

Alternative dispute resolution in community schemes: the statutory intervention

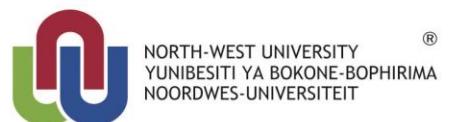
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ABSTRACT

In order to utilise land resources optimally and adhere to the need of residential accommodation that recognises the social, economic and psychological needs of society, the use of various community schemes seems to flourish in South Africa. In terms of the *Community Schemes Ombud Service Act 9 of 2011*, community schemes include any sectional title scheme, share block company, house or property owner's association established to administer a development, housing schemes for retired persons and any other scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings. The most favourable scheme seems to be sectional title schemes as it is estimated that there are more than 780 000 registered sectional title schemes in South Africa. However, these types of housing schemes often pose difficulties in resolving disputes between members *inter se* and members and the governing body, resulting in expensive and time-consuming litigation.

By virtue of the fact that the Department of Land Affairs, which administers the *Sectional Title Act 95 of 1986*, experienced a backlog regarding numerous complaints arising from the management and operation of sectional title schemes which could not be alleviated effectively by means of arbitration, the need for a recognised mechanism became clear. Therefore, the Department of Land Affairs lodged an investigation into the separation of consumer issues from registration issues together with the possibility of an ombud to attend to disputes that may arise in community schemes. This investigation led to the enactment of the *Sectional Titles Schemes Management Act 8 of 2011* and the *Community Schemes Ombud Service Act 9 of 2011* on 7 October 2016. Consequently, the Ombud Service, which has been established in terms of the *Community Schemes Ombud Service Act 9 of 2011*, has jurisdiction to settle disputes which may arise from sectional title schemes, share block schemes, time sharing schemes, retirement schemes and other communal residential schemes. The *Sectional Titles Schemes Management Act 8 of 2011* separates management and consumer affairs from registration and survey aspects of the *Sectional Titles Act 95 of 1986*.

This dissertation provides a critical analysis of the effectiveness of the *Sectional Titles Schemes Management Act 8 of 2011* and the *Community Scheme Ombud Service Act 9 of 2011*.

Keywords: arbitration, disputes, fragmented property schemes, litigation, mediation, ombud service, retirement schemes, rules, sectional title schemes, share block schemes, time-sharing schemes.

OPSOMMING

Verskeie gemeenskaplike woonskemas in Suid-Afrika floreer, welke skemas grond optimaal benut om sodoende te voldoen aan die behoeftes van residensiële verblyf wat die sosiale, ekonomiese en sielkundige behoeftes van die samelewing erken. In terme van die *Community Schemes Ombud Service Act 9* van 2011 word die volgende skemas geag as gemeenskapskemas: deeltiteleenhede, aandeleblokmaatskappye, behuisingskemas vir afgetrede persone en enige ander skema of reëling ingevolge waarvan daar 'n gesamentlike gebruik van en verantwoordelikheid vir dele van grond en geboue is. Die mees gunstige skema blyk deeltitelskemas te wees aangesien daar na beraming meer as 780 000 geregistreerde deeltitelskemas in Suid-Afrika is. Hierdie soort behuisingskemas lei dikwels tot probleme in die beslegting van geskille tussen lede onderling en tussen lede en die beheerliggaam wat weer lei tot duur en tydrowende litigasie.

Die Departement van Grondsake is verantwoordelik vir die regulering van die *Wet op Deeltitels* 95 van 1986 en het 'n agterstand begin ervaar weens talle klagtes aangaande die administrasie en bestuur van deeltitelskemas, welke klagtes nie by wyse van die voorgeskrewe arbitrasie suksesvol beredder kon word nie. Dit is hoofsaaklik weens die feit dat die Departement van Grondsake ondersoek ingestel het na die moontlike skeiding van verbruikers- en registrasieaangeleenthede en die daarstelling van 'n ombud om toe te sien tot die beslegting van geskille. As gevolg van die ondersoek is die *Sectional Titles Schemes Management Act 8* van 2011 en die *Community Schemes Ombud Service Act 9* van 2011 op 7 Oktober 2016 in werking gestel. Die ombuddiens wat in terme van die *Community Schemes Ombud Service Act 9* van 2011 daargestel is, het jurisdiksie om geskille, voortspruitend uit deeltitelskemas, aandeleblokskemas, tyddeelskemas, aftreeskemas en ander gemeenskaplike residensiële skemas, te besleg. Die *Sectional Titles Schemes Management Act 8* van 2011 stel die skeiding van bestuurs- en verbruikersaangeleenthede van registrasieaangeleenthede voor. Derhalwe sal registrasieaangeleenthede deur die gewysigde *Wet op Deeltitels* 95 van 1986 gereguleer word.

Hierdie verhandeling bied 'n kritiese analise met betrekking tot die doeltreffendheid van die *Sectional Titles Schemes Management Act* 8 van 2011 en die *Community Schemes Ombud Service Act* 9 van 2011.

Sleutelwoorde: aandeelblokskemas, aftreeskemas, arbitrasie, deeltitels, gefragmenteerde eiendomsskemas, geskille, litigasie, mediasie, ombuddiens, reëls, tyddeelskemas.

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1 Chapter 1: Introduction

1.1 General background

Community schemes include sectional title schemes, share block schemes, property owners' associations that were established for the administration of a development, housing schemes for retired persons and any other scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings.¹ Often these types of housing schemes pose difficulties in resolving disputes between members *inter se* and members and the governing body, resulting in expensive and time-consuming litigation.

With regard to sectional title schemes, the common law principle of *superficies solo credit* entails that a landowner not only owns the land but also the buildings erected thereon.² Therefore, the concept of owning part of a building was not recognised in South African law until the promulgation of the *Sectional Titles Act* 66 of 1971.³ Consequently, the concept of the division of ownership of land in horizontal layers had been recognised in South African law for the first time.⁴ Deeds registries, as well as the surveyor general, were required to accommodate this transformation.⁵ The examination, approval and filing of the rules of sectional title schemes, however, became problematic. In terms of legislation the rules were registered in a deeds registry as part of the sectional title register of a particular scheme. The examining and approval of the rules fell outside the ambit of the general functions of the deeds registries and therefore no official responsibility was accepted for these functions. The need for analysis of the rules to determine the legality thereof pertaining to the contents and validity of the adoption

¹ Section 1 of the *Community Schemes Ombud Service Act* 9 of 2011 (hereafter the *Ombud Service Act*).

² See para 2.2.1 and Van der Merwe 2012 *TSAR* 611 and Boysen *A critical analysis of the financial and social obligations* 1.

³ Reg 1115 in *GG* 3169 of 30 June 1971.

⁴ Maree 2015 *De Rebus* 18–20. Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1 para 1.8 (2014 Service 12) explains that according to estimation, more than 780 000 sectional title units are registered in South Africa.

⁵ The administration of both the deeds registries and surveyor general fell under the then Department of Land Affairs. In this regard also see Maree 2015 *De Rebus* 18–20 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1 para 1.4 (2014 Service 12).

procedures became apparent. This aspect remained problematic as the lacuna was unresolved under the *Sectional Titles Act* 95 of 1986.⁶ The enactment of the *Sectional Titles Schemes Management Act* 8 of 2011 (hereafter the *Management Act*) seems to remedy this as the rules are required to be submitted to the Chief Ombud for approval.⁷

Conflict and disputes are inevitable in sectional title schemes as sectional owners and body corporates will be confronted by situations that involve the violation of the rules, use of and damage to common property as well as the nonpayment of levies. Even though many of these situations tend to resolve themselves, many do not. Under the *Sectional Titles Act*⁸ the civil court was the recourse available to aggrieved parties in these instances.⁹ However, only the high courts have jurisdiction to hear matters pertaining to specific performance which would be the required relief if the rules were violated.¹⁰ Therefore, the cost of settling a dispute in court is fairly high. Furthermore, the relief sought in respect of conduct rules that permit or forbid the keeping of pets in a section, makes a mockery of the judicial system.¹¹ The perception was that courts were not the appropriate forum to resolve disputes in sectional title schemes.¹² In an attempt to fill this void regarding the resolution of disputes in sectional title schemes, the drafters of the regulations under the *Sectional Titles Act*¹³ made provision for certain disputes to be referred to arbitration under rule 71 (which is now repealed).¹⁴ Upon perusal of the previous rule 71 it is notable that it only makes provision for disputes between the body corporate and sectional owners or sectional owners *inter se*. Therefore, no provision was

⁶ Maree 2015 *De Rebus* 18–20.

⁷ Section 10 of the *Management Act*.

⁸ 95 of 1986.

⁹ In terms of s 46(2)(c) of the *Magistrates' Court Act* 32 of 1944 only a high court has jurisdiction to hear matters regarding specific performance. Also see Van der Merwe 1999 *SALJ* 624.

¹⁰ Ryan and Pienaar 2007 *TSAR* 442.

¹¹ Butler 1998 *Stell LR* 258-259 and Pienaar *Sectional titles and other fragmented property schemes* 221 explains that the relief sought due to these violations must be obtained by the High Court as it requires an order for specific performance.

¹² Van der Merwe 1999 *SALJ* 624.

¹³ Act 95 of 1986.

¹⁴ Annexure 8 of the *Sectional Titles Act* 95 of 1986. *The Arbitration Act* 42 of 1965 must apply as far as possible to arbitration proceedings under the *Sectional Titles Act* 95 of 1986. Also see Maree 1998 *De Rebus* 31 and Butler and Finsen *Arbitration in South Africa: Law and Practice* 151-153 and Van der Merwe 1999 *SALJ* 624.

made for disputes between the body corporate and the developer, trustees or a tenant.¹⁵ Some scholars are of the view that arbitration has become just as time consuming and expensive as litigation and should therefore be regarded as an unsuitable method of dispute resolution in sectional title schemes.¹⁶ The general perception is that arbitration will be the most suitable method for the settlement of disputes if the rules of the scheme are amended to make it mandatory. This is discussed in Chapter 4. Furthermore, the wording of rule 71 was so confusing that it may be safely ignored by parties who have the intention to litigate.¹⁷ Consequently, the Department of Rural Development and Land Reform (previously the Department of Land Affairs) appointed consultants to launch an investigation into a more favourable dispute resolution system which would function more effectively when it comes to the solving of disputes.¹⁸ The result was the promulgation and subsequent enactment of the *Management Act*¹⁹ and the *Community Schemes Ombud Service Act* 9 of 2011 (hereafter the *Ombud Service Act*).²⁰

Two issues emerge here, namely the division of the *Sectional Titles Act*²¹ into the amended *Sectional Titles Act*²² and the *Management Act* as well as the introduction of an ombudsman in terms of the *Ombud Service Act*.

The pivotal consideration of this study, in view of the obvious changes to the *Sectional Titles Act*²³ and the inclusion of share block schemes, time-sharing schemes and retirement schemes to the dispute resolution procedure provided for in the *Ombud Service Act*, is whether the dispute resolution procedure provided is a more suitable and cost-effective solution for disputing parties in the various community schemes. This is

¹⁵ Ryan and Pienaar 2007 *TSAR* 444.

¹⁶ Van der Merwe 2014 *Stell LR* 403.

¹⁷ Also see Maree 1998 *De Rebus* 31.

¹⁸ Paddock, Van der Merwe and Maluleke *Sectional Title Ombudsman investigation: Consultation paper to inform the design of a sectional titles dispute resolution system* (2005) unpublished paper of the Department of Housing. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1 para 1.13 (2014 Service 12) and Van der Merwe 2012 *TSAR* 611.

¹⁹ GN 518 in *GG* 34367 of 14 June 2011.

²⁰ GN 519 in *GG* 34368 of 14 June 2011.

²¹ The amended *Sectional Titles Act* 95 of 1986, which repealed all sections pertaining to management issues/matters.

²² 95 of 1986.

²³ 95 of 1986.

critical as a superficial shift may only lead to frustrate the transformative thrust of the *Management Act* and the *Ombud Service Act*. Therefore, the question explored in this study is whether a more effective dispute resolution procedure is provided for as envisioned in the *Management Act* and the *Ombud Service Act* in comparison to the previous procedures provided for in the *Sectional Titles Act*.²⁴

1.2 Research aims, hypotheses and methodology

The aim of this research is to compare the previous dispute resolution measures available to aggrieved parties in sectional title schemes, share block schemes, time-sharing schemes and retirement schemes²⁵ to the measures introduced by the *Management Act* and the *Ombud Service Act*.

