must ensure that all the rules of the body corporate have been obtained or reconstructed, if necessary.

If no records of the rules can be traced, then the trustees should assume that the PMRs apply to the sectional title scheme and have not been altered. If the trustees consider that amendments to the standard rules are necessary for the proper management of the scheme, they should propose these and convene an SGM to allow owners to vote for the required amendments, with any changes that the owners agree.

5.6.4 Sectional title plans

To understand the extent and content of the common property, the PQs and any registered exclusive use areas (EUAs), the trustees must obtain a copy of the latest sectional plans. These can be obtained from the Surveyor-General's office.

However, in the unlikely event that the sectional plans are indeed unavailable, the trustees should contact the land surveyor and/or architect who prepared the plans to obtain the latest copies in their records. It would also be advisable to attempt to contact the original developer. Sometimes the original town planner may be of assistance in this regard. As a last resort, one could try the mortgagee who financed the development, if financing was used.

5.6.5 Registered *domicilium* address

Confirmation of the current *domicilium* address as contained in the CSOS records must be obtained and amended accordingly, if required. As noted in 5.6.2.2, the previous *domicilium* address should be monitored until the trustees are satisfied that all records are complete and that satisfactory notice of the new address has been issued and received by all concerned parties.

5.6.6 Managing agent details

All contact details of previous managing agents, if any, should be noted and recorded. This is especially necessary when there are levy balances and/or records which are missing. The new managing agent should also advise the previous managing agents of the body corporate's current *domicilium* address so that any correspondence can be correctly forwarded.

5.6.7 Auditors

The procedure to follow in the case of new and previous auditors is the same as the procedure given in Paragraph 5.6.6 for managing agent details.

5.6.8 Contractors and service providers

All information pertaining to the various service providers and the services they render to the body corporate should be obtained and recorded. In the absence of any information, the body corporate must ensure that all the records of the body corporate have been obtained or reconstructed, if necessary.

5.6.9 Trustees in office

It is imperative that the managing agent not only obtain the details of all the current serving trustees, if any, but also convenes a meeting with them as soon as possible, to assist them with the items noted above.

The managing agent should also ensure that the current trustees have been duly appointed in terms of the STSMA and the STSMA Regulations and that their appointment has been correctly noted in the minutes of the last AGM or SGM.

The managing agent must also confirm if any of the current trustees have resigned and ensure that their resignations are in writing.

The managing agent must confirm and record if any trustees have been co-opted in terms of PMR 7.[255]

In the event that there are no current trustees, the managing agent should immediately convene an SGM to nominate and elect new trustees. If this still provides no trustees, the managing agent should advise the owners, mortgagees (bondholders) and any judgement creditor that they should make application to the Magistrate's Court to appoint an administrator of the body corporate in terms of Section 16 of the STSMA.

5.7 Occupation Status

Having established a foundation, the trustees must continue to define and understand the various circumstances and factors existing within the body corporate, including the occupational status of each section.

5.7.1 Owners

The trustees must ensure that they have correctly identified the owners of each section and have recorded their correct and/or updated contact details. Table 22 suggests some methods to use to identify owners.

Table 22 Methods used to identify owners

The latest Deeds Office records. It must be noted that the Deeds Office records cannot be taken to be 100% accurate as there may have been various transfers that have not yet been processed;
Asking owners for their details as they sign the attendance register at general meetings; and
Sending a circular to each section requesting the owner's information on a pre-printed form or by placing a general notice in the common property areas requesting owners to contact the managing agent.

The trustees should further identify those owners who reside in the sectional title scheme and those who do not.

5.7.2 Tenants

The trustees should also draft a list of names and contact details of all tenants. This process is generally not as easy as it sounds as many tenants offer little cooperation to representatives of the body corporate. In such an event, the trustees must approach the owners for the relevant information, as prescribed in Section 13(1)(f) of the STSMA.

5.7.3 Other occupants

It is unfortunately becoming more common to find illegally occupied units. Once again, the trustees can expect little cooperation from these illegal occupants as they have not been placed by the unit owner. These illegal occupants are clearly not the direct responsibility of the body corporate, but they are usually destructive and troublesome.

The managing agent, as a service provider to all unit owners, should therefore be in a position to offer advice and assistance to a body corporate in this predicament. One route that can be employed is to tighten and restrict access to the sectional title scheme.

Effectively this hinders access to the illegal occupants. Although not guaranteed to resolve the problem, this action should create enough inconvenience for the illegal occupants to reconsider their options. At worst, it places the legal burden on them to prove their rights should they seek the courts or other authorities' assistance to protect their illegal occupation.

5.8 Common Property: Facilities and Structures

The trustees would now have gained full insight into what and who they are about to manage and rehabilitate. The last piece of the puzzle requires an on-site inspection so that the trustees gain first-hand insight and understanding of the condition and content of the scheme's common property, facilities and structures.

5.8.1 General condition

A picture paints a thousand words and with the age of digital photography upon us, the trustees should photograph as much of the common property and facilities as possible. Furthermore, they should remember to repeat this process at regular intervals.

5.8.2 Reticulations

Having seen and recorded the content and general condition of the common property and facilities, the trustees should now focus their attention on the various service reticulations, namely:

- The water and plumbing reticulation system;
- The electrical meters; and
- The hot water system (in the absence of individual geysers). If there are individual geysers, then the trustees must know where they are situated as well as the make and model details.

5.8.3 Exclusive use areas (EUAs)

Finally, the trustees should identify, confirm according to the sectional plans and inspect all the EUAs. As noted above, it is recommended that these also be photographed.

5.9 Insurance Status and Payment

At this point, the trustees should be fully acquainted with the sectional title scheme's records, occupation status and common property. They must now confirm that the correct insurance has been placed and paid.[256]

5.9.1 Insurance policy

The trustees should review the insurance policy and identify the following terms and conditions:

- The name and contact details of the broker and insurance company;
- What is insured and for how much;
- What excesses are required in the event of a claim;
- Under what circumstances can a claim be repudiated and other breach conditions, e.g. non-maintenance of fire equipment;
- What the current premiums are and whether they are market related;
- The renewal date of the policy. PMR 26(1)(c)(v) states that the financial records presented at the AGM must also indicate the insurance policy expiry date; and
- Escalation dates and amounts.

5.9.2 Proof of payment

The trustees should get written proof that all insurance premiums to date have been paid.

5.9.3 Confirmation of information

The trustees must ensure that the information contained in the insurance policy matches the information presented at the last AGM, i.e. that the insurance replacement values of the sections noted in the policy are the same as those recorded in the minutes of the last AGM.

5.9.4 Terms and conditions

It is vitally important that the trustees confirm that all the terms and conditions of the insurance policy are being complied with, thereby ensuring that a claim will not be repudiated as a result of a breach in the insurance policy.

Consider this example:

EXAMPLE

Fire equipment

Experience has shown that sectional title scheme claims are often repudiated due to non-compliance to the 'fine print'. The most glaring of these relates to the stringent conditions, usually encountered in body corporate insurance policies, pertaining to the maintenance of fire equipment. Picture the scenario where diligent trustees restructure the management, complete and collect all the records, collect the levies, pay all the bills and are on first-name terms with all the owners. Then disaster strikes and one of the units burns down. Unfortunately, the claim is repudiated due to non-compliance to the 'fine print'. Goodbye trustees and hello legal arguments.

5.9.5 Summary

Although trustees may get away with some administrative mistakes, a mistake on insurance should not be one of them. As such, it is vital that in the process of rehabilitation of a sectional title scheme, the insurance status of the sectional title scheme is given priority.

5.10 Current Levy and Arrear Levy Collections

Because money is the life-blood of a body corporate, the trustees must ensure that all levies are billed correctly and collected timeously.

5.10.1 Billing of monthly levies

Levy collection is a bit like computer input and output: junk in/junk out. The trustees must ensure that the body corporate has an accurate budget. If not, this must be brought to the immediate attention of the owners, and it must be rectified. There will be more about budgets later.

Having established the correct budget, the trustees must ensure that the levy accounts are being sent to the correct addresses. This can be done by implementing the procedure given in 5.6.5. However, this is not a static process. Any changes to the owners' address details should be routinely monitored and recorded. Non-payment of levies is sometimes the first sign that accounts are not reaching the owner. Thus, trustees should flag performing accounts that suddenly become dormant.

Perfect billing is what every trustee should strive towards. The wasted time, energy and resources, as well as the reputational risk associated with account errors is staggering. Anyone involved in billing knows that every once in a while, errors may creep in. However, it is of the utmost importance that screening and checking procedures are established to reduce errors to an absolute minimum. Why is this so important?

There are always some owners who are looking for any excuse not to pay their levies, or at least delay their payments. By making an error on their levy account the trustees are handing out a golden opportunity to delay payment. This is especially important considering that an error on their levy account will protect owners against penalties and legal action. The legal costs of that action will also have to be borne by the body corporate.

Assuming that legal action is taken against the body corporate as a result of a billing error made by the managing agent, it would not be inconceivable to find the body corporate attempting to recover these costs from the managing agent.

It has been mentioned that sectional title body corporate management is more akin to personality management. Errors on levy accounts will damage the image of and confidence in the trustees and/or managing agent.

5.10.2 Receipting and recording of payments

Equally important in the levy collection process is that all payments are correctly allocated and recorded. Failure to correctly allocate and record owners' payments will lead to the same problems noted in Paragraph 5.9.

5.10.3 Collection of arrear levies

The first step in collecting arrear levies is to develop and record a formal credit control policy applicable to that sectional title scheme. The emphasis and foundation of the credit control policy must be equality and transparency. Many bodies corporate encounter all sorts of difficulties collecting arrear levies when a formal credit control policy is not in place. Allegations of favouritism, racism and other complaints are common under such circumstances. In addition to equality and transparency, the general rule to be applied when developing a credit control policy, is that it is **not your money** and as such, the strictest policy should be implemented.

Bodies corporate often enter huge debates on the concept of leniency. What if the owner is overseas and is only one month in arrears? Is legal action warranted in these circumstances? In essence, the owners may direct their trustees in the manner they deem fit when considering the criteria of a credit control policy. However, experience has shown that **any** leniency given in the collection of arrear levies generally results in misery for **all** parties.

5.10.4 Components of good credit control

Having established the credit control policy, the trustees would be well advised to convene an SGM to have the policy approved by the members. This action generates all sorts of advantages:

- The trustees are seen to be transparent and non-dictatorial in their affairs;

- Once the members have endorsed the credit control policy, the trustees will have far less difficulty in implementing it because it was approved by the members; and
- Negative sentiment towards the trustees is reduced when the credit control policy is implemented.

Table 23 Inclusions in the credit control policy

Indicate the time allowed and procedures followed prior to implementation of pre- and post-legal debt collection procedures;
Define and quantify all collection charges and procedures. All interest rates and collection charges, including legal fee structures, must be clearly indicated;
Provide for an account reconciliation period. At the same SGM where the credit control policy is approved, the trustees should establish an 'account reconciliation' period. During this period, of say 15 to 30 days, each owner has the opportunity to: • Query any and all items reflected on their accounts; and • Tender proof of any payments they have made that are not reflected on their accounts.

During the account reconciliation period all legal or collection actions should be suspended.

5.10.5 Debt arrangement policy

Should the trustees deem it fit, and should the financial position of the body corporate allow it, the trustees could structure a debt arrangement policy. This involves the establishment of a **standard** set of terms and conditions under which **all** owners may repay their arrear levies. The theory behind a debt arrangement policy is to support the debtor when the debtor is temporarily unable to pay his or her current debt. If the debtor is already struggling to find the finances to address the current debt, then the addition of legal and other collection fees, along with interest, would detrimentally affect the debtor's position. The final result of this would most likely lead to the debtor losing their property.

By establishing a structured repayment plan, the debtor has a greater chance of repaying the debt and retaining his or her unit.

Figure 3 Inclusions in a debt arrangement policy

Period of repayment

A maximum repayment period must be set irrespective of the individual value of the debt owed by any unit owner. This means all unit owners must repay their debt within a given period, say twelve months. They have the flexibility to choose any period less than twelve months, depending on their individual financial position, but the repayment period may never exceed the specified period.

Interest and other collection costs

The rate of interest charged is set by the credit control policy and applied to the defined period and added to the base instalment cost. Note that the interest charged must comply with the CSOSA. Legal fees cannot be placed on the levy statement unless consented to by the debtor.

Acknowledgement of debt (AOD)

Any owner wishing to avail themselves of the debt arrangement policy must sign an Acknowledgement of Debt (AOD) agreement between themselves and the body corporate before the debt arrangement can be implemented. This agreement formalises the debt arrangement and binds both parties to that debt arrangement. Some points to note in this regard:

- The credit control policy must stipulate a specific period during which these agreements can be completed. This implies that if the owner has fallen into arrears, the owner will have a specified time to avail themselves of the debt arrangement policy and to sign the AOD agreement. Failure to comply with this time period must have defined consequences, such as immediate legal action being implemented to recover the debt;
- Every debtor must be given an equal opportunity to enter into an AOD agreement;
- The terms and conditions must be **equally applicable** to all debtors;
- All current and future levies must be paid in **addition** to any instalments throughout the duration of the agreement;
- The AOD must clearly indicate that any default on the agreement will result in immediate legal action; and
- At no point in time, can different terms and conditions apply to different debtors, other than selecting a repayment period of less than twelve months. If any new condition is considered for one debtor, then the trustees would be bound to offer the same new condition to all the debtors. In other words, the trustees should not allow any variations to the debt arrangement policy.

5.10.6 Appointment and control of the legal team

Having afforded the debtors every opportunity to validate their debt, as well as to afford them an opportunity to avoid legal action by signing an AOD, the trustees now have no alternative but to implement legal action to recover the arrear levies. The body corporate now engages the services of an attorney to represent its interests in the legal collection process.

Usually, the managing agent recommends a legal firm that they employ to do levy collections in the other bodies corporate within their portfolio. However, it is strongly recommended that the managing agent ensures that the instruction to appoint the legal representative is in writing from the trustees. The instruction should form part of the minutes of a duly constituted and convened trustees' meeting.

The trustees should also specify in clear, unambiguous terms the duties and responsibilities of the managing agent and the legal representative in the arrear levy collection process. Once again, it is recommended that this be reduced to writing and confirmed at a trustees' meeting. Many disputes have arisen from misunderstandings regarding the duties and responsibilities of the managing agent within the legal collection process. It is advisable that the managing agent always remain as facilitator to manage and coordinate the efforts of the legal representative, as well as to monitor their performance. It is vitally important that all legal actions and the results of these actions be reported to the trustees on a regular basis and that they are correctly recorded.

5.10.7 Summary

Levy collections and arrear levy collections are the life-blood of any body corporate's future financial stability. Levy billing must be accurate, timeous and effective. Arrear levy collections must:

- Be transparent and applied equally to all owners;
- Allow every debtor to query and confirm their debt;
- Allow every debtor the same opportunities to make arrangements to repay their debts, without legal action on set terms and conditions; and
- Ensure that there are no exceptions to the approved credit control policy.

5.11 Creditor Management

Perhaps not as important as levy collections, but the management and control of body corporate creditors remains a high priority in the rehabilitation of financially distressed bodies corporate, especially if those creditors supply essential services to the body corporate.

5.11.1 Confirmation and prioritisation

The first step is to confirm that the amounts claimed from the various creditors are in fact due and payable. This includes confirmation that:

- All work, materials or services were duly received and accepted; and
- Any and all previous payments made have been correctly recorded and deducted from the amount owing.

The next step involves the prioritisation of creditors for payment. Clearly any creditor who supplies essential services to the body corporate should be placed at the top of the payment list, **except** of course, insurance, as noted in Paragraph 5.9. It is a common mistake made by self-managed bodies corporate to prioritise those creditors supplying essential services rather than paying their insurance premiums. For example, some bodies corporate continue to pay their security service providers rather than their insurance premiums.

Having identified and prioritised the creditors supplying essential services, the task of prioritising the remaining creditors becomes more difficult. The trustees must attempt to assess the level of aggression of

each creditor. This assessment, coupled with the costs, penalties and legal fees charged by the creditor, will assist the trustees to prioritise the repayment plan for each creditor. Essentially, this means less aggressive and less expensive creditors are repaid at a slower rate than more aggressive and expensive creditors.

5.11.2 Negotiation

Generally speaking, the trustees should try to negotiate some form of settlement, or a longer interest-free repayment period, before tendering the full payment. Clearly, the creditor must be made to understand that it is **not** the body corporate's financial default but rather the owners' defaults in not paying their levies and or special levies timeously. A good rule to apply in this situation is: "If this was our personal debt and our money, what sort of discount or extended period would I attempt to negotiate?"

5.11.3 Day-to-day functioning

Clearly any and all creditor repayment plans must be synchronised with the day-to-day financial operations of the body corporate. Essential services must be maintained, and sufficient funds must be made available to try to ensure that the body corporate functions as closely to normal as possible.

5.11.4 Owners' financial position

The ability of the members to absorb and maintain the impact of any special levies must also be considered. Creditor repayments within financially distressed bodies corporate are like walking a tight rope. Any unbalanced action could lead to disaster. For example, a body corporate runs short of money through a shortfall in the budget or an unexpected expense. The financial theory is that all the members would have the necessary affordability to immediately pay a special levy to expunge the body corporate creditor. In reality, this is rarely the case. Consider a pensioner who has just sufficient monthly cash to meet the current levies. A special levy would be a financial disaster in the pensioner's circumstances.

5.11.5 Section 15 of the STSMA: Recovery from owners of unsatisfied judgement against bodies corporate

More detail is given on this section in Paragraph 5.12. Essentially, the amendment to Section 15(1)(c) of the STSMA, has afforded owners who pay their levy in full some protection against being joined as joint judgement debtors. However, it appears that the burden of proof will rest with those owners to prove that:

- They have fully paid all levy contributions due; and
- The levies they paid are **in relation to the same judgement debt**. That is, even if they have fully paid their levies, but their levies did not cover that which is being claimed by the judgement creditor, they could still be joined as joint judgement debtors in their personal capacity. This would occur in bodies corporate that operated a deficit budget, i.e. if no allowance was made for a particular expense and hence no levy was raised for its payment.

5.11.6 Securing a loan

In certain circumstances, the body corporate should consider securing a loan to repay its creditors. This sounds a bit like robbing Peter to pay Paul, but makes sound financial sense under the right conditions. This will be explained in more detail in Paragraph 5.12.

5.12 Levy Financing/Body Corporate Loans

As a general rule, bodies corporate should not borrow money. If they are short of funds, they should raise a special levy. In a perfect world, this topic would end here. The obvious real-world problem with the statement above is that raising a special levy does not automatically ensure that the owners are willing and/or able to pay it. For example, a special levy for

R100 000 is raised to repay the council for electricity. The problem is that only 70% of the owners are able and/or willing to pay the special levy.

This means only R70 000 is raised, and the creditor is not fully repaid. The council now disconnects the electricity due to the short payment. In order to resolve this position, an additional special levy must be raised to cover the shortfall – forcing the paying unit owners to contribute once again. Effectively, the paying unit owners are subsidising the non-paying unit owners. This leads to the paying unit owners' financial status being affected by the delinquent actions of their defaulting neighbours.

Given the above, it is evident that there are definite circumstances under which the body corporate could, and perhaps should, borrow money.

Table 24 When a body corporate could or should borrow money

If the interests of the members who are paying their levies are being financially detrimentally affected by those who are not paying;
If the body corporate has an aggressive creditor whose costs, interest, penalties and legal fees exceed the costs associated with a loan; and
If there are large numbers of levy debtors.

5.12.1 In the interests of the paying owners

Assume that a body corporate has an aggressive creditor as a result of bad budgeting, i.e. not sufficient money was budgeted for on this particular creditor – hence, unit owners have no protection from the creditor's right to join them individually as joint judgement debtors under Section 15 of the STSMA. Assume further that there are levy debtors' debts equal to or greater than the sum owed to that creditor. If the debtors immediately paid their debts, the body corporate could repay this aggressive creditor. The problem is that the collection of arrear levies generally involves a lengthy and expensive legal process. The financial position resulting from a legal process is illustrated in Table 25.

Table 25 Financial position resulting from a legal process

A cash-strapped body corporate is being charged interest, penalties and legal fees by an aggressive creditor;
These charges are being allocated to each member in their PQ share in terms of the STSMA and PMRs;[257]
To alleviate the situation, the body corporate must spend cash it does not have to pay their legal representatives to collect the arrear levies, which could take months;
By this time, the aggressive creditor would have taken judgement and joined individual unit owners as joint judgement debtors under Section 15 of STSMA for their PQ share of the outstanding debt; and
This in turn may result in some unit owners not being able to fund the cash to pay their PQ share of the judgement debt. In this event, their movable assets and/or their units may be sold to repay the judgement creditor.

The situation now exists where an innocent unit owner may lose their unit as a result of their neighbour's non-payment. In this situation, it would clearly be in the interests of all the unit owners that the body corporate obtains a loan, repays the creditor, saves further penalties, interest and legal fees while also removing the risk of a Section 15 claim.

5.12.2 Another creditor's costs exceed the cost of the loan

Assume that the body corporate has no levy debtors and because of bad budgeting, there is an unpaid creditor whose claim for interest, penalties, legal fees and other costs equals *X*. If the body corporate were to consider a loan and all the costs associated to the loan equal *Y*, it then follows that as long as the value of *Y* is less than *X*, the body corporate would be financially better off taking the loan. This also assumes that all other things are equal.

Effectively, all the body corporate has achieved is to replace a more expensive creditor with a less expensive creditor. Another example of this type of exercise applies to the mortgage bond over a property. If you change mortgagees (bondholders) to one that offers better rates,

you still have a bond for the same amount, but now it costs less. Clearly the saving made by a body corporate by switching to a less expensive creditor would be to the benefit of **all** unit owners.

5.12.3 Large amounts due by levy debtors

This is a very interesting position and bodies corporate have adopted various approaches to this situation. Consider a body corporate that has a large number of levy debtors but **no** creditors. This means that there is no pressure for the body corporate to raise money to pay creditors. Better still, it may seem, all money received from interest on the levy debts is to the benefit of the body corporate account. This position is further confirmed on the body corporate balance sheet with the levy arrears being reflected as assets.

Given that there are no creditors, and all other conditions are equal, the body corporate is in a financially solvent position. In these circumstances, some bodies corporate have advised that they will nurture and protect this position, as it assists the body corporate financially, even to the extent that the interest income is used to reduce levy contributions, making this a very popular position with some trustees.

Generally, this approach should **not** be sanctioned by the trustees for the following reasons:

- Any uncollected levy arrears, asset or otherwise, is still exactly that – uncollected – and until such time that the arrear levies have been collected, the balance is an unrealised asset or book entry. Consider the example where the body corporate allows these debts to grow uncontrolled as has been witnessed in many financially distressed sectional title schemes. Eventually, the body corporate decides to act and issues legal action to collect the arrear levies. If the collection process goes all the way to the sale of the immovable property and/or sequestration of the unit owner, which is commonplace these days, the legal fees usually form a sizeable portion of the total debt. Should the SIE yield sufficient income to repay all the legal and collection costs, as well as the arrear levies and interest, then the body corporate will not incur a loss. However, if the SIE income does not

cover all the legal costs, collection costs and levy debt then the body corporate has incurred a loss. The interest which had been charged and which was considered an asset now needs to be written off as a bad debt. This would negate the whole reason for not collecting the arrears in the first place;

- Any interest earned by the body corporate from levy debtors is considered income and, as such, is subject to taxation. Thus the body corporate must calculate the net earning and **not** the gross earning when calculating the benefit of this income; and
- **Most importantly**, the STSMA and PMRs clearly indicate that it is the duty of the body corporate (trustees) to collect all levies that are due and payable. In our view, any decision by the trustees not to actively collect levies is akin to entering the realm of a levy financier, and would contravene this duty.

Consider that body corporate budgets are calculated on a non-profit basis. For a body corporate to be in a position where they have unpaid levies **and** no creditors, means that the paying unit owners have covered all the expenses of the body corporate. In other words, the paying unit owners have subsidised the non-paying unit owners. Effectively they have overpaid their portion of the cash required. For this position to be acceptable, **it assumes** that the paying unit owners:

- Are able and willing to inject this extra income into the body corporate; and
- Are aware that their additional payments are equally benefitting the non-paying unit owners.

Finally, and most importantly, the major problem or weakness of using levy debtors as a source of income, is that it is based on the assumption that all unit owners not only share the same financial position, but also share the same plans as and when to sell their unit, as well as the exact extent of maintenance and improvement plans for the body corporate.

Consider the following example.

EXAMPLE

A unit owner whose work transfers him to another branch, wishes to sell his unit. Given the condition of the common property, he will achieve a certain sales price.

However, if the levy debtors had been fully collected, the body corporate would have extra income, i.e. no creditors to pay. This income could have been utilised to implement improvements and/or increase the levels of maintenance to the common property, which would, in turn, improve the sales value of the units. Hence, the non-collection of the levy debtors is not in the best interests of any unit owner wishing to sell their unit in the short term. In this instance, it would have been better if the body corporate had taken a loan and used the interest received from the debtors to refund all of the costs of the loan, and then used the available cash to improve the property. If any cash balance remained it could be used to reduce the quantum of future levies. The difference now is that those unit owners who wish to sell their units would receive the full value of the body corporate debtors.

Some words of caution. The above example gives very specific circumstances where unit owners would benefit by adopting a loan. The trustees must ensure that the loan will meet these conditions and not further burden the body corporate with additional obligations and/or costs. Various circumstances do exist where a body corporate should not enter into a loan.

5.12.4 May bodies corporate borrow money and what process is to be followed?

In terms of Section 4(e) of the STSMA, one of the powers of the body corporate is to "*borrow moneys required by it in the performance of its functions or the exercise of its powers"* by the adoption of a special resolution. Section 7(1) of the STSMA further states that "*the functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules*".

Further to this, PMR 10(1) states that "*No document signed on behalf of the body corporate is valid and binding unless it is signed on the authority of a trustee resolution by:*[258]

a. *Two trustees or the managing agent, in the case of a clearance certificate issued by the body corporate in terms of Section 15B(3)(i)(aa) of the STA; and*
b. *Two trustees or one trustee and the managing agent, in the case of any other document*."

At the general meeting to adopt a loan, the trustees would be well advised to discuss all aspects, benefits, terms and conditions as well as all relevant implications thereof. Besides the obvious benefits of transparency and good governance, loans affect **all** unit owners, and as such, as many unit owners as possible should be involved in the decision-making process.

5.12.5 Loans from managing agents and unit owners

Although there are few commercial entities that offer loan finance to bodies corporate, there are a few that should be avoided. Currently within the sectional title management industry, it is commonplace to find the managing agent appointed to the sectional title scheme advancing loans to the body corporate. This usually occurs when the body corporate's funds fall short to meet their monthly commitments. The managing agent then advances money to the body corporate to facilitate the monthly payments.

Such an arrangement could be perfectly synergistic and transparent. However, there is a risk of a perceived or an actual conflict of interests.

In essence, the managing agent, having been appointed in one capacity, is now wearing two hats. On one side, they are being paid to administer the financial affairs of the body corporate while on the other they are profiting from the poor financial position of the body corporate. Is it not the managing agent's responsibility, if not duty, to manage the financial affairs of the body corporate to ensure that the body corporate has sufficient funds, at all times, to discharge their monthly financial obligations?

The next problem is that, while the managing agent is profiting from the loan, one may start to question the managing agent's motivation to diligently rectify the body corporate's financial position when it would, in turn, terminate the managing agent's extra source of revenue.

Some managing agents will argue that such loans are purely short-term, bridging finance to assist the body corporate while they restructure and stabilise the body corporate's financial affairs. An example of this could be where the body corporate has encountered an urgent abnormal expense and requires the implementation of a special levy. However, due to the urgency, there is no time to allow the special levy to be implemented and collected. In this situation, the managing agent provides bridging finance.

Furthermore, by financing the shortfall, the managing agent ensures that the loan is repaid as soon as the special levy is collected, which minimises the body corporate's exposure. Clearly this transaction could be in the best interests of the body corporate. If only we lived in a perfect world where all transactions were concluded in this manner! However, take the above scenario where these events happen to fall over the period where the AGM is to be held and the managing agent's contract is on the agenda.

Included in many managing agent loan contracts is a clause that stipulates that the body corporate may not terminate the services of the managing agent unless the loan has been fully repaid. This clause may, in isolation, appear innocent enough by merely providing protection to the managing agent to ensure the repayment of the loan. However, what if other unit owners are dissatisfied with the managing agent's performance and at the AGM request the termination of the agent's services, only to be advised that, in fact, their services can only be terminated on full repayment of the loan?

Furthermore, what if the special levy is not paid by all unit owners and hence the loan is not immediately repaid? The body corporate must institute legal action to collect the special levy. In terms of the loan agreement, the tenure of the managing agent is protected, irrespective of the wishes of the unit owners or the level of performance of the managing

agent, until the arrear levies are collected. This example clearly illustrates the dangers that could 'innocently' arise out of this relationship.

Should the above appear to be undermining the integrity of managing agents, this is not the intention. It is not a given fact that all managing agent loan agreements include clauses that protect their appointments. However, the example does illustrate the risks that could exist.

Another practice is where an owner within the sectional title scheme has lent money to the body corporate. Once again, this appears to be a harmless arrangement assuming all terms and conditions are consistent with industry norms. However, once again, this situation may lead to abuse. Consider an owner who wishes to alter their EUA and requires the permission of the trustees to affect the alteration. It is possible that such owner could place undue pressure on the trustees, given the loan, to accept his proposals. That is, the body corporate could be held to ransom at the whim of a single owner.

5.12.6 Other creditor rights

5.12.6.1 Levy collections

A frequently encountered clause within body corporate loan agreements is one that entitles the lender to control and manage, on behalf of the body corporate, all collection activities relating to body corporate levies. In essence, this is to protect the lender and ensures that the collections are undertaken effectively and efficiently. This makes good sense considering that repayment of the loan is linked to the collection of the arrear levies. However, this could pose a potential problem for the body corporate.

5.12.6.2 Performance

The collection clause is to protect the lender from delinquent bodies corporate, trustees and/or managing agents who do not ensure the timely collection of the arrear levies and by so doing, detrimentally affect both the

body corporate and the lender. So far so good; however, in the event that the lender manages and controls the levy collection process, what clauses are contained in the loan agreement to protect the body corporate in the event the lender is delinquent in managing and controlling the collection process? Furthermore, what control does the body corporate have on the various fees charged by the lender for collecting the levies? To secure the body corporate, it is therefore imperative that the trustees ensure that the loan agreement with the lender contains clauses clarifying:

- The remedies and rights the body corporate can implement in the event of any default by the lender in the collection process; and
- Any and all fees that the lender will charge to implement the collections process.

5.12.6.3 Managing agent and service providers

Body corporate loan agreements often enable the lender to appoint and/or replace various service providers to the body corporate. Again, this is a basic protection mechanism to ensure that the affairs of the body corporate are being conducted in accordance with the various Acts. However, the contract should also fully disclose the options and procedures available to the body corporate should the lender's appointed service providers prove to be inadequate or inordinately expensive.

5.12.6.4 Attendance at meetings

The STSMA and PMRs stipulate that various parties other than the unit owners may attend a body corporate meeting. For example, the managing agent and a mortgagee have the right to attend body corporate meetings. Generally, the loan agreement will give the lender the right to attend body corporate meetings and to speak on all financial matters.

A lender cannot, however, be given any voting rights by the body corporate.

5.12.6.5 Documentation

To maintain control over the lender's investment, the loan agreement will require the body corporate to complete and forward various reports and documents, on a monthly basis, to the lender. The responsibility, costs and other implications of providing this information should be fully understood by the trustees.

5.12.7 Termination and breach

Clauses that are often overlooked as legal jargon are those pertaining to termination and breach. One reason for this is that parties entering an agreement are not usually planning to terminate or breach the agreement before they have even signed it. However, the concept to bear in mind when signing any agreement is that 'even the best intentions can go wrong'. As such, the trustees should fully understand the terms and conditions that will apply in the event of any breach and/or termination, and more importantly, what actions or incidents could cause these events.

5.12.7.1 Breach clauses

Regarding breach clauses, an important point to note is that, generally, in the event of a breach, the standard terms and conditions will be altered and new conditions could apply. For example, in the event of a breach the lender may require full and immediate repayment of the loan. This could have a huge impact on all the members of the body corporate as, contrary to the standard contents of the agreement, repayment is now not limited to those unit owners in arrears but to all unit owners. This means that even paid-up members may find themselves as a joint judgement debtor for their PQ share of the full loan. To obviate this scenario, the trustees should ensure that:

- They always conform to the terms and conditions of the loan even if there is a change in trustees; and
- They ensure that the agreement offers the body corporate sufficient time and recourse to repair the breach or to implement the necessary corrective action.

5.12.7.2 Termination

Most loan agreements will offer both parties the right to terminate the agreement, usually after a pre-defined period. The trustees should carefully examine the terms and conditions under which the contract can be terminated, as well as the consequences thereof.

Consider for example, each party has the right to terminate the contract after one year. However, the loan agreement further states that on termination, the full value of the loan is to be repaid immediately. Once again, this action could negate other terms and conditions in the loan agreement, especially those regarding repayment from arrear levies. This action could once again place each owner at risk for the repayment of the outstanding loan at that stage. Table 26 illustrates what trustees must investigate.

Table 26 What trustees must investigate

The terms and conditions under which the contract can be terminated;
The status of the body corporate should the contract be terminated as stated in the agreement; and
That the contract contains sufficient clauses to protect the body corporate if the lender wishes to terminate the agreement. For example, that repayment, and any termination clause, must still be linked to the collection of the arrear levies.

5.13 The Levy Finance Contract: Tricks and Traps of Loans

One of the core concepts of the terms and conditions of a body corporate loan contract is that they should only pertain to the loan and not to any other business, activities or relationships that the parties may jointly enjoy.

Additionally, as with any contract entered into by a body corporate, the terms and conditions must apply equally to all unit owners. That is, that the loan agreement must be in the best interests of **all** unit owners.

5.13.1 Cost

As with any transaction, cost is a critical issue. Within a body corporate environment, it is not merely the quantum that needs clarity but also who is ultimately responsible for the payment of these costs and why.

5.13.2 Interest

Being a financial transaction, the main cost of any loan is interest. Because the loan agreement is concluded with the body corporate, the interest charged is for the body corporate's account and is treated as an expense. It is at this point that further clarity is needed.

All expenditure of the body corporate must be dealt with in terms of the STSMA and PMRs which, unless these have been amended either by the developer when the scheme was established or subsequently by the unit owners, all expenditure is shared amongst the unit owners in their PQ share. Hence, each owner is liable for their PQ share of the interest charged on the loan.

To fully recover the interest paid by the body corporate, and thereby prevent the paying unit owners from being liable, most bodies corporate apply an equal interest charge to all unit owners who are in arrears with their levies and further only borrow to the maximum amount of the levy debtors' debts. Full recovery of the interest will only be attained **if** the total levy debts are equal to or less than the loan amount. If the loan is greater than the levy debtors' debts, then the shortfall in interest recovered will be borne by all the unit owners in their PQ share.

However, the recovery of interest paid only takes place if the arrear levies, including the interest, are fully recovered. This could mean that a cash flow problem may arise that the body corporate would have to fund in the interim.

The considerations to be taken into account when entering into a loan agreement are illustrated in Table 27.

Table 27 Considerations when entering into a loan agreement

Ensure that the loan agreement allows for the capitalisation of the interest charges to allow for the collection of the arrear levies plus interest thereon; and/or
Ensure that the body corporate has sufficient funds available to meet the interest charges while the arrear levies are collected; and/or
In the absence of capitalisation of the interest, raise a special levy to ensure sufficient funds are collected to meet the body corporate's interest obligations.

A common problem that occurs with interest from loan agreements is that it often does not form part of a special levy, neither is it included in the annual budget and hence, it does not form part of the ordinary levies. The consequence of this, should the interest not be paid by the body corporate, is that the lender may implement Section 15(1) of the STSMA and join each owner as joint judgement debtors. The paying unit owners would not be protected as the levies they paid would not have been "*in relation to the same judgement debt*". It is vital that the trustees implement one or all three of the options noted above before signing a loan agreement.

Another scenario that is encountered is where the trustees have diligently implemented the correct procedures and protections to protect the paying unit owners and to ensure that the interest is paid according to the loan contract. However, the collection of the arrear levies is never achieved. How does this happen?

Take, for example, where an owner has not paid his/her levies for an extended period and the level of the arrears starts to approximate the value of his/her unit in a forced-sale situation, i.e. the value at an SIE. In addition to the arrear levies interest, as noted above, various other costs, such as collection and legal fees, are applicable. This can result in the debt exceeding the bid price achieved at the SIE. The consequence of this is that the body corporate has incurred a bad debt, which in turn may jeopardise the financial position of the body corporate.

Finally, the trustees must ensure that the loan agreement complies with the CSOSA in terms of interest and other charges.

5.13.3 Administration and other fees

A common marketing trick applied by some lenders is to reduce the common comparison factors, e.g. the interest rate and to recover this reduction by inflating other ancillary charges. That is, one lender may advertise a discount of 2% (two percent) on the ruling interest rate only to increase administrative and other costs. To avoid falling into this trap, the trustees need to assess the net cost of the loan by considering all charges, direct or indirect **over the duration** of the loan. Even charges relating to any default or non-action are to be considered. This becomes even more important when comparing various loan options.

A further point to note is that administrative and other loan costs associated with the loan agreement, excluding interest, cannot be recovered directly from levy debtors only.

This is because they cannot be apportioned to the debtors only as the loan is to the benefit of the entire body corporate. The interest charged to the levy debtors is not an offsetting of the interest charged from the loan, but rather the recovery of an expense that would be less or nil if the levy debtors had paid their accounts. This point once again highlights the importance of ensuring that the reasons and the net benefits from a loan have been thoroughly investigated to ensure benefit and equality to all unit owners.

5.13.4 Contracting parties

A concept relating to body corporate loan repayments, which often leads to misunderstandings, is identifying the contracting parties. Most, if not all, loan contracts with sectional title bodies corporate clearly state that the two contracting parties are the lending entity and the body corporate itself.

The confusion often starts here as many trustees and unit owners do not understand that the body corporate is itself a legal entity. That is, it can sue and be sued. As such, the contract is between the lender and the legal entity, the body corporate. This means that no matter what security is given or how the levy debtors are managed, the final responsibility for any repayment of the loan rests with the body corporate and hence **all** members of that body corporate. This becomes more meaningful when a default or breach occurs, which was discussed in Paragraph 5.12.7.

5.13.5 Levy debtors

Many, if not all, body corporate loan agreements link the loan repayment, in some form or another, with the recovery of all levy debts within the body corporate. This is a vital component of a body corporate loan agreement as it protects the paying unit owners from additional contributions and ensures equality amongst all unit owners in repaying the loan. As such, many body corporate loan agreements contain provisions whereby the lender agrees to first receive repayment by way of the recovery/collection of all levy arrears, either from actions taken by the body corporate and/or the lender. Having exhausted every opportunity to recover the levy arrears and being left with a shortfall, only then may the lender approach the body corporate for payment. Hence, it is important that the trustees ensure these clauses exist and that they are fully understood. The absence of these clauses could result in inequality amongst unit owners in the repayment of the loan.

To support this concept, consider a situation whereby a loan agreement has been entered into by a body corporate which has fixed repayment requirements. That is, irrespective of any arrear levy collections, the body corporate is bound to repay a certain amount of the loan each month. If the arrear levy collections do not match the agreed monthly repayment amount and the body corporate does not have any additional funds, which has likely given the need for the loan in the first place, then the trustees will need to raise a special levy to generate the required income for the monthly repayments. This results in paying unit owners being called upon to find additional income to subsidise non-paying unit owners until such time as the arrear levies are collected.

What if the owner is a pensioner and does not have the financial capacity to pay the special levy to fund the interim cash-flow deficit? Suddenly, this owner's financial position has been compromised which, in an extreme case, could lead to the loss of their unit. Hence, unless there are no levy debtors, the trustees should ensure that the loan agreement provides for the collection of the levy arrears as part of the repayment arrangements, before the body corporate is called upon to make good on any shortfalls.

The question now arises as to what actions should be taken if, for some reason, a body corporate requires a loan but does not have

any levy debtors. In this situation, the trustees must quantify the body corporate's financial requirements **and raise a special levy for the full amount in accordance with the Act and PMR**. Any unit owner who is willing and able to pay the special levy does so and forms part of the "paying owners". Those who are unable or unwilling to pay form part of a newly created levy debtor balance. This balance can be used to secure and repay the loan.

The trustees must attempt to limit any shortfall in the loan repayment from the levy debts. As such, the trustees must confirm the integrity and accuracy of the levy debt, prior to entering into a loan agreement. These confirmations should be gained by:

- Consulting the body corporate auditors to conduct a specific audit on the debtor accounts; and
- Consulting each of the debtors to confirm their agreement of the outstanding amounts.

Shortfalls remain the responsibility of the body corporate and hence of **all** unit owners. Shortfalls on arrear levy collections can usually be attributed to either:

- Improper administration of levy collections;
- Inordinate delays in the implementation of the collection process; and
- Inordinately large legal and/or collection fees.

In order to remedy the shortfall in the loan repayment, a special levy must be implemented and collected. So the trustees must ensure that the loan contract contains provisions that will facilitate this process without incurring any penalties and/or additional costs.

With the amendment to Section 15(1) of the STSMA, previously addressed in Paragraph 5.11.5, a high degree of uncertainty and confusion has arisen regarding the implications of this amendment. Many professional sectional title experts have expressed caution in giving advice on the implications of this amendment, especially in the absence of any reported court cases pertaining to the new amendment. The general view is that loans to bodies corporate and the repayment thereof, unless they form part of the ordinary or special levies, are not affected by the amendment and, as such, the repayments remain the responsibility of each member of the body corporate.

This is based on the following:

- The amendment states that if an owner can prove that all his levy contributions have been paid in full **and** that those contributions were also "*in respect to the same debt*" then that owner cannot be linked as a joint judgement debtor.
- As is the case with most body corporate loan agreements, if the repayment of the loan has been linked to the collection of levy debtors, then the repayments would not form part of any levy calculations or the body corporate budget and would not meet the requirements of the amendment. If there was a shortfall and a special levy had been raised to generate the required income to repay the shortfall and an owner had fully paid this special levy, then, as his levy was in respect of the same debt, that owner would not be joined as a joint judgement debtor.
- Repayments and shortfalls can be easily understood, but this amendment becomes more important in the event of termination or default of the loan agreement.

5.13.6 Security for the loan

As with any loan agreement, the lender usually requires some form of security to act as collateral for the loan. In a financially distressed body corporate, the only assets that are usually available as security are the levy debtors.

5.13.7 Cession of levy debtors

Most, if not all, sectional title loan agreements will contain some form of cession agreement whereby the body corporate cedes, as security to the loan, all rights title and interest in their levy debtors.

There are two types of cessions:

- Security cessions; and
- Outright cessions.

5.13.8 Trustees' surety

In some cases, where there are no levy debtors, the lender may require the surety of the chairman and/or trustees to act as security for the loan. This should be avoided at all costs. It is ludicrous to think that the trustees should encumber themselves, in their private capacities, on behalf of an entity they merely represent. No circumstances, reasoning or rationale could justify this course of action.

5.14 Repairs and Maintenance

We have noted the importance of correct budgeting to ensure that the body corporate meets **all** its expenditure obligations. However, most body corporate budgets are based and implemented on a break-even position, which is income equals expenditure, and as such, the body corporate still remains in a hand-to-mouth financial position. This leaves little room to manoeuvre in the event of any unexpected expense or increase in any budgeted expense.

5.14.1 Budgets and contingencies

Section 3(1)(b) of the STSMA and PMRs (2) and (22) of the STSMA Regulations have revolutionised the historic problems bodies corporate experienced with the underbudgeting for future repairs and maintenance. So much so that set formulas and procedures have been provided for bodies corporate to follow.

Unfortunately, adherence to these provisions is rarely implemented in financially distressed bodies corporate. Failure to provide the required reserves will have serious ramifications, including the urgent and unexpected need to raise special levies to fund necessary repairs and maintenance. The main problem with special levies relates to the members' ability to fund these levies on an unplanned basis.

A prime example would be a pensioner who must carefully budget all monthly expenditure. An urgent and abnormal expense in this situation could lead to disaster.

Non-payment of the special levy could result in the maintenance not being undertaken and/or delays in the implementation of the maintenance resulting in additional risk and cost.

In some affluent bodies corporate, unit owners have forwarded arguments that they would rather retain the extra money in their personal capacities, rather than fund a reserve, on the basis that should the body corporate ever require the money they would be willing and able to make the necessary contributions at that time. Fortunately, this option is now not an option.

As stated before, maintenance is a cancer – the longer you wait the worse it gets. Consider a ceiling panel that has been damaged by a water leak. If the repairs are immediately implemented, then only the one panel would need to be replaced. However, by delaying the required maintenance, it is likely that the water leak will spread to a second and perhaps even a third panel. Thus, delaying the repairs could cost the body corporate three times more.

5.14.2 The ten-year maintenance plan

When the STSMA came into operation in October 2016, one of the most important new legislative concepts in it for the Sectional Title industry was the creation of an obligatory maintenance reserve fund, and a requirement in the management rules that each and every sectional title scheme must develop and maintain an up-to-date, long-term maintenance, repair and replacement plan. This legislative requirement changed the focus of the management of schemes from a very short-term budget period (12 months) to a medium- to long-term period (ten years). A major outcome of this change was that, correctly implemented, the necessity of special levies for large maintenance projects basically fell away. If utilised correctly, the maintenance reserve fund will be sufficient to cover the cost of all the large maintenance projects when they become necessary.

The concepts in the Act and the management rules are actually very simple. A special additional fund is created into which funds will be paid monthly (maintenance reserve fund) and this fund will be utilised to pay

for the projects that are contained in the long-term maintenance, repair and replacement plan.

The requirements for the maintenance, repair and replacement plan are covered in PMR 22. The plan must cover all major capital items expected to require maintenance, repair and replacement in the next 10 years. To verify when the items will be requiring attention, it is necessary to determine the present state of the specific items. To do financial planning for the maintenance and repair, it is necessary to estimate the reasonable cost of replacement and repair at the time when it will be done. All these aspects, apart from being logical, are legal requirements of the plan.

The requirements for the plan, as set out above, are simple. Accordingly, it is tempting for trustees and managing agents to prepare the plan themselves. This is, however, not advisable. A properly qualified person will add value by having the necessary experience and knowledge to make the appropriate assumptions and to know what to look for. Each body corporate has its own physical 'footprint' that is, at any given time and in any specific condition, cannot be compared directly with the scheme

next door. Therefore, a general maintenance plan or a maintenance plan copied from another body corporate is not the ideal way to address this legal requirement. The general items required in a maintenance, repair and replacement plan are listed in Table 28.

Table 28 General items in a maintenance, repair and replacement plan

- Roof and waterproofing maintenance
- Paint and redecoration of the buildings
- Security and entrance control systems
- Water reticulation infrastructure
- Electrical infrastructure
- Lift and escalator equipment
- Carports, driveways and paving maintenance

A quick check through a long-term maintenance plan to make sure it covers at least the items in Table 28 will help to verify the quality of the specific plan.

The Management Act provides for the minister to specify minimum levels for the reserve fund. That was done in the regulations of the Act (Regulation no 2) and provided for minimum levels depending on three situations:

1. Where the available maintenance reserve fund is less than 25% of the levels of the administrative fund of the previous year;
2. Where the available maintenance reserve fund is more than 25%, but less than 100% of the administrative fund of the previous year; and
3. Where the available maintenance reserve fund is more than 100% of the administrative fund of the previous year.

Although it is important to make sure that the body corporate does comply with the minimum requirements set by the minister, the reality is that it is far more important to ensure that the maintenance reserve fund is sufficient to cover the maintenance, repair and replacement plan. In most cases, if the maintenance reserve fund is sufficient to cover the maintenance, repair and replacement plan, it will exceed the minimum levels set by the minister.

The management rules require that the auditor of the body corporate must report annually on the maintenance reserve fund and specifically report any shortfall in the fund.

The maintenance, repair and replacement plan was a significant addition to the legislative framework for sectional title schemes. If used correctly, it will protect, and even enhance, the value of a sectional title scheme.

5.15 Communication (Keeping Unit Owners Informed)

It has often been said that body corporate management is the management of relationships and personalities, rather than the management of business activities. Given that numerous decisions and actions taken by bodies corporate are often motivated and implemented as a direct result of personal opinions and attitudes, rather than prudent business acumen, this environment would give credibility to the above statement.

The managing agent is a key role-player in managing these relationships and should do their utmost to create, improve and implement strong communication channels between themselves, the members of the body corporate, the trustees and all service providers to the body corporate.

5.15.1 When the managing agent is appointed

The managing agent should advise all unit owners of their appointment and provide all relevant contact details. They should further indicate what their proposed business plan is to rehabilitate and/or manage the body corporate with specific references to timing and priorities.

At regular intervals thereafter, the managing agent must establish standard feedback mechanisms to the owners. This feedback must keep the owners informed of progress made, difficulties being experienced and any problems with the current management and rehabilitation of the body corporate. This promotes transparency, reduces misunderstandings, and creates a sense of participation amongst the owners.

5.15.2 Unit owners versus trustees

Although the trustees conduct the management of the body corporate affairs, a prudent managing agent never loses sight of the fact that all unit owners are members of the body corporate with equal rights and interests in the affairs of the body corporate. As such, they must balance the communication between unit owners and trustees. For example, many managing agents state that they **only** deal with the trustees of the body corporate. Should other unit owners wish to interact with them, such interaction must be channelled through the trustees.

The motivation behind this is that managing agents cannot afford to interact with unit owners individually. This makes sense to some degree because time is money. Consider the managing agent being polite to ten individual unit owners for 15 minutes on the phone discussing the same problem, which has already been identified by the trustees. This would not be considered cost effective for either party.

However, the opposite position is also a problem. If the managing agent only interacts with the trustees and not the other unit owners, the risk may arise that the trustees do not convey the unit owners' requirements correctly or at all. For this reason, a balance should be found whereby the managing agent communicates with all the unit owners in a controlled and agreed manner.

Some of the preferred methods of communicating with unit owners are newsletters or notices placed in relevant areas of the common property. The managing agent should request that a portion of the newsletter/common property notice board be made available to them to advise unit owners on different issues. For example:

- Notifying members of the conduct rules;
- Offering advice and information on maintenance projects; and
- Relaying humorous stories of body corporate life and management.

Preferably, the managing agent should establish their own newsletter as this would indicate their independence from the trustees and enable them to focus on issues pertaining to their functions and duties. For example:

- Establishing a feedback mechanism to highlight owner grievances on an informal basis; and
- Highlighting any management or rehabilitation successes.

5.16 Dealing with Conflict

Anyone who has worked in large bureaucratic organisations will immediately tell you that, in addition to the normal business activities, there are also certain political aspects one needs to be aware of if you wish to be successful. For example, ridiculing your boss, even if it was justified, would not be considered a good advancement tactic. This 'political' environment applies to managing agents as well, in fact more so. Unfortunately, a managing agent's success or failure is often not entirely dependent on performance alone.

Experience has shown that good, performing managing agents have been fired as a direct result of personality clashes with the chairman and/or trustees. As a service provider, the managing agent is well advised to adhere to the old adage "the customer is always right". The important thing to remember is who the customer is. Although the trustees are tasked with the hiring and firing of the managing agent, the underlying customer remains all the members of the body corporate.

5.16.1 Opposing owner factions

Consider the situation where you have two opposing owner factions within a body corporate. Having just noted that the client is always right, this scenario pushes the managing agent into a lose-lose position. In this event, the managing agent should position him- or herself outside the conflict area. For example, if the dispute is of a legal nature, he/she should recommend that the body corporate enlist the services of an attorney to resolve the dispute.

If the dispute is of an operational or administrative nature, the managing agent should suggest that it be tabled at a general meeting and put to the vote so that a democratic solution can be found. By so doing, the managing agent diverts the conflict away from themselves to an independent third party, while still remaining involved.

A position that a managing agent should never adopt is to take sides. Clearly, a managing agent must maintain a position if the conflict is centred around a point of fact and which fact is identifiably wrong or

right. However, when the situation revolves around opinion or attitude, a managing agent should never take sides as these opinions and attitudes tend to change with different unit owners.

5.16.2 Opposing trustees

Once again, a managing agent should distance him, or herself from conflict situations between trustees where the conflict involves opinion or attitude. One action that often resolves conflict between trustees is to remind them that they are merely representatives of the unit owners and hence should consider what the unit owners would require rather than their own personal requirements.

Should this still not resolve the issue then it would be prudent to recommend that the issue be tabled at a general meeting of the unit owners to reach a final decision. Once again, it is not advisable for an agent to choose sides, irrespective of their personal beliefs.

5.17 Dispute Resolution

Disputes are inevitable in any social environment. Most body corporate disputes range from the sublime to the ridiculous. However, every once in a while a dispute will arise that may have serious consequences for the body corporate. If the managing agent and trustees believe that neither have the necessary skill or ability to resolve the dispute, then they should approach the CSOS. The formation of the CSOS has been of amazing benefit in body corporate disputes.

Another way of resolving disputes is the appointment of an administrator, which is discussed in Paragraph 5.17.1.

5.17.1 Administrator

The appointment of an administrator is an extreme step as the administrator, as stated in Section 16(3) of the STSMA, "*... has, to the exclusion of the body corporate, such powers and duties of the body corporate as the Magistrate's Court may direct*". As such, this option is rarely used by bodies corporate to resolve disputes. Administrators are, however, used by body corporate creditors and mortgagees (bondholders) who believe that their interests are being negatively affected by the current control and management of the body corporate.

The mortgagees, in terms of the STSMA, are one of the parties, the others being the body corporate, the local authority, a judgement creditor, or any owner or other person having a registered real right in or over a unit, who may apply to a Magistrates Court. From a managing agent's perspective, this is generally good news as the administrator replaces the trustees, and as such, they will now deal with a 'professional' who has the required expertise and experience to assist the body corporate.

5.18 Rehabilitation Time Frames

How long does it take to rehabilitate a body corporate? Given that, like fingerprints, no two bodies corporate are identical, it is extremely difficult to develop averages or expected time frames that could be generally applied to gauge different bodies' corporate rate of rehabilitation performance and/or success.

5.18.1 No standard measures

Although many of the procedures and processes involved in the rehabilitation of bodies corporate are the same, the implementation, circumstances, reactions and success of rehabilitation actions vary widely between bodies corporate.

For example, consider two delinquent bodies corporate with identical problems. Assume both are financially insolvent and have not held an AGM for the past three years. The processes and procedures contained

in the rehabilitation plan would be the same. However, in one body corporate a huge degree of animosity exists against the current trustees. Implementation of the rehabilitation business plan in this body corporate would be vastly different to that in which the members supported their trustees.