My hypothesis entails that the cost of establishing and running the offices of record for sectional title and other community schemes' governance documentation, as well as the rendering of monitoring and quality control services, will have to be funded mainly by such schemes, most of which are struggling to scrape together sufficient funding for maintenance costs, insurance and other expenses.²⁶ A body corporate as party to ombud services will also be held liable for the adjudicator's cost if unsuccessful, thus adding to the financial burden of the scheme.²⁷ However, the provision of an ombud service and the training and educational aspects of the Act are necessary and will probably be more cost effective due to the fact that these functions do not entail the huge administration costs of an administrative body with quality control, monitoring and recording functions.²⁸ In lieu hereof the suitability of mediation for different kinds of community schemes will be investigated.

In order to investigate the research problems, the nature of community schemes is analysed to fully understand the legal nature of community schemes. This investigation

²⁴ 95 of 1986.

²⁵ As defined in s 1 of the *Ombud Service Act*.

²⁶ Whittle 2010 *De Rebus* 11.

²⁷ Pienaar *Sectional titles and other fragmented property schemes* 228-229 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1 para 18.2.10 (2014 Service 12).

²⁸ Pienaar *Sectional titles and other fragmented property schemes* 228-229.

is supported by research from legal textbooks, case law, legislation and journal articles concerning and dealing with the nature of community schemes. These academic sources enable an understanding of the underlying assumptions and enhance the flow of the dissertation.

An investigation regarding the rules community schemes are required to adhere to in order to assure the functioning of such schemes, has also been done by describing and analysing the rules of community schemes and comparing the rules applicable to sectional title schemes to the rules provided for in the *Management Act*. The remedies and settlement of disputes follow hereafter by means of a careful analysis regarding the manner in which disputes were resolved before the enactment of the *Management Act* and the *Ombud Service Act* on 7 October 2016. Specific reference is made to sectional title schemes as such schemes will undergo more changes due to the enactment of the *Management Act*. This research is done by an analysis of legal textbooks, case law, legislation and journal articles pertaining to the underpinning of the *Management Act* and the *Ombud Service Act*.

Legislation that features throughout is the *Sectional Titles Act* 95 of 1986. This Act has been amended by the *Sectional Titles Amendment Act* 66 of 1991; *Sectional Titles Amendment Act* 7 of 1992; *Sectional Titles Amendment Act* 15 of 1993; *Sectional Titles Amendment Act* 44 of 1997; *Sectional Titles Amendment Act* 29 of 2003; *Sectional Titles Amendment Act* 7 of 2005 and lastly the *Sectional Titles Amendment Act* 11 of 2010.

Due to the persistent need for a more cost effective dispute resolution system, the Department of Rural Development and Land Reform, the successor of the Department of Land Affairs, appointed consultants in 2004 with the remit to separate registration and administration matters and to propose a dispute resolution mechanism in sectional title schemes. Consequently, this led to the promulgation of the *Management Act*²⁹ and the *Ombud Service Act*.³⁰ The *Management Act*³¹ separated the registration and management provisions by re-enacting the management provisions in the *Management*

²⁹ GN 518 in *GG* 34367 of 14 June 2011.

³⁰ GN 519 in *GG* 34368 of 14 June 2011.

³¹ GN 518 in *GG* 34367 of 14 June 2011.

Act.³² This caused the *Sectional Titles Act* 95 of 1986 (as amended) to be focused on matters regarding registration only. These provisions will be administered by the Department of Rural Development and Land Reform whilst the Department of Human Settlements will administer the provisions of the *Management Act* and the *Ombud Service Act*.

The findings of this research are analysed to determine whether the dispute resolution measures provided for in the *Management Act* and the *Ombud Service Act* is more suitable and cost-effective. The findings are then compared to the conclusions drawn from the analysis of the previous approach in terms of the *Sectional Titles Act*.³³ In the event that disparities between the *Management Act*, the *Ombud Service Act* and current legislation pertaining to share block schemes emerge, it should be regarded as consequential to the investigation as it is not the main focus of the study. Lastly, a brief constitutional analysis indicates whether the *Management Act* and the *Ombud Service Act* give effect to the values embodied in the *Constitution of the Republic of South Africa, 1996*.³⁴

1.3 Chapter overview

This dissertation consists of five chapters. The introductory chapter provides a general background regarding the flawed rule 71 pertaining to arbitration that was applicable to sectional title schemes. It also highlights the enacted legislation namely the *Management Act*³⁵ and the *Ombud Service Act*³⁶ that were drafted with the aim to address the current shortfalls pertaining to dispute resolution measures. Possible stumbling blocks that may arise from the implementation of these statutes will be highlighted. Furthermore, the objectives of the dissertation, together with the methodology used to achieve the objectives, will be discussed.

³² GN 518 in *GG* 34367 of 14 June 2011.

³³ 95 of 1986.

³⁴ Section 34 of the *Constitution of the Republic of South Africa* 108 of 1996.

³⁵ GN 518 in *GG* 34367 of 14 June 2011.

³⁶ GN 519 *GG* 34368 of 14 June 2011.

In order to understand the impact that the proposed statutes will have on community schemes, one needs to understand the disputes which may arise from the different community schemes. For this reason, it is imperative to understand what is regarded as a community scheme. The aim of Chapter 2 is to provide a brief background as to how different community schemes came into existence and to explain the legal nature and functioning of the different community schemes. This also enhances the flow of the dissertation as the rules governing community schemes,³⁷ together with the legal action and settlement of disputes,³⁸ are also discussed in detail.

An analysis regarding the statutory rules that govern community schemes is given in Chapter 3. In this regard the changes introduced by the *Management Act*³⁹ and the *Ombud Service Act*⁴⁰ are highlighted. The focus of this chapter is on the nature of these rules,⁴¹ the rights and duties of the different role players,⁴² enforcement of the rules and sanctions for noncompliance together with the recourse available to aggrieved parties.

Chapter 4 illustrates that conflict is inevitable when a large number of people occupy a high-density living space. In light hereof it is understandable that social cohesion and community spirit needs to be protected in order to ensure the harmonious functioning of a community scheme. The purpose of Chapter 4 is therefore to highlight the disputes that arise in fragmented property schemes. These disputes mainly relate to noncompliance with the rules. Specific reference is made to the embargo principle

³⁷ Chapter 2.

³⁸ Chapter 3.

³⁹ GN 518 in *GG 34367* of 14 June 2011.

⁴⁰ GN 519 in *GG 34368* of 14 June 2011.

⁴¹ See para 3.1.1 regarding the legal nature of the rules governing sectional title schemes; and section 3.4 regarding the legal nature of the rules governing share block schemes. In respect of time-sharing schemes, see section 3.6 and for retirement schemes see section 3.7.

⁴² See para 3.2.1 regarding the rights and duties of a sectional owner; section 3.2.2 regarding the rights and duties of the body corporate; section 3.2.3 regarding the rights and duties of the trustees; and section 3.2.4 regarding the rights and duties of the managing agent. With regard to share block schemes see section 3.4.1 for a discussion regarding the rights and duties of directors and section 3.4.2 regarding shareholders or members. In respect of time-sharing schemes see section 3.6 and for retirement schemes see section 3.7.

envisioned in section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*,⁴³ litigation,⁴⁴ arbitration⁴⁵ and mediation⁴⁶ in sectional title schemes. In respect of share blocks the application of the *Companies Act*⁴⁷ regarding dispute resolution is explored as share block companies are managed by the *Share Blocks Control Act*⁴⁸ together with the *Companies Act*.⁴⁹ Reference is also made to the new voluntary court-annexed mediation in terms of the rules of magistrates' courts. These rules are enabled by the *Rules Board for Courts of Law Act*.⁵⁰ In terms of these rules, provision is made that aggrieved parties may request to mediate before or even during litigation proceedings.

Chapter 5 concludes this dissertation with a critical analysis of the effectiveness of the proposed *Management Act*⁵¹ and the *Ombud Service Act*.⁵² This analysis is based on the legislation, case law and academic literature discussed in each chapter. The conclusion focuses on the argument that a more cost-effective framework needs to be structured in order to give effect to the ombud service. The main argument is aimed at the suitability of mediation for all different kinds of community schemes included in the *Ombud Service Act*.

⁴³ 95 of 1986. Also see section 4.1.1.1.

⁴⁴ See para 4.1.1.2.

⁴⁵ See para 4.1.1.3.

⁴⁶ See para 4.1.1.4.

⁴⁷ 71 of 2008.

⁴⁸ 59 of 1980.

⁴⁹ 71 of 2008. Also see paras 2.3.2 and 4.1.2.

⁵⁰ 107 of 1985. Also see para 4.1.2.

⁵¹ GN 518 in *GG 34367* of 14 June 2011.

⁵² GN 519 in *GG 34368* of 14 June 2011.

2 Chapter 2: Nature of community schemes

2.1 Introduction

The aim of this chapter is to provide a brief overview of the legal nature and functioning of different community schemes that will be affected by the *Management Act*⁵³ and the *Ombud Service Act*.⁵⁴ The chapter contributes to the understanding of the impact this legislation will have on community schemes. In particular, the nature of the occupancy rights of right holders in the different community schemes is analysed.

2.2 Sectional titles

2.2.1 Introduction and historical overview

Since the Roman-Dutch law's maxim *superficies solo cedit* has been ingrained in South African law, ownership of immovable property was regarded as absolute and individualistic.⁵⁵ Consequently, ownership of a building separate from the land on which it was erected, or part of a building, had not been recognised and the need for legal intervention became apparent.⁵⁶ A person could obtain personal rights to use a part of a

⁵³ GN 518 in *GG* 34367 of 14 June 2011.

⁵⁴ GN 519 in *GG* 34368 of 14 June 2011.

⁵⁵ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1 paras 1.4 and 2.2 (2014 Service 24); Visser 1985 *Acta Juridica* 39 explains the history of the current position in South Africa, namely the maxim *superficies solo credit* and *plena in re potestas*, which was derived from the Pandectists as their influence on the South African law strengthened during the first half of the 19th century. Savigny's definition of ownership was quoted in 1910 in the case of *Johannesburg City Council v Rand Townships Registrar* 1910 TDP 1314. In *Gien v Gien* 1979 2 SA 113 (T) Judge Spoelstra referred to the dictum "kan iedereen met sy eiendom doen wat hy wil, al strek dit tot nadeel of misnoë van 'n ander..." to support the view that the South African law's point of departure is the "sogenaamde absoluutheid van eiendomsreg". The judge continued his statement: "Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas..." The concept of ownership endured further restrictions that were imposed by neighbour law. This is evident from *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A); Van Der Walt and Pienaar *Property Law* 59-61; Pienaar *Sectional titles and other fragmented property schemes* 3-4; Van der Walt and Kleyn "Duplex Dominium: The history and significance of the concept of divided ownership" 214.

⁵⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 441 state that in the South African common law, as with Roman-Dutch law and early European law, no provision was made for apartment ownership; Van der Merwe *Sectional titles, share blocks and time sharing*, para 1.4 (2014 Service 24). Also see Pienaar *Sectional titles and other fragmented property schemes* 3-4; *Macdonald Ltd Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Van Wezel v Van Wezel's Trustee* 1924 AD 409.

building by virtue of a lease agreement, or alternatively the use agreement in the case of shareholding in a share block company.⁵⁷ The use agreement was not registrable and binding on third parties.⁵⁸ This is an important factor as the use agreement divides the use of the property between the shareholders.⁵⁹ Concern also arose due to the fact that the possibility existed that individual purchasers of property, by means of share block schemes, may incur financial losses if these purchasers were not able to become registered titleholders of their purchased property.⁶⁰ It therefore became imperative for the South African legislative system to develop and introduce sectional ownership or *condominium* (the American concept for fragmented property holding).⁶¹ As a consequence of this lacuna, the *Sectional Titles Act* 66 of 1971 was promulgated on 30 June 1971 and came into operation on 30 March 1973.⁶² The Act incurred minor amendments since its enactment until it was replaced by a second-generation statute and regulations.⁶³ The new *Sectional Titles Act* 95 of 1986 was promulgated

57 Pienaar *Sectional titles and other fragmented property schemes* 13-21. Pienaar further explains the distinction between short-term (lease period shorter than ten years and not registrable in the deeds registry) and long-term leases (lease period longer than ten years and registrable in the deeds registry). The rights of the parties of a short-term lease are determined by the lease agreement. However, the lessee of a long-term lease agreement obtains a limited real right once the agreement is registered in the deeds registry as determined by section 63(1) of the *Deeds Registries Act* 47 of 1937.