Another example could be where one body corporate has not had audited financial statements for the past three years compared with another body corporate that has current financial statements. Clearly, the first body corporate would need to complete the outstanding financial statements before they address any insolvent position.

Hence, there are numerous factors, present within each body corporate, which could either adversely affect or even aid the rehabilitation process. This makes it virtually impossible to accurately develop standard time frames for body corporate rehabilitation.

6 Levies and the Law

Chapter 6.1 written by Fausto Di Palma
Chapter 6.2 written by Fausto Di Palma and Adv Viviana Vergano

This chapter answers important legal questions related to body corporate levies, such as prescribed debt, compromising levy claims and selling levies.

6.1 Prescription of Levy Debts

Is a body corporate insulated from prescription of levy debts owed by its members?

In the case of *Body Corporate of Sante Fe v Bassonia Four Zero Seven CC*[259] the body corporate applied for liquidation of the respondent unit owner, which was a close corporation, based on outstanding arrear levies due to it in respect of two units owned by the respondent in the Santa Fe Sectional Title Scheme. The focus of this chapter is on the specific defence of prescription raised by the unit owner, Bassonia Four Zero Seven CC (the respondent). The respondent argued that the outstanding

levies had prescribed in terms of Section 11(d) of the Prescription Act,[260] which provides that "*the period of prescription of debts shall be, save where an Act of Parliament provides otherwise, three years in respect of any other debt*".

The court application was dismissed and it was held that the institution of liquidation proceedings does not interrupt the prescription of a debt.[261] Section 15(1) of the Prescription Act provides that for judicial interruption of prescription, unless the debtor acknowledges liability, prescription shall "*be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt*". The court reinforced the position in law that winding-up proceedings, such as liquidation proceedings, are not considered to be proceedings whereby "*the creditor claims payment of the debt*". While this principle in relation to whether or not liquidation proceedings are proceedings where a creditor claims payment of the debt, may be correct in law, as the court provides case precedent (authority) for this principle, there are additional underlying issues with the way that the court dealt with the levy debts and the claims in question.

The body corporate applied for leave to appeal the judgement on several grounds, notably for the purposes of this chapter, the following grounds:

a. That the unit owner's indebtedness, or alternatively a part of that indebtedness, was the subject of a judgement in favour of the body corporate (the first body corporate action) and as such, the period of prescription in respect of such indebtedness is 30 years from the date of judgement, as per Section 11(a)(ii) of the Prescription Act; and
b. That, in any event, the outstanding levies, for which no judgement had yet been obtained, or for which no action had yet been instituted by the body corporate, had not prescribed as a result of the provisions of Section 13(1)(e) and (i) of the Prescription Act. These provisions provide that the period of prescription would be delayed until a year after the debtor (the unit owner) who is a member of the governing body of the creditor (the body corporate, which is a juristic person), ceases to be a member of the juristic person.

It is important to note that the High Court application for leave to appeal was also dismissed, and the body corporate thereafter petitioned the Supreme Court of Appeal (SCA) to hear the appeal under a special application for leave to appeal. Unfortunately, this appeal lapsed for reasons unknown but may have been because the appeal was not prosecuted timeously by the appellant.

In addition to the above, a significant part of the indebtedness due to the body corporate had not prescribed, so it is argued, as not only had the body corporate obtained judgement against the unit owner, in the first body corporate action, but also served summons in the second body corporate action. The body corporate argued that it instituted actions in the Magistrate's Court against the unit owner for the payment of levies, one of which was granted, thus falling within Section 11(a)(ii) of the Prescription Act (being a judgement debt), and the other, which is still pending, and was therefore interrupted in accordance with Section 15 of the Prescription Act when summons was served on the unit owner. The SCA, if it had been given the opportunity to hear an appeal on this matter, would have been required to adjudicate on the above, and it does appear that the body corporate would have had good prospects of success on these grounds. This issue will come up again in court, and parties should be ready for the potential arguments.

Let's explore one of the initial grounds of appeal relating to prescription – whether prescription is delayed until one year after the unit owner ceases to be a member of the body corporate, in accordance with Sections 13(1)(e) and (i) of the Prescription Act.

The question arises as to who is considered to be "*a member of the governing body*" for the purposes of Sections 13(1)(e) and (i) of the Prescription Act and its application to bodies corporate. Is this exception referring only to the trustees of a body corporate or to the unit owners themselves who are members of the body corporate? It is submitted that the answer to this question hinges on (a) the functions and duties of trustees and (b) the question of who **ultimately** has the power to manage and administer this unique legal entity known as the body corporate. If you consider the proposed mischief that this particular provision of the Prescription Act seeks to ameliorate, it is to prevent a person in power

or control of a juristic person, from obstructing and otherwise benefitting from inaction against them on behalf of the juristic person for the collection or enforcement of debt owed by them to the juristic person. Does this provision only protect the body corporate from prescription in respect of levy debts owed by the trustees or by ordinary members of the body corporate too?

It is submitted that unit owners are members of the governing body in terms of Sections 2(1) and (3) of the STSMA[262], which states that any person who becomes an owner within a sectional title scheme is regarded as being a member of the body corporate, and ceases to be a member of the body corporate when such member ceases to be an owner of a unit within the scheme in question. It is well-known that the body corporate (and the unit owners who are members thereof) are responsible for the management and administration of the sectional title scheme and are given extensive functions and powers in terms of Sections 3, 4 and 5 of the STSMA, albeit that these functions are carried out by elected trustees of the body corporate.

While trustees must be elected and appointed to perform the said functions and powers on behalf of the body corporate, subject to the STSMA and the management and conduct rules of the body corporate, it is the unit owners who have sufficient and ultimate power to elect and remove the trustees, and the trustees must abide by any restriction imposed or direction given at a general meeting of the unit owners.[263] The trustees must exercise the body corporate's powers and functions assigned and delegated to them in accordance with the resolutions taken at general meetings and at meetings of trustees.[264] In substantiation of the above, a member of the body corporate may nominate any person for the office of trustee,[265] and at the AGM the trustees are elected by the unit owners.[266] A trustee ceases to hold office if that trustee is removed from office by ordinary resolution of a general meeting of the owners, provided that the intention to vote on the proposed removal was stated in the notice calling the general meeting.[267] It is therefore submitted that the true and ultimate power of the body corporate lies with the unit owners.

Section 4(i) of the STSMA specifically states that the body corporate has the power to do all things reasonably necessary for the enforcement

of the rules and for the management and administration of the common property. Furthermore, Section 10(2) of the STSMA allows for the body corporate to amend management or conduct rules by unanimous and special resolution, respectively.

Governing bodies generally govern the actions and conduct of a particular juristic person, such as the board of directors of a company. A sectional title body corporate is not a company, though; it is a unique juristic person born of statute.[268] Trustees are not directors of a company. The shareholders of a company are not the same as members of a body corporate. The term 'body corporate' and 'governing body' are synonymous in nature given the practical and unique operation of a body corporate in the sectional title environment. It is a necessary and logical conclusion that a member of a body corporate is a member of a governing body within the meaning of Section 13(1)(e) and (i) of the Prescription Act, and this will ensure the achievement of the purpose for which the provision was enacted.

One must bear in mind that when the Prescription Act became effective in South Africa on 1 December 1970, sectional title bodies corporate did not exist. The legislature may not have contemplated the interplay between the prescription provisions so enacted in 1970, and the body corporate's members' debts owed to it, as the first Sectional Titles Act[269] was only promulgated on 30 June 1971 and only came into operation on 30 March 1973.

As far as the functions and duties of the trustees are concerned, the trustees exist to manage the body corporate effectively and in accordance with the STSMA, the management and conduct rules, and any directive given to them by the members of the body corporate, and are confined by the restrictions imposed on them by the members of the body corporate, in a general meeting.

It is therefore submitted that the ultimate seat of power lies with the unit owners in a general meeting (but not in individual members) who can, remove trustees who seek to launch legal action against them for non-payment of levies, and elect trustees who may not seek to collect the levies from them. In amplification of the above, it is also conceivable that unit owner(s) with sufficient PQs (power), equalling 25% of the total

quotas of all sections, could force trustees to call a general meeting with the sole purpose of removing one or more of them as trustees and appointing new trustees in their place, and if they fail to call the meeting, the members are entitled to call the meeting for that stated purpose.[270]

However, it could also be argued that "*a member of the governing body*" is, in this instance, reference to a trustee only, who may, by their mere presence, impede a decision by the board of trustees to institute an action against them for arrear levies. It is submitted that this is an overly restrictive interpretation of the Prescription Act and does not take into account the text, context and purpose of the provisions relating to the interruption of prescription.

Look back at the proposed mischief that Section 13(1)(e) and (i) of the Prescription Act seek to address, viewed against the backdrop of the unique nature of a body corporate made up of its members. The body corporate's claim against a member of the body corporate, whether they are an ordinary owner or a trustee, should be insulated by this delay in extinctive prescription until one year after they cease to be a member of the body corporate. The unit owners can obstruct and delay the implementation of levy collection activities and the institution of legal action against them as defaulting levy debtors, inasmuch as a trustee could do so for a debt that he or she personally owes to the body corporate.

Practically, therefore, the levy debts of a member should rarely prescribe due to the effect of the levy clearance certificate as per Section 15B(3)(a)(i)(aa) of the STA,[271] which requires that all debts in respect of the unit must have been paid, or provision has been made to the satisfaction of the body corporate for the payment thereof, before transfer can be registered in the name of a new owner.

Whatever the outcome of this argument in potential future cases, it will have wide industry impact on the collection of levies where a member of a governing body either as a unit owner or a trustee may be prevented from relying on prescription as an absolute defence to a claim for arrear levies while they are still members of the said body corporate.

The Body Corporate of Santa Fe and its legal representatives, and ultimately the SCA, have missed an opportunity to finally argue and

carefully pronounce on the prescription of levies owed to sectional title bodies corporate by its members. We will have to wait for the next opportunity for such an argument to be fully ventilated.

6.2 Compromising Levy Claims and Selling Levies

Questions arise as to whether the board of trustees of a body corporate, or the unit owners in a general meeting, have the power to accept less in settlement from a unit owner than the full value of the arrear levy debt and other charges lawfully owing in respect of a specific unit (compromise the debt).

This can occur in the following common scenarios, amongst others:

1. At an SIE against the immovable property (being the unit in the sectional title scheme) of the unit owner in arrears (judgement debtor) where the auction results in a bid from a purchaser for a purchase price that is less than the value of the arrear levy debt owed to the body corporate by that unit owner; and
2. In a transaction with a third party for the sale of arrear levies (cession on an out-and-out basis) at a discount of the face value of those arrear levies.

The *Selma Court* case

In a recent appeal judgement, the Pietermaritzburg High Court (two judges presiding) had to grapple with this issue. In the reported case of *Zikalala v Body Corporate of Selma Court and Another*[272] (*Selma Court*), the court was faced with an appeal stemming from an application brought by the body corporate for the collection of unpaid levy contributions.[273] When the unit owner (the appellant) failed to pay their levy contributions, the body corporate obtained default judgement against the unit owner.[274] The unit owner then acknowledged the indebtedness and informed the body corporate of his inability to pay the debt all at once, offering to pay in monthly instalments, but the offer of settlement was rejected by the

body corporate.[275] The body corporate then executed on the judgement debt, but the Sheriff found no, or insufficient, movable property belonging to the unit to extinguish the judgement debt, and therefore issued and delivered a *nulla bona* return to the body corporate.[276]

The body corporate then proceeded against the unit owner by launching a financial enquiry in the Magistrate's Court.[277] At the financial enquiry, the unit owner made a written offer to the body corporate in "*full and final settlement*".[278] The financial enquiry was adjourned for a week so that the body corporate's attorney could take instructions from the trustees of the body corporate.[279] On the return day of the financial enquiry, the body corporate's attorney confirmed to the court that their instructions were that the offer of settlement was acceptable to the trustees of the body corporate.[280]

This was not the end of the matter because, a few days later, the body corporate's attorneys wrote to the unit owner and advised them that the settlement offer was erroneously accepted and that acceptance of the offer would prejudice the body corporate.[281] Unable to resolve the dispute that ensued, the body corporate launched an application to

declare the unit owner's movable property specially executable, and the unit owner launched a counter-application for an order declaring that the settlement agreement concluded at the earlier financial enquiry should be held to be valid and enforceable against the body corporate.[282] The unit owner argued that not only did the body corporate's attorneys accept his offer in full and final settlement of the levy claims, but that two of the trustees of the body corporate had also responded to his email and accepted the settlement offer in reply.[283]

It was apparent from the facts presented to the court that the trustees who accepted the settlement offer did not consider the entire indebtedness owed by the unit owner to the body corporate.[284] The court *a quo* (the Magistrate's Court which first heard these arguments) accepted that the settlement offer had been erroneously accepted because the prejudice which the remaining sectional title unit owners would suffer was not considered, since they would need to foot the bill for the balance of the unit owner's indebtedness if the lower settlement offer were accepted.[285] The court *a quo* then held that the unit owner had failed to prove the existence of a valid and binding settlement agreement with the body corporate.[286]

Dissatisfied with the magistrate's ruling, the unit owner appealed to the Pietermaritzburg High Court. Two judges preside over appeals to the High Court from the Magistrates' Courts. In the appeal, the body corporate raised the question of whether it was competent for the body corporate, operating through the trustees, to accept an offer of less than the indebtedness claimed against the unit owner, thereby compromising the body corporate's claim for levies, interest and costs.[287] The contention was that these actions of the trustees would be *ultra vires* (beyond) their powers in terms of the STSMA and STSMA Regulations.[288]

The unit owner's representatives argued that the trustees' act was valid as two trustees had confirmed in writing that the offer was acceptable, and therefore it was binding on the body corporate in accordance with PMR 10(1) of the STSMA Regulations.[289] This did not persuade the High Court, as there was no evidence of a trustee resolution preceding the acceptance of the offer by the two trustees, and PMR 10(1)(b) of the STSMA Regulations states that no document signed on behalf of

the body corporate is valid and binding unless it is signed by two trustees (or one trustee and the managing agent) on the authority of a trustee resolution.[290] The court then queried whether such a trustee resolution would have been permitted in law anyway.[291]

The requirement for an owner resolution was considered by the High Court, and it was held that the unit owner's settlement offer (which was far less than the claimed amounts) would have resulted in the remaining portion of the unpaid levies being paid by the remaining members of the body corporate.[292] Without the written consent or resolution by the owners permitting the two trustees to compromise the levy claims, the trustees were never empowered to accept the lower settlement offer, as the remaining unit owners would have been adversely affected by such a decision.[293]

The Honourable Judge Vahed, then wrote that:

> *"It appears to me that the only manner in which trustees could have been so authorised was by way of unanimous resolution of all the members of the body corporate, giving their consent to compromise the claim."*[294]

The learned judge stated further that:

> *"Allowing the acceptance of the offer to stand would entail burdening the remaining sectional title owners with a liability for levies and contributions which is exclusively that of the appellant [the owner]."*[295]

The court's analysis did not end there. The court referred to the general powers and duties of trustees contained in PMR 9(b) of the STSMA Regulations.[296] This provision states that the trustees must exercise the body corporate's powers and functions assigned and delegated to them in terms of Section 7(1) of the STSMA in accordance with resolutions taken at general meetings and trustee resolutions.[297] The court held that because there is no express or implied power accorded to the body corporate in the STSMA, the trustees have no power to conclude agreements that are outside of the powers given to them in terms of the STSMA.[298] The body

corporate and the trustees must operate within the four corners of the legislation which empowers them to act. There is no power in the STSMA or STSMA Regulations that permits the body corporate, or empowers the trustees of the body corporate, to compromise on its obligation to collect levies or contributions.[299]

On the contrary, so the judgement went, PMR 21(2)(b) of the STSMA Regulations precludes a body corporate from refunding a levy lawfully levied and paid, which by implication for the court meant that the body corporate is prohibited from compromising on any sum lawfully due to the body corporate in terms of levies and contributions.[300]

The case of *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd*[301] (*Fish Eagle)* was also cited by the court in *Selma Court,* where that court in *Fish Eagle* was faced with an application for the winding up of the unit owner (a company) arising from outstanding levies and electricity charges. Notably, this court case was heard prior to the enactment of the new sectional title laws.

The Body Corporate of Fish Eagle allegedly held a special general meeting at which a resolution was passed providing that the body corporate will not continue with any litigation and previous litigation will be stopped, in respect of levy collections.[302] It was held that such a resolution was *ultra vires* the body corporate, because (at the time) Section 37(1)(d) of the STA provided that one of the functions of the body corporate was to raise amounts by the levying of contributions on the owners in proportion to the PQs of their respective sections.[303] This provision is now re-enacted in Section 3(1)(f) of the STSMA. Furthermore, in terms of (at the time) Section 39(1) of the STA, the trustees of the body corporate were obliged to perform this function.[304] This provision is now re-enacted in Section 7(1) of the STSMA.

The High Court in *Fish Eagle* concluded that, in law, a body corporate does not have the power to pass a resolution to the effect that it will not carry out one or more of the duties imposed upon it by the sectional title laws.[305] In citing and discussing the *Fish Eagle* case, Professor van der Merwe remarks that "*collection of levies is a statutory duty, which cannot be circumvented by the making of a resolution*".[306]

The court in *Selma Court* went further and stated that the reasons for the lack of power on trustees to compromise a levy claim (i.e. nothing

contained in the sectional title laws) is the same for the lack of power on trustees compromising on the collection of interest and legal costs incurred on outstanding amounts due.[307]

Professor van der Merwe comments that a body corporate is a juristic person created by statute.[308] Since it is an artificially created entity, its status and powers are only those that are conferred on it by the STA and the STSMA.[309] The body corporate can only perform acts within the framework of the legislation, and anything done outside of the legislative framework is void *ab initio* (from the beginning).[310] Professor van der Merwe continues this thought process and writes that, in respect of trustees, a person who seeks to enforce a contract against the body corporate must first establish that the contract was within the capacity of the body corporate in the first place, because an act performed by the trustees in excess of the capacity of the body corporate is *ultra vires* and therefore void.[311] In addition, the person seeking to enforce the contract against the body corporate would have to establish that the act was not one reserved for the owners in general meeting in terms of the STA or STSMA.[312] This commentary by Professor van der Merwe is quoted with authority in the text of the *Selma Court* judgement.[313]

Collecting the full amount of levies and contributions due, together with interest and legal costs is a statutory obligation on the body corporate, and there is no power or discretion bestowed on trustees to deviate from this obligation.[314] Compromising levy and contribution claims owing to the body corporate is "*plainly not permitted or contemplated by the legislative framework governing the affairs of sectional title developments*".[315] Providing context to the effect of such an unlawful compromise, the court stated that:

> *"It would undermine the uniformity for the common burden that must be shared by all sectional owners to pay their levies, based on their participation quota. This is an intrinsic component of communal living envisaged in the STA and the STSMA."*[316]

Therefore, the current law, which answers the question of whether or not trustees, the body corporate, or the owners in general meeting are empowered in law to compromise a claim for outstanding levies, interest and legal fees, against a unit owner, is that neither the trustees, the body corporate, nor the owners in general meeting have any such power.

The High Court in *Selma Court* also held that there was no basis to infer the existence of an implied power given to the body corporate to compromise a claim for levies due, or that such a power could be considered as ancillary to the powers to collect levies and contributions.[317] As a final pronouncement on the issue, the court dismissed the appeal because:

> *"Whatever the conduct of the attorney and the two trustees in conveying the impression that an agreement had been reached, in law neither had the authority to compromise the claim, as to do so would be ultra vires the provisions of the STSMA and the Regulations."*[318]

No attempts were made or completed to appeal the High Court ruling to the SCA.

What about the ability to compromise a levy claim in 'thorny disputes'?

The judgement in *Selma Court* also analysed analogous restrictions on the powers of statutory bodies, such as the South African Revenue Service (SARS), to waive or compromise tax claims, so as to protect the fiscus.[319] The exception to this principle of taxation is that where it is apparent that the debt was otherwise not recoverable, then SARS may waive a claim for taxes as it would technically not negatively affect the fiscus.[320] It is submitted that **this may be the answer to the question of whether or not a body corporate can compromise a levy claim in a forced sale position**.

If a body corporate is in a forced-sale position with a unit owner in arrears and the recoverability of the full indebtedness owed to the body corporate is in question (a 'thorny dispute'), and it is relatively certain that the body corporate would not recover the full indebtedness owing to it, then it is submitted that the body corporate could be empowered to compromise the claims. However, the High Court in *Selma Court* provides a different perspective, where the judge remarked that no such latitude exists in the STA and STSMA or the Regulations.[321] Respectfully, to accept the contrary would lead to an absurdity because the body corporate would be stuck without the ability to collect any of the indebtedness, the

unit would not be transferred because the body corporate would refuse to issue a levy clearance certificate, and there would be a deadlock in the collection of the outstanding levies. It is submitted that these comments by the High Court were not part of the reasoning in the decision reached on the case. The comments are part of *obiter dicta*[322] and not part of the *ratio decidendi*.[323] It could not have been the intention of the legislature to create such an unbusinesslike environment or outcome in sectional title scheme governance and levy collections.

Arguably, however, a unanimous resolution of the members would be required to compromise a levy claim in circumstances of a forced sale or a 'thorny dispute' and not merely a trustee resolution.

Does a body corporate have the power to sell its levy debts and other charges owing to it?

The court's reasoning in the *Selma Court* case may affect the validity of transactions entered into between a body corporate and a third-party, for the discount sale of outstanding debts (cession on an out-and-out basis) owed to the body corporate (i.e. less than the face-value of those debts). This is because the body corporate is, in effect, compromising the claims owed to it by accepting less than full face-value.

Bodies corporate should tread carefully in such transactions since there are also no statutory powers for bodies corporate or trustees to conclude such agreements, which invariably also entail that the remaining members of the body corporate must foot the bill for the portion of levies and interest owing to the body corporate, and for any costs incurred by the body corporate for the collection thereof, which are not included in the purchase price of the arrear levy book in question.

Furthermore, it has been argued that the administrative fund of the body corporate is owned jointly by all members of the body corporate and those funds are used for purposes of the sectional title laws, such as common property maintenance, and for the other costs of community living, thereby advancing the interests of members.[324] Examples provided have ranged from the fact that trustees have no power to donate for charitable purposes from the body corporate's funds, or to pay an honorarium to a retiring caretaker, since these transactions require member approval.[325]

For these reasons, legal commentators have concluded that at least a unanimous resolution of the members would be required to sell an arrear levy debtors book, since the debt assets being sold as the subject of the transaction, are funds that are held on behalf of all members.[326] This is a contradiction to the ruling in *Selma Court* though, which held that a compromise of levy debts owed to a body corporate is void *ab initio*.

Therefore, it is still uncertain whether a body corporate, or the trustees, have any power at all to sell arrear levies to a third party at a discount. It is also uncertain how a body corporate, or the trustees, if they do have such a power, can exercise that power: i.e. by unanimous resolution, by special resolution or by a simple majority (ordinary) resolution of the members of the body corporate, or by trustee resolution alone. Suffice to say that the decision of whether to sell a body corporate's assets in the form of levy debts owed to it by members, who all have a vested interest in such an asset, is a decision that cannot have been contemplated to be lawfully made without any member involvement. Clarity from the legislature (with an amendment to the STSMA) or from the courts in this regard would be welcomed.

Whether a body corporate has the power to sell its debts for their full-face value to a third-party financier, is another question entirely since the answer may be found in the law of obligations and contract law. It is submitted that there is no such empowering provision in the STA, STA Regulations, STSMA, STSMA Regulations, CSOSA, or CSOS Regulations that vests the body corporate or trustees with authority to sell its levy debts at all, whether for a discount or at face-value. However, since no prejudice could be conceived for a sale of arrear levy debts at their full face-value, it may very well be permissible under the law of obligations, for an entity such as a body corporate to sell (cede on an out-and-out basis) its arrear levies for full value. It is, however, completely uncertain whether a unanimous resolution, special resolution or a mere majority (ordinary) resolution of the members of the body corporate, or only a trustee resolution, would be required to alienate the arrear debtors' book at full value.

6.3 PMR 25(1) and (2) of the STSMA Regulations – The Tail Cannot Wag the Dog

Is compliance with PMRs 25(1) and (2) of the STSMA Regulations a pre-requisite for levy debt enforcement? To answer this question, we need to have a look at the High Court interpretations of these provisions and consider the legislative dominance of the STSMA[327] over the STSMA Regulations.

According to the Honourable Judge Kathree-Setiloane, who wrote the appeal judgement in the case of the *Body Corporate of Central Park v Mosa* (two judges presiding),[328] to read the STSMA conjunctively with the STSMA Regulations and to construe that a specific regulation could override a general provision, in a statute, is in effect to have the tail wag the dog.[329] When instituting legal action against members who fail to pay levies, special levies and other charges, bodies corporate are often faced with magistrates who dismiss applications for default judgement due to non-compliance with PMRs 25(1) and (2) of the STSMA Regulations. These delays have placed increased strain on bodies corporate and the success of levy debt collections.

THE TAIL SHOULD NOT WAG THE DOG.

Let's unpack the provisions contained in PMRs 25(1) and (2) of the STSMA Regulations.

a. PMR 25(1) states that the body corporate must, as soon as possible, but no later than 14 days after a general meeting during which the budgets for the administrative and reserve funds for the next financial year were approved,[330] give each member written notice of the contributions and charges due and payable by that member to the body corporate. The notice must state that the member has an obligation to pay the specified contributions and charges, and specify the due date for each payment as well as the interest rate payable on any overdue contributions and charges, if applicable. The notice should further include details of the dispute resolution process that will apply in respect of disputed contributions and charges.[331]
b. PMR 25(2) further makes provision for the body corporate to send a final notice to a member who has not paid the required levies and contributions on the dates specified in the notice referred to in PMR 25(1). The final notice must state that the member has an obligation to pay the overdue contributions and charges and any applicable interest, immediately. If applicable, the final notice must further indicate the interest that is payable in respect of the overdue contributions and charges, as at the date of the final notice, as well as the amount of interest that will accrue daily until payment of the overdue contributions and charges have been made. Finally, the body corporate must state its intentions of taking action to recover the amount due if payment of the overdue contributions, charges and interest owing is not received within 14 days following the date of final notice given.[332]

Guided by recent High Court interpretations into the requirements of PMR 25(1) and (2), it is important to consider what the primary statutory provisions contained in the STSMA provide. Focus must be placed on Section 3(2) of the STSMA, which states the liability for contributions levied, save for special contributions, accrues from the passing of a trustee resolution to that effect, and may be recovered by the body corporate by application to an Ombud from the persons who were owners of the units at the time when such a resolution was passed.[333]

Section 3(3) of the STSMA provides for a special contribution becoming due on the passing of a trustee resolution levying such a contribution and may be recovered by the body corporate by application to an Ombud from the persons who were owners of the units at the time when such a resolution was passed.[334]

Magistrate's Courts have often rejected applications for default judgement stating that the STSMA and the STSMA Regulations must be read in conjunction with one another, as they complement each other.[335] This has led to the view that levies, under the STSMA, do not become due and payable from the mere passing of a trustee resolution and may not be recovered until such time as the body corporate has complied with PMR 25(1) of the STSMA Regulations, despite the provisions of Section 3(2) and (3) of the STSMA. Therefore, written reasons from magistrates for the dismissal of applications for default judgement often include the interpretation that the liability to pay levies arises from the resolution by the trustees and that the liability only becomes due and payable when notice, as set out in PMR 25(1), has been provided to the members of the body corporate.

> *"It would be absurd to suggest that the body corporate could issue summons for outstanding levies without informing the owners of the amount due and the manner in which the contributions are payable."*[336]

The above quote by the magistrate, indicates how the Magistrates' Courts have erroneously been proceeding on the basis that compliance with PMRs 25(1) and (2) is a prerequisite before a body corporate may institute legal action against a member to claim for payment of unpaid levies, special levies and other contributions. This was the specific situation in two principal cases brought on appeal to the Johannesburg High Court from the Randburg Magistrate's Court, which are discussed below.

In the *Body Corporate of Kleber v Obakeng and Another*[337] (also two judges presiding) and *the Body Corporate of Central Park*[338]*,* the appellant bodies corporate lodged appeals to the Johannesburg High Court, following applications of default judgement that were refused by the Magistrate's Court due to alleged non-compliance with PMRs

25(1) and (2) of the STSMA Regulations. The appeals were based on the argument that, in terms of Section 3(2) of the STSMA, the liability to pay levies accrues the moment a trustee resolution is passed and no further steps need to be taken by the body corporate to cause an indebtedness to arise and make the levies due and payable.[339]

The High Court found, in both matters, that Section 3(2) is clear in its meaning in that, upon the passing of a trustee resolution, for normal levies, these levies become due and payable each consecutive month thereafter and at the same time as the right to claim accrues to the body corporate.[340]

The High Court held that STSMA does not make provision for notices such as the ones contemplated in PMR 25(1) and (2) of the STSMA Regulations and therefore, failure by a body corporate to provide one or the other of the notices does not negate the body corporate's rights to claim payment of the arrear levies under Sections 3(2) and (3) of the STSMA.[341] In addition thereto, the primary legislation does not prescribe the giving of a notice to make the debt due and payable.[342] A "liability" means, unequivocally, an obligation to perform the prescribed deed, therefore upon the trustee resolution the members have a liability to pay

the prescribed levy.[343] Pleading the giving of a notice in terms of PMR 25(1) does not form part of the cause of action.[344]

Furthermore, PMR 25(2) of the STSMA Regulations can be considered an aspect of an administrative procedure to facilitate good practice and is not an injunction that is relevant to framing the cause of action.[345]

The STSMA Regulations are a form of subordinate or delegated legislation made under the authority of the original (empowering) legislation, being the STSMA.[346] Subordinate or delegated legislation can never override any Act of Parliament, or take away any right granted by it.[347] The STSMA Regulations cannot, therefore, be used as an aid to interpret the STSMA, and cannot trump the express primary statutory provisions contained in Sections 3(2) and (3) of the STSMA.[348]

Based on the aforementioned reasoning, both appeals were upheld by the High Court and judgements granted in favour of the respective bodies corporate.

Therefore, compliance with PMRs 25(1) and (2) of the STSMA Regulations is not currently a pre-requisite for a body corporate to claim unpaid levies from a member, as Sections 3(2) and (3) of the STSMA expressly entitle the body corporate to do so on the passing of the trustee resolution in that respect.

There are three other interesting takeaways from these judgements:

- Firstly, on a proper interpretation of Sections 3(2) and (3) of the STSMA, and with specific reference to the word "may", the trustees of a body corporate can, in the exercise of their discretion, institute court proceedings to enforce payments of levies and contributions and are not compelled to make an application to the CSOS.[349]
- Secondly, "reasonable" legal fees were construed to entitle the body corporate to taxed attorney and client costs.
- Lastly, due to the nature of appeals from the Magistrate's Court to the High Court, which are heard by two judges, these decisions are considered a precedent that is binding on single judges sitting in other divisions, as well as all magistrates, regardless of their jurisdiction.

These judgements are a welcoming win for bodies corporate and managing agents and should reduce both the costs and the time of levy collections in the Magistrate's Courts.

7 Airbnb

7.1 To Airbnb or Not?

In 2007, two friends named Joe and Brian were struggling to pay their rent. A design conference was held in town and the surrounding hotels were fully booked. Joe and Brian decided to set up a rudimentary website and advertise availability to stay in their small loft on a couple of air mattresses on the floor. It ended up being quite a successful endeavour for them and the Airbnb was born. What started as a simple website that allowed people across America to advertise an available air mattress in their spare room, blossomed into a $113-billion, global enterprise. Now anyone can list a room or an entire house on the platform for travellers to rent for a day or more.

Airbnb is an attractive platform for many unit owners in community schemes to earn extra income by renting out a room or unit. Nevertheless, unit owners wishing to list their units on Airbnb or similar short-term letting platforms must tread carefully as unit owners complain that such short-term rentals bring about nuisance and security issues, and it amounts to running a business.

7.2 The Paddock Case[350]

In January of 2021, the High Court of South Africa found in favour of a body corporate seeking to stop one of its members from using their unit for short-term leases on the Airbnb platform. The argument made by the body corporate, which ultimately proved successful, was that the owner was in breach of the approved conduct rules.

Following the almost five-year process, which started in 2016 when members of the body corporate of The Paddock (*The Paddock*) first raised their concerns about units being used for Airbnb rentals, the legal process has come to an end. This means that, for the time being, a precedent has been set in Gauteng, which may be followed in other jurisdictions.

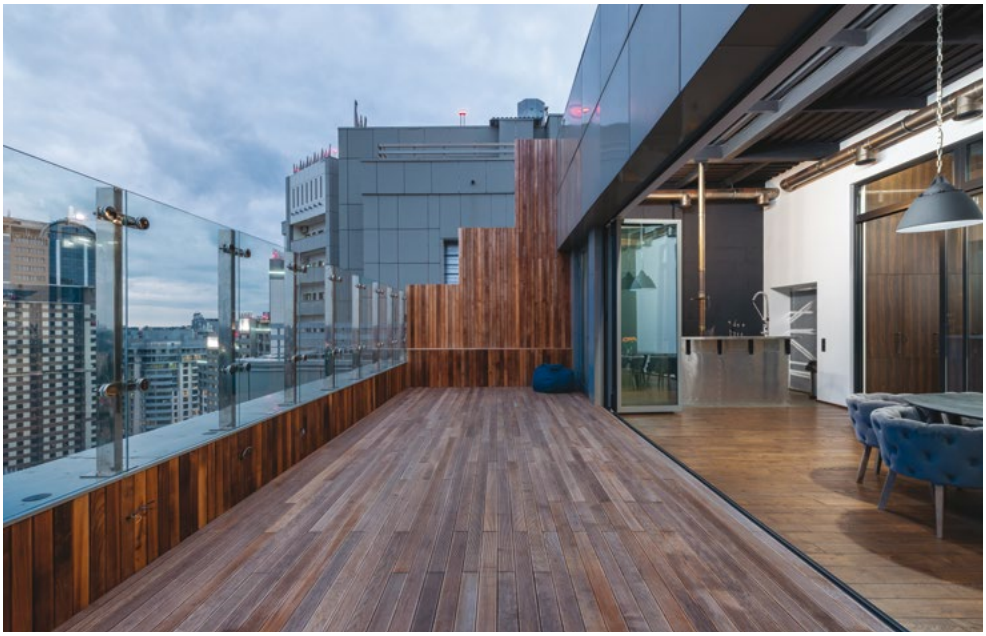
Certain members of The Paddock had initially raised a concern that short-term letting posed several challenges as well as a real security risk to the residents. However, at the time, there were no rules prohibiting it.

The members felt that as the identity of a short-term tenant was not known to the body corporate, this made it possible for unauthorised persons to enter the complex, masquerade as a short-term tenant and then cause injury to the persons or property within the complex.

Additionally, these tenants may not have received a copy of the conduct rules, which would make it difficult for the body corporate to enforce them. This may result in damage, noise, disturbances, and a host of problems including using units for commercial purposes, which the rules would usually prohibit.

These complaints led to a meeting of the owners in which the conduct rules were changed by way of a special resolution. The body corporate is governed by the STA and the STSMA and their Regulations. The correct process was followed in the adoption of the new conduct rules, and they were registered with the CSOS.

Even though the change to the conduct rules followed due process, the offending owner was notified and then repeatedly warned, yet the unit was still continuously used for short-term Airbnb rentals. The owner admitted to breaching the conduct rules but felt that there was justifiable reason to do so.



The owner felt that as the unit was purchased for investment purposes as well as short-term leasing, she was being unfairly prejudiced. Further, she felt that the change to the conduct rules was made after the unit was purchased and that an Airbnb should not be considered commercial use.

During the legal process, the offending owner also argued that the conduct rules were adopted unlawfully and finally that the new conduct rule was an infringement of her constitutional right not to be arbitrarily deprived of her property. Section 25(1) of the Constitution of the Republic of South Africa, 1996 reads:

> *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property..."*

All concerns were thoroughly explored by the High Court, including its pronouncement that nothing in the properly construed, validly approved, and certified conduct rules serve to arbitrarily deprive the owner of her right to the property, which resulted in the following order:[351]

- The owner was directed to immediately cease from leasing the unit for a period shorter than six months;

- The owner was directed to immediately cease from utilising the unit and/or leasing the unit for commercial use and/or as a resort facility and/or a bed and breakfast;
- The owner was directed to provide copies of the lease agreements entered into between herself and future tenants of the unit to the body corporate;
- The owner was ordered to pay the cost of the application; and
- The leave to appeal the application was also dismissed with costs, due to there being no prospects of success.

Ultimately, bodies corporate are required to have conduct rules in place as they are binding by law on all owners and occupiers of the sectional title scheme. As the conduct rules of The Paddock comply with the relevant legislation and were deemed to be for the benefit of all the owners and occupants, the court felt that it is essential that they be complied with.

7.3 The Blyde Case[352]

The developer and Homeowners Association (HOA) of the Blyde amended the rules of the development to ban short-term letting of units. According to them, the reason for this change was the nuisance that the guests cause. A large group of dismayed owners brought the HOA and the developer before the CSOS seeking remedy to reverse the amendment to the rules prohibiting short-term rentals. The owner applicants argued that they would not have bought the units had it not been for the investment opportunity to rent these units out on platforms like Airbnb.[353]

The Ombud found in favour of the applicants for the following reasons (amongst others):

- The amendment to the rule infringed on the owners' right in terms of Section 25 of the Constitution not to be arbitrarily deprived of their property;[354]
- The lack of evidence that the guests were in fact causing the nuisance, as it transpired that some of the permanent owners or tenants may have been the problem;[355] and
- The incorrect procedure to change the rules was followed.[356]

7.4 Changing the Rules

In short, the keyword in a community scheme is 'community'. It is a democracy. Currently, the collective majority unit owners may implement rules to prohibit Airbnb rentals or allow Airbnb rentals, and institute rules to manage same.

Section 10(2)(a) of the STSMA indicates that for the owners to amend their management rules, a unanimous resolution is required, i.e. a resolution passed by all the members of the body corporate at a meeting at which at least 80% are present or represented, calculated both in value and in number. (See note regarding abstention of vote under 'unanimous resolution' on page 35.)

Section 10(2)(b) of the STSMA indicates that a special resolution is required to amend the conduct rules, i.e. a resolution passed by at least 75% calculated both in value and in number, of the votes of the members of a body corporate who are represented at a general meeting with an ordinary quorum. Accordingly, the threshold to amend the conduct rules is lower so this may be the easier route to follow.

It is important to remember that the rules of a body corporate are subject to the CSOS approval[357] and that the management or conduct rules must be reasonable and apply equally to all owners of units.[358] Once the body corporate votes in favour of the amendment to a rule and the CSOS approves the amendment, the rule is enforceable.

In the case of an HOA, the relevant governing constitutional documents should provide guidance as to the requisite process to be followed to change their rules.

7.5 Recommended Practices if Short-term Rentals are Allowed

In the event that a community scheme does not prohibit Airbnb rentals, it is recommended that reasonable measures be implemented and followed to promote harmony.

For example, an owner has a duty to notify the body corporate forthwith of any change of occupancy in his or her section.[359] It is reasonable then for the body corporate to request that owners who wish to let out their properties provide it with the expected guests' information for security purposes.

It is also recommended that owners who let out their units on a short-term basis provide their guests with a copy of the body corporate/scheme rules before their stay to ensure that nuisance is kept at a minimum.

7.6 Proposed Tourism Amendment Bill (Gazetted on 12 April 2019)[360]

Whilst currently the power is in the hands of the unit owners to decide, by way of the scheme rules, to restrict or maintain short-term letting, the proverbial cheese may have moved with the proposed Tourism Amendment Bill, which seeks to place legislative restrictions on short-term letting. As at the date of this publication, this Bill is still in commentary phase.

8 The Protection of Personal Information Act (POPIA)

Data has become a commodity; a precious resource with immense value that organisations are willing to pay a fortune to obtain. The uncovering of scandals like the exploitation of personal information by Facebook and Cambridge Analytica, highlights the urgent need to protect individuals' data.

The POPIA is South Africa's answer to this urgent need. POPIA compliance has been a hot topic, not only for managing agents, but across all sectors over the last couple of years.

8.1 POPIA Application in Sectional Title Schemes

The Protection of Personal Information Act 4 of 2013 (the POPIA) was assented to by the President on 19 November 2013, published in the *Government Gazette* on 26 November 2013 and came into effect on 1 July 2020 with a 12-month period provided for compliance. This Act gives effect to the important right of privacy as enshrined in Section 14 of the Constitution of the Republic of South Africa, 1996.

8.1.1 The purposes of the POPIA

The purposes of the POPIA are set out in Section 2 as follows:

a. "*To safeguard personal information when processed by a responsible party, subject to justifiable limitations aimed at – balancing the right to privacy against other rights, particularly the right of access to information; and protecting important interests, including the free flow of information within the Republic and across international borders;*
b. *To regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;*
c. *To provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and*
d. *To establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act*."[361]

8.1.2 Key players in the POPIA

The POPIA is applicable to all persons (natural or juristic) who process personal information for any purpose whatsoever. This means that the POPIA will be applicable to sectional title schemes, trustees and managing agents when such persons process personal information.

Table 29 Key players in the POPIA

Responsible party ...	... a body (private or public) or person which, alone or with others, determines the purpose of and means for processing personal information.[362] **Example**: A body corporate is a responsible party in the way that it determines the purpose of and means for processing personal information of its members.
Data subject ...	... a person to whom personal information relates.[363] **Example**: A member of the body corporate is a data subject. Where applicable, a body corporate itself is a data subject.
Operator ...	... a person who processes information on behalf of a responsible party in terms of a contract or mandate.[364] A managing agent is an example of an operator, who is contracted by the body corporate to process the body corporate's personal information and the personal information related to its members.
Information officer ...	... the person who is the head of a body that is charged with ensuring that a body is in compliance with the POPIA.[365]
Information Regulator ...	... established in terms of Section 39 and empowered with duties, amongst others, to monitor and enforce compliance of the POPIA.[366] The Information Regulator's website is: https://inforegulator.org.za/

8.2 Definition of Terms

8.2.1 Personal information

Section 1 of the POPIA defines personal information as, "*information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person*". Examples of such information include, amongst other things:

- Identity numbers;
- E-mail addresses, physical addresses and telephone numbers;
- Location information;
- Biometric information; and
- Information about race, religion, birth, and the personal views of a person.

8.2.2 Processing

This is any operation or activity or any set of operations, whether or not by automatic means, concerning personal information.[367] The operations included in processing are listed in Table 30.

Table 30 Operations included in processing

Collection	Receipt	Recording
Organisation	Collation	Storage
Updating/modification	Retrieval	Alteration
Consultation/use	Dissemination by means of transmission	Distribution or making available in any other form
Merging	Linking	Restriction
Degradation	Erasure	Destruction

8.3 Conditions for Lawful Processing of Personal Information

Personal information can be processed if it is done in compliance with the eight conditions for lawful processing as set out in the POPIA.[368] In other words, there are eight golden requirements that must be borne in mind when personal information is processed. These eight golden requirements are listed in Table 31.

Table 31 Conditions for processing personal information

1. Accountability	5. Information quality
2. Processing limitation	6. Openness
3. Purpose specification	7. Security safeguards
4. Further processing limitation	8. Data subject participation

We will briefly discuss these conditions below.

8.3.1 Accountability[369]

This condition stipulates that a responsible party must ensure that personal information is processed lawfully and in terms of the conditions for processing personal information as set out in the POPIA. Where a community scheme or a managing agent is a responsible party, they are **accountable** for ensuring that personal information is lawfully processed. The buck stops with the responsible party.

8.3.2 Processing limitation

POPIA establishes the boundaries surrounding when personal information can be processed:

- Processing must be done lawfully and reasonably.[370]
- Processing should be limited to personal information that is strictly necessary to fulfil the intended purpose. It must be adequate, relevant and not excessive.[371]
- While personal information may be lawfully processed when a data subject, or a competent person where the data subject is a minor, consents to the processing, there are several other lawful justifications for processing personal information, over and above consent, including:[372]
  - That the processing is required to act in terms of a contract in which the data subject is a party;
  - That the processing is required so that the responsible party can comply with the law;
  - That the processing protects the data subject's legitimate interests; and
  - That processing is required to engage in the legitimate interests of the responsible party or of a third party to whom the information is supplied.

8.3.3 Purpose specification

- There must be a lawful, specific reason or purpose for the processing of personal information.[373]
- Personal information should only be retained for as long as it is required or in terms of prescribed laws, after which it must be destroyed, deleted or de-identified.[374]

8.3.4 Further processing limitation

Further processing[375] of personal information must align to the purpose for which it was collected unless:

- The data subject consents to further processing;
- The personal information is available publicly; or
- The further processing is necessary in compliance with applicable laws.

8.3.5 Information quality[376]

It is imperative that the responsible party or operator ensures the quality of personal information that is processed. It must be complete, correct, up to date and not deceptive.

8.3.6 Openness[377]

A responsible party must be transparent in the way that it processes personal information. As such, a responsible party must have a Promotion of Access to Information Act (PAIA) Manual and must notify data subjects of any processing activity in respect of their personal information.

8.3.7 Security safeguards[378]

A responsible party is charged with protecting the personal information in its custody. This mandate includes ensuring that the personal information is secure and maintains its integrity and privacy. The POPIA is not operationally prescriptive in the sense that it does not mandate the type of anti-malware that one should install, for example. However, it does broadly provide that a responsible party must take steps that are aligned to the "*generally accepted information security practices*", safeguards that are appropriate, reasonable technical and organisational measures to implement safety procedures to prevent loss of or damage to the personal information or unlawful access or unlawful processing of personal information. These safety procedures should be regularly reviewed and updated to ensure that they are working as they should.

It is important to remember that if security is compromised and personal information is unlawfully accessed or obtained, the responsible party must report the breach in writing to the information regulator and the data subject(s) as soon as possible.[379]

8.3.8 Data subject participation

A data subject, after providing evidence of identity, is entitled to find out from the responsible party, for free, what personal information is held of theirs and how this information has been shared with third parties. The responsible party must accommodate such request within a reasonable time.[380]

A data subject may request that certain information be corrected or deleted.[381]

8.4 The Risk of Non-compliance

Section 99(2) of the POPIA stipulates that a data subject may institute civil action for loss or damages that they have suffered as a result of a responsible party's non-compliance with a provision of the Act. Such civil action could result in an order for the payment of damages, interest and costs of the suit.

Furthermore, the POPIA provides for the imposition of penalties (a fine or imprisonment for a period of not more than ten years) if a person is found liable for an offence in the POPIA.[382]

8.5 Access to Personal Information Included in the Sectional Title Legislation

The STSMA and the PMRs that are contained in the STSMA Regulations for bodies corporate contain certain provisions that necessitate the processing of personal information.

For example, the body corporate must prepare and update lists of trustees, members and tenants with their full names, identity numbers (or passport numbers for foreign citizens), section addresses and mailing addresses, telephone numbers and email addresses or other electronic addresses, if any.[383] On receiving a written request, the body corporate must make these records available for inspection by, and provide copies of them to a member, a registered bondholder or to a person authorised in writing by a member or registered bondholder.[384] The body corporate must comply with a request for inspection or copying under this rule within ten days.[385] The records must be in writing or in a form that can be easily converted to writing.[386]

Furthermore, the body corporate's books of account must include individual accounts for each member.[387] These books of account must contain necessary information to allow members to assess the body corporate's financial situation. These books of account and records must be made available for inspection and copying, on application of any member, registered bondholder or of the managing agent.[388]

Section 3(1)(n) of the STSMA also provides that a body corporate must perform the functions entrusted to it by or under the STSMA or the rules, and such functions include complying with any reasonable request for the names and addresses of the persons who are the trustees of the body corporate in terms of the rules or who are members of the body corporate.

It is apparent from the provisions above that bodies corporate, in some cases, have a legislative mandate to process personal information

and provide same to certain identified persons, on a reasonable request therefor. It is suggested that these Acts must be read together.

Table 32 lists the steps that need to be taken to comply with the POPIA.

Table 32 Steps needed to comply with the POPIA

Appoint an Information Officer	Must be registered with the Information Regulator.
Perform a Risk Assessment	• What personal information is processed? • What is the purpose of this processing? • Are the eight conditions for lawful processing adhered to? • Have any reasonably foreseeable internal or external risks to personal information that is processed been identified?
Prepare a PAIA Manual	Upload to the community scheme's website (if a website exists).
Adhere to the conditions of Lawful Processing of Personal Information	See Paragraphs 8.3.1 to 8.3.8.
Update contracts with operators	Contracts with operators should be updated to ensure that the security measures in terms of Section 19 of the POPIA condition 7 (Security Safeguards) are maintained by the operator when processing personal information on behalf of a responsible party.
Create, maintain, manage, and monitor protocols and policies to ensure that: a. Data subjects' requests (e.g. requests for access to their data/rectification/deletion of data) are attended to; b. A framework of solutions is identified and established to preserve appropriate defences or safety measures against the reasonably foreseeable internal and external risks; c. Security breaches are communicated to the Information Regulator and data subjects as soon as possible; and d. Processing of personal information is recorded and compliant.	Amend rules of the body corporate, if required.

9 Selected Case Notes for Managing Agents

Written by Fausto Di Palma

In this chapter, we will briefly set out some relatively new case law over the last year or so, which should be of interest to managing agents and potentially their body corporate clients or trustees.

9.1 2021 Cases

9.1.1 Lessons from a recent appeal against a CSOS adjudication order

An appeal against a CSOS adjudication order in KwaZulu-Natal saw the Pietermaritzburg High Court set aside the adjudicator's order as it was wrong in law. The case in question is *Royal Palm Body Corporate v Vahlati Investments (Pty) Ltd and Another*[389] (*Royal Palm*) and judgement was delivered on 1 June 2021.

The judge made the point that the appeal application against the CSOS adjudicator's order must be served on the CSOS and the adjudicator in question. Another noteworthy confirmation flowing from this court's judgement is in respect of the service of court process (documents and notices) on the unit owner of a sectional title scheme in accordance with PMR 4(5) of the STSMA Regulations. This rule provides that the service address for any legal process or delivery of any other document to a member is the address of the primary section registered in that member's name. The member is entitled to change that address for purposes of the member's receipt of notices for a general meeting of the body corporate – where a special or unanimous resolution will be taken, for example, Sections 6(3)(c) and 6(4) of the STSMA – to another physical address, postal address or fax in South Africa or to an email address, and that change is then effective when the body corporate receives written notice of such a change from the member.

Although not dealt with by the court in this judgement, it is arguable that the notice of change of address, if any is received from a member of the body corporate, is only applicable in respect of notices for general meetings and not for legal process, for example, a summons.

After an exercise in statutory interpretation, the judge in the *Royal Palm* case agreed that the old management rules that were applicable in terms of the STA[390] were repealed by the provisions of the new management rules created by the STSMA Regulations – specifically in this case, relating to a quorum for a general meeting. The issue was that the old PMR 57(1) of Annexure 8 of the STA Regulations[391] provided that no business shall be transacted at a general meeting unless a quorum is present, and then went on to set the quorum at the number of owners holding at least 20% of the votes by representatives recognised by law and entitled to vote. On the other hand, the new PMRs in the STSMA Regulations provide that a quorum is one-third of the total votes of members in value, provided that in calculating the value of votes required to constitute a quorum, the value of the votes of the developer must not be taken into account.

Notwithstanding that the erstwhile developer of *Royal Palm* was still the owner of several units in the scheme, they were no longer the

developer as defined in the STSMA and therefore their votes could be counted at the general meeting. The meeting was therefore quorate and calculated correctly based on the percentage of members present and entitled to vote at the general meeting.[392]

Although the adjudicator had the power to declare certain provisions of the old management rules as invalid and inconsistent with the new PMRs, the adjudicator's decision was still wrong in law on an application of the facts, and was therefore set aside.

9.1.2 The CSOS adjudicators are not always incorrect

In the case of *Prag N.O and another v Trustees for the Time Being of the Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and others*[393] (*Mitchell's Plain Industrial Enterprises*) there was a sectional title unit that was destroyed in a fire in 2019.[394] When the claim submitted to the scheme's insurer was rejected, because the Trust that owned the unit in question, had not complied with the requirement to obtain valid electricity and fire equipment certificates, that the relevant insurer had previously demanded, the unit owner started complaining.[395] Dissatisfied with the outcome of the claim, the unit owner launched an application to the CSOS, and the adjudicator dismissed the claim on the basis that the CSOS lacked jurisdiction.[396] The unit owner was still dissatisfied and appealed against the adjudicator's decision to the High Court.

The High Court (two judges presiding) held that while the CSOS and its adjudicators have wide powers to assist in dispute resolution and can make quite a few orders relating to financial, behavioural, governance, management, and regulatory spheres, it did not have jurisdiction to entertain the claim brought by the unit owner and that the adjudicator was correct in dismissing the application.[397]

Unit owners are responsible for the upkeep of their sections and losses suffered within their sections, are for their own account.[398] It is not envisaged that the unit owners can sue the body corporate or their insurer for damages sustained within their section.[399] The common property insurance that is required to be obtained by the body corporate

is meant to protect the common interests of owners in the scheme and not the personal interests of individual unit owners.[400]

9.1.3 When you do not know your own powers – a lesson and reminder for trustees

In Marvel's Spider-Man comic series, Uncle Ben teaches Peter Parker that with great power comes great responsibility. This saying has become a cliché in many quarters. But the lesson also rings true for the power that trustees of bodies corporate wield in sectional title schemes.

In *BAE Estates and Escapes (Pty) Ltd v The Trustees for the Time Being of the Legacy Body Corporate and Pam Golding Property Management Services (Pty) Ltd*[401] (*Legacy*), Judge Bozalek delivered a judgement that reviewed and set aside a trustee resolution.[402] It is not the first time, nor will it be the last, that a trustee resolution is overturned and dismissed by a court.

The trustee resolution in the *Legacy* case was reviewed and set aside on the basis that it was an administrative action, and was unlawful, unreasonable, and not rationally connected to the purpose for which it was taken or to the information before the body corporate.[403] The judge further held that irrelevant considerations were taken into account or relevant considerations were not taken into account.[404] Moreover, the trustee resolution was taken in a procedurally unfair manner in that the affected parties were neither heard nor consulted prior to the decision being taken.[405]

The facts of the matter were that an estate agency (BAE Estates and Escapes – the applicant) was barred from conducting certain business within the sectional title scheme as per a trustee resolution, which was purportedly passed under powers afforded to the trustees in a conduct rule. The estate agency was appointed to search for tenants for a unit on behalf of a unit owner within the scheme. A tenant was found by them, and the tenant then started sub-letting the unit on Airbnb for short periods. As guests started streaming in for short periods, so the complaints followed from neighbours due to various nuisances – from loud parties to cigarette butts being thrown on neighbouring properties.