58 Section 24(1) of the *Deeds Registries Act* 47 of 1937; Carey Miller and Pope *Land title in South Africa* 208.

59 Pienaar *Sectional titles and other fragmented property schemes* 13-21; Carey Miller and Pope *Land title in South Africa* 208.

60 See *Sectional titles, share blocks and time sharing*, para 1.4 (2014 Service 24) where it is explained that an appointed committee in 1969 reported the abovementioned.

61 Butler *Sectional titles, share blocks and time sharing* 27-28 and Pienaar *Sectional titles and other fragmented property schemes* 8-10 discuss that the need to make optimum use of available land requires fragmented land tenure schemes in urban areas. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 441 explain the need for sectional ownership as the need for residential housing was on the increase. Also see Maree *De Rebus* 35-40.

62 Proc R18 in *GG* 3776 of 2 February 1973. The regulations of the Act were promulgated by GN 475 in *GG* 3822 of 30 March 1973 and came into operation with the Act. It is evident that this Act was mainly based on the *Strata Titles Act* 17 of 1961 of New South Wales. Also see *Sectional titles, share blocks and time sharing* para 1.4 (2014 Service 24); Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 441.

63 The amendments are envisaged in the *General Law Amendment Act* 62 of 1973; the *Second General Law Amendment Act* 94 of 1974; the *General Law Amendment Act* 57 of 1975; the *Sectional Titles Amendment Act* 1 of 1977; the *Sectional Titles Amendment Act* 54 of 1980; the *Share Blocks Control Act* 59 of 1980; the *Sectional Titles Amendment Act* 12 of 1981 as well as the *Sectional Titles Amendment Act* 77 of 1983. There were also amendments to the regulations as noted in GN R1938 in *GG* 5746 of 23 September 1977; GN R2579 in *GG* 6261 of 29 December 1978 and GN R1137 in *GG* 7598 of 29 May 1981; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of*

accordingly.⁶⁴ The changes brought about by the new Act were focused mainly on registration procedures and provided directives for the developing modern sectional ownership.⁶⁵ A further legal development occurred in 2011 with the promulgation of the *Management Act* and the *Ombud Service Act*. The management provisions of the *Sectional Titles Act* of 1986 were transferred to the *Management Act*. Consequently, the *Management Act* contains the management provisions whilst the amended *Sectional Titles Act*⁶⁶ still embodies the registration and survey provisions.⁶⁷

2.2.1.1 Sectional Titles Schemes Management Act

The *Sectional Title Amendment Bill*,⁶⁸ published in 2010, modified the previous Bill⁶⁹ in only a few minor respects.⁷⁰ These were the last amendments brought about by the Department of Rural Development and Land Reform before the *Sectional Titles Act*⁷¹ was divided into three separate statutes, namely the leaner *Sectional Titles Act*,⁷² the *Management Act* and the *Ombud Service Act*. The *Sectional Titles Act*⁷³ only governs land registration and survey matters whilst the *Management Act* pertains to managerial

Property 441. Also see Van der Merwe *Sectional titles, share blocks and time sharing* vol 1 paras 1.4 and 1.11-1.12 (2014 Service 24). As stated in Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 441, the *Sectional Titles Act* 95 of 1986 superseded Act 66 of 1971. The *Sectional Titles Act* 95 of 1986 came into operation on 1 June 1988 (Proc R62 in *GG* 11240 of 8 April 1988).

⁶⁴ GN R1943 of *GG* 10440 of 17 September 1986. *Sectional titles, share blocks and time sharing* paras 1.4 and 1.11-1.12 (2014 Service 24). See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 441; Pienaar *Sectional titles and other fragmented property schemes* 57-59.

⁶⁵ Pienaar *Sectional titles and other fragmented property schemes* 57-59. See also Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1 paras 1.4 and 1.11-1.12 (2014 Service 24); Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 441-442.

⁶⁶ 95 of 1986.

⁶⁷ See *Management Act* and *Sectional Titles Act* 95 of 1986; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.4 (2014 Service 24); Pienaar *Sectional titles and other fragmented property schemes* 57-59.

⁶⁸ GN 605 in *GG* 33316 of 21 June 2010.

⁶⁹ The *Sectional Title Amendment Bill* was originally published in GN R 1109 *GG* 32498 of 17 August 2009 together with the memorandum that provides the objectives of the Bill in *GG* 32498 of 17 August 2009.

⁷⁰ See Van der Merwe 2011 *Stell LR* 115.

⁷¹ *Sectional Titles Act* 95 of 1986.

⁷² Amended *Sectional Titles Act* 95 of 1986. Section 1, 11, 15B, 17, 19, 24, 25, 26, 27, 29, 32, 34, 36, 49, 55, 60, 60A have been amended in the amended *Sectional Titles Act* 95 of 1986. Sections 27A, 35, 37-48 and 51 have been repealed in the amended *Sectional Titles Act* 95 of 1986.

⁷³ 95 of 1986.

aspects which previously formed part of the *Sectional Titles Act*.⁷⁴ The aim of the *Ombud Service Act* is to make provision for a dispute resolution structure for sectional titles and other community schemes.⁷⁵ The administration of the prescribed management rules contained in Annexure 8⁷⁶ and the conduct rules contained in Annexure 9⁷⁷ have been reassigned to the Department of Human Settlements, the successor of the former Department of Housing. The *Management Act* and the *Ombud Service Act* came into effect from 7 October 2016.⁷⁸

Upon perusal of the *Sectional Title Amendment Bill*,⁷⁹ it is clear that it was the intention of the legislature to promulgate the *Sectional Title Amendment Act*⁸⁰ simultaneously with the *Management Act* in order to divide the registration issues and managerial aspects of the present *Sectional Titles Act*.⁸¹ The most important change is that the amendments contained in the *Sectional Titles Amendment Bill*⁸² will be removed from the amended *Sectional Titles Act*⁸³ and inserted in the *Management Act*.⁸⁴ Van der Merwe⁸⁵ is of the opinion that these amendments would modernise and facilitate the operation of the amended *Sectional Titles Act*⁸⁶ and would provide much deserved clarity to both conveyancers and deeds registry officials whilst strengthening the hands of the persons who are responsible for the governance in the schemes such as managing agents and trustees.

⁷⁴ 95 of 1986.

⁷⁵ Van der Merwe 2011 *Stell LR* 115.

⁷⁶ Annexure 8 to the *Sectional Titles Act* 95 of 1986.

⁷⁷ Annexure 9 to the *Sectional Titles Act* 95 of 1986.

⁷⁸ Van der Merwe 2012 *TSAR* 611-649.

⁷⁹ GN 605 *GG* 33316 of 21 June 2010.

⁸⁰ The *Sectional Title Amendment Bill* of 2010 has been enacted on 7 October 2016.

⁸¹ Van der Merwe 2011 *Stell LR* 115.

⁸² GN 605 *GG* 33316 of 21 June 2010.

⁸³ 95 of 1986.

⁸⁴ Also see Van der Merwe 2011 *Stell LR* 116.

⁸⁵ Van der Merwe 2011 *Stell LR* 116. However, Whittle 2010 *De Rebus* 11 explains that although the Law Society of South Africa is in favour of the separation of registration and managerial provisions, it was under the impression that the *Sectional Titles Act* 95 of 1986 would first have been updated. The Law Society is of the opinion that it would have been more effective if the *Sectional Titles Act* 95 of 1986 has been updated so that the division of the Act is based on an updated version that has addressed the issues that required updating. Also see section 2.6.

⁸⁶ 95 of 1986.

The *Management Act*⁸⁷ makes provision for the establishment of bodies corporate to manage and regulate the use of sections and the common property in sectional title schemes.⁸⁸ In order to achieve this purpose, the mentioned Act provides rules as well as directives as to how these rules are to be applied to such schemes.⁸⁹ The Act furthermore makes provision for the establishment of a sectional title scheme advisory council to attend to matters relating thereto.⁹⁰

The most important managerial provisions regarding the legal proceedings in respect of sections require either the written consent of all owners, the consent of the trustees or a special or unanimous resolution of the owners in a general meeting for matters pertaining to the subdivision or consolidation of sections or for the establishment of exclusive use areas in respect of the common property.⁹¹ Therefore, these managerial aspects have been encompassed in sections 5(1) and (2) of the *Management Act* which pertains to the additional powers of the bodies corporate.⁹² Section 7(2), which deals with the consent of trustees, is copied directly from section 39(2) of the *Sectional Titles Act*.⁹³ The scope of the changes and the impact thereof are discussed in Chapter 3.⁹⁴

2.2.1.2 Procedure of implementation

It is clear that the leaner *Sectional Titles Act*,⁹⁵ which deals with conveyancing aspects, the *Management Act* and the *Ombud Service Act* are all intertwined and would therefore

⁸⁷ The *Management Act* was gazetted and signed by the president in June 2011 and has commenced on 7 October 2016.

⁸⁸ Section 2(5) read with section 3(1)(t) of the *Management Act*.

⁸⁹ Section 10 of the *Management Act*.

⁹⁰ Section 18 of the *Management Act*. Also see Padayachee 2011 <http://www.paddocks.co.za/paddocks-press-newsletter/sectional-titles-schemes-management-act-8-of-2011/>.

⁹¹ *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.2 (2014 Service 24). In terms of s 27 of the *Sectional Titles Act* 95 of 1986 a unanimous resolution is required for the amendment of the management rules in order to create new exclusive use areas as provided for in s 27A of the latter. A special resolution will be required for the amendment of the conduct rules in order to create new exclusive use areas as provided for in s 27A of the *Sectional Titles Act* 95 of 1986.

⁹² In this regard see section 2.2.1.2 and 3.2.3, as well as *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.1 and 18.1.1 (2014 Service 24).

⁹³ 95 of 1986. See para 3.2.3.

⁹⁴ See paras 3.2.1-3.2.4.

⁹⁵ The amended *Sectional Titles Act* 95 of 1986.

operate in conjunction with one another. This is highlighted throughout the dissertation.⁹⁶ An important insertion is found in section 36 of the *Sectional Titles Act*⁹⁷ that requires the registrar to issue a certificate upon the registration of a unit in the name of a person other than the developer and to lodge this certificate with the chief ombud.⁹⁸ Section 11 of the *Management Act* also requires a chief ombud to certify that the rules as contemplated in section 10 have been approved.⁹⁹

With regard to the regulations, the *Sectional Titles Amendment Regulations* of 2015¹⁰⁰ imported amendments that have been promulgated.¹⁰¹ These amendments mainly concern the regulations contained in Annexure I that deals with the different forms of registration of real rights in terms of the *Sectional Titles Act*¹⁰² and Annexure 8 that deals with the managerial aspects of sectional title schemes.¹⁰³

2.2.1.3 Sectional title as a unit as immovable property

The *Sectional Titles Act* 95 of 1986 defines a "sectional title unit" as:

A section together with its undivided share in the common property apportioned to that section in accordance with the participation quota of the section.¹⁰⁴

In view hereof, a new composite immovable entity has been invented in the form of a sectional title unit that consists of a section (regarded as the corporeal principal component) of a building, together with an undivided co-ownership share (regarded as the incorporeal accessory)¹⁰⁵ of the common property in accordance with the participation

⁹⁶ See Chapters 2, 3 and 4.

⁹⁷ 95 of 1986.

⁹⁸ Section 36(3) of the *Management Act*.

⁹⁹ See paras 2.2.1.3; 2.2.1.4; 3.2.2.

¹⁰⁰ GN 548 in *GG* 38923 of 30 June 2015.

¹⁰¹ GN R 664 of 8 April 1988 (rectified by GN R 991 of 27 May 1988) as amended.

¹⁰² *Sectional Titles Act* 95 of 1986.

¹⁰³ Van der Merwe 2016 *TSAR* 126. These amendments came into effect on 30 July 2015. For the purposes of this chapter the focus will be on the amendments that pertain to Annexure 8 as this forms part of the core of this chapter.

¹⁰⁴ Section 1 of the *Sectional Titles Act* 95 of 1986; Cowen 1973 *CILSA* 7-8.