The conduct rule in question provided the trustees with the power to restrict short-term holiday letting to only those which were, in the sole discretion of the trustees, managed by a "reputable" letting agency.[406] The trustees, on the authority of the conduct rule and in reaction to the complaints received from other owners about the nuisances stemming from this unit, passed a resolution restricting the operation of short-term letting to "reputable" letting agencies only, and caused an email to be sent to BAE Estates and Escapes, to the effect that they were not permitted to operate within the scheme at all and with immediate effect.[407] The email to BAE Estates and Escapes implied that the estate agency was not reputable and was vehemently opposed by the estate agency.[408] So much so, that when the trustees refused to retract their decision upon demand from the estate agency, the estate agency filed an application to review the decision of the trustees in the Western Cape High Court.[409]

The estate agency argued that the trustee resolution was an administrative action in terms of the Promotion of Administrative Justice Act[410] (PAJA), but that if it was not deemed to be an administrative action in terms of PAJA, that it was still reviewable under the common law, read with Section 33 of the Constitution (the right to just administrative action), on general principles of lawfulness, reasonableness and procedural fairness.[411]

The trustees contended that the trustee resolution was not an administrative action because the trustees did not exercise a public power or perform a public function.[412] It was further argued that the decision did not adversely affect the rights of BAE Estates and Escapes and the decision did not have a direct, external legal effect.[413] For the trustee resolution to amount to an administrative action under PAJA, it had to bear these features, among other considerations.

Therefore, the court had to decide if the trustee resolution was reviewable, either as an administrative action under PAJA or under the common law. And then, if it was reviewable, whether it fell to be set aside on the merits or for procedural fairness reasons, or at all.

The learned judge referred to another court case in which the above was considered prior to the enactment of PAJA, but with no argument or

opposition to fully ventilate the arguments in court for that matter.[414] That case was *Body Corporate of Laguna Ridge v Dorse*[415] (*Laguna*) where the judge was of the view that a decision of a body corporate affecting a member was reviewable at common law. There was no external third party here. The facts in *Laguna* were that the rules of the body corporate allowed pets only with the trustees' written consent. This is a common rule found in community schemes to this day.

The trustees had denied consent to an owner to keep her dog because the building was a high-rise (18 stories) and was in their opinion, unsuitable for keeping pets. The trustees had a 'general policy' in which they would deny applications as they believed that they had created a precedent. (Several denials had presumably preceded the denial in question.) The court in *Laguna* found that the trustees had considered irrelevant considerations (i.e. setting a precedent) and ignored relevant considerations, such as that the dog was not a nuisance. The court interfered with the decision of the trustees and set it aside on the basis that it was unreasonable and the trustees had not applied their mind to the matter. They therefore permitted the owner to keep her dog, notwithstanding the rule, under certain conditions.

As Civin and Pereira stated in their article aptly titled *"'Paws' before signing on the dotted line"*:[416]

> *"If each decision by the trustees to grant or refuse such permissions was to be considered on its own merits that decision would not constitute a precedent because it would be a decision based on the facts and circumstances relevant to the particular case under consideration. A refusal to grant permission in a particular case simply because it would create a precedent would be tantamount to a failure to consider and decide the application on its own merits and would result in a refusal to depart from the general policy of not granting permission. As such the court held the decision of a trustee is reviewable under the common law."*

In the case of *North Global Properties (Pty) Ltd v Body Corporate of Sunrise Beach*[417] *(Sunrise Beach)*, which was also quoted by the court in *Legacy*,[418] the Durban High Court ruled that trustees' decisions must

be objectively reasonable, and if they are not, then they are reviewable under the common law, read with the STA[419], PAJA and Section 33 of the Constitution.[420] The judge in the *Sunrise Beach* case went further and stated that the body corporate is a statutory body performing not only commercial and regulatory functions but also administrative functions.[421] Therefore, so the judge ruled, the trustees must adhere to the general constitutional principles of just administrative action, and that the body corporate is also an administrator as defined in PAJA.[422]

The court in *Legacy* also quoted the earlier matter of *Khyber Rock Estate East HOA v Unit 9 of Erf 823 Woodmead Ext 13*[423] *(Khyber Rock)* where the decision of an HOA[424] was found to have fallen outside of the ambit of PAJA. Despite this outcome, the *Khyber Rock* case concluded that the decisions of the HOA are reviewable under the common law since those are decisions of a voluntary association. It ruled that a court could be called upon to interfere with the decisions of trustees of an HOA where that entity has failed to comply with the principles of natural justice, procedural fairness and reasonableness.[425]

To determine the reasonableness of a decision, it was clear after the *Khyber Rock* case, that it was imperative that there be a rational connection between the facts that are presented to the decision makers and the considerations that are brought to bear in the process of decision-making to reach a conclusion.[426] What was not clear, was if PAJA would apply to such a decision under consideration.

In essence, for there to be administrative action, the action must not only have a public character, which means that it must be a power and function exercised in terms of an empowering provision (a statute), but it must also have a direct, external legal effect.[427] There is a plethora of cases, going even as far as the Constitutional Court, under administrative law, which grappled with these principles and definitions in administrative law.[428]

A private body has the ability to exercise public powers or perform public functions, and this is to be determined on a case by case basis.[429] It was explained that the source of the body corporate's powers, acting through its trustees, is the STSMA[430], which provides that the body corporate is responsible not only for the enforcement of rules and for

the management of the common property, but also for financial and administrative management.[431] The body corporate is managed by the board of trustees who do so for the benefit of all owners and their powers stem from legislation.[432] The trustees also stand in a fiduciary relationship to the body corporate.[433] The judge noted that sectional title schemes constitute a growing component of the housing market and was of the opinion that the application of management and conduct rules affects a significant section of the public.[434] The judge went even further and stated that many of the rules enforced by bodies corporate are characterised by their coercive and disciplinary natures.[435]

Notwithstanding that the rules, insofar as they regulate the relationship between owners, occupiers and the body corporate, have been held to be contractual in nature, the rules themselves, as well as the power to implement and enforce them, stem from statutory authority.[436] Notably, other than the owners who participated in the original adoption of the management or conduct rules, the vast majority of the owners (including new owners or those who did not participate in the changes) are subjected to these rules and must live with them if they wish to live within the scheme.[437] This was how the court contrasted the case of *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others*[438] where it was held that the relationship between an owner and an HOA is contractual in nature. The trustees in the *Legacy* case attempted to argue this point to escape the review of its decision by the court, but it was not accepted.

The court ultimately held that the resolution was harmful in its effect on the estate agency and directly impacted a party outside of the contractual relationship between owners and the body corporate, which brought other considerations to bear on the matter to which the court had to apply its mind.[439] The direct, external legal effect that the resolution had on the estate agency was that it removed a pre-existing right that the estate agency had to engage short-term letting on behalf of owners within the scheme.[440] The reputation of the estate agency was also threatened because it lost the business of the owner in question and was not able to serve other potential clients within the scheme.[441]

The court concluded that in the exercise of its powers, a body corporate is exercising a public power and performing a public function, namely regulating and administering the affairs and conditions under which owners and occupiers must live.[442] In this case, the body corporate's powers and the performance of its functions impacted upon an external third party who was not directly subject to the rules of the body corporate.[443] In this regard, it was held that the decision of the trustees, at least insofar as it related to the estate agency, constituted administrative action in terms of PAJA and was therefore reviewable by the estate agency.[444]

Even if PAJA was not a successful argument for the estate agency, the court held that the trustee resolution could still be reviewable on the basis of lawfulness, reasonableness and procedural fairness.[445] Neither the trustees, the body corporate, nor the managing agent performed any basic investigation of the underlying facts and the estate agency was not given any opportunity to make any representations prior to the decision being made.[446] The decision also went beyond what the conduct rule had initially envisioned.[447] On the evidence, there was no factual basis upon which the trustees could rely which could lay the blame of the nuisances experienced in relation to the Airbnb occupants at the door of the estate agency.[448]

The court further ruled that the decision to restrict the activities of the estate agency in terms of the conduct rule and the trustee resolution that followed, was not rationally connected to the purpose for which it was intended, or to the information that was before the body corporate at the time that the decision was taken, and was therefore unlawful and unreasonable.[449] Relevant considerations were ignored and/or irrelevant considerations were taken into account (i.e. the estate agency had nothing to do with the short-term letting of the unit in question).[450]

The trustees in the *Legacy* case had acted arbitrarily and irrationally.[451] They exceeded their powers by trying to ban the estate agency from conducting its business in the sectional title scheme.[452] It was notable that the conduct rule itself limited the body corporate's powers to restrict an estate agency from short-term letting in circumstances where the

trustees considered that such an agency was not a reputable one for that purpose.[453]

Insofar as the rights of members of a sectional title scheme are affected by the decisions of trustees, their decisions are reviewable as they constitute administrative action.[454] The same goes for decisions of trustees that affect external parties who are not members of the sectional title scheme. In terms of Section 3(2) of PAJA, there are several requirements to take heed of:[455]

- Adequate notice of the nature and purpose of the proposed action must be given;
- The proposed action must be described with sufficient detail to be understood;
- A reasonable opportunity must be given to submit representations from those affected;
- Adequate notice must be given of a right to an internal appeal or review mechanism, if one is available to those affected; and
- Adequate notice of a right to request written reasons for the decision must be provided.

Professor van der Merwe suggests that if the body corporate's rules dealing with such actions contain a fair administrative procedure, then those procedures may be followed to the exclusion of the provisions of PAJA.[456] However, the fairness of any procedures set out in the rules will be tested against the standards set out in PAJA if a dispute results from any actions taken.[457] For example, the procedure to enforce a fine or penalty against an owner for non-compliance with a rule is the most commonly disputed instance where, in some cases, the owner being fined was not given the opportunity to make representations to the trustees prior to a decision being taken against the owner (a penalty being imposed). For instance, the CSOS refers to some rules as being 'undesirable' such as, if penalties are imposed "*without following due process*".[458]

With the establishment of the CSOS in terms of the CSOSA,[459] it is arguable that the CSOS is the more appropriate forum to review a decision-making process and/or a decision of an executive committee of a community scheme. Specific relief is afforded to applicants in a dispute resolution application to the CSOS in terms of Sections 39(4)(c) or (e) of

the CSOSA, for example. An order can be applied for on the basis that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association was void or invalid. An order can also be passed by the CSOS declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners.

Trustee resolutions come in many forms and shapes and they are concluded often, and for many different reasons. Decisions are required or considered necessary in the day-to-day management of the sectional title scheme, as the trustees exercise the body corporate's powers and perform its functions. In some instances, trustees are obliged to make decisions in terms of the STSMA, the rules or directives imposed on them at a general meeting.

In any case, even if there is no external third party who may be adversely affected by a decision that a board of trustees is contemplating, the trustees must act fairly in accordance with the law, honour their fiduciary duty towards the body corporate and follow due process. If they do not do so, their decisions could be set aside once successfully reviewed by a court or the CSOS.

The *Legacy* case went on appeal to the SCA and the hearing of the appeal was set down for Thursday, 26 August 2021.[460] It was interesting to note that the SCA disagreed with the Western Cape High Court on the question of whether PAJA applied to the decision taken by the trustees.[461] The SCA held that in order for PAJA to apply, the trustees' decision had to amount to administrative action as defined in Section 1 of PAJA. The true character of the action taken must be determined in the context of either a public power or a public function. The SCA held that the High Court had failed to properly analyse the relevant requirements of the definition of an administrative action. Just because bodies corporate derive their powers from statute does not mean that their decisions are couched in public power or the performance of a public function. There needs to be more, and there are three crucial requirements/queries as confirmed by the SCA:

a. Was the trustees' decision of an administrative nature? The answer was that the decision is not of an administrative nature;[462]
b. Did the trustees exercise a public power or perform a public function? The answer was that they did and do not;[463] and
c. Did the trustees act in terms of any legislation or an empowering provision? The answer was that they did not.[464]

The outcome in the SCA was the same, but for different reasons. The SCA held that the decision of a private body can be subjected to judicial review at common law, and held that the trustees' decision was reviewable at common law.[465] The SCA confirmed that the trustees' decision should be set aside and dismissed their appeal.[466]

9.1.4 Back to basics

In the reported judgement of *Body Corporate of Nautica v Mispha CC*[467] (*Nautica*) from the Western Cape High Court (7 December 2021), the court went back to basics on several principles relevant to the collection of arrear levy debts.

The High Court held that:
a. The defendant unit owner had no reasonable justification for withholding payment of the levies due to the body corporate;[468]
b. Bodies corporate have *locus standi* to sue for arrear levies as conferred on them by Section 2(7) of the STSMA;[469]
c. A body corporate was entitled to levy compound interest on arrears;[470] and
d. The *in duplum* rule permits interest to run anew from the date that the judgement debt is due and payable (interest runs on and is limited to an amount equal to the whole of the judgement debt, including the portion that consists of previously accrued interest).[471]

9.1.5 Ratifying community scheme resolutions – who has the power?

The full bench decision (three judges) of the Pietermaritzburg High Court, in the case of *Derby Downs Management Association v Assegaai River*

Properties (Pty) Ltd and Another (the *Derby Downs* case),[472] is interesting for quite a few reasons.

One reason is that it appears to be a rare occasion when a CSOS adjudication order is not only appealed to one High Court judge, but then the decision of the single judge is appealed to the full bench of that High Court. Another reason that the judgement is interesting is that the adjudicator's decision was overturned by the single judge of the High Court in the first appeal, and then the adjudication order was re-established by the full bench. This means that the adjudicator was correct from the very start, and the single judge's decision was set aside.

Primarily, however, this judgement is interesting because the shareholders (members) of the HOA were permitted to ratify, by special resolution, an earlier impugned decision made by the HOA's Board of Directors, some ten years earlier. That decision was to change the calculation of levies for the HOA.

Although the decision allowing the ratification by special resolution of the members was based on Section 20(2) of the Companies Act[473] (because the HOA is a registered non-profit company), it makes one question whether this kind of ratification, or other types of ratification of potentially impugned body corporate or trustee resolutions, is possible in a sectional title environment, or for HOAs which are common law voluntary associations.

Starting with bodies corporate, we know that a body corporate is a creature of statute and so when we embark on an exercise to determine whether a particular act is valid and permitted in terms of the STSMA,[474] the STSMA Regulations[475] or any rules,[476] we have to carefully review and confirm the source of the body corporate's power to perform that act. Section 4(i) of the STSMA provides for a catch-all or broad provision relating to the powers of the body corporate. This provision states that the body corporate may exercise the powers conferred upon it by, or under, the STSMA or the rules, and such powers include the power to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.

A body corporate makes decisions in two traditional ways: Through the board of trustees and through the members. Members can pass

resolutions of the body corporate either at a general meeting or in writing in certain circumstances. Certain decisions are preserved for the members to decide and cannot be decided by trustees.[477] Trustee powers can also be restricted in terms of the rules and in terms of any restriction imposed or direction given at a general meeting of the owners of the sections.[478]

If an act is performed and such act is not within the body corporate's powers as per the STSMA, STSMA Regulations or the rules, then such an act is *ultra vires* (beyond their available powers) and the act is void.[479] If that act is void, then it has no legal force and cannot be enforced by, or against, the body corporate by instituting court proceedings.[480] Some commentators have also provided the opinion that a body corporate cannot even ratify an *ultra vires* act by passing a unanimous resolution.[481]

If the trustees exceed their powers in performing an act, a general meeting of members may be able to ratify that act, provided that such act is within the capacity/power of the body corporate itself.[482] It could be argued that a general meeting of members is not required if the statutory requirements are met to obtain a written special or unanimous resolution (round-robin). The members cannot ratify an impugned act of the trustees if the body corporate itself has no express or implied power to perform that act.

With regard to the protection of third parties in instances where contracts are entered into by trustees of a body corporate when they do not have the power or authority to do so, the principle of ostensible authority, the defence of *estoppel* and even PMRs 10(1) and (2) of the STSMA Regulations may protect those third parties who may still be able to enforce their contracts entered into by the body corporate. The members may then have recourse against the trustees who acted in breach of their fiduciary relationship to recover any loss suffered as a result thereof by the body corporate.[483] In turn, though, the trustees are indemnified against all costs, losses and expenses arising as a result of any official act that is not in breach of the trustee's fiduciary obligations.[484]

The STSMA and the STSMA Regulations would appear to be silent on ratification of decisions by the board of trustees, or the membership, which were previously, but potentially wrongfully, made. One place where ratification by the membership is contemplated is PMR 16(2)(d) of

the STSMA Regulations, but this relates to the motion at the first general meeting to ratify or not to ratify contracts entered into by the developer on behalf of the body corporate (also referred to as 'sweetheart contracts').[485]

There are, however, legislative mechanisms provided for failed proposals for special or unanimous resolutions in sectional title schemes that would involve the CSOS. This could be categorised under quasi-judicial ratification. Section 6(9) of the STSMA provides that a body corporate or an owner who is unable to obtain a special or unanimous resolution may approach the Chief Ombud for relief. Similarly, relief is offered in Section 39(4)(d) of the CSOSA,[486] which states that, in respect of meetings, the adjudicator could declare that a motion for a resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and give effect to the motion as was originally proposed, or a variation of the motion proposed.

Furthermore, in terms of Section 54(5) of the CSOSA, the adjudicator's order may provide that the order they make has the effect of any type of resolution or decision provided for in the scheme governance documentation (the rules of the body corporate). This would appear to cover trustee resolutions too.

Therefore, we have learnt that if an HOA's Board of Directors passes a resolution that was void at the time it was passed, it can be ratified even a decade later by the members of the HOA in terms of the Companies Act and following the *Derby Downs* case. This leaves open the question of whether resolutions of the executive committee of a common law voluntary HOA, governed by a constitution and estate rules, can be ratified by the members of the voluntary association.

In the sectional title environment, there are different factors and provisions that must be taken into account in determining whether a body corporate or trustee resolution can be ratified by the members of the body corporate, if the impugned resolution was originally void, as stated above. In addition to the potential for the members of the body corporate to ratify decisions of the board of trustees or of the members, if the body corporate itself has the power to perform the act it seeks

to ratify, the current sectional title legislation offers ways in which failed proposed resolutions could be obtained from the CSOS. It is important not to assume that the members of the body corporate have the power to ratify an impugned act of the trustees and it is not safe to assume that a failed proposed resolution cannot be validated or approved by the CSOS.

9.1.6 Managing agents beware the interdict

In the unreported case of *Kanyin Body Corporate v Lumic Property Consultants (Pty) Ltd and Another*[487] (*Kanyin*) the High Court handed down a final urgent interdict in favour of the body corporate (with enforcement measures) for the return of financial and other documentation and for the transfer of signing powers of the body corporate's account.[488] The body corporate was struggling to break free of a management agreement with the managing agent, and to take repossession of their bank account and documents.

This case teaches us that where managing agents seek to bind bodies corporate to their agreements in some kind of perpetual servitude, it is not going to be acceptable to a court, in the event of a relationship of trust breaking down irretrievably.[489] In essence, the relationship between a body corporate and a managing agent arises out of the law of agency.[490]

9.2 2022 Cases (to date of publication of this guide)

9.2.1 Use another gate, please

A body corporate would be well within its rights to regulate access to the common property premises for the sake of convenience and safety of residents and owners, and for good management.[491] This is what was held by the High Court in *Barzani 53 (Pty) Ltd v Body Corporate Witfield Ridge*[492] (*Witfield Ridge*). The court also held that regulating access is one of the primary purposes of the management of a body corporate.[493]

9.2.2 Cancelling a management agreement

In the case of *The Body Corporate of Brushwood Sectional Title Scheme vs Whitfields Property Management (Pty) Ltd*[494] (*Brushwood*) the body corporate sought an application to terminate the management agreement between the parties, and sought an order that the managing agent provide all of the financial documentation and other information in its possession relating to the body corporate from the inception of the management agreement to the date of the order.[495] The managing agent argued that the trustees of the body corporate were not validly appointed and refused to carry out a payment instruction given to them by the purported trustees.[496]

The court remarked that:

> *"It is apparent that the relationship between applicant and the respondent is that of agency and mandate. It is trite that under common law a mandate is in general terminable at the will of the principal and that it is against public policy to coerce a principal into retaining an individual as an agent when he no longer wishes to have him as such."*[497]

The issue was that the managing agent had accepted the authority of the current trustees at the time that the management agreement was concluded.[498] The court held that it was therefore not open to the managing agent to now contend that the trustees were not validly appointed and therefore have no authority to cancel the management agreement.[499]

The court also held, while citing PMR 10(2) of the STSMA Regulations, that even if there is a defect in the appointment of the trustees, it does not mean that their actions become unlawful, but that they remain valid and effective unless it is established that those actions were unfair, unreasonable and not in the best interests of the body corporate.[500] The court then concluded that the trustees had lawfully terminated the management agreement and ordered that all the financial and other documentation be delivered to the body corporate.[501]

9.2.3 New clarifications on the CSOS appeals

We briefly touched on the following case in the context of the CSOS appeals in the Trustee Reference Guide; however, there was a bit more to this case, which is relevant for managing agents.

To recap, we know that in terms of Section 57(1) of the CSOSA,[502] an applicant, the community scheme, or any affected person who is dissatisfied with an adjudication order of the CSOS may appeal to the High Court on a question of law only. In the recent case of *Ncala v Park Avenue Body Corporate*[503] (*Park Avenue*), the Johannesburg High Court (two judges presiding) handed down judgement on 9 May 2022, in which the court clarified a couple of important issues about appeals in terms of Section 57 of the CSOSA.

As an aside, the *Park Avenue* case also makes for interesting reading and consideration in that the appellant (the unit owner) who is visually impaired, was unsuccessful in his claims and allegations against the body corporate where he sought a declaratory order to the effect that the body corporate had infringed on his constitutional rights to dignity and equality. The unit owner was unsuccessful in his bid to have alterations made to an exclusive use area and argued that the body corporate's refusal to

permit the alterations infringed on his rights to dignity and equality as a disabled person.

An analysis of these issues is a topic for another day, and since the appellant has now lodged an application for special leave to appeal to the SCA, we may learn more from any subsequent judgement if the appeal to the SCA is heard.

Let's now re-emphasise this judgement's impact on Section 57 appeals to the High Court in terms of the CSOSA.

9.2.3.1 No leave to appeal is required

In the *Park Avenue* case, the body corporate unsuccessfully contended that the appellant had failed to make out reasonable prospects of success on appeal and had no prospects of success on appeal.[504] The court held that there is no room for applying a prospects of success test in an appeal in terms of Section 57 of the CSOSA for several reasons, including:[505]

a. That there is no reference to prospects of success or a leave to appeal process in terms of Section 57 of the CSOSA;
b. That a dissatisfied party has a statutory right of appeal against an order of an adjudicator in terms of Section 57 of the CSOSA; and
c. That it would be inappropriate to require the adjudicator to grant leave to appeal first, because the adjudicator is not a judge, and it may mean that the dissatisfied party may never be able to seek redress from a court if the adjudicator decided not to grant leave to appeal.

While this principle was also confirmed in the *Stenersen* case, it has been reaffirmed in the *Park Avenue* case. In the *Stenersen* case, the full bench (three judges presiding) already held that no leave to appeal is required to be given.[506]

Leave to appeal is not required as it would prolong the finalisation of the matter, which is contrary to the intention of the legislature in limiting the appeal process in the CSOSA.[507] It is safe to say that even before the *Park Avenue* judgement, this was well known and understood in the industry. What was perhaps not so well known, was whether an appeal in terms of Section 57 of the CSOSA could be lodged more than 30 days after the delivery of the adjudication order.

9.2.3.2 The appeal must be lodged within 30 days, otherwise it lapses

In terms of Section 57(2) of the CSOSA, an appeal against an adjudication order must be lodged within 30 days after the date of the delivery of the adjudication order.

The court in the *Park Avenue* case had to decide whether the High Court had the implied power to condone non-compliance with the statutory period for lodging an appeal, where the appeal is lodged more than 30 days after the adjudication order has been delivered.[508] The appeal was lodged 67 days late and therefore the unit owner had to make a formal application for condonation.[509]

The unit owner contended that the High Court had the inherent power and jurisdiction to condone the late filing of the statutory appeal, that it is in the interests of justice, and that the High Court has inherent power to protect and regulate its own process and to develop the common law.[510] The body corporate argued that the High Court has no jurisdiction to interfere with an adjudicator's order where the appeal is lodged after the prescribed 30-day period because the purpose of the CSOSA was for the quick and speedy resolution of disputes, and delays in the prosecution of appeals are neither in the interest of justice, nor in the interest of the general community that the CSOSA serves (community schemes, owners and occupants of community scheme units).[511]

After considering other statutes that impose time limits for instituting proceedings in the High Court,[512] as well as notable case law from the Constitutional Court and the SCA,[513] the court held that, when properly construed and having regard to the CSOSA as a whole, there is no residual power for a High Court to condone non-compliance with an appeal lodged out of time (i.e. more than 30 days after the delivery of the CSOS adjudication order).[514]

The court compared the provisions of the Arbitration Act[515] where the party who believes that there is a basis to review the arbitrator's award has six weeks within which to apply to have the award set aside.[516] The Arbitration Act expressly gives the court the power to condone non-compliance with any of its provisions on good cause shown, whereas there is no such provision in the CSOSA.[517]

The court stated further that the CSOSA aims to resolve disputes between parties in a community scheme in a speedy manner and once

again cited the *Stenersen* case, wherein it was pronounced that speed, economy and finality were the reasons that the legislature limited the appeal process in the CSOSA.[518] According to the court in the *Park Avenue* case, it would run counter to the legislature's intention to import a residual power to condone non-compliance with the 30-day period within which an appeal must be lodged.[519]

The court in the *Park Avenue* case stated that:[520]

> *"Prompt resolution of disputes allows residents to move on from the dispute and remove simmering tensions. Over a long period of time these disputes, if not promptly resolved may exacerbate tensions. It is important for residents to have disputes finalised as quickly as possible. A residual power to condone does not accord with these principles."*

To this end, and considering the inter-judicial debates between the Western Cape High Court, the Pietermaritzburg High Court and the Johannesburg High Court on issues relating to the proper mode for prosecuting an appeal in terms of Section 57 of the CSOSA, we may not have heard the end of debates surrounding whether a High Court has the power to condone the late filing of such an appeal.

To be on the safe side, you must lodge your appeal within 30 days of receiving the CSOS adjudication order if you are unhappy with it and there is a question of law to be challenged. There is no need to make out a case for prospects of success since there is no requirement for leave to appeal to be granted before lodging your statutory appeal in terms of Section 57 of the CSOSA.

9.2.4 Don't rush to get urgent court orders

In the recent case of *Minaar v Key West Body Corporate,*[521] the court dismissed an urgent application to halt the execution of a CSOS adjudication order in terms of Section 53 of the CSOSA, pending the finalisation of the appeal which the applicant was noting in terms of Section 57 of the CSOSA. The application was dismissed with costs.

Conclusion

The Managing Agent Reference Guide was designed to assist managing agents and trustees to gain a deeper understanding of the governing sectional title laws and their interpretation. We encourage continuous use of this guide to provide insight into the legal requirements contained in the PPA and POPIA, as well as further insights into a sectional title scheme's financials, meetings, levies and everything in between. We trust this guide provides you with the knowledge and confidence to ensure effective and efficient management of a sectional title scheme.

Feel free to offer feedback on the Managing Agent Reference Guide on: https://www.tracslearning.co.za/contact-us.

FAQs

Chapter 1: The Property Practitioners Act

Q Does the Property Practitioners Act (PPA) and the Property Practitioners Regulations (PP Regulations) apply to managing agents?

A Yes. As of 1 February 2022 the PPA has repealed and replaced the Estate Agency Affairs Act (EAAA). Whereas the EAAA only applied to estate agents, the scope of the PPA is significantly wider and no longer speaks of an estate agent, but rather a property practitioner. Subparagraph (c) of the definition of 'property practitioner' in Section 1 of the PPA has been expanded and includes "*any person who for remuneration manages a property on behalf of another*". Further, Regulation 1.22 of the PP Regulations defines a 'managing agent' as including a managing agent in terms of PMR 28 of the STSMA Regulations. Managing agents therefore fall within the ambit of the definition of 'property practitioner' and are required to register and comply with the provisions of the PPA and the PP Regulations, unless exempted from doing so by the Property Practitioners Regulatory Authority (Authority) on application in accordance with the PP Regulations.

Q What fees and/or levies are payable by managing agents to the Property Practitioners Regulatory Authority (Authority)?

A Managing agents as property practitioners are required to pay to the Authority a levy of R2 340.00 every three years (or R780 per annum if permitted by the Authority). Candidate managing agents pay a reduced fee of R380.00 per year for the first two years and thereafter the full managing agent fee is payable. Managing agents are further required to pay a contribution of R400.00 to the Property Practitioners Fidelity Fund upon first becoming registered as a property practitioner.

These amounts will be increased annually on 1st April of each year by a percentage equal to the percentage change in the Consumer Price Index.

Q Who at a managing agent's office needs to hold a Fidelity Fund Certificate?

A Managing agents who are juristic entities or business operations (such as Companies, Close Corporations, Trusts or Partnerships) carrying on the activities of a property practitioner are required to hold a separate valid Fidelity Fund Certificate. Further, every director/member/trustee/partner of these juristic entities/business operations and every employee employed by a property practitioner and rendering property practitioner services are required to hold a valid Fidelity Fund Certificate. Support and administration staff need not hold a Fidelity Fund Certificate.

Q Are all managing agents required to open and keep one or more separate trust accounts?

A Section 54 of the PPA provides that every property practitioner must open and keep one or more separate trust accounts with a bank registered in terms of the Banks Act and appoint an auditor. However, managing agents may be exempted from keeping a trust account if the managing agent has never received trust monies and submits an affidavit in the prescribed form to the Authority in terms of which they undertake not to receive trust funds after such date of affidavit. Regulation 2 of the PP Regulations also exempts managing agents from operating a trust account in respect of a body corporate where the funds of that body corporate are held in a bank account opened in the name of the body corporate concerned in terms of PMR 21(4)(a) of the STSMA Regulations.

Regulation 2 of the PP Regulations further provides that all property practitioners, other than a property practitioner registered as a business property practitioner (juristic entity) with the Authority are exempt from operating trust accounts.

Q Are managing agents required to have their accounting records audited annually?

A Every managing agent must appoint an auditor and cause his or her or its accounting records to be audited within six months after the final date of the financial year of the managing agent concerned and must submit this audit report to the Authority. However, a managing agent whose turnover is below R2.5 million is not required to have his or her or its accounting records

audited, but must subject same to an independent review by a registered accountant.

Chapter 2: The Law of Meetings

Q Is it possible to conduct a meeting simultaneously in person and virtually in order to accommodate members who cannot attend one or the other?

A Due to the fact that virtual meetings are specifically authorised under PMR 17(10) of the STSMA Regulations, the managing agent can engage with members to find out who would be able to join the meeting in person and who would be able to attend virtually; the meeting can then be arranged to take place both virtually and within a chosen venue. This is referred to as a hybrid meeting.

Q Can a matter be raised during a general meeting which is not included within the provided agenda?

A The purpose of an agenda is to list the items that must be discussed during a general meeting. Members are more than welcome to engage on the topics listed within the agenda but should keep away from matters not listed in the agenda. It is also important to keep in mind that not all matters need to, or should be, discussed during general meetings. The chairperson must maintain order, regulate the orderly expression of views and guide the members and other participants through the business of the meeting in accordance with the common law of meetings. The chairperson must also ensure that all motions and amendments proposed are within the scope of the notice and powers of the meeting in terms of PMR 18(3) of the STSMA Regulations.

Q Who is allowed to attend and participate during AGMs and SGMs?

A The following persons are allowed to attend AGMs and SGMs:

- The chairperson;
- Unit owners or their proxies;
- Trustees;
- Registered bondholders;
- Holders of future development rights; and
- The managing agent.

Q What happens when unit owners holding less than 50% of the total value of votes pass a special resolution at an AGM or an SGM?

A The body corporate must wait a week after the AGM or SGM before implementing the specific resolution, except if the trustees resolve that immediate action is necessary in order to protect the community scheme from loss or damage.

Chapter 3: Sectional Title Scheme Finances

Q Are trustees entitled to charge interest on unpaid levies?

A Yes. In terms of PMR 21(3)(c) of the STSMA Regulations, the body corporate may, on the authority of a written trustee resolution, charge a member interest on unpaid levies in line with the prescribed rate of interest in line with the National Credit Act, 2005. The accepted industry practice is 2% per month, calculated and compounded monthly.

Q May levies be increased between AGMs?

A No. Levies are tabled and approved at the AGM for the succeeding financial year and may not be increased without holding an SGM to approve a new budget. The exception is that, in terms of PMR 21(3)(b) of the STSMA Regulations, the body corporate may, on the authority of a trustee resolution, increase the contributions due by members by a maximum of 10% at the end of the financial year to take account of anticipated increased liabilities of the body corporate, which increase will remain effective until members have received notice of the contributions due by them for the next financial year. This is provided that the trustees give notice to the members of such an increased contribution in terms of PMR 25, with such changes as are required by the context.

Q What is the difference between an administrative fund and a reserve fund?

A The administrative fund is used to pay for day-to-day operational costs, whereas the reserve fund is used for prospective or future maintenance and repairs for major capital items.

In terms of Section 3(1)(a) of the STSMA, the body corporate must establish and maintain an administrative fund, which is reasonably sufficient to cover the estimated annual operating cost, i.e. repairs, maintenance, management, rates and taxes and the payment of insurance premiums.

In terms of Section 3(1)(b) of the STSMA, the body corporate must establish and maintain a reserve fund, in such amount as is reasonably sufficient to cover the cost of future maintenance and repair of the common property.

Q What are special levies and when may a special levy be raised?

A A special levy is an additional amount of money that must be raised to pay for a project, upgrade or extensive repairs that are outside of the normal monthly repair and maintenance plans and requirements of the body corporate's budget. In terms of Section 3(3) and (4) of the STSMA, a special levy may be raised by the trustees by way of a resolution for an expense that is necessary and which is not budgeted for and approved by the owners at the last AGM.

Chapter 4: Executive Managing Agents

Q How does a body corporate appoint an executive managing agent (EMA)?

A PMR 28 of the STSMA Regulations sets out the two potential paths that a body corporate may take when appointing an EMA.

The first option is in terms of PMR 28(1) of the STSMA Regulations and requires that the body corporate pass a special resolution appointing the EMA. The body corporate must take note of the requirements when passing a valid special resolution.

The second option is outlined in PMR 28(2) of the STSMA Regulations and allows for members entitled to 25% of the total PQs of all sections to apply to the CSOS for the appointment of an EMA.

It is important to note that the body corporate is not bound to follow PMR 28(1) of the STSMA Regulations before proceeding with PMR 28(2) of the STSMA Regulations, but in the case that it is unsuccessful in passing a resolution in terms of PMR 28(1) of the STSMA Regulations, the body corporate may proceed in terms of PMR 28(2) of the STSMA Regulations. Similarly, where the body corporate is unsuccessful in passing the special resolution, it may turn to Section 6(9) of the STSMA, and apply to the CSOS for the necessary relief.

Q If the body corporate appoints an EMA, does it still need to elect trustees?

A When a body corporate elects an EMA, the EMA steps into the shoes of and takes over the duties and responsibilities of the trustees; therefore, it may not be necessary for the body corporate to elect trustees. This does not, however, prohibit the body corporate from electing trustees to attend to matters which fall outside of the scope of the EMA's duties and obligations due to limitations placed on them by the body corporate or just to oversee the performance of the EMA.

Q What are the reporting obligations of an EMA?

A An EMA is obliged, in terms of PMR 28(3)(f) of the STSMA Regulations, to report to every member of the body corporate, at least every four months, in respect of the administration of the scheme and the reports must meet the minimum requirements as set out in PMR 28(4) of the STSMA Regulations.

Q Does an EMA need a Fidelity Fund Certificate (FFC)?

A In terms of the broad definition of a property practitioner contained in the PPA, an EMA is considered to be a property practitioner and no person or entity may act as a property practitioner unless they comply with the provisions of the PPA, registered as such, and have been issued with an FFC by the Authority.

Chapter 5: Sectional Title Scheme Rehabilitation

Q What is a distressed scheme?

A A distressed scheme is any sectional title scheme which does not comply fully with the sectional title legislation. There are specific key performance indicators which affect sectional title schemes and which may be used to indicate various levels of distress. These include requirements for insurance, AGMs, trustee meetings, audits, budgets, levy collection and other essential service requirements, as well as compliance with legislative obligations regarding the appointment of trustees, retention of body corporate records, common property maintenance and accurate implementation of PQ schedules, a credit control policy and the ten-year maintenance, repair and replacement plan.

While there are various levels of distress, it is important to note that non-compliance with even one legislative requirement may plunge the body corporate into financial or administrative distress.

Q What is the difference between administrative levies and reserve levies for purposes of budgeting?

A Administrative levies fund the estimated annual operating expenses of a body corporate, including costs for repairs, maintenance, management and administration of common property, the payment of rates and taxes and other municipal charges and the payment of insurance, garden services and security. The reserve levy is an additional levy that is used to pay for the projects, future maintenance and repairs of the common property as detailed and contained in the ten-year maintenance, repair and replacement plan for major capital items. All owners are obliged to pay both of these levies as budgeted and calculated in accordance with their respective PQ share.

Q What is the level of reserves that need to be maintained in the reserve fund?

A The STSMA provides that the body corporate must establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property, but not less than such amounts as prescribed by the Minister. The minimum amounts prescribed by the Minister are contained in PMR 2 of the STSMA Regulations and make provision for three scenarios:

1. If the amount of money in the reserve fund at the end of the previous financial year is less than 25% of the total contributions to the administrative fund for that previous financial year, the contribution to the reserve fund must be at least 15% of the total budgeted contribution to the administrative fund.
2. If the amount of money in the reserve fund at the end of the financial year is equal to or greater than 100% of the total contributions to the administrative fund for that previous financial year, there is no minimum contribution to the reserve fund.
3. If the amount of money in the reserve fund at the end of the financial year is more than 25% but less than 100% of the total contributions to the administrative fund for that previous financial year, the budgeted

contribution to the reserve fund must at least be the amount budgeted to be spent from the administrative fund on repairs and maintenance to the common property in the financial year being budgeted for.

Q May bodies corporate borrow money (i.e. take out a loan) and, if so, what process is to be followed?

A Yes. In terms of Section 4(e) of the STSMA a body corporate has the power to borrow moneys required by it in the performance of its functions or the exercise of its powers through the adoption of a special resolution. The STSMA goes on to provide in Section 7(1) that the powers of the body corporate must, subject to the provisions of the STSMA and any restrictions or rules imposed or given by the owners at a general meeting, be performed and exercised by the trustees of the body corporate.

The body corporate would be required to convene a general meeting at which a special resolution approving the loan would need to be passed by the members. Following this general meeting, the trustees would be required to convene a trustee meeting and pass a trustee resolution authorising two trustees (or one trustee and the managing agent) to sign and enter into a loan on behalf of the body corporate. Or, the members could pass a round-robin special resolution (in writing).

Q Can managing agents hold back on arrear levy collections if the body corporate has no immediate creditors to pay and is benefitting from the interest charged on the arrears (i.e. by utilising interest income to reduce levy contributions)?

A No. In terms of the STSMA and PMRs, it is a legislative duty for the body corporate (trustees) to collect all levies that are due and payable. Failing to collect arrear levies would constitute a breach of these statutory duties.

Chapter 6: Levies and the Law

Q When considering the prescription of levies within a body corporate, who is considered a member of the governing body as per Sections 13(1)(e) and (i) of the Prescription Act?

A One school of thought is that the members of the governing body are the members of the body corporate (i.e. all unit owners). Another school of thought is that the members of the governing body are only the trustees

of the body corporate, who may or may not be members of the body corporate (i.e. trustees need not be unit owners).

Q Who has the ultimate power within a body corporate?

A Even though the trustees have the powers and functions to act on behalf of the body corporate, it is submitted that the unit owners within the body corporate have the power to elect and remove trustees. And the owners also have the authority to restrict the powers and functions of their elected trustees. The ultimate power of a body corporate lies with the unit owners who, it is submitted, are members of the governing body of the juristic entity known as the body corporate.

Q Are the board of trustees or unit owners permitted to compromise a claim for outstanding levies, interest and legal fees, against an indebted unit owner?

A No. The STSMA and STA does not make provision for the trustees or unit owners to compromise a claim of an indebted unit owner or owners. Permitting a compromise would place an undue burden on the remaining sectional title unit owners with a liability for levies and contributions which are owed exclusively by the indebted unit owner.

Q Are trustees allowed to sell a body corporate's arrear levy debts?

A Yes. This is so, notwithstanding that there are no empowering legislative provisions in the STA, STA Regulations, STSMA, STSMA Regulations, CSOSA or CSOS Regulations which confers the body corporate or trustees with an explicit power to sell its arrear levy debts. The sale of arrear levy debts may be realisable if the sale of the debt does not prejudice the members of the body corporate and it is concluded by way of an ordinary resolution by the members (i.e. sold for full face value).

Q Are unit owners entitled to a refund of levies lawfully raised and collected?

A No. PMR 21(2)(b) of the STSMA Regulations prevents a body corporate from refunding a levy that was lawfully levied and paid. This means that levies that have been appropriately and lawfully raised and paid by a member of a body corporate cannot be refunded. This also implies that levies cannot be sold at a discount.

Chapter 7: Airbnb

Q Can a body corporate or homeowners association (HOA) restrict an owner's right to use their investment property for short-term leases?

A In short, yes, the courts and the CSOS have found that an HOA and/or a body corporate may restrict an owner's rights to use their property for the purpose of short-term leases by including such a restriction in its conduct rules, as long as the restriction is reasonable in the circumstances. The obligation falls on the body corporate and/or the HOA to ensure that the proper process is followed when amending and enforcing its conduct rules.

Q If a body corporate or HOA chooses not to ban short-term letting within the scheme, what measures can be put in place?

A If an HOA or body corporate chooses to permit short-term letting, the potential nuisance caused by those guests can be limited by ensuring that the scheme is notified of the change in occupancy and is provided with the identities of the expected guests. It is also important to ensure that the owner provides to the guests a copy of the scheme conduct rules. The scheme may also look at various ways to compensate for the increased traffic in ways which will benefit the body corporate as a whole, such as, improved access control and security. It may even be contemplated to charge a short-term leasing surcharge on the levies of the unit owner in question, provided due process is followed in this regard.

Q If the guests of the short-term lease do not comply with the conduct rules of a body corporate, who is responsible?

A PMR 3(2) of the STSMA Regulations places the burden on the member to take all reasonable steps to ensure the compliance with the adopted conduct rules by any tenant or other occupant of any section. A body corporate may have recourse against any member who does not meet this requirement, or where the invited employees, guests, visitors or family members of the unit owner do not comply with the adopted conduct rules.

Chapter 8: The Protection of Personal Information Act (POPIA)

Q What is the Protection of Personal Information Act (POPIA)?

A The POPIA is South Africa's data privacy law which regulates the safekeeping and processing of personal information so as to protect the right to privacy as enshrined in the Constitution and balance this right against other rights, such as the right to access to information.

Q Is POPIA relevant to managing agents?

A Yes. The POPIA is applicable to all natural and juristic persons who process personal information for any purpose whatsoever. The STSMA and STSMA Regulations contain certain provisions that make it apparent that bodies corporate, in some cases, have a legislative mandate to process personal information and provide same to certain identified persons on written request, such as members or trustees.

As managing agents are generally appointed by the trustees to attend to the financial, administrative and physical management as well as the day to day business of the scheme, it is clear that managing agents are 'operators' in terms of the POPIA, and may process body corporate's, individual member's or trustees' personal information in terms of a contract or mandate.

Q How do managing agents become compliant with the POPIA?

A In order to ensure compliance with the POPIA, it is recommended that managing agents attend to the following:

- Appoint an information officer;
- Prepare a PAIA manual;
- Adhere to the conditions of lawful processing of personal information;
- Update contracts with operators;
- Create, maintain, manage, and monitor protocols and policies (such as a privacy policy);
- Raise awareness amongst employees;
- Report data breaches to the Regulator and affected data subjects; and
- Only share personal information if required to do so in terms of the law.

Q Are there any sanctions for non-compliance with the POPIA?

A Yes. There are significant legal consequences for not complying with the POPIA. The POPIA provides for the imposition of penalties which include a fine of up to R10 million or imprisonment for a period of up to ten years if a person is found liable for an offence in the POPIA. Further, a data subject (e.g. a member) may institute civil action against the responsible party (e.g. a body corporate) for any loss or damages they may have suffered as a result of non-compliance with the provisions of the POPIA.

References

1 Act 22 of 2019.
2 Act 112 of 1976.
3 Section 76 of the PPA.
4 On 14 January 2022, in Proclamation Notice 47 of 2022, in *Government Gazette* No. 45735, the PP Regulations were published, together with notification of the commencement date of the PPA, being 1 February 2022.
5 Sections 3(a) and (i) to (k) of the PPA.
6 Sections 5 and 75 of the PPA. See also the definition of "authority" in Section 1 of the PPA.
7 Section 34(1) of the PPA. See also the definition of "fund" in Section 1 of the PPA.
8 Sections 3(f) and (g) of the PPA.
9 Section 3(h) of the PPA.
10 Section 1 of the PPA: definition of "property", read with Section 2 of the PPA.
11 Section 1 of the PPA.
12 Subparagraph (c) of the definition of "property practitioner" in Section 1 of the PPA.
13 Definition of "manage" as per: Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.com. Accessed: 11 March 2022.
14 Act 9 of 2011.
15 Section 1 of the CSOSA.
16 STSMA, 2016.
17 Regulation 1(a) of the STSMA Regulations.
18 Section 1 of the PPA.
19 Section 1 of the PPA.
20 Regulation 1.22 of the PP Regulations.
21 Section 1 of the PPA.
22 Regulation 1(c) of the STSMA Regulations.
23 Regulation 1.22.3.1 of the PP Regulations.
24 Refer to Sections 4(1) and (2) of the PPA read with Schedule 1 of Regulation 41 of the PP Regulations, for detail regarding the applications and administrative matters relating to exemptions.
25 This chapter is for information purposes only and shall not be construed as legal advice. It is advisable that managing agents familiarise themselves with the provisions of the PPA and the Regulations thereto and seek formal legal advice in order to understand the implication of the PPA for their business and for any employees of their business.
26 Sections 41(1)(a) and (b) of the PPA.
27 Regulation 15.1 of the PP Regulations.
28 The Authority has published the "Schedule of Fees – 2022" for the public on their website, which can be accessed here: https://theppra.org.za/schedule_of_fees_2019_2020_effective_01_july_2019. Last accessed on 25 July 2022.
29 Regulation 15.3 of the PPR. Curiously, this fee is not mentioned in the above mentioned by the Authority in the "Schedule of Fees – 2022".
30 Regulation 16 of the PP Regulations.
31 Regulation 26 of the PP Regulations.
32 Section 50(a)(vii) of the PPA. This applicant for a FFC has to declare that they are in possession of a valid tax clearance certificate and a valid BEE certificate in the prescribed form for the Application for the Issue of a FFC or for the Property Practitioner's Registration Certificate (see Regulation 21.2 of the PP Regulations).
33 Section 50(a)(x) of the PPA.
34 Regulation 25.2 of the PP Regulations.
35 Sections 48 (1) and (2), read with section 1 of the PPA: definition of "property practitioner".
36 Regulation 25(1) of the PP Regulations.
37 Section 48(1) of the PPA.
38 Section 50(a) of the PPA.
39 There is no requirement to produce a specific level of BEE compliance.
40 Regulation 41.10 of the PP Regulations.
41 Regulation 41.10 of the PP Regulations.
42 Regulations 41.19 to 41.21 of the PP Regulations.
43 Sections 50(b)(ii) and (iii) of the PPA. The prescribed standard of training can be found at Regulation 33 of the PP Regulations.
44 Regulation 33.2.1 of the PP Regulations.
45 PPRA is another abbreviation used for Property Practitioners Regulatory Authority.
46 Section 53(1)(b) of the PPA, read with Regulation 37.1 of the PP Regulations.
47 Section 53(1)(c) of the PPA, read with Regulation 37.2 of the PP Regulations.
48 Sections 53(1) and (2) of the PPA.
49 Section 47(5) of the PPA.
50 Section 47(6) of the PPA.
51 Section 47(1) of the PPA.
52 Section 47(4) of the PPA, read with Regulations 15.1 and 23.1 of the PP Regulations. This stipulated fine appears contradictory to Item 5 of Regulation 38 of the PP Regulations, which states that the maximum fine is "R450 per full month". This should be amended and clarified by the legislature.
53 Section 35(1) of the PPA.
54 Section 54(1) and (3) of the PPA.

55 Regulation 15(1) of the CSOS Regulations.
56 Regulation 15(2) of the CSOS Regulations.
57 Sections 54(1) and (5) of the PPA.
58 Act 94 of 1990.
59 Regulation 27.1 of the PP Regulations.
60 Regulation 27.2 of the PP Regulations.
61 Section 54(1)(d) of the PPA.
62 Section 54(5)(a) and (b) of the PPA.
63 Section 54(14) of the PPA.
64 Regulation 2 of the PP Regulations.
65 Regulation 2.6 of the PP Regulations.
66 Section 55(1) of the PPA.
67 Section 61(1) of the PPA, read with Regulation 34 of the PP Regulations.
68 Section 6(b) of the PPA.
69 Section 28(1) of the PPA. See Regulation 5 of the PP Regulations for the Complaint Form.
70 Section 25(1) of the PPA.
71 Section 25(1) of the PPA.
72 Section 25(2) of the PPA.
73 Section 58(1)(b) of the PPA.
74 Section 58(3) of the PPA.
75 Section 58(4) of the PPA.
76 Regulation 41.9 of the PP Regulations.
77 Section 71 of the PPA, read with Regulation 38 of the PP Regulations.
78 Regulation 38 of the PP Regulations.
79 Item 1 of Regulation 38 of the PP Regulations, read with Section 23(1) of the PPA.
80 Item 18 of Regulation 38 of the PP Regulations, read with Section 54(3)(a) of the PPA.
81 Oxford University Press – Oxford Learners Dictionaries https://www.oxfordlearnersdictionaries.com/definition/english/meeting? q=meetings date used 22 July 2022.
82 Cambridge University Press – Cambridge Dictionary https://dictionary.cambridge.org/dictionary/ english/meeting date used 22 July 2022.
83 Section 2(8)(a) of the STSMA.
84 PMR 17(1) of the STSMA Regulations.
85 PMR 15(1) of the STSMA Regulations.
86 Section 6(2) of the STSMA.
87 PMR 15(7) read with PMR 29(2) and 29(4) of the STSMA Regulations.
88 PMR 29(2) of the STSMA Regulations.
89 PMR 29(4) of the STSMA Regulations.
90 PMR 15(1) of the STSMA Regulations.
91 Section 6(2) of the STSMA.
92 PMR14(7) read with PMR 29(2) and 29(4) of the STSMA Regulations.
93 PMR 29(2) of the STSMA Regulations.
94 PMR 29(4) of the STSMA Regulations.
95 PMR 11(1) of the STSMA Regulations.
96 PMR 15(3) of the STSMA Regulations.
97 PMR 15(1) of the STSMA Regulations.
98 Section 2(8) of the STSMA states:
"*(a) A developer must convene a meeting of the members of the body corporate not more than 60 days after the establishment of the body corporate.*
(b) The agenda for the meeting is as prescribed in the management rules for the meeting.
(c) At such meeting the developer must furnish the members with –
(i) a copy of the sectional plan;
(ii) a certificate from the local authority to the effect that all rates due by the developer up to the date of the establishment of the body corporate have been paid; and
(iii) proof of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate."
99 PMR 16(1) of the STSMA Regulations.
100 PMR 17(7) of the STSMA Regulations.
101 PMR 17(5)–(7) of the STSMA Regulations.
102 See Annexure 2 for the checklists.
103 PMR 9(a)–(d) of the STSMA Regulations.
104 PMR 11(2) of the STSMA Regulations.
105 PMR 11(4) of the STSMA Regulations.
106 PMR 11(4) of the STSMA Regulations.
107 PMR 15(1) of the STSMA Regulations.
108 Section 6(3) of the STSMA.
109 Section 6(4) of the STSMA.
110 PMR 15(5) of the STSMA Regulations.
111 PMR 15(5) of the STSMA Regulations.
112 PMR 15(5) of the STSMA Regulations.
113 Section 6(5) of the STSMA.
114 Section 6(5) of the STSMA.
115 Regulation 5(3) of the STSMA Regulations.
116 PMR 20(6) of the STSMA Regulations.
117 PMR 11(3) of the STSMA Regulations.
118 PMR 11(3) of the STSMA Regulations.
119 PMR 12(2) of the STSMA Regulations.
120 PMR 19(1)–(2) of the STSMA Regulations.
121 PMR 19(4) of the STSMA Regulations.
122 PMR 19(4) of the STSMA Regulations.
123 PMR 13(1) of the STSMA Regulations.
124 PMR 13(2) of the STSMA Regulations.
125 PMR 13(3) of the STSMA Regulations.
126 PMR 13(4) of the STSMA Regulations.
127 PMR 19(2) of the STSMA Regulations.
128 PMR 19(2) of the STSMA Regulations.
129 PMR 19(3) of the STSMA Regulations.
130 Section 6(6) of the STSMA.
131 Section 6(7) of the STSMA.
132 PQ % = (unit sqm / total sqm) x 100
= (200 m^2 / 2 000 m^2) x 100.
133 PQ % = (unit sqm / total sqm) x 100
= (200 m^2 / 2 000 m^2) x 100.