¹⁰⁵ The undivided co-ownership share in the joint property is a real right.

quota.¹⁰⁶ The unit is therefore an independent immovable object.¹⁰⁷ As stated above, a sectional title unit consists of a section and its undivided share in the common property where such share is apportioned in accordance with the participation quota of the relevant section.¹⁰⁸ Paddock¹⁰⁹ cautions that when referring to sectional ownership it must be borne in mind that the ownership of the section coexists with the undivided share in the common property which illustrates the composite kind of ownership with which the unit is owned. Therefore, if one purchases a unit in a sectional title scheme, ownership of the section as part of the unit cannot be transferred without transferring the undivided share of the common property simultaneously.¹¹⁰

It is important that a unit should not be confused with a section.¹¹¹ The definition above is criticised in the sense that the description of a sectional title unit deviates from the common law principle where land is always regarded as the principal entity where attachments of movables to immovable property is concerned.¹¹²

Ownership of a unit may therefore be registered in the deeds registry according to the *Sectional Titles Act* 95 of 1986 which defines a unit to be land in terms of this Act.¹¹³ This entails that the *Deeds Registries Act* 47 of 1937, together with its regulations, applies *mutatis mutandis* in respect of the filing and registering of documents unless otherwise

¹⁰⁶ Mostert and Pope *The principles of the law of property in South Africa* 100-101. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 442-443; Cowen 1973 *CILSA* 7-8; Section 10(1) and s 15B(1)(a) of the *Sectional Titles Act* 95 of 1986 and also s 36(1). Van der Walt and Pienaar *Property Law* 61; *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* 1986 (1) SA 722 (A).

¹⁰⁷ Pienaar *Sectional titles and other fragmented property schemes* 59; Section 3 of the *Sectional Titles Act* 95 of 1986; Cowen 1973 *CILSA* 7-8. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 442-443; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 2.2 (2014 Service 24).

¹⁰⁸ Section 1(1) of the *Sectional Titles Act* 95 of 1986.

¹⁰⁹ Paddock *Sectional Title Survival Manual* 1-2; 1-3; Boysen *A critical analysis of the financial and social obligations* 19.

¹¹⁰ Section 15B(c) of the *Sectional Titles Act* 95 of 1986. Van der Walt and Pienaar *Property Law* 61. Pienaar *Sectional titles and other fragmented property schemes* 59; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 455; De Ville 1994 *Stell LR* 33-46.

¹¹¹ Maree *Sectional Titles on Tap*, para 2.3; Boysen *A critical analysis of the financial and social obligations* 19.

¹¹² Pienaar *Sectional titles and other fragmented property schemes* 67; *Van Wezel v Van Wezel's Trustee* 1924 AD 409, 417; *Durban Corporation v Lincoln* 1940 AD 36, 42.

¹¹³ Section 3(4) of the *Sectional Titles Act* 95 of 1986; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1 para 3.2.1 (2014 Service 12); Boysen *A critical analysis of the financial and social obligations* 20; Pienaar *Sectional titles and other fragmented property schemes* 67-69.

provided for in the *Sectional Titles Act*.¹¹⁴ In addition hereto, the *Alienation of Land Act* 68 of 1981 will also be applicable since the sale of units, together with instalment sales, falls within the scope and ambit of this Act.¹¹⁵

A section is defined as that part of a building designated on a sectional plan and by virtue whereof separate ownership or co-ownership may be obtained.¹¹⁶ The importance and significance of this distinction is that an owner, as sole owner of a section, generally has more entitlements to his section compared to his entitlements to the common property of that specific scheme, as this is owned by all co-owners in undivided shares.¹¹⁷ It is also important to distinguish between the exclusive use areas and the common property since the owners of a specific exclusive use area are responsible for maintenance to such areas as in the case of sections, while all owners of the sectional title scheme are responsible for the maintenance of the common property.¹¹⁸ To fulfil this responsibility, each owner contributes to an administrative fund for reparations and maintenance purposes.¹¹⁹

In modern South African law a threefold legal relationship arises when one purchases an apartment in a sectional title scheme.¹²⁰ This legal relationship entails that a purchaser firstly becomes the titleholder or owner of the apartment that he/she has purchased; secondly the purchaser becomes the joint or common owner of the common property and thirdly the purchaser becomes a member of the body corporate.¹²¹ These three legal components can only be dealt with in unity with one another and it is impossible to

¹¹⁴ Section 3(1) of the *Sectional Titles Act* 95 of 1986.

¹¹⁵ Section 1 of the *Alienation of Land Act* 68 of 1981.

¹¹⁶ Section 1 of the *Sectional Titles Act* 95 of 1986; Van der Walt and Pienaar *Property Law* 61 describe a section as follows: "A section is a part of the building which is indicated on the sectional plan and in respect of which separate ownership or co-ownership can be acquired".

¹¹⁷ Booyens *A critical analysis of the financial and social obligations* paras 2.2.1-2.2.3; Pienaar *Sectional titles and other fragmented property schemes* 59-69.

¹¹⁸ Section 44(1)(c) of the *Sectional Titles Act* 95 of 1986 and s 13(1)(c) of the *Management Act*; Section 37(1)(a) of the *Sectional Titles Act* 95 of 1986 and s 3(1)(a) of the *Management Act*.

¹¹⁹ See para 3(1)(a) of the *Management Act* in this regard as s 37(1)(a) of the *Sectional Titles Act* 95 of 1986 has been repealed.

¹²⁰ Van Der Merwe 1992 *Stell LR* 131.

¹²¹ Van Der Merwe 1992 *Stell LR* 131. Also see Van der Merwe *Sectional Titles, share blocks and time sharing* vol 1, para 2.1 (2014 Service 24) where it is also further explained that the "three-fold unity" has been developed by Bärmann, Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 442-443 and Booyens *A critical analysis of the financial and social obligations* 17.

alienate or burden these components individually.¹²² The concept of sectional titles is considered to be a form of fragmented property and thus the essence of sectional titles, namely the rights and duties of the sectional owner, the body corporate, the trustees and the managing agents, is discussed in the next section.¹²³

2.2.1.4 Common property and exclusive use areas

In view of the definition provided in the *Sectional Titles Act* 95 of 1986, common property is defined as all land included in the scheme; physical portions of the building or buildings which are excluded from sections in the building; as well as land referred to in section 26.¹²⁴ It is clear that an exclusive definition is trailed by this Act as all parts of the scheme are included with the exception of the physical portions which form part of the section.¹²⁵

All land included in a scheme therefore forms part of that scheme's common property,¹²⁶ including everything above and below the building; certain parts of the building; as well as the land that is reserved for further development.¹²⁷ The scheme may include more than one piece of land. However, in these instances the different pieces of land must be contiguous and notarially tied in the relevant deeds registry.¹²⁸ The pieces of land in a scheme may be noncontiguous on condition that the building or buildings are situated on the same piece of land and are divided into sections.¹²⁹

¹²² Sections 16(3) and 36(2) of the *Sectional Titles Act* 95 of 1986.

¹²³ This will be discussed in section 3.2 Chapter 3.

¹²⁴ Section 1 of the *Sectional Titles Act* 95 of 1986.

¹²⁵ Booyse *A critical analysis of the financial and social obligations* 22; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 3.2.4 (2010 Service 12).

¹²⁶ Pienaar *Sectional titles and other fragmented property schemes* 70–81 submits that due to this, land never forms part of a section; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 3.2.4 (2010 Service 12).

¹²⁷ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 3.2.4 (2014 Service 24) explains that "the soil beneath the building, the land for the yet undeveloped parts of the scheme and the air space around and above the building are part of the common property". Also see Booyse *A critical analysis of the financial and social obligations* 22.

¹²⁸ Section 4(2) of the *Sectional Titles Act* 95 of 1986. Also see Pienaar *Sectional titles and other fragmented property schemes* 70-81.

¹²⁹ Section 4(2) of the *Sectional Titles Act* 95 of 1986; Pienaar *Sectional titles and other fragmented property schemes* 70-81.

In addition to the land and all improvements and attachments to the land, common property also encompasses all parts of the building or buildings that do not form part of the sections.¹³⁰ This includes the outer shell of the sectionalised buildings from the median confines of the walls, floors and ceilings of each section as well as the foundations of the building.¹³¹ Communal facilities that are also considered to be common property include entrances to the section, passages, lifts, stairways, recreational and entertainment areas, laundries, parking bays and storerooms.¹³² All movable assets used to maintain the common property such as garden tools and cleaning equipment, are owned by the body corporate but is not considered part of the common property.¹³³

An exclusive use area is defined in the Act as a part or parts of the common property that is reserved for the exclusive use by the owner or owners of one or more than one section.¹³⁴ This means that a specific area may be allocated to a specific sectional owner, for example a parking bay.¹³⁵ This exclusive use area still falls under the governance of the body corporate as it remains part of the common property.¹³⁶ Once the certificate of real right of exclusive use has been registered in the relevant deeds registry, the sectional owner obtains a limited real right in respect of his exclusive use area of which he/she is already a co-owner.¹³⁷ This right is regarded as "a right to urban immovable property" which may be notarially ceded to other sectional owners.¹³⁸ In order to avoid malpractices

¹³⁰ Pienaar *Sectional titles and other fragmented property schemes* 70-81 explains that swimming pools, gardens and recreational facilities are regarded as attachments.

¹³¹ Pienaar *Sectional titles and other fragmented property schemes* 70-81; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 3.2.4 (2014 Service 24).

¹³² Pienaar *Sectional titles and other fragmented property schemes* 70-72.

¹³³ Section 38(c) of the *Sectional Titles Act* 95 of 1986 and s 4(c) of the *Management Act*. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 3.2.7 (2014 Service 24).

¹³⁴ Section 1(1) of the *Sectional Titles Act* 95 of 1986. Also see Mostert 1997 *Stell LR* 324; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 3.2.5 (2014 Service 24).

¹³⁵ Mostert 1997 *Stell LR* 324; Pienaar *Sectional titles and other fragmented property schemes* 74-75.

¹³⁶ Pienaar *Sectional titles and other fragmented property schemes* 74-81.

¹³⁷ Section 27(6) of the *Sectional Titles Act* 95 of 1986 has been repealed; Wood-Bodley 1997 *TSAR* 463; Mostert 1997 *Stell LR* 331-333; Pienaar *Sectional titles and other fragmented property schemes* 74-81.

¹³⁸ Pienaar *Sectional titles and other fragmented property schemes* 74-81 explains that this right of exclusive use may not be regarded as a personal right as such rights are not registrable in the deeds registry as s 63(1) of the *Deeds Registries Act* 47 of 1937 precludes the registration of personal rights. In this view *Ex Parte Geldenhuys* 1926 OPD 155 162; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) para 12-15 as well as *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879

by developers, the Act clearly specifies that an exclusive use area may be registered in one of the four following ways. Firstly, if the developer has indicated the exclusive use area on the sectional plan at the opening of the sectional title register. Afterwards, this real right¹³⁹ is to be ceded to the owner of such section by way of a unilateral notarial deed of cession.¹⁴⁰ Secondly, if the developer has not reserved an area as an exclusive use area on the sectional plan, he/she may, after the opening of the sectional title register, apply for the certification that the limited real right of the exclusive use be granted with the written consent of the mortgagee of that section and that this right is notorially ceded to the sectional owner subject to existing mortgage bonds.¹⁴¹ However, this has to be done before the body corporate is constituted.¹⁴² Thirdly, an application may be lodged to the surveyor-general by the body corporate which has been duly authorised by its members in terms of an unanimous resolution, to designate the exclusive use areas that have been reserved in favour of specific sectional owners where after the same is notorially ceded by the body corporate to the specific sectional owners.¹⁴³ Lastly, in the event where a sectional owner has applied to the body corporate to cede the right of exclusive use areas by means of a notarial deed of cession in the event where exclusive use areas have been contractually instituted or amended by the rules of the *Sectional Titles Act* 66 of 1971.¹⁴⁴ It is, however, not possible for exclusive use rights to be ceded to a person who is not a sectional owner of the scheme.¹⁴⁵

In addition, the *Sectional Titles Amendment Act* 44 of 1997 made further provision for developers or the body corporate to register rules in favour of sectional owners to obtain personal rights in respect of the exclusive use and enjoyment of parts of the common

(A) 885B must be considered with regard to the application of the "subtraction from the *dominium* test".

¹³⁹ Section 27(6) indicates that this right is deemed as a right to urban immovable property. Also see Pienaar *Sectional titles and other fragmented property schemes* 76.