134 PQ % = (unit sqm / total sqm) x 100 = (200 m^2 / 2 000 m^2) x 100.
135 Section 1 of the STSMA.
136 PMR 14(1)(b) of the STSMA Regulations.
137 PMR 14(2) of the STSMA Regulations.
138 PMR 17(6)(a) of the STSMA Regulations.
139 PMR 20(7) of the STSMA Regulations.
140 PMR 20(2)(a) of the STSMA Regulations.
141 PMR 20(2)(b) of the STSMA Regulations.
142 PMR 20(2) of the STSMA Regulations.
143 PMR 20(3) of the STSMA Regulations.
144 PMR 14(3)(a) of the STSMA Regulations.
145 PMR 14(3)(b) of the STSMA Regulations.
146 PQ % = (unit sqm / total sqm) x 100 = (200 m^2 / 2 000 m^2) x 100.
147 PQ % = (unit sqm / total sqm) x 100 = (200 m^2 / 2 000 m^2) x 100.
148 PQ % = (unit sqm / total sqm) x 100 = (200 m^2 / 2 000 m^2) x 100.
149 PQ % = (unit sqm / total sqm) x 100 = (200 m^2 / 2 000 m^2) x 100.
150 PMR 27(2)(a) of the STSMA Regulations.
151 PMR 27(2)(a)(i) – (iv) of the STSMA Regulations.
152 PMR 9(e) of the STSMA Regulations.
153 Definition of "special resolution" in Section 1 of the STSMA.
154 Definition of "unanimous resolution" in Section 1 of the STSMA.
155 PMR 17(8) of the STSMA Regulations.
156 PMR 17(8) of the STSMA Regulations.
157 Act 9 of 2011.
158 Sections 39(4) and 7(a) of the CSOSA.
159 PMR 34(2) of the Regulations of the Sectional Titles Act 95 of 1986 (30 July 2015 – 06 October 2016) stated "***34. Minutes*** *(2) The trustees shall keep all minute books in perpetuity*", but this provision was removed and is not recorded in the current STSMA Regulations.
160 STSMA.
161 STSMA.
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175 STSMA.
176 STSMA.
177 STSMA Regulations.
178 STSMA Regulations.
179 STSMA Regulations.
180 STSMA Regulations.
181 STSMA Regulations.
182 STSMA Regulations.
183 STSMA Regulations.
184 PMR 26(1)(c) read with PMR 26(4) of the STSMA Regulations.
185 PMR 21(3)(a) of the STSMA Regulations.
186 Section 3(4) of the STSMA.
187 STSMA Regulations.
188 PMR 21(3)(c) of the STSMA Regulations.
189 PMR 21(3)(c) of the STSMA Regulations.
190 STSMA Regulations.
191 STSMA Regulations.
192 STSMA Regulations.
193 STSMA Regulations.
194 STSMA Regulations.
195 STSMA Regulations.
196 STSMA Regulations.
197 STSMA Regulations.
198 STSMA Regulations.
199 STSMA Regulations.
200 STSMA Regulations.
201 STSMA Regulations.
202 STSMA Regulations.
203 PMR 26(3) of the STSMA Regulations.
204 STSMA Regulations.
205 STSMA Regulations.
206 114 of 1998.
207 Act 8 of 2011.
208 Paddocks Press Newsletter: "*Scheme Management solely by an executive managing agent*" 25/04/2018.
209 PMR 28 of the STSMA Regulations.
210 Section 1(1) of the STSMA.
211 PMR 15 of the of the STSMA Regulations.
212 PMR 19 of the STSMA Regulations.
213 PMR 20 of the STSMA Regulations.
214 PMR 28(2) of the STSMA Regulations.
215 Paddocks Management Services Orders – *Appointment of a Sectional Title Executive Managing Agent*.
216 PMR 28(6) of the STSMA Regulations.
217 PMR 28(7) of the STSMA Regulations.
218 PMR 28(8) of the STSMA Regulations.
219 PMR 27(7) and (8) of the STSMA Regulations.
220 PMR 28(3)(e) and (f) of the STSMA Regulations.
221 PMR 28(3)(f) of the STSMA Regulations.
222 PMR 28(4) of the STSMA Regulations.
223 Section 16(1) of the STSMA.
224 Section 16(2)(a)(i) and (ii) of the STSMA.
225 Section 16(3) of the STSMA.
226 Section 16(4)(b)(i) and (ii) of the STSMA.
227 PMR 28(3)(f) of the STSMA Regulations.
228 Section 16(5)(b) to (d) of the STSMA.

229 PMR 17(6)(j)(vii) *at an AGM, if the body corporate has more than four members and is not managed by an executive managing agent, they must determine the number of trustees to be elected to serve during the next financial year*.
230 PMR 28(3)(a) of the STSMA Regulations.
231 PMR 8(4) of the STSMA Regulations.
232 PMR 8(1), (2) and (3) of the STSMA Regulations.
233 PMR 7(4) of the STSMA Regulations.
234 PMR 2(1)(j) of the STSMA Regulations.
235 PMR 28(5) of the STSMA Regulations.
236 www.csos.org.za "*Presentation: Panel of Executive Managing Agents*".
237 PMR 28(3) of the STSMA Regulations.
238 Section 61 of the PPA, read with Regulation 34 of the PP Regulations.
239 Act 22 of 2019.
240 PMR 17(6)(j)(iv) of the STSMA Regulations.
241 Section 3(1)(f) of the STSMA.
242 Section 3(1)(b) of the STSMA.
243 PMR 17(1) of the STSMA Regulations.
244 Section 8 of the STSMA.
245 Section 6(5) of the STSMA.
246 PMR 17(1) of the STSMA Regulations.
247 PMR 26(5) of the STSMA Regulations.
248 PMR 5 to 8 of the STSMA Regulations.
249 PMR 17(6)(j)(iv) read with PMR 26(1)(e) of the STSMA Regulations.
250 Section 3 of the STSMA read with PMR 17(6)(iv) and PMR 25 of the STSMA Regulations.
251 Section 32 of the STA.
252 PMR 27 of the STSMA.
253 PMR 4 of the STSMA Regulation.
254 Sections 3, 4 and 5 of the STSMA.
255 PMR 7 of the STSMA Regulations.
256 Section 3(1)(h) and (i) of the STSMA read with Section 3 and PMR 23 of the STSMA Regulations.
257 Section 15(1)(b) of the STSMA.
258 PMR 10(1) of the STSMA Regulations.
259 (Case No: 35593/2018) [2019] ZAGPJHC 54 (6 March 2019). Available at: http://www.saflii.org/za/cases/ZAGPJHC/2019/54.html.
260 Act 68 of 1969.
261 Paragraph 17 of the judgement.
262 Act 8 of 2011.
263 Section 7(1) of the STSMA read with PMR 17(6)(m) of the STSMA Regulations. At the first (inaugural) general meeting, PMR 16(2)(h) of the STSMA Regulations is applicable to the motion detailing any restrictions to be imposed or directions to be given in terms of Section 7(1) of the STSMA or confirming that there are no such restrictions or directions.
264 PMR 9(b) of the STSMA Regulations.
265 PMR 7(1) of the STSMA Regulations.
266 PMR 17(6)(j)(viii) of the STSMA Regulations. At the first (inaugural) general meeting, PMR 16(2)(g) of the STSMA Regulations is applicable for the election of trustees.
267 PMR 6(4)(g) of the STSMA Regulations.
268 Section 2(6) of the STSMA specifically states that the provisions of the Companies Act 71 of 2008 does not apply in relation to the body corporate.
269 Act 66 of 1971.
270 PMR 17(4)(a) and (b) of the STSMA Regulations.
271 Act 95 of 1986.
272 (AR255/2020) [2021] ZAKZPHC 81; 2022 (2) SA 305 (KNP) (23 September 2021), found at http://www.saflii.org/za/cases/ZAKZPHC/2021/81.html, last access on 27 July 2022.
273 *Selma Court*, Paragraph 1.
274 *Selma Court*, Paragraph 1.
275 *Selma Court*, Paragraph 2.
276 *Selma Court*, Paragraph 2.
277 This a debt collection step in terms of Section 65 of the Magistrates' Courts Act 32 of 1944.
278 *Selma Court*, Paragraph 3.
279 *Selma Court*, Paragraph 4.
280 *Selma Court*, Paragraph 4.
281 *Selma Court*, Paragraphs 4 and 10.
282 *Selma Court*, Paragraph 9.
283 *Selma Court*, Paragraph 9.
284 *Selma Court*, Paragraph 10.
285 *Selma Court*, Paragraph 11.
286 *Selma Court*, Paragraph 11.
287 *Selma Court*, Paragraph 12.
288 *Selma Court*, Paragraph 12.
289 *Selma Court*, Paragraph 14.
290 *Selma Court*, Paragraph 15.
291 *Selma Court*, Paragraph 15.
292 *Selma Court*, Paragraph 15.
293 *Selma Court*, Paragraph 15.
294 *Selma Court*, Paragraph 15.
295 *Selma Court*, Paragraph 17.
296 *Selma Court*, Paragraph 18.
297 *Selma Court*, Paragraphs 18 and 19.
298 *Selma Court*, Paragraph 19.
299 *Selma Court*, Paragraphs 20 and 23.
300 *Selma Court*, Paragraph 21.
301 2002 (5) SA 414 (W).
302 *Fish Eagle*, Paragraph 6.
303 *Fish Eagle*, Paragraph 9.
304 *Fish Eagle*, Paragraph 9.
305 *Fish Eagle*, Paragraph 9.
306 CG Van der Merwe *Sectional Titles, Share Blocks and Time-Sharing* Vol 1 at page 14–65, Paragraph 14 2 4 3 12.
307 *Selma Court*, Paragraph 25.
308 Van der Merwe *Sectional Titles* at page 14–17 to 14–18, Paragraph 14 2 1.

309 Van der Merwe *Sectional Titles* at page 14-17 to 14–18, Paragraph 14 2 1.
310 Van der Merwe *Sectional Titles* at page 14–17 to 14-18, Paragraph 14 2 1.
311 Van der Merwe *Sectional Titles* at page 14–237, Paragraph 14 5 2.
312 Van der Merwe *Sectional Titles* at page 14–237, Paragraph 14 5 2.
313 *Selma Court*, Paragraph 25.
314 *Selma Court*, Paragraph 26.
315 *Selma Court*, Paragraph 26.
316 *Selma Court*, Paragraph 26.
317 *Selma Court*, Paragraph 36.
318 *Selma Court*, Paragraph 37.
319 *Selma Court*, Paragraph 27.
320 *Selma Court*, Paragraph 27.
321 *Selma Court*, Paragraph 31.
322 This is a comment or observation by the court which is said or written in the judgement in passing and does not form part of the rationale for the decision reached by the court.
323 These are points in the court judgement which determined the decision made by the court, as such form the rationale for the decision reached. This is what creates precedent, as opposed to *obiter dicta* which are only persuasive authority for a given proposition.
324 E Stuart *Sale of Arrear Levies by a Body Corporate* Article 1 (January 2019) found at https://eyslaw.co.za/?wysija-page=1&controller=email&action=view&email_id=55&wysijap=subscriptions, last accessed on 28 July 2022.
325 Stuart *Sale of Arrear Levies by a Body Corporate* (January 2019).
326 Stuart *Sale of Arrear Levies by a Body Corporate* (January 2019).
327 Act 8 of 2011.
328 See also *Body Corporate of Central Park v Mosa* (24-Nov-21) Johannesburg High Court https://www.tracslearning.co.za/wp-content/uploads/2022/09/Body-Corporate-of-Central-Park-v-Mosa-24-Nov-21-Johannesburg-High-Court.pdf.
329 *Body Corporate of Central Park*, Paragraph 32.
330 PMR 7(6)(j)(iv) of the STSMA Regulations.
331 PMR 25(1) of the STSMA Regulations.
332 PMR 25(2) of the STSMA Regulations.
333 Section 3(2) of the STSMA.
334 Section 3(3) of the STSMA.
335 *Body Corporate of Central Park*, Paragraphs 11 and 33.
336 Quote taken from an extract of the learned Magistrate's written reasons quoted in the written judgement for *Body Corporate of Central Park*, Paragraph 11.
337 (ZAGPJHC) (unreported) case number A3094/2021 of 9 November 2021.
338 (ZAGPJHC) (unreported) case number A3064/2021 of 24 November 2021.
339 *Body Corporate of Kleber*, Paragraph 5.
340 *Body Corporate of Central Park*, Paragraph 24.
341 *Body Corporate of Central Park*, Paragraph 27.
342 *Body Corporate of Kleber*, Paragraph 12.
343 *Body Corporate of Kleber*, Paragraph 11.
344 *Body Corporate of Kleber*, Paragraph 12.
345 *Body Corporate of Kleber*, Paragraph 13.
346 *Body Corporate of Central Park*, Paragraph 13.
347 *Body Corporate of Central Park*, Paragraph 14.
348 *Body Corporate of Central Park*, Paragraph 16.
349 *Body Corporate of Central Park*, Paragraph 25.
350 *Body Corporate of the Paddock Sectional Title Scheme No 249-1984 v Nicholl* (29534/18) [2019] ZAGPJHC 437; 2020 (2) SA 472 (GJ) (2 October 2019).
351 Paragraph 78 of *Body Corporate of the Paddock Sectional Title Scheme No 249-1984 v Nicholl* (29534/18) [2019] ZAGPJHC 437; 2020 (2) SA 472 (GJ) (2 October 2019).
352 The CSOS Adjudication is *Belinda Tshehla and 84 Others v The Board of Trustees of the Blyde Riverwalk Estate Homeowners Association, Landsdowne Property Group and Balwin Properties Limited* (CSOS 3272/GP/21) Accessed: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://csos.org.za/wp-content/uploads/2022/01/CSOS3272GP21.pdf.
353 Paragraph 112 of *Belinda Tshehla and 84 Others v The Board of Trustees of the Blyde Riverwalk Homeowners Association, Landsdowne Property Group and Balwin Properties Limited*.
354 Paragraph 97 of *Belinda Tshehla and 84 Others v The Board of Trustees of the Blyde Riverwalk Homeowners Association, Landsdowne Property Group and Balwin Properties Limited*.
355 Paragraphs 83, 84, 90 and 113 of *Belinda Tshehla and 84 Others v The Board of Trustees of the Blyde Riverwalk Homeowners Association, Landsdowne Property Group and Balwin Properties Limited*.
356 Paragraphs 104 and 124 to 131 of *Belinda Tshehla and 84 Others v The Board of Trustees of the Blyde Riverwalk Homeowners Association, Landsdowne Property Group and Balwin Properties Limited*.
357 Section 10(2)(a) and (b) of the STSMA.
358 Section 10(3) of the STSMA.
359 Section 13(f) of the STSMA.
360 Tourism Amendment Bill of 2019. (Government Gazette No. 42404, Notice 235 of 2019).

https://sakeliga.co.za/wp-content/uploads/2019/06/GG042404N_0004_GenN_0235_190415.pdf
361 Section 2 of the POPIA.
362 Section 1 of the POPIA. See 'responsible party'.
363 Section 1 of the POPIA. See 'data subject'.
364 Section 1 of the POPIA. See 'operator'.
365 Sections 1, 55 and 56 of the POPIA. See 'information officer'.
366 Section 39 of the POPIA.
367 Section 1 of the POPIA. See 'processing'.
368 Section 4 of the POPIA.
369 Section 8 of the POPIA.
370 Section 9 of the POPIA.
371 Section 10 of the POPIA.
372 Section 11 of the POPIA.
373 Section 13 of the POPIA.
374 Section 14 of the POPIA.
375 Section 15 of the POPIA.
376 Section 16 of the POPIA.
377 Section 17 of the POPIA.
378 Section 19 of the POPIA.
379 Section 22 of the POPIA.
380 Section 23(1) of the POPIA.
381 Section 23(2) of the POPIA.
382 Section 107 of the POPIA.
383 PMR 27(2)(b) and (c) of the STSMA Regulations.
384 PMR 27(4) of the STSMA Regulations.
385 PMR 27(5) of the STSMA Regulations.
386 PMR 27(8) of the STSMA Regulations.
387 PMR 26(1) of the STSMA Regulations.
388 PMR 26(2) of the STSMA Regulations.
389 (7214/2020P) [2021] ZAKZPHC 28; 2021 (5) SA 632 (KZP) (1 June 2021), found at http://www.saflii.org/za/cases/ZAKZPHC/2021/28.html, last accessed on 30 July 2022.
390 Act 95 of 1986.
391 The Sectional Titles Act Regulations, 1988.
392 *Royal Palm*, Paragraph 43.
393 (A260/2020) [2021] ZAWCHC 132; 2021 (5) SA 623 (WCC) (16 July 2021), found at http://www.saflii.org/za/cases/ZAWCHC/2021/132.html, last accessed on 30 July 2022.
394 *Mitchell's Plain Industrial Enterprises*, Paragraph 4.
395 *Mitchell's Plain Industrial Enterprises*, Paragraphs 6 to 8 and 25.
396 *Mitchell's Plain Industrial Enterprises*, Paragraph 2.
397 *Mitchell's Plain Industrial Enterprises*, Paragraphs 9, 17 and 30.
398 *Mitchell's Plain Industrial Enterprises*, Paragraph 13.
399 *Mitchell's Plain Industrial Enterprises*, Paragraph 14.
400 *Mitchell's Plain Industrial Enterprises*, Paragraph 14.
401 2020 (4) SA 514 (WCC) – http://www.saflii.org/za/cases/ZAWCHC/2020/82.html.
402 The *SCA Legacy Body Corporate case*, Paragraphs 47 and 48.
403 *Legacy*, Paragraph 41.
404 *Legacy*, Paragraph 41.
405 *Legacy*, Paragraph 41.
406 *Legacy*, Paragraph 8.
407 *Legacy*, Paragraph 10.
408 *Legacy*, Paragraphs 10 and 11.
409 *Legacy*, Paragraph 12.
410 Act 3 of 2000.
411 *Legacy*, Paragraph 14.
412 *Legacy*, Paragraph 15.
413 *Legacy*, Paragraph 15.
414 *Legacy*, Paragraph 17.
415 1992 (2) SA 512 (D).
416 "'Paws' before signing on the dotted line" De Rebus 1 February 2015 https://www.derebus.org.za/paws-before-signing-on-the-dotted-line/ (accessed 15 August 2021).
417 (12465/2011) [2012] ZAKZDHC 47 (17 August 2012) – http://www.saflii.org/za/cases/ZAKZDHC/2012/47.html.
418 *Legacy*, Paragraph 18.
419 Sectional Titles Act 95 of 1986.
420 *Sunrise Beach*, Paragraph 9.
421 *Sunrise Beach*, Paragraph 9.
422 *Sunrise Beach*, Paragraph 9.
423 (7689/2006) [2007] ZAGPHC 137 (14 August 2007) – http://www.saflii.org/za/cases/ZAGPHC/2007/137.html. *Legacy*, Paragraph 19.
424 Remember, an HOA is not the same as a body corporate in that an HOA may be established either by virtue of the common law (voluntary association) or by incorporation as a non-profit company in terms of the Companies Act 71 of 2008. Each HOA is unique and needs to be assessed on the terms of its founding or constitutional documentation. In some cases, within the estate of an HOA there may be underlying sectional title schemes: this is commonly known as a layered scheme or Master HOA, where the powers and functions of any subordinate bodies corporate are vested in the HOA, with or without amendment from the powers and functions as are contained in the STSMA and the STSMA Regulations.
425 *Khyber Rock*, Paragraph 36.
426 *Khyber Rock*, Paragraph 36. As quoted in *Legacy*, Paragraph 19.
427 *Legacy*, Paragraph 22.
428 An analysis of these cases extends beyond the scope of this article. To name a few of the cases: *Pharmaceutical Manufacturers Association of SA and Another: In re: ex parte President of the Republic of SA and Others*

2000 (2) SA 674 (CC) – http://www.saflii.org/za/cases/ZACC/2000/1.html; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) – http://www.saflii.org/za/cases/ZACC/2004/15.html; *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC) – http://www.saflii.org/za/cases/ZACC/2005/25.html; *Transnet Ltd and Others v Chirwa* 2007 (2) SA 198 (SCA) – http://www.saflii.org/za/cases/ZASCA/2006/177.html; *Sidumo and Another v Rustenburg Platinum Mines* 2008 (2) BCLR 158 (CC) – http://www.saflii.org/za/cases/ZACC/2007/22.html; *Head of Department: Mpumulanga Department of Education and Minister of Education v Hoërskool Ermelo and the School Governing Body of Hoërskool Ermelo and Others* 2010 (2) SA 415 (CC) – http://www.saflii.org/za/cases/ZACC/2009/32.html.

429 *Legacy*, Paragraph 22.
430 Act 8 of 2011.
431 *Legacy*, Paragraph 22.
432 *Legacy*, Paragraph 22.
433 Section 8(1) of the STSMA.
434 *Legacy*, Paragraph 23.
435 *Legacy*, Paragraph 23.
436 *Legacy*, Paragraph 24.
437 *Legacy*, Paragraph 24.
438 2019 (4) SA 471 (SCA), found at http://www.saflii.org/za/cases/ZASCA/2019/30.html, last accessed on 30 July 2022.
439 *Legacy*, Paragraph 25.
440 *Legacy*, Paragraph 27.
441 *Legacy*, Paragraph 27.
442 *Legacy*, Paragraph 31.
443 *Legacy*, Paragraph 31.
444 *Legacy*, Paragraph 32.
445 *Legacy*, Paragraph 34.
446 *Legacy*, Paragraph 35.
447 *Legacy*, Paragraph 35.
448 *Legacy*, Paragraph 35.
449 *Legacy*, Paragraph 41.
450 *Legacy*, Paragraph 41.
451 *Legacy*, Paragraph 42.
452 *Legacy*, Paragraph 42.
453 *Legacy*, Paragraph 42.
454 CG van der Merwe *Sectional Titles, Share Blocks and Time-Sharing* Vol 1 LexisNexis SA Paragraph 14.4.15.
455 Van der Merwe *Sectional Titles* Vol 1 Paragraph 14.4.15.
456 Van der Merwe *Sectional Titles* Vol 1 Paragraph 14.4.15.
457 Van der Merwe *Sectional Titles* Vol 1 Paragraph 14.4.15.
458 CSOS Circular on Amendment or Rules in terms of the STSMA (1 August 2019) – accessible from the CSOS website at https://csos.org.za/wp-content/uploads/2019/10/Circular-On-Amendment-Of-Rules-In-Terms-Of-The-STSMA.pdf.
459 Act 9 of 2011.
460 *Trustees for the time being of the Legacy Body Corporate v BAE Estates and Escapes (Pty) Ltd and another* [2022] 1 All SA 138 (SCA), found at http://www.saflii.org/za/cases/ZASCA/2021/157.html, last accessed on 30 July 2022 (the SCA *Legacy Body Corporate case*).
461 *Legacy*, Paragraphs 11 to 17.
462 *Legacy*, Paragraphs 15, 16 and 18, 19.
463 *Legacy*, Paragraphs 20 to 26.
464 *Legacy*, Paragraphs 27 to 32.
465 *Legacy*, Paragraphs 33 to 53.
466 *Legacy*, Paragraphs 52 and 55.
467 [2022] 1 All SA 399 (WCC), found at http://www.saflii.org/za/cases/ZAWCHC/2021/259.html, last accessed on 30 July 2022.
468 *Nautica*, Paragraph 59.
469 *Nautica*, Paragraphs 72 to 78.
470 *Nautica*, Paragraphs 81 and 97.
471 *Nautica*, Paragraphs 98 to 100.
472 (AR1/2021) [2021] ZAKZPHC 91; 2022 (2) SA 71 (KZP) (12 November 2021), found at http://www.saflii.org/za/cases/ZAKZPHC/2021/91.html, last accessed on 30 July 2022.
473 Act 71 of 2008.
474 Act 8 of 2011.
475 2016.
476 The PMRs and PCRs are found in Annexures 1 and 2 of the STSMA Regulations, respectively.
477 For example, only the members can pass resolutions, including but not limited to:
- Amend, repeal or supplement the management or conduct rules of the body corporate (a unanimous or special resolution, respectively) (Sections 10(2)(a) and (b) of the STSMA);
- Lease common property for more than ten years (unanimous resolution) (Section 5(1)(a) of the STSMA read with Section 17(1) of the STA);
- Purchase or otherwise acquire, take transfer of, mortgage, sell, give transfer of or hire or let units (special resolution) (Section 4(b) of the STSMA);
- Borrow moneys required by it in the performance of its functions or the exercise of its powers (special resolution) (Section 4(e) of the STSMA);
- Lease common property for less than ten years (special resolution) (Section 4(h) of the STSMA);

- Extend sections (special resolution) (Section 5(1)(h) of the STSMA read with Section 24(3) of the STA); and
- Change the value of each owner's vote, or the liability to make contributions (special resolution) (Section 11(2)(a) of the STSMA).

478 Section 7(1) of the STSMA read with PMR 9(b) of the STSMA Regulations.
479 Van der Merwe *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 Paragraph 14 2 5 1.
480 Van der Merwe *Sectional Titles*, Paragraph 14 2 5 1.
481 Van der Merwe *Sectional Titles*, Paragraph 14 2 5 1.
482 Van der Merwe *Sectional Titles*, Paragraph 14.3 and 14 5 11.
483 Section 8(3)(a) of the STSMA.
484 PMR 8(4) of the STSMA Regulations.
485 Van der Merwe *Sectional Titles* Paragraph 3.3.3.
486 Act 9 of 2011.
487 *Kanyin Body Corporate v Lumic Property Consultants and Others* (1-Sep-21) Johannesburg High Court: https://www.tracslearning.co.za/wp-content/uploads/2022/09/Kanyin-Body-Corporate-v-Lumic-Property-Consultants-and-Others-1-Sep-21-JoPhannesburg-High-Court.pdf.
488 *Kanyin*, Paragraph 30.
489 *Kanyin*, Paragraphs 22 and 26.
490 *Kanyin*, Paragraph 9.
491 *Witfield Ridge*, Paragraph 9.
492 (2022/9286) [2022] ZAGPJHC 146 (14 March 2022), found at http://www.saflii.org/za/cases/ZAGPJHC/2022/146.html, last accessed on 30 July 2022.
493 *Witfield Ridge*, Paragraph 9.
494 (17078/2021) [2022] ZAGPJHC 358 (26 May 2022), found at http://www.saflii.org/za/cases/ZAGPJHC/2022/358.html, last accessed on 30 July 2022.
495 *Brushwood*, Paragraph 1.
496 *Brushwood*, Paragraphs 2 to 4.
497 *Brushwood*, Paragraph 6.
498 *Brushwood*, Paragraph 8.
499 *Brushwood*, Paragraph 8.
500 *Brushwood*, Paragraph 13.
501 *Brushwood*, Paragraphs 14 and 15.
502 Act 9 of 2011.
503 (A3029/2019) ZAGPJHC (9 May 2022). This recent case is marked as reportable by the court, but has not yet found its way into the law reports or onto the SAFLII website, hence there is no law report citation at this time. You can find the case here: https://www.stsolutions.co.za/wp-content/uploads/2022/05/Ncala-v-Park-Avenue-Body-Corporate-9-May-22-Johannesburg-High-Court.pdf. The judgement obtained is missing page 59 thereof and this missing page has not yet been obtained from the judge or the parties in the matter.
504 *Park Avenue*, Paragraph 107.
505 *Park Avenue*, Paragraphs 107 to 109.
506 *Park Avenue*, Paragraph 31.
507 *Park Avenue*, Paragraph 144.
508 *Park Avenue*, Paragraphs 120 and 140.
509 *Park Avenue*, Paragraph 14.
510 *Park Avenue*, Paragraphs 121 and 126.
511 *Park Avenue*, Paragraphs 121 and 127.
512 *Park Avenue*, Paragraph 123.
513 *Park Avenue*, Paragraphs 125 to 139.
514 *Park Avenue*, Paragraph 142.
515 Act 42 of 1965.
516 Section 33(2) of the Arbitration Act.
517 *Park Avenue*, Paragraph 146.
518 *Park Avenue*, Paragraph 143. See also Paragraph 31 of the Stenersen case.
519 *Park Avenue*, Paragraph 144.
520 *Park Avenue*, Paragraph 145.
521 (55262/2021) [2022] ZAGPPHC 508 (28 June 2022), found at http://www.saflii.org/za/cases/ZAGPPHC/2022/508.html, last accessed on 30 July 2022.