¹⁴⁰ Sections 5(3)(f), 27(a) and (b) read with s 11(b)(iii) of the *Sectional Titles Act* 95 of 1986.

¹⁴¹ Sections 27(1A) and 1(B) read with s 12(1)(f) of the *Sectional Titles Act* 95 of 1986.

¹⁴² Section 2(1) of the *Management Act*.

¹⁴³ Sections 27(2) and (3) of the *Sectional Titles Act* 95 of 1986 as well as s 5(1)(e) of the *Management Act*.

¹⁴⁴ Section 60(3) of the *Sectional Titles Act* 95 of 1986.

¹⁴⁵ Section 27(1)(c) of the *Sectional Titles Act* 95 of 1986 was amended by the *Sectional Titles Amendment Act* 29 of 2003 to this effect.

property.¹⁴⁶ Maree is of opinion that the holder of these rights must be considered liable for all maintenance costs and repairs to damages caused by the holder of the right himself/herself.¹⁴⁷

2.2.1.5 Participation quota

The participation quota is determined in a schedule that has been included with the sectional plan and complies with the provisions of the *Sectional Titles Act* 95 of 1986. This schedule contains the quota allocated to each unit in the scheme.¹⁴⁸ A sectional title scheme will not be able to function successfully without the participation quotas for the different sections as it forms an indivisible part of the sectional ownership. There are a number of reasons for this. Firstly, the participation quota determines the extent of the undivided share of sectional owners in respect of the common property.¹⁴⁹ The participation quota further determines the value of each sectional owner's vote in general and special meetings of the body corporate.¹⁵⁰ It further determines the proportional contribution to common expenses, for which each sectional owner is liable.¹⁵¹ Lastly, it

¹⁴⁶ This provision has been inserted by s 27(A) of the *Sectional Titles Amendment Act* 44 of 1997. In terms of s 27(6) of the *Sectional Titles Act* 95 of 1986 these rights are not considered to be real rights as they are not registrable in the deeds registry, but personal rights. Even though these rights are not registered, they are deemed to be enforceable against the body corporate and other sectional owners. In this regard see *Kmatt Properties (Pty) Ltd* 2007 5 SA 475 (W) paras 19.4.1 and 19.5.2-3 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 11.5.8 (2014 Service 24).

¹⁴⁷ Maree 2002 *De Rebus* 54; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 11.5.4 (2014 Service 24); Pienaar *Sectional titles and other fragmented property schemes* 75. *De la Harpe v Body Corporate of Bella Toscana* 2015 JOL 33930 (KZD) regarding the responsibility for the costs incurred for a damaged common property wall. Also see Paddock *Paddocks Press Newsletter* 2.

¹⁴⁸ Section 5(3)(g) of the *Sectional Titles Act* 95 of 1986.

¹⁴⁹ *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* 1986 1 SA 722 (A) 742H-I and 744D-745; Delport 2008 *Obiter* 87-92; Pienaar 1986 *THRHR* 479-485.

¹⁵⁰ In instances where the vote is to be determined in value. In this regard see s 32(3)(a) of the *Sectional Titles Act* 95 of 1986 and s 11(1)(a) of the *Management Act*. However, as from 7 October 2016 s 32(3) of the *Sectional Titles Act* 95 of 1986 has been substituted by s 20 of the *Management Act*. Therefore, provision has been made in s 11(1)(a) of the *Management Act* regarding this.

¹⁵¹ Section 37(1)(a) of the *Sectional Titles Act* 95 of 1986, which section has been repealed as from 7 October 2016. Therefore, in this instance see s 3(1)(a) of the *Management Act*.

determines the extent to which each sectional owner is liable¹⁵² for the debts of the body corporate.¹⁵³

Even though section 11(2) of the *Management Act* repealed section 32(4) of the *Sectional Titles Act* 95 of 1986 with regard to the management provisions on participation quotas, the effect hereof was that in essence it remained the same except for the fact that a more comprehensive provision was provided.¹⁵⁴

The Act distinguishes between residential and nonresidential schemes.¹⁵⁵ With regard to residential schemes, it provides that the participation quota is determined by the division of the floor area (rounded off to the nearest square meter) by the combined floor area of all the sections in the building or buildings of the scheme also (rounded off to the nearest square meter) which will amount to a percentage that must be expressed to four decimal places.¹⁵⁶ According to this quota, a sectional owner's contribution towards common expenses including his/her proportional liability regarding the debts of the body corporate is determined. This formula tends to contribute to the social cohesion of the sectional title scheme,¹⁵⁷ but endures much criticism when applied to determine a

¹⁵² See s 15 of the *Management Act* and s 47(1) of the *Sectional Titles Act* 95 of 1986, which section has been repealed as from 7 October 2016.

¹⁵³ See 11(1)(c) of the *Management Act* as s 32(3)(c) of the *Sectional Titles Act* 95 of 1986 has been substituted by section 20 of the *Management Act*.

¹⁵⁴ Section 11(2) of the *Management Act* provides that a developer may, when he/she submits an application for the opening of a sectional title register or, alternatively, the members of the body corporate by way of special resolution, make rules in terms of s 10 by which a different value is attached to the vote of an owner, alternatively his/her liability for contributions to the administrative and reserve fund together with the debt of the body corporate is amended. In respect of the contributions that must be made to the administrative and reserve fund, as well as the debt of the body corporate, one needs to take into account the contributions made by the holders of exclusive use areas as well as the developers' right of extension of the scheme. Also see Van der Merwe 2012 *TSAR* 637-638.

¹⁵⁵ See Van Schalkwyk and Van der Merwe 2008 *TSAR* 222 for a general discussion in this regard.

¹⁵⁶ Section 32(1) of the *Sectional Titles Act* 95 of 1986. Also see *Kennaway (Pty) Ltd v Controlling Body of the Kennaway Court Building* 1988 (EC); Pienaar *Sectional titles and other fragmented property schemes* 81-87.

¹⁵⁷ Van der Merwe 1987 *SALJ* 73. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 460 explain that s 32(4) read with s 35 of the *Sectional Titles Act* 95 of 1986 which permits a developer to submit special rules (by way of a special resolution) to alter the value attached to the vote of sectional owners with regard to matter pertaining to their liability and contributions to the common property. Also see Maree 2001 *De Rebus* 13-14 and Van der Merwe 2012 *TSAR* 637.

sectional owner's contribution towards the maintenance, repairs and administration regarding the common property, since it tends to ignore value as a criterion and utility.¹⁵⁸

With regard to nonresidential schemes, the participation quota is calculated as a percentage expressed to four decimal places and determined by the developer in a discretionary manner.¹⁵⁹ This discretion is a matter of great concern and Maree¹⁶⁰ questions developers' competence in this regard especially when determining levy dispensations.

With regard to mixed schemes,¹⁶¹ being partly residential and partly nonresidential, the responsibility vests in the developer to indicate the total percentage of quotas which have been allocated to residential sections. This quota must be further divided amongst the relevant sections in accordance with the floor area method.¹⁶² A further prerequisite is that a developer is obliged to disclose the participation quota that has been allocated to a specific section in the deed of alienation before the sectional title register has been opened.¹⁶³ Failure hereof entitles a prospective purchaser to declare such deed as voidable if he/she so chooses.¹⁶⁴ However, the developer is not obliged to disclose the formula he/she formulated in determining the participation quota nor whether any formula has been used.¹⁶⁵

¹⁵⁸ Maree 2001 *De Rebus* 13. In this regard see Pienaar *Sectional titles and other fragmented property schemes* 81-87 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 4.2.3 and 4.3 (2014 Service 24) for a discussion on the criticism and suggestion to resolve critique and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 459-462.

¹⁵⁹ Section 32(2) of the *Sectional Titles Act* 95 of 1986; Pienaar *Sectional titles and other fragmented property schemes* 81-87.

¹⁶⁰ Maree 2005 *MCS Courier Newsletter* 10-15.

¹⁶¹ These are schemes which consist of both residential and nonresidential schemes.

¹⁶² Section 32(2)(a) of the *Sectional Titles Act* 95 of 1986. In this regard also see Van der Merwe and Habdas 2006 *Stell LR* 178 where it is illustrated that when a unit allocation is 40% residential and 60% nonresidential, the developer must allocate the quota for each individual nonresidential section also in this manner. Also see Booyens *A critical analysis of the financial and social obligations* 28-31.

¹⁶³ Section 32(2)(b) of the *Sectional Titles Act* 95 of 1986 as amended.

¹⁶⁴ Sections 32(2)(b) and (c) of the *Sectional Titles Act* 95 of 1986 as amended. Also see Pienaar *Sectional titles and other fragmented property schemes* 81-87.

¹⁶⁵ Pienaar *Sectional titles and other fragmented property schemes* 81-87. Also see Van der Merwe *Sectional Titles, share blocks and time sharing*, vol 1, para 4.2.1 (2014 Service 24).

Even though the discretionary amendment of the participation quota is problematic, the Act provides that certain aspects thereof may be amended.¹⁶⁶ Upon application for the opening of a sectional title register, a developer may make special rules¹⁶⁷ in order to modify the value of a sectional owner's vote or the liability of sectional owners to make contributions towards the common expenses or unpaid debts that the body corporate incurred.¹⁶⁸ The body corporate is entitled to request a similar special resolution on condition that all sectional owners, who are adversely affected by such a special resolution, have furnished the body corporate with their written consent in this regard.¹⁶⁹ In the latter instance it is a prerequisite that a minimum of 30% of all units in the scheme must have been sold or alternatively alienated to persons other than the developer.¹⁷⁰

2.2.1.6 Body corporate

After the sectional title register has been opened in a deeds registry, and the sectional title scheme is in operation, units in the sectional title scheme may be alienated by the developer.¹⁷¹ Sections 36(1)-(3) of the amended *Sectional Titles Act* 95 of 1986 compels the registrar to issue and lodge a certificate with the chief ombud once a unit has been registered in the name of any purchaser other than the developer.¹⁷² This certificate confirms that the body corporate has been established.¹⁷³ All sectional owners become

¹⁶⁶ Section 32(4) of the *Sectional Titles Act* 95 of 1986 as amended. Also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 461; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, paras 4.2.3 and 4.3 (2014 Service 24).

¹⁶⁷ Section 35 of the *Sectional Titles Act* 95 of 1986 has been repealed. Also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 460.

¹⁶⁸ Section 32(4) of the *Sectional Titles Act* 95 of 1986 and section 11(2)(a) of the *Management Act*; Paddock *Paddocks Press Newsletter* 1-3.

¹⁶⁹ Pienaar *Sectional titles and other fragmented property schemes* 81-87.

¹⁷⁰ Section 32(4) of the *Sectional Titles Act* 95 of 1986 and ss 11(2)(a) and (c) of the *Management Act*.

¹⁷¹ Section 36 of the *Sectional Titles Act* 95 of 1986 which section has been repealed and s 2(1) of the *Management Act*. Also see *J de Moor (Edms) Bpk. v Beheerliggaam Outeniqua* 1985 3 SA 997 (T); *Body Corporate of La Roche v Resort Administration Services* 2003 JOL 11655 CC (N) 2; Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.15 (2014 Service 24); Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 466; Pienaar *Sectional titles and other fragmented property schemes* 88-89.

¹⁷² Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.5 (2014 Service 24).

¹⁷³ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.5 (2014 Service 24).

members of the body corporate and do not cease to be members until their respective units have been transferred to a new sectional owner.¹⁷⁴

All members of the body corporate incur obligations towards the body corporate itself as well as to other sectional owners regarding the management and maintenance of the common property.¹⁷⁵ In view hereof it is clear that sectional ownership is greatly limited. This aspect of sectional ownership is criticised as not being true ownership due to the fact that the limitations and restrictions, imposed by legislation and neighbour law, erode the essence of ownership.¹⁷⁶ Pienaar¹⁷⁷ submits that even though the common law principle of *plena in re potestas* is hereby restricted, it serves as an indication that the application of the aforementioned principle is unpractical in modern times, and especially in the case of communal property schemes. He further submits that the use of this form of fragmented property does not amount to the erosion of the institution of ownership, but rather contributes to the development thereof.¹⁷⁸

Section 2 of the *Management Act* provides for two new subsections. Firstly, one makes provision for the developer's right in the case of an extension of the scheme by virtue of new sections or exclusive use areas to make additional contributions so as to bear the financial costs with regard to the common property that has been affected by this right. Secondly, provision has been made that dictates that after the enactment of the *Management Act*, all references in any law or document to a body corporate in terms of the *Sectional Titles Act* 95 of 1986 must be interpreted as a reference to a "body corporate" as envisaged in section 2 of the *Management Act*.¹⁷⁹

¹⁷⁴ Section 36(2) of the *Sectional Titles Act* 95 of 1986 has been repealed and is substituted by section 20 of the *Management Act*. See s 2(3) of the *Management Act* in this regard. Also see Pienaar *Sectional titles and other fragmented property schemes* 88-89.

¹⁷⁵ In this regard see the repealed s 35 and 44 of the *Sectional Titles Act* 95 of 1986 and s 10 and 13 of the *Management Act* with reference to the rules and duties of owners. Also see Pienaar *Sectional titles and other fragmented property schemes* 88-89.

¹⁷⁶ This was refuted by Van der Merwe 1992 *Stell LR* 131-136. In this regard also see Pienaar *Sectional titles and other fragmented property schemes* 88-89.

¹⁷⁷ Pienaar *Sectional titles and other fragmented property schemes* 88-89.

¹⁷⁸ Pienaar *Sectional titles and other fragmented property schemes* 88-89.

¹⁷⁹ *Sectional Titles Act* 95 of 1986 and the *Management Act*. In this regard also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.5 (2014 Service 24).

It is clear that a body corporate complies with the criteria applied by courts for the recognition as a juristic person, since a body corporate is endowed with perpetual succession and may also be the holder of property distinct from its members.¹⁸⁰ The nature of a body corporate as legal person is strengthened by the *Sectional Titles Act* 95 of 1986, which provides further that the body corporate is permitted to purchase, hire or acquire movable property for the use and enjoyment of the common property by all owners.¹⁸¹ The body corporate may also open and operate a bank account.¹⁸²

However, the body corporate displays characteristics that differ from that of common law or statutory juristic persons in that it does not necessarily come into being by consensus or registration as is the case with companies and close corporations, but automatically on transfer of the first unit by the developer to an owner after opening of the sectional title register.¹⁸³ Membership of the body corporate is not voluntary as in the case of membership interests in a close corporation or shareholding in a company¹⁸⁴ and it cannot be dissolved by a resolution of its members as is the case with voluntary associations.¹⁸⁵ A sectional owner automatically becomes a member of the body corporate once he/she is the registered owner of a unit in the sectional title scheme and no one can revoke this membership unless the owner sells his/her unit to another person who in turn will then

¹⁸⁰ In this regard see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 2.4.3, (2014 Service 24); Section 38 of the *Sectional Titles Act* 95 of 1986 has been repealed with effect from 7 October 2016; *Webb v Northern Rifles* 1908 TS 462, 465; *Reddy v Body Corporate of Croftdene Mall* 2002 5 SA 640 (D) 643J-644B, 646G-I; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 885 (C) 861; *Morrison v Standard Building Society* 1932 AD 229,238; *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly NNO* 1984 1 SA 160 (W) 163.

¹⁸¹ Section 38 of the *Sectional Titles Act* 95 of 1986 has been repealed with effect from 7 October 2016.

¹⁸² Section 37(1)(e) of the *Sectional Titles Act* 95 of 1986 has been repealed with effect from 7 October 2016.

¹⁸³ *Morrison v Standard Building Society* 1932 AD 229, 238; *Eden Village (Meadowbrook) (Pty) Ltd v Edwards* 1995 4 SA 31 (A) 40G-I. Also see Pienaar *Sectional titles and other fragmented property schemes* 89-95.

¹⁸⁴ Section 36(1) of the *Sectional Titles Act* 95 of 1986 and s 2(1) of the *Management Act*. Also see Pienaar *Sectional titles and other fragmented property schemes* 89-95.

¹⁸⁵ A body corporate may only be dissolved by means of a court order. See s 17(6)(b) of the *Management Act* as s 48(6) of the *Sectional Titles Act* 95 of 1986 has been repealed with effect on 7 October 2016. Also see *Ex Parte: Body Corporate of Caroline Court* 2001 4 SA 1230 (SCA); Pienaar *Sectional titles and other fragmented property schemes* 89-95.

become a member of the body corporate.¹⁸⁶ Even though a body corporate is considered to be an entity distinct from the individuals compiling it, it is not regarded as an entity with rights and obligations that are distinct from its members.¹⁸⁷ Provision is made that members of the body corporate may be personally held liable in respect of judgement debts.¹⁸⁸ This excludes members who have already paid their levy contributions in respect of the same debt before judgement has been obtained against the body corporate.¹⁸⁹ This distinguishes a body corporate from other juristic persons. The trustees, as managerial and administrative organ, exercise the functions and powers of the body corporate.¹⁹⁰

The body corporate derives its mandatory functions and discretionary powers from the *Sectional Titles Act*, the *Management Act* and the management rules in terms of the sectional title regulations.¹⁹¹ It may open bank accounts in the name of the body corporate; own sectional title units that may be leased, mortgaged and alienated by the body corporate; and own all movable property¹⁹² of the sectional title scheme and additional land that has been acquired.¹⁹³ Subject to the Act, management and conduct

¹⁸⁶ See s 2(3) of the *Management Act* as well as s 36(2) of the *Sectional Titles Act* 95 of 1986. Also see Pienaar *Sectional titles and other fragmented property schemes* 89-95.

¹⁸⁷ Pienaar *Sectional titles and other fragmented property schemes* 89-95; *Sectional titles, share blocks and time sharing*, vol 1, para 2.4.3 (2014 Service 24). An exception to this is additional land that has been acquired in terms of s 26(1) of the *Sectional Titles Act* 95 of 1986.

¹⁸⁸ See s 15 of the *Management Act* as s 47(1) of the *Sectional Titles Act* 95 of 1986 has been repealed with effect from 7 October 2016.

¹⁸⁹ Section 6 of the *Sectional Titles Amendment Act* 7 of 2005 remedied the previous provision that stipulated that all members may be joined as co-debtors irrespective of whether they have already paid their levy contributions prior to judgment being obtained. The only recourse for these members was to obtain repayment hereof from the body corporate which was impractical as the body corporate did not possess any funding to effect such repayments since other owners were in arrears with their levy payments. In this regard also see Pienaar *Sectional titles and other fragmented property schemes* 89-95.

¹⁹⁰ See s 7(1) of the *Management Act*. Section 39(1) of the *Sectional Titles Act* 95 of 1986 has been repealed with effect from 7 October 2016.

¹⁹¹ Section 3 of the *Management Act* resembles s 37 of the *Sectional Titles Act* 95 of 1986 with regard to the functions of the body corporate. Section 37 of the *Sectional Titles Act* 95 of 1986 has also been repealed with effect from 7 October 2016. With regard to the powers of the body corporate s 38 of the *Sectional Titles Act* 95 of 1986 was repealed and substantially re-enacted in s 4 of the *Management Act* with effect from 7 October 2016. Also see *Sectional Titles, share blocks and time sharing*, vol 1, para 1.13.5-1.13.7 and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 466-467.

¹⁹² Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 2.4.3 (2014 Service 24); Pienaar *Sectional titles and other fragmented property schemes* 89-95.

¹⁹³ This entails land that has been acquired in terms of s 26(1) of the *Sectional Titles Act* 95 of 1986.

rules,¹⁹⁴ as well as the resolutions that have been passed at general meetings,¹⁹⁵ the body corporate acts through its trustees as managerial and administrative organ.¹⁹⁶ A more comprehensive discussion regarding the functions and powers of the body corporate will follow in Chapter 3.

2.3 Share blocks

2.3.1 Introduction and historical overview

By virtue of the fact that Roman-Dutch and South African law accepted the Roman law principle of *superficies solo credit*, the need for acquiring use rights to an apartment by means of share blocks became evident before the introduction of sectional titles.¹⁹⁷ A statutory exception hereto has been created with the introduction of the *Sectional Titles Act*¹⁹⁸ in terms whereof it was made possible to acquire individual ownership of an apartment.¹⁹⁹ Prior to the enactment of this Act, the former practice of leasing or co-ownership of property by means of a share block construction, was favoured for securing fragmented property rights.²⁰⁰ This practice originated in Durban in the early 1930s and from thereon it spread to other urban areas.²⁰¹ Since the introduction of share block schemes, the use of the concept was fairly successfully.²⁰² However, financial institutions were hesitant to advance money for the purchase of share blocks due to the lack of suitable security for these loans as the use and occupation rights of share blocks are based on personal rights of shareholding in a company.²⁰³ The only real security is that

¹⁹⁴ Section 35(2)(a) of the *Sectional Titles Act* 95 of 1986 and Annexure 8 of the sectional title regulations (regarding management rules) has been repealed with effect from 7 October 2016 and has been replaced by s 10(2)(a) of the *Management Act* and Annexure 9 of the sectional title regulations (regarding the conduct rules).

¹⁹⁵ Section 39(1) of the *Sectional Titles Act* 95 of 1986, which has been repealed with effect from 7 October 2016, and replaced by s 7(1) of the *Management Act*.

¹⁹⁶ Pienaar *Sectional titles and other fragmented property schemes* 95-98.

¹⁹⁷ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24). Also see *MacDonald Ltd v Radin* 1915 AD 454; *Van Wezel v Van Wezel's Trustee* 1924 AD 409.

¹⁹⁸ Act 66 of 1971 which was replaced by the *Sectional Titles Act* 95 of 1986.

¹⁹⁹ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24).

²⁰⁰ Pienaar *Sectional titles and other fragmented property schemes* 287-293. In this regard also see Cowen 1975 *THRHR* 93; Butler 'Shareblocks' *LAWSA* (2001) part 1, para 2.

²⁰¹ Pienaar *Sectional titles and other fragmented property schemes* 287-293.

²⁰² Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24).

²⁰³ Pienaar *Sectional titles and other fragmented property schemes* 287-293.

of the cession of shares to the creditor. This is subject to any lien the company may have over the shares of the prospective purchasers.²⁰⁴ Prior to the enactment of the *Share Block Control Act* 59 of 1980 a number of abuses became evident.²⁰⁵ Examples of these abuses entail that the share block company jeopardised shareholders' investments in the company severely by virtue of high-risk business ventures that the share block company conducted.²⁰⁶ Developers also made attempts to retain control of the share block company, to the detriment of other investors, by granting developers loaded voting rights.²⁰⁷ Another abuse was that adequate information was not fully disclosed to investors in these schemes.²⁰⁸ The developers also withheld the shareholders' financial contributions in respect of the share block company's mortgage obligations to the potential disadvantage of the shareholders.²⁰⁹

Consequently, a Commission of Inquiry into the *Development Schemes Bill* investigated these abuses in 1978 to ascertain whether share block schemes should be outlawed. It concluded that the continued existence of share block schemes, together with sectional title schemes, is essential as both schemes consist of unique special uses and advantages. It was further concluded that there is a need for legislation to regulate and govern these abuses in share block schemes in order to improve the functioning thereof.²¹⁰ The

²⁰⁴ Pienaar *Sectional titles and other fragmented property schemes* 287-293.

²⁰⁵ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24).

²⁰⁶ Pienaar *Sectional titles and other fragmented property schemes* 287-293; Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24); Katz 1980 *Modern Business Law* 140.

²⁰⁷ *Utopia Vakansie-Oorde Bpk. v Du Plessis* 1974 3 SA 148 (A) 169A-170C. Also see Pienaar *Sectional titles and other fragmented property schemes* 287 – 293. Sonnekus *Sectional titles, share blocks and time sharing*, vol 2 (2014 Service 24) para 1.2.

²⁰⁸ *Pretorius v Natal South Sea Investment Trust Ltd* 1965 3 SA 410 (W) 414E–415B; *Bonnet v Snaar Dorpsontwikkelaars (Edms.) Bpk.* 1978 4 SA 212 (D) paras 217F–218A. Also see Pienaar *Sectional titles and other fragmented property schemes* 287-293. Sonnekus *Sectional titles, share blocks and time sharing*, vol 2 (2014 Service 24) para 1.2.

²⁰⁹ *Barcelona Ltd v Coinland (Pty) Ltd* 1977 4 SA 751 (D) para 756 A-C. Also see Pienaar *Sectional titles and other fragmented property schemes* 287-293. Sonnekus *Sectional titles, share blocks and time sharing*, vol 2 (2014 Service 24) para 1.2.