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APPENDIX

Glossary

administrative fund – established by the body corporate to cover annual operating costs, e.g. repairs, maintenance, payment of rates and taxes and other municipal service charges to the buildings or land, payment of any insurance premiums relating to the buildings or land

administrator – court-appointed, independent person or commercial concern that takes over the role of the trustees to manage the body corporate; appointed if there is evidence of serious financial or administrative mismanagement of a body corporate

agenda – document given to all attendees before the meeting that lists, in order, the matters to be discussed

body corporate – sectional title owners' association; established to govern the land, buildings and the common property for the benefit of all the unit owners; responsible for the enforcement of the rules

chairperson – a trustee who has been elected by the majority of the trustees to preside over meetings of the body corporate

common property – all the land and parts of the buildings that are not part of a section; owned by all unit owners jointly; e.g. foundations, roofing and the outer skin of the buildings, staircases, driveways, roads, entrance gate, guard house, club house and enclosed refuse areas

community scheme – any arrangement where there is shared use of, and responsibility for, parts of land and buildings, e.g. sectional title schemes, homeowners associations, housing schemes for retired persons and housing cooperatives

Community Schemes Ombud Service (CSOS) – investigates complaints and disagreements in community schemes, makes recommendations of how the complaints and/or disputes can be resolved

exclusive use area (EUA) – an area of common property that is owned by all unit owners but is reserved for use by a single unit owner or unit owners

executive managing agent – special type of managing agent who is appointed to perform the powers and functions of a board of trustees

freehold ownership – the owner has full ownership of the land and buildings on it

in number – the value of a member's vote is not related to their PQ share

in value – value of a member's vote in relation to their PQ shares of the scheme's total PQ

legal entity – an organisation that can do the same things in law as a human person, e.g. own property, enter into contracts, sue or be sued

levy, normal – monthly payments into the scheme's administrative fund (for annual operating costs) and its reserve fund (for future maintenance and repairs); also referred to as contributions

levy, special – a contribution other than a normal levy; expenses must be unforeseen, urgent and necessary

managing agent – a person appointed to assist the trustees and body corporate in the daily management of the scheme; paid to do this job

median line – an imaginary line that passes through the middle of something

meeting, annual general (AGM) – annual meeting where all members of the body corporate consider the most recent audited financial statements, the insurance of the body corporate, the appointment and election of trustees, and the budget for the upcoming financial year

meeting, general – any meeting that involves the unit owners; there are two types of general meetings: annual general meeting and special general meeting

meeting, special general (SGM) – meeting of the body corporate that is not an AGM; can be called by the trustees or the unit owners

notarial bond – if the debtor (person who owes money) does not pay their debt, the creditor (person to whom money is owed) is entitled to sell the debtor's movable property to cover the debt

notices – written documents to inform affected role-players of the date, time, venue and main purpose of a meeting of the trustees, usually to the exclusion of the body corporate and when there is evidence of serious financial or administrative mismanagement of a body corporate

ordinary resolution – a resolution taken by at least 50% plus one of the members present or represented by proxy at a meeting

participation quota (PQ) – the formula that calculates, among others, the unit owners' monthly levies and value of an individual unit owner's vote

personal right – only enforceable against specific persons or entities

primary section – a section designed to be used for human occupation as a residence, office, shop, factory or for any other type of use allowed in terms of local municipal by-laws

property practitioner – any person who for remuneration manages a property on behalf of another

proxy – a member may give someone else permission to represent them at a meeting and cast votes on their behalf; the proxy does not have to be a member of the body corporate

quorum – the minimum number of eligible persons that must be present at a meeting to make the proceedings at the meeting valid

quotas – fixed numbers or values allocated to sections registered in a member's name

real right – claims in things that are enforceable against everyone and all entities

reserve fund – established by the body corporate to cover the cost of future maintenance and repair of the common property

resolution – a record of a decision that will be actioned

section – one of the parts of a sectional title scheme; owned by a natural person or a legal person (like a company or trust)

sectional plan – shows the boundaries between sections, exclusive use areas and common property

sectional scheme (SS) number – a number unique to each sectional title scheme; reflects the year it was registered and the ordinal number for that year

sectional title scheme – land and buildings that are divided into two or more sections

special resolution – a resolution passed by at least 75% of the votes (reckoned in value and/or in number, as the case may be) of members of the body corporate who are present at a meeting or represented by proxy

trustees – people appointed to perform the work of the body corporate, in accordance with the directions of the STSMA and decisions taken at a general meeting of the unit owners; they do this work voluntarily

unanimous resolution – a resolution where (a) there is a quorum of 80% and (b) all the members who vote are in favour of the resolution (see note regarding abstention of vote under 'unanimous resolution' on page 35); may also be a resolution agreed to in writing by all the members of the body corporate

unit – a section *together with* its undivided share in the common property

unit owners – own only their units and have use of common property and exclusive use areas

utility section – a section that is designed to be used as an accessory to a main section, such as a communal bathroom or toilet, storeroom, workshop, shed, parking garage or parking bay

Annexures

Annexure A

SECTIONAL PLAN No SS: *112/1990*	SHEET 1 OF 5 SHEETS	S.G. No. D1035/1996
Registered at PRETORIA Registrar of Deeds Date: 03 /05 / 1996		APPROVED for Surveyor-General Date: *03.04.1996*
NAME OF BUILDING TO WHICH THE SCHEME RELATES: SHAMBLE HEIGHTS		
DESCRIPTION OF LAND ACCORDING TO DIAGRAM: Portion 1101 of the farm Lyttelton No. 500 – JR Province of Gauteng, measuring 2.1414 Hectares		
DIAGRAM No.: S.G. No. A 1771/1939		
NAME OF LOCAL AUTHORITY: City Council of Twane LOCAL AUTHORITY APPROVAL IN TERMS OF SECTION 4(SA) OF ACT 95 OF 1986 LOCAL AUTHORITY REFERENCE NUMBER: ST 628 / 95		
DESCRIPTION OF BUILDINGS: Seventeen building, namely: (a) Building 1, comprising Section 1; (b) Building 2, comprising of a part of Section 2; (c) Building 3, comprising of a part of Section 2; (d) Building 4, comprising of a part of Section 3; (e) Building 5, comprising of parts of Sections 3 and 4; (f) Building 6, comprising of a part of Section 4; (g) Building 7, comprising of a part of Section 5; (h) Building 8, comprising of a part of Section 5; (i) Building 9, comprising of a part of Section 6; (j) Building 10, comprising of a part of Section 6; (k) Building 11, comprising of a part of Section 7; (l) Building 12, comprising of a part of Section 7; (m) Building 13, comprising of parts of Sections 8 and 9 and common property; (n) Building 14, comprising of a part of Section 10; (o) Building 15, comprising of parts of Sections 10 and 12 and Section 11; (p) Building 16, comprising of a part of Section 12; and (q) Building 17, comprising of Section 13;		
ENCROACHMENTS ON LAND: No		
CAVEAT ***IN RESPECT OF EXTENSION OF SCHEME:*** ***The developer reserves the right in terms of section 25 of the Sectional Titles Act 95/1986 to extend the scheme further by the erection of additional buildings.*** CERTIFICATE: I, David Neil Paul Clark Russell, hereby certify that I have prepared sheets 1 to 5 inclusive of this sectional plan from survey in accordance with the provisions of the Sectional Titles Act, 95/1986 and the regulations promulgated thereunder. Date 29 September 1995 Signed Registration No. PLS 0491-D Land Surveyor 5555 MILK STREET SUNNYSIDE 0132		
Survey Records No, 1541/2003	Compilation: JRSQ-214	Gen, Plan **TP 292**

Annexure B

Reserve Fund Calculations

by Gustav Taute of MG Taute Registered Auditors

Minimum Reserve Fund Calculations in terms of the Regulations to the Sectional Titles Scheme Management Act 8 of 2011.

The Sectional Title Schemes Management Act (STSMA) 8 of 2011, stresses that one of the functions of a body corporate is to "*establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property, but not less than such amounts as may be prescribed by the Minister*".

Under the Sectional Titles Act (STA) 95 of 1986, owners in the scheme could determine the provision to be made for the reserve fund and determine increases, if any. However, the STSMA now places a statutory minimum contribution on schemes in accordance with what they currently have in their reserve fund.

The following rules apply in terms of STSMA Regulation 2:

1. If the amount of money in the reserve fund at the end of the previous financial year is less than 25% of total contributions to the administrative fund for that previous financial year, the budgeted contribution to the reserve fund must be at least 15% of the total budgeted contribution to the administrative fund.
   - Year end 30/9/2017: Budgeted contributions R550 000
   - Previous year end 30/9/2016:
     - Reserve fund 30/9/2016: R100 000
     - Total contributions 30/9/2016: R500 000
     - 25% of the Total contributions of R500 000 is R125 000
     - The reserve fund is thus less than 25% of the Total contributions of R500 000
   - 15% of the budgeted contribution to the administrative fund of 2017 must be budgeted for extra (15% of R550 000, thus R82 500)
   - The budgeted amount for the new year must be:
     R550 000 + R82 500 = R632 500.

2. If the amount of money in the reserve fund at the end of the previous financial year is equal to or greater than 100% of the total contributions to the administrative fund for that previous financial year there is no minimum contribution to the reserve fund.
   - Year end 30/9/2017. Budgeted contributions R550 000
   - Previous year end 30/9/2016:
     - Reserve fund 30/9/2016: R550 000
     - Total contributions 30/9/2016: R500 000
     - No extra amount.
   - The budgeted amount for the next year will be R550 000.

3. If the amount of money in the reserve fund at the end of the previous financial year is more than 25% but less than 100% of the total contributions to the administrative fund for that previous financial year, the budgeted contribution to the reserve fund must be at least the amount budgeted to be spent from the administrative fund on repairs and maintenance to the common property in the financial year being budgeted for.
   - Year end 30/9/2017: Total budgeted amount R550 000. Budgeted amount for repairs and maintenance R100 000 (included)
   - Previous year end 30/9/2016:
     - Reserve fund 30/9/2016: R150 000
     - Total contributions 30/9/2016: R500 000.
     - 25% of the contributions is R125 000. Therefore, more than 25% and less than 100%.
   - The budgeted amount for 30/9/2017 must be R550 000 plus R100 000 (maintenance and repairs).
   - Total amount of R650 000.

The objective is for every scheme to have at least one year's levy income/administrative or operational fund in their reserve fund. The administrative fund is simply your scheme's budgeted expenses for one year, excluding the reserve fund contribution.

Annexure C

Attention:
All members;
The developer;
All registered bondholders;
All holders of future development rights; and
The managing agent.

Notice of the First (Inaugural) General Meeting

Kindly take note that the body corporate of _____ *[Insert body corporate name here]* (SS _____ / _____) intends to hold its First General Meeting on the _____ *[Insert date here]* at __:__ *[Insert time here]* at the following venue: _____ *[Insert address here]*.

Proposed agenda for the meeting

The proposed agenda for the meeting is as follows:

	Agenda item	Please see attached
1.	Confirmation of proxies, nominees and other persons representing members and issuing voting cards;	Proxy form.
2.	Quorum determination;	
3.	The election of a person to chair the meeting, if necessary;	
4.	Present to the meeting proof of notice of the meeting or waivers of notice;	
5.	Approve the agenda;	
6.	A motion to confirm or vary the terms of the policies of insurance effected by the developer or the body corporate;	Insurance policy.
7.	An optional motion to determine if the default financial year of 1 October to 30 September provided by the PMR 21(1) of STSMA Regulations is to be retained or another financial year period is preferred;	

	Agenda item	Please see attached
8.	A motion to confirm or vary an itemised estimate of the body corporate's anticipated income and expenses for its first financial year;	Itemised estimate of the body corporate's anticipated income and expenses for its first financial year.
9.	A motion to approve, with or without amendment, the developer's evidence of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate, as required in terms of Section 2(8)(c)(iii) of the Act;	Developer's evidence of revenue and expenditure.
10.	A motion to approve, with or without amendment, the developer's financial statements relating to the management and administration of the scheme from the date of establishment of the body corporate to the date of notice of the first general meeting referred to in sub-rule (1);	Financial statement.
11.	Subject to Section 15(2) of the Act, a motion to ratify or not to ratify the terms of any contract entered into by the developer on behalf of the body corporate;	All contracts entered into by the developer on behalf of the body corporate.
12.	Motion confirming that the developer has furnished the meeting with copies of the documents referred to in Section 2(8) of the Act and in this rule;	• A copy of the sectional plan; • A certificate from the local authority to the effect that all rates due by the developer up to the date of the establishment of the body corporate have been paid; and • Proof of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate.
13.	A motion confirming that the developer has paid over any residue referred to in Section 2(9) of the Act;	

	Agenda item	Please see attached
14.	Appoint an auditor to audit the annual financial statements;	
15.	Determine the number of trustees;	
16.	Election of trustees;	
17.	Report on the lodgement of any amendments to the scheme's rules adopted by the body corporate under Section 10 of the Act and, if applicable, table a consolidated set of scheme rules;	
18.	Deal with any new or further business;	
19.	Give directions or impose restrictions referred to in Section 7(1) of the Act; and	
20.	Dissolution of the meeting.	

[Further and in compliance with PMR 16(4), please see attached the following documents:]

OR

[Please note that in compliance with PMR 16(4) the following documents will be provided to the body corporate at the First Annual General Meeting:]

- All building plans approved by the local municipality;
- Any encroachment permit or other document issued by the local municipality in regard to the improvements in the scheme;
- Plans showing the location of all pipes, wires, cables and ducts referred to in Section 3(1)(r) of the STSMA;
- Names and addresses of all contractors, subcontractors and any other persons whom the developer has employed to render services or supply materials relating to the development of the scheme;
- All warranties, manuals, schematic drawings, operating instructions, service guides, documentation from manufacturers and other similar information in respect of the construction, installation, operation, maintenance, repair and servicing of any common property or body corporate assets, occupation certificate, including any guarantee or warranty provided to the developer by a person referred to in sub-rule (4)(d);
- All records the body corporate is required to prepare or retain in terms of PMR 27.

The agenda for the first general meeting of unit owners must include the following:

1.	A motion to confirm or vary the terms of the policies of insurance effected by the developer or the body corporate.
2.	A motion to confirm or vary an itemised estimate of the body corporate's anticipated income and expenses for its first financial year.
3.	A motion to approve, with or without amendment, the developer's evidence of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate, as required in terms of Section 2(8)(c)(iii) of the STSMA.
4.	A motion to approve, with or without amendment, the developer's financial statements relating to the management and administration of the sectional title scheme from the date of establishment of the body corporate to the date of notice of the first general meeting.
5.	Subject to Section 15(2) of the STSMA, a motion to ratify or not to ratify the terms of any contract entered into by the developer on behalf of the body corporate.
6.	A motion confirming that the developer has furnished the meeting with copies of the documents referred to in Section 2(8) of the STSMA and in this rule.
7.	A motion confirming that the developer has paid over any residue referred to in Section 2(9) of the STSMA.
8.	A motion appointing an auditor to audit the evidence and financial statements.
9.	Motions determining the number of trustees and electing trustees.
10.	A motion detailing any restrictions to be imposed or directions to be given in terms of Section 7(1) of the STSMA or confirming that there are no such restrictions or directions.

Documents to provide to the unit owners before the meeting:

1.	A copy of the sectional plan.
2.	Certificate from the local authority to the effect that all rates due by the developer up to the date of the establishment of the body corporate have been paid.
3.	Proof of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate.
4.	All building plans approved by the local municipality.
5.	Any encroachment permit or other document issued by the local municipality in regard to the improvements in the scheme.
6.	Plans showing the location of all pipes, wires, cables and ducts referred to in Section (3)(1)(r) of the STSMA.
7.	Names and addresses of all contractors, subcontractors and any other persons whom the developer has employed to render services or supply materials relating to the development of the scheme.
8.	All warranties, manuals, schematic drawings, operating instructions, service guides, documentation from manufacturers and other similar information in respect of the construction, installation, operation, maintenance, repair and servicing of any common property or body corporate assets, occupation certificate, including any guarantee or warranty provided to the developer.
9.	All records the body corporate is required to prepare or retain in terms of PMR 27.

Annexure D

Insurance-related tasks to be completed before the Annual General Meeting		
	Task	**Done**
1.	The trustees or managing agent should ensure that a professional evaluator has valued all buildings and improvements within the last three years (this valuation must not be older than three years).	
2.	The trustees or managing agent should prepare schedules showing estimates of: • The replacement value of the buildings and all improvements to the common property; and • The replacement value of each unit, excluding the member's interest in the land included in the scheme, the total of such values of all units being equal to the value referred to in Item 1 above.[1]	
3.	Obtain quotations, policies and general policy wording documents from one or more preferred insurers either directly or through brokers. (Seek professional advice from a registered Insurance Advisor as registered in terms of the Financial and Intermediary Services Act 37 of 2002.)	
4.	Ensure that the AGM agenda, which is sent out with the notice of the meeting, includes the following insurance related agenda points: • Approval by the owners of the schedules of insurance replacement values; • Determination of cover required for fidelity insurance and approval thereof; • Determination of extent of cover required for liability; • Insurance and approval thereof; • List of additional insurance required, if any; and • If applicable, a motion to vote on required additional insurance to authorise same via special resolution. (Please take note of the requirement for a 30-day notice period[2] for a meeting at which a special resolution is to be taken.)	
5.	Copies of the following should be distributed with the notice and the agenda of the meeting:[3] • A copy of the quotation/s and proposed insurance policy or policies that the members must consider for approval; • A copy of the replacement valuation schedule; and • Any additional insurance-related document or summary thereof that the owners should consider before the meeting.	

1 PMR 23(4) of the STSMA Regulations.
2 Section 6(2) of the STSMA.
3 PMR 15(3)(b) of the STSMA Regulations.

Annexure E

Insurance checklist for the body corporate insurance policy		
	Inclusions	**Check**
1.	Includes building cover;	
1.1.	Schedule of replacement values as approved by unit owners and bondholders;	
1.2.	Cover for fire risk;	
1.3.	Cover for lightning risk;	
1.4.	Cover for explosion risk;	
1.5.	Cover for smoke risk;	
1.6.	Cover for riot, civil commotion, strikes, lock-outs, labour disturbances or malicious persons acting on behalf of or in connection with any political organisation;	
1.7.	Cover for storm, tempest, windstorm, hail and flood;	
1.8.	Cover for earthquake and subsidence;	
1.9.	Cover for water escape, including bursting or overflowing of water tanks, apparatus or pipes;	
1.10.	Cover for impact by aircraft and vehicles;	
1.11.	Cover for housebreaking or any attempt thereat.	
2.	Includes liability cover;	
2.1.	Minimum cover of R10 million.	
3.	Includes fidelity cover;	
3.1.	Correct minimum cover as calculated in Paragraph 5.9.	
4.	Includes additional cover included as resolved by the members via special resolution.	
5.	Includes additional cover included as directed by registered bondholder of over 25% in number of the primary sections.	
6.	Restriction of average clause.	
7.	Inclusion of clause stating that the policy is valid and enforceable by registered mortgage bondholders.	
8.	If applicable, a list of noted cessions of members' interests to mortgage bondholders in any of the proceeds of the policy.	

Annexure F

Trustee Resolution

At a meeting (Meeting) of the trustees of the body corporate of _____ **(SS _____/_____)** (body corporate) held at _____ (place) on this ____ day of _____ 20__ at _____ (time).

IT WAS RESOLVED THAT:

1. An urgent Special General Meeting (SGM) shall be called on less than 30 days' notice as it is reasonably necessary to do so due to the urgency of the matter.

2. The unit owners must urgently consider and take a vote to resolve:

   _____

   _____

3. The grounds for urgency are as follows:

   3.1. _____

   _____

   3.2. _____

   _____

   _____

4. Therefore, the abovementioned SGM is to be held on seven (7) days' notice.

Signature: _____ Signature: _____
Name: _____ Name: _____
Designation: #1 Trustee Designation: #2 Trustee

Signature: _____ Signature: _____
Name: _____ Name: _____
Designation: #3 Trustee Designation: #4

Signature: _____
Name: _____
Designation: Managing Agent

Annexure G

Attention:
All members;
All registered bondholders;
All holders of future development rights; and
The managing agent.

Notice of Annual General Meeting

Kindly take note that the body corporate of _____ *[Insert body corporate name here]* (SS _____ / _____) intends to hold an Annual General Meeting on the _____ *[Insert date here]* at __:__ *[Insert time here]* at the following venue: _____ *[Insert address here]*.

Agenda for the meeting

The proposed agenda for the meeting is as follows:

	Agenda Item	Please see attached
1.	Confirmation of proxies, nominees and other persons representing members, and issue voting cards;	Proxy form.
2.	Quorum determination;	
3.	The election of a person to chair the meeting, if necessary;	
4.	Present to the meeting proof of notice of the meeting or waivers of notice;	
5.	Approve the agenda;	
6.	Approve minutes from the previous general meeting, if any;	Minutes from previous meeting, if any.
7.	Deal with unfinished business, if any;	
8.	Any members or a bondholder who request a meeting in terms of sub-rule (4) must include one or more motions or matters for discussion with their request and these motions or matters must be included, without amendment, in the agenda for the meeting;	

	Agenda Item	Please see attached
9.	Receive reports of the activities and decisions of trustees since the previous general meeting, including reports of committees;	Reports.
10.	Approve the schedules of insurance replacement values referred to in PMR 23(3), with or without amendment;	Schedules of insurance replacement values.
11.	Determine the extent of the insurance cover by the body corporate in terms of PMRs 23(6), (7) and (8);	
12.	Approve the budgets for the administrative and reserve funds for the next financial year;	Proposed budget.
13.	Consider the annual financial statements;	Annual financial statement.
14.	The appointment of an auditor to audit the annual financial statements;	
15.	Determine the number of trustees;	
16.	Election of trustees;	
17.	Report on the lodgement of any amendments to the scheme's rules adopted by the body corporate and, if applicable, table a consolidated set of scheme rules;	
18.	Deal with any new or further business;	
19.	Give directions or impose restrictions referred to in Section 7(1) of the Act; and	
20.	Dissolution of the meeting.	

Annexure H

Attention:
All members;
All registered bondholders;
All holders of future development rights; and
The managing agent.

Notice of Special General Meeting

Kindly take note that the body corporate of _____ *[Insert body corporate name here]* (SS _____ / _____) intends to hold a Special General Meeting on the _____ *[Insert date here]* at __:__ *[Insert time here]* at the following venue: _____ *[Insert address here]*.

Agenda for the meeting

The proposed agenda for the meeting is as follows:

	Agenda item	Please see attached
1.	Confirmation of proxies, nominees and other persons representing members and issue voting cards;	Proxy form.
2.	Quorum determination;	
3.	The election of a person to chair the meeting, if necessary;	
4.	Present to the meeting proof of notice of the meeting or waivers of notice;	
5.	Approve minutes from the previous general meeting, if any;	Previous meeting minutes that require approval, if applicable.
6.	Approval of the agenda;	
7.	Deal with unfinished business, if any;	

8.	_____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ [Insert a description of the general nature of all business here.]	
9.	_____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ *[Insert a description of the matters that will be voted on at the meeting, including the proposed wording of any special or unanimous resolution here.]*	Proposed special resolution/proposed unanimous resolution.
10.	Dissolution of the meeting.	

Annexure I

Notification, appointment of proxy and acceptance of mandate

Notes: In terms of Section 6(5) of the STSMA a member must be represented in person or by proxy at general meetings of body corporate and a person may not act as a proxy for more than two members of the body corporate.

Scheme Details:	
Name of Scheme	
SS Number / Year	/ (first number, if more than one)

To: The body corporate
I/We, the undersigned owner(s) and member(s) give notice to the body corporate of the above scheme that I/we appoint a proxy to speak and vote at the general meetings (including adjournments) and on the terms set out below.

Member name(s):	
Unit numbers:	
Proxy name (insert one full name):	

This appointment applies to: (tick one of the following and complete as necessary)

	The general meeting to be held on:	**D D / M M / Y Y Y Y**
	All general meetings held before:	**D D / M M / Y Y Y Y**

	All general meetings until and including the body corporate's next annual general meeting.

Special conditions or instructions to proxy: (if this portion is left blank, the appointment is unconditional)

For example, one can add that: *"My proxy has the power to substitute a third party instead of him/herself as my agent if he/she is not able to exercise this proxy appointment due to the restriction contained in Section 6(5) of the STSMA."*

Signature(s) of members giving mandate:

_____ _____

Date signed

_____ _____

Date signed

Signature of person accepting mandate:

_____ _____

Date signed

About the Author

Justin graduated with a B. Comm degree majoring in Commercial Law and Economics from the University of Natal. He began his business career as a property portfolio manager. He then joined a new partnership focusing on property broking and residential sectional title developments. Having completed a number of successful property developments, the largest being the 201-unit Hazelwood complex, he decided to form his own company.

Justin developed and established a financial lending model to assist bodies corporate in financial distress due to unit owners not paying their levies. This loan model, at its core, involves a debtor's rehabilitation program with a view that paying owners should not be negatively impacted as a result of the body corporate borrowing.

Justin has participated in and continues to contribute to a number of ground-breaking advancements within the sectional title industry. These include his active involvement within the National Association of Managing Agents (NAMA). He was instrumental in the development of a code of conduct for Sectional Title Managing Agents. He was also awarded an Honorary Life Membership to NAMA.

He had the opportunity to collaborate, with Graham Paddock, Prof. C.G. van der Merwe and others, in various amendments to the Sectional Title Act. The first of these was his participation, as part of a government research team, to Singapore and Australia pertaining to the government's introduction of the community scheme legislation to include an Ombudsman's office to regulate and control dispute resolution and more recently in relation to the regulations pertaining to the Sectional Titles Schemes Management Act.

In recent years, Justin has successfully collaborated with other industry leaders to expand his business operations into solar energy and other renewable energy resources, fibre optics and mediation services. He is a qualified mediator from the London School of Mediation. He is currently appointed as Chairman of Bright Light Solar VCC, a public company specialising in renewable energy production and management, as well as the Chairman of the Sectional Title Solutions Group.

Justin was instrumental in the formation of TRACS, a non-profit company with the sole goal of providing quality education, at no cost, to the community scheme industry. Currently TRACS has a FREE fully interactive sectional title course for sectional title property owners, which has been translated into five languages.

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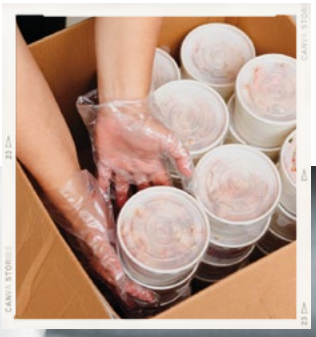
The Covid-19 pandemic and lockdown have taken a big toll on wage earners, the homeless, business owners and the underprivileged. The ripple effects of the pandemic are still being felt. Many people have lost loved ones, employment, and ways of life that bring comfort and even access to basic necessities.

Faith Food Distribution is a Non-Profit Company that not only acknowledges the economic realities of the poor, but is also grounded in the belief that each person has inherent dignity and worth. Through collaboration with businesses, communities, charities and causes we provide food, care packages and financial assistance to meet basic human needs. We also support education, training and guidance to create self-sufficiency in the communities we serve.



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The **Sectional Title Trustee Reference Guide** provides trustees and diligent unit owners with a more detailed understanding of important aspects of scheme management, ownership, the formation and amendment of rules, holding valid meetings, and many other important details to ensure that the scheme is transparently managed for the benefit of all residents.

The **Sectional Title Managing Agent Reference Guide** provides specific advanced knowledge for high-level sectional title scheme management, including rehabilitation, finance, executive managing agents, the Property Practitioners Act, recent case law, as well as relevant summaries of noteworthy CSOS case law, directives and adjudication orders.

The guide is packed with tons of practical examples, summary tables, illustrations and FAQs to make owning and managing your sectional title properties a breeze.

The Training Academy for Community Schemes (TRACS) is a NPC that was established to empower potential and existing sectional title stakeholders with the necessary **FREE** training and education to protect, preserve and manage their greatest asset, within the framework of the governing legislation. For more info on TRACS visit https://www.tracslearning.co.za.

ISBN: 9780620998093

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