²¹⁰ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2 (2014 Service 24) para 1.2.

commission proposed protective legislation in this regard and consequently the *Share Block Control Act*²¹¹ came into operation on 1 January 1981.²¹²

Although most of these shortcomings have been addressed by legislation, one inherent drawback that remains is that a shareholder does not obtain ownership of the unit he/she is occupying, but is only a shareholder in a company and can offer no real security to cover any personal loan obligation.²¹³ A shareholder's right to occupy a part of the building (apartment, shop or office) is based on shareholding as a personal right and therefore a shareholder does not obtain a real right that may be mortgaged should he/she require such financial assistance.²¹⁴ This is possible in the case of sectional titles which makes it easier to obtain financial assistance.²¹⁵ As a result of this lack of real security, financial institutions are hesitant to grant financial assistance to prospective purchasers of share blocks.²¹⁶

Today share block schemes are mostly used for commercial and holiday concepts as their use for residential occupation is less favoured than sectional title schemes.²¹⁷ Share block schemes are also considered to be the most preferred method of conferring occupation

²¹¹ 59 of 1980. Proc R130 GG 7172 of August 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 287–293 and Sonnekus *Sectional titles, share blocks and time sharing*, vol 2 (2014 Service 24) para 1.2.

²¹² *Second Report of the Commission of Inquiry into the Development Schemes Bill* (1978) para 6; Katz 1980 *Modern Business Law* 138–139. Also see *Elandsheuwel Farming (Edms) Bpk. v Sekretaris van Binnelandse Inkomste* 1978 1 SA 101 (A). Before the enactment of the Act in 1980, the functioning of share block schemes was governed by the *Companies Act* 61 of 1973 in terms whereof private or public companies had to be registered depending on the number of shareholders. If there were more than fifty shareholders, developers were obliged in terms of Act 61 of 1973 to register public companies. The latter Act further stipulated that the land onto which the scheme is to be erected must be transferred into the name of the company. In this regard see Cowen 1975 *THRHR* 95–96. For an extensive discussion regarding the features of share block schemes governed by the *Companies Act* 61 of 1973 see Pienaar *Sectional titles and other fragmented property schemes* 293–300.

²¹³ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24); Pienaar *Sectional titles and other fragmented property schemes* 287–293.

²¹⁴ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24); Pienaar *Sectional titles and other fragmented property schemes* 287–293.

²¹⁵ Section 15B(1)(c) of the *Sectional Titles Act* 95 of 1986. In this regard also see Sonnekus *Sectional Titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24).

²¹⁶ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2 (2014 Service 24) para 1.2; Pienaar *Sectional titles and other fragmented property schemes* 287–293. Today share block companies may provide financial assistance provided that all the requirements are met as envisaged in s 44 of the *Companies Act* 71 of 2008.

²¹⁷ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 497.

and use rights with regard to game lodges and other recreational schemes in agricultural and rural regions with the written consent of the minister of agriculture.²¹⁸ It may also be used for retirement schemes and high-density commercial schemes.²¹⁹

2.3.2 Legal nature of share block schemes

A share block, being a number of shares in a company compiled into a cluster, is considered an incorporeal movable thing.²²⁰ A shareholder does not obtain ownership in the strong sense of the word, however, he/she obtains use and occupancy rights of a unit in a building in terms of his shareholding.²²¹ This is a contractual right that a shareholder obtains against the share block company with property-like protection provided for by statute. The nature of these rights may therefore be classified as personal rights in traditional common law.²²² These rights are not registrable real rights and this seems to be the main difference between share block holders and sectional title owners, as the latter obtain registrable real rights.²²³

Share block companies are governed and regulated by the *Share Blocks Control Act* 59 of 1980 and the *Companies Act* 71 of 2008.²²⁴ A developer must register a private or public company in terms whereof the scheme will be governed.²²⁵ The share block developer is not necessarily the initial developer but is the person who possesses fifty percent or more of all the shares in the company. One of the goals of the *Share Block Control Act* 59 of 1980 was to address the abuse among developers of these schemes.²²⁶

²¹⁸ Sections 4(1)(a)(ii) and (b); 4(2)-4(4) of the *Subdivision of Agricultural Land Act* 70 of 1970. This Act has been repealed by the *Subdivision of Agricultural Land Repeal Act* 64 of 1998 where such Act has not been enacted; Section 5(1)(a) of the *Sectional Titles Act* 95 of 1986; Pienaar *Sectional titles and other fragmented property schemes* 287-293.

²¹⁹ Pienaar *Sectional titles and other fragmented property schemes* 287-293; Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.2 (2014 Service 24).

²²⁰ Pienaar *Sectional titles and other fragmented property schemes* 332.

²²¹ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 507-509.

²²² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 507-509.

²²³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 507-509.

²²⁴ These schemes are governed by the *Companies Act* 71 of 2008 or the *Companies Act* 61 of 1973. Also see *Van Staden v Fourie* 1989 3 SA 200 (A) para 213F-I.

²²⁵ Section 8 of the *Companies Act* 71 of 2008.

²²⁶ For a comprehensive discussion hereof see Pienaar *Sectional titles and other fragmented property schemes* 309-312 and *Amoils v Fuel Transport (Pty) Ltd* 1978 4 SA 343 (W).

The registration of private companies are preferable in instances where a scheme consists of fifty or less shareholders as these companies entail fewer administrative functions and financial requirements compared to public companies.²²⁷ Consequently, it is much cheaper and easier to manage. The *Share Block Control Act* 59 of 1980 contains various amendments to certain company law principles. These amendments stipulate, among others, that a company may not be wound-up;²²⁸ shareholders may not be liable for any debts the company incurred;²²⁹ shareholders are entitled to vote;²³⁰ the share block company only operates the scheme;²³¹ with the approval of a special resolution, a share block company may transfer immovable property,²³² encumber assets; or upsurge its loan obligations.²³³

A share block scheme may also be operated by an *inter vivos* trust, partnership, closed corporation, a trading cooperative or a common law association.²³⁴

²²⁷ In this regard see Pienaar *Sectional titles and other fragmented property schemes* 302-309 for a more comprehensive discussion regarding the share block company.

²²⁸ Section 3(1)(a)(i) of the *Share Block Control Act* 59 of 1980.

²²⁹ Section 3(1)(a)(i) of the *Share Block Control Act* 59 of 1980.

²³⁰ Section 3(b) and s 10(a) of the *Share Block Control Act* 59 of 1980. In this regard it is important to note that the *Companies Act* 71 of 2008 determines that the provision in respect of the right to vote is required to be included in the memorandum of incorporation.

²³¹ Sections 7(1); 8(1)(a)-(c) of the *Share Block Control Act* 59 of 1980. Section 8(1)(d) determines that should the company act in excess of its capacity, being the operation of the company, such actions shall be deemed to be void.

²³² Section 8(1)(c) of the *Share Block Control Act* 59 of 1980.

²³³ Section 14(1) of the *Share Block Control Act* 59 of 1980. For a more comprehensive discussion regarding these amendments see Pienaar *Sectional titles and other fragmented property schemes* 305-307.

²³⁴ Pienaar *Sectional titles and other fragmented property schemes* 305-307. Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 2.1, (2014 Service 24). Butler 'Shareblocks' *LAWSA* (2001) part 1, paras 4 and 9. If the scheme is not operated by a share block company the *Share Block Control Act* 59 of 1980 will not be applicable as this Act only governs shares in a share block company according to s 1 thereof. With regard to trusts, see Olivier *Trust law and practice* 1990 115-128; Geach and Yeats *Trusts law and practice* 2007 paras 2.4 and 13.3.12; Theron 1991 *TSAR* 270. Also see *Commissioner for Inland Revenue v Pretorius* 1986 1 SA 238 (A) 246B-C regarding a trust that is not considered to be a juristic person and that substitution of beneficiaries and trustees may only be done by virtue of the trust deed. It is important to note that should a scheme be operated by virtue of a close corporation, all members are required to be natural persons and should not exceed ten members. This provision is envisaged in s 28-29 of the *Close Corporations Act* 69 of 1984. According to s 17 of the *Co-operatives Act* 14 of 2005 a share block scheme may be operated by a trading cooperative. In this regard see *Sectional titles, share blocks and time sharing*, vol 2, para 2.1 (2014 Service 24). Regarding common law associations see Pienaar *Sectional titles and other fragmented property schemes* 308-309, *Theron v Ring van Wellington, NG Sendingkerk in SA* 1976 2 SA 1 (A) 13, *Morrison v Standard Building Society* 1932 AD 229,238 and Bamford *The law of partnership and voluntary*

2.3.3 Company documents of a share block scheme

2.3.3.1 Memorandum of incorporation

The memorandum of incorporation determines that a share block company's main objective and business is to be restricted to the operation of the scheme.²³⁵ A share block company's main objective is determined by its capacity and it also determines ancillary objectives of the company.²³⁶ The powers of the share block company are limited to realise its main and ancillary objectives.²³⁷ A share block company is furthermore prohibited from transferring property without a special resolution,²³⁸ as well as from accumulating loan obligations without a seventy five percent resolution.²³⁹ It is also a prerequisite that the name of the share block company must include the words "share block company" or *aandeleblok*.²⁴⁰

2.3.3.2 Articles of association included in memorandum

The 2008 *Companies Act* does not provide for articles of association. These requirements are now included in the memorandum of incorporation of a company. The rights and obligations of shareholders are determined by the memorandum of the company.²⁴¹ For compliance with the *Share Blocks Control Act* 59 of 1980, certain amendments need to be made when including the standard articles in the memorandum of the company.²⁴²

association in South Africa 126–127 for a comprehensive discussion on common law associations that may either be a universitas or an association without juristic personality.

²³⁵ Section 7(1) of the *Share Block Control Act* 59 of 1980. In this regard also see *Van Staden v Fourie* 1989 3 SA 200 (A) 212H-213A.

²³⁶ Section 8(1)(a) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 312-313.

²³⁷ Pienaar *Sectional titles and other fragmented property schemes* 312-313; Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 2.8, (2014 Service 24). Butler 'Shareblocks' *LAWSA* (2001) part 1, para 16 for a comprehensive discussion regarding the ultra vires application in respect of share block companies.

²³⁸ Section 8(1)(c) of the *Share Block Control Act* 59 of 1980.

²³⁹ Section 14(1) of the *Share Block Control Act* 59 of 1980.

²⁴⁰ Section 9(1) and 9(3) of the *Share Block Control Act* 59 of 1980.

²⁴¹ Pienaar *Sectional titles and other fragmented property schemes* 318.

²⁴² Pienaar *Sectional titles and other fragmented property schemes* 315-318. Also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 500-501 and Carey Miller and Pope *Land title in South Africa* 230-231.

These amendments entail that shareholders must be entitled to vote²⁴³ and it must further be stated that its members have the right to use a specific part of the building connected to their shareholding.²⁴⁴ It is also recommended that statutory requirements are included in respect of the appointment of directors.²⁴⁵ The size of the share block, in proportion to the total of issued share capital, regulates the extent of a shareholder's obligation to contribute towards the levy fund.²⁴⁶ A shareholder's allocated loan account is also determined by the shareholding.²⁴⁷

2.3.3.3 Use agreement

The use agreement is a standard agreement which supplements the articles of incorporation in respect of the rights and duties of the shareholders.²⁴⁸ The *Share Block Control Act* 59 of 1980 determines that rights and conditions regarding occupancy rights need to be envisaged in the use agreement, and that such agreement should be in writing and concluded between the company and its members.²⁴⁹ It is also a prerequisite that any amendments to the use agreement or cession of the use agreement is in writing and duly signed by all parties thereto or their representatives.²⁵⁰

²⁴³ In this regard see ss 3(1)(b), 10(a), 13(2) and 14(2) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 315-318.

²⁴⁴ Section 7(2) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 315-318.

²⁴⁵ Pienaar *Sectional titles and other fragmented property schemes* 316.

²⁴⁶ Section 13(2) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 317.

²⁴⁷ Section 14(2) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 315-317 for a more comprehensive discussion.

²⁴⁸ Pienaar *Sectional titles and other fragmented property schemes* 318. Also see Carey Miller and Pope *Land title in South Africa* 231.

²⁴⁹ Section 1 and 7(2) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 318.

²⁵⁰ Section 16 of the *Share Block Control Act* 59 of 1980. Sections 16 and 18 of the *Share Block Control Act* 59 of 1980 deal with the issue of noncompliance with formalities. For a comprehensive discussion of the use agreement, see Pienaar *Sectional titles and other fragmented property schemes* 318-320. A more comprehensive discussion of the use agreement will follow in Chapter 3.

2.4 Time-sharing schemes

2.4.1 Introduction and historical overview

The *Property Time-Sharing Control Act* 75 of 1983 defines a time-sharing interest as any right to or interest in the exclusive use or occupation of accommodation during determined or determinable periods in any year.²⁵¹ Even though this is indicative of the occupation or use of immovable property by means of a real right or a personal right, the legal nature of time-sharing is dependent on the nature of the scheme in terms of which it is operated.²⁵² The most popular schemes for the operation of time-sharing are sectional titles, share blocks and club membership schemes, often based on the points system,²⁵³ with share blocks being the most preferred scheme.²⁵⁴

Time-sharing schemes are mostly popular for holiday purposes where the owner obtains a shared use of the specific accommodation for a recurrent period on an annual basis.²⁵⁵ Even though time-sharing schemes endured much unfounded criticism and resistance, the development of the concept came naturally.²⁵⁶

2.4.2 Composition of time-sharing schemes

Sectional title schemes may be used as the legal vehicle for time-sharing. In these instances, the purchaser obtains an indivisible co-ownership share in the unit, which is based on a real right and governed in terms of the *Sectional Titles Act* 95 of 1986. According to the provisions of the *Sectional Titles Act* 95 of 1986, more than one person

²⁵¹ Section 1 of the *Property Time-Sharing Control Act* 75 of 1983.

²⁵² In other words, the owner obtains a use right that is allocated on the basis of time. Pienaar *Sectional titles and other fragmented property schemes* 415.

²⁵³ Pienaar *Sectional titles and other fragmented property schemes* 413 explains that the points system entails that the holder of the right annually obtains a number of points which is linked to the holder's time-sharing interests. The holder of these points may use it for accommodation in the scheme where the time-sharing interest is held alternatively, in a different time-sharing scheme.

²⁵⁴ Pienaar *Sectional titles and other fragmented property schemes* 413.

²⁵⁵ Pienaar *Sectional titles and other fragmented property schemes* 412. Also see Butler "Shareblocks" in *LAWSA* (2001) part 1, para 459 where it is explained that time-sharing schemes may also be used with regard to commercial property.

²⁵⁶ For a comprehensive discussion regarding the historical development and criticism of time-sharing schemes see Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, paras 7.2 and 8.1 (2014 Service 24) as well as Pienaar *Journal for Juridical Science* 1986 2-3; Van der Walt and Kleyn in Visser 1989 214, Visser 1985 *Acta Juridica* 39.

may be the registered co-owners of a unit in undivided shares, where such co-ownership is subject to use agreements in terms whereof provision is made for their time-sharing interests.²⁵⁷ However, with time it has become clear that management and conduct rules of sectional title schemes need to be amended so as to allow the optimal functioning of a time-sharing scheme.²⁵⁸ These amendments entail the specification of the intermittent annual time periods;²⁵⁹ inclusion of the suspension of the right to demand partition for the duration of the scheme; the restriction of the right to the use of the common property; provision that must be made in respect of voting rights, as well as for the appointment of a proxy; the adjustment of the participation quota so as to exclude the body corporate from voting rights and financial contributions; ownership of all movables that must be retained by the body corporate; the prohibition of alterations to the property without the necessary consent from the body corporate; the adjustment of the levy fund so as to make provision for the maintenance of the interior of the sections; guidelines in respect of the letting and transfer of occupation rights; the necessity regarding the limitation of use restrictions;²⁶⁰ and the provision for the appointment of a managing agent as well as for property tax.²⁶¹

In the case of a share block company the legal nature of a shareholder's use right is based on a personal right. Share blocks as the legal vehicle for time sharing are most preferred as it is less complicated, more effective and much cheaper in comparison to

²⁵⁷ In this regard see s 2(b), s 15(B)(1)(a), s 15B(4) and s 15B(5) of the *Sectional Titles Act* 95 of 1986. As practical problems with the registration process of these exclusive use agreement have featured see Maree *De Rebus* 2002 55-57, Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 7.7.3.2; Pienaar *Sectional titles and other fragmented property schemes* 416-421.

²⁵⁸ These requirements will be discussed in Chapter 3.

²⁵⁹ Boraine *Journal for Juridical Science* 1996 112-116. Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 7.7.3.3(i) (2014 Service 24) explains that share blocks as a legal vehicle for time-sharing may be considered as more flexible than sectional title schemes as a legal vehicle due to the fact that a person who has obtained a time-sharing interest in a sectional title scheme, is the co-owner of his unit and has therefore obtained occupancy rights to that unit but not to any other unit in the scheme. Also see Pienaar *Sectional titles and other fragmented property schemes* 416-421.

²⁶⁰ Pienaar *Sectional titles and other fragmented property schemes* 416-421.

²⁶¹ With regard to property tax see Van der Walt 2008 *Butterworths Property Law Digest* 8-10. Property tax is only applicable in instances where the local authority has individually valued sectional title units. Also see Pienaar *Sectional titles and other fragmented property schemes* 416-421. It is also important to note that regulations 6 to 14 as promulgated by the *Property Time-sharing Control Act* 75 of 1983 are not applicable to the management of time-sharing where sectional title schemes are used as its legal vehicle.

sectional title schemes as a legal vessel. The reason for this is that with share blocks no title deeds have to be registered in the deeds registry and supports the view of lower transfer costs. Furthermore, it is argued that the provisions of the *Share Block Control Act* 59 of 1980 function optimally as the shareholders' rights are protected as well as the fact that the company is controlled by directors contributes to the flexibility of share blocks. When share blocks are used as legal vessels for time-sharing, the shareholder does not obtain permanent use and occupation rights. These rights are still obtained for annual recurrent periods. Although shareholding in the company is permanent, the right to use a part of the building is annually limited to recurrent periods.²⁶²

Members or participants of clubs that are the legal entities for time-sharing obtain a real or personal right in the scheme. Time-sharing interests may be governed in terms of a *universitas* where it is considered to operate as a separate legal entity since it consists of rights and obligations that are distinct from those of its members.²⁶³ A *universitas* is also equipped with perpetual succession irrespective of varying members,²⁶⁴ and furthermore, owns property that members are entitled to use.²⁶⁵ When a *universitas* is used as legal vessel for time-sharing its operation must not be for profit.²⁶⁶ If the objective is mainly that of profit, a partnership needs to be used as legal vessel.²⁶⁷ However, partnerships for these purposes are not popular due to practical and technical impediments.²⁶⁸ The most effective scheme in respect of profit gain is a share block company. Alternatively, a voluntary association without juristic personality may be used as legal vessel for time-sharing schemes.²⁶⁹ In instances where clubs are used as legal vessels for the operation

²⁶² Pienaar *Sectional titles and other fragmented property schemes* 421-425.

²⁶³ Pienaar *Sectional titles and other fragmented property schemes* 425-429.

²⁶⁴ Pienaar *Sectional titles and other fragmented property schemes* 425-429.

²⁶⁵ Pienaar *Sectional titles and other fragmented property schemes* 425-429. Also see Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 7.8.3 (2014 Service 24); *Webb & Co Ltd v Northern Rifles* 1908 TS 462, 465 and *Morrison v Standard Building Society* 1932 AD 229,238.

²⁶⁶ Pienaar *Sectional titles and other fragmented property schemes* 425-429.

²⁶⁷ Section 30 of the *Companies Act* 71 of 2008. See also Pienaar *Sectional titles and other fragmented property schemes* 425-429.

²⁶⁸ Pienaar *Sectional titles and other fragmented property schemes* 425-429.

²⁶⁹ Bamford *The law of partnership and voluntary association in South Africa* 126-127.

of time-sharing, regulations 6 to 14 of the *Property Time-sharing Control Act* 75 of 1983 are applicable.²⁷⁰

To operate time-sharing by way of leases, one will have to register a long-term lease of a sectional title unit, or use an unregistered long-term lease or alternatively a short-term lease.²⁷¹ Short-term leases are not registered in the deeds registry and are based on creditors' rights.²⁷² The lease contract regulates the legal relationship between the parties.²⁷³ Long-term leases on the other hand are for periods of ten years and longer.²⁷⁴ For a lessee to obtain a limited real right against the lessor, the long-term lease agreement needs to be registered in the deeds registry.²⁷⁵ However, only long-term leases in respect of sectional titles may be registered in the deeds registry as registration for the use of a part of a building is impossible.²⁷⁶ Unregistered leases, irrespective of whether it is long-term or short-term leases, are also based on creditors' rights.²⁷⁷ Regulations 6 to 14 of the *Property Time-sharing Control Act* are also applicable where leases are used as legal vessels for the operation of time-sharing.²⁷⁸

Time-sharing is not linked to a fixed period when a person makes use of floating time.²⁷⁹ When floating time is the legal vessel for time-sharing, it is usually operated in terms of share block schemes or clubs as no specific units are normally allocated to a specific right holder.²⁸⁰ This is also the reason why sectional titles of leases are not considered to be

²⁷⁰ Pienaar *Sectional titles and other fragmented property schemes* 426 explains the distinction between a universitas and a voluntary association without juristic personality. This entails that a member of the club may participate in activities and further may sell their functions to members of the public. Time-sharing managed by way of clubs is not popular in South Africa. Also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 515 in this regard.

²⁷¹ Pienaar *Sectional titles and other fragmented property schemes* 429-431.

²⁷² Pienaar *Sectional titles and other fragmented property schemes* 429-431 explains that short-term leases cannot be registered in the deeds registry as it is not based on limited real rights.

²⁷³ Pienaar *Sectional titles and other fragmented property schemes* 429-431.

²⁷⁴ Section 1(2)(a) of the *Formalities in respect of Leases of Land Act* 18 of 1969 and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 430-431.

²⁷⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 494 and also *MacDonald Ltd v Radin and the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454.

²⁷⁶ Pienaar *Sectional titles and other fragmented property schemes* 429-431.

²⁷⁷ Pienaar *Sectional titles and other fragmented property schemes* 429-431.

²⁷⁸ Pienaar *Sectional titles and other fragmented property schemes* 429-431.

²⁷⁹ Pienaar *Sectional titles and other fragmented property schemes* 431-433.

²⁸⁰ Pienaar *Sectional titles and other fragmented property schemes* 431-433.

the appropriate legal vessel with regard to floating time.²⁸¹ Today the point system is an extremely popular method of time-sharing.²⁸² Points may be used for accommodation or may even be exchanged for alternative accommodation in a different time-sharing scheme.²⁸³

2.5 Retirement schemes

2.5.1 Introduction and functioning of retirement schemes

Retirement schemes are regarded as safe havens for the elderly as these schemes realise the need for safety and comfort.²⁸⁴ The main objective of the *Housing Development Schemes for Retired Persons Act* 65 of 1988 is for the proper and sufficient regulation of retirement schemes so as to protect the interests of the elderly with the prospect of providing tenure security, prevent the abuse and misuse of funding and proper management of the scheme.²⁸⁵ The Act defines a housing interest as any right to claim ownership of the land relating to a housing development scheme or for the use and occupation of the land.²⁸⁶ The Act also clearly describes a housing development scheme as any scheme in terms whereof housing interests are transferred for the purpose of occupation by a retired person.²⁸⁷ A housing scheme may be operated in terms of the sectional title ownership of a unit. It may also function by virtue of a share block company in terms whereof a retired person's occupancy rights will be connected to his shareholding and therefore based on personal rights. It is furthermore possible for life rights in terms of an occupation agreement, which is based on personal rights as the retired person obtains an exclusive right to occupancy of a certain section in the scheme, together with

²⁸¹ Pienaar *Sectional titles and other fragmented property schemes* 431-433.

²⁸² Pienaar *Sectional titles and other fragmented property schemes* 431-433.

²⁸³ Pienaar *Sectional titles and other fragmented property schemes* 431-433. In this regard also see Boraine 1996 *Journal for Juridical Science* 112-116.

²⁸⁴ Butler 1992 *TSAR* 13-14.

²⁸⁵ Kilbourn 2008 *Butterworths Property Law Digest* 10-12; Pienaar *Sectional titles and other fragmented property schemes* 431-433.

²⁸⁶ Section 1 of the *Housing Development Schemes for Retired Persons Act* 65 of 1988.

²⁸⁷ Section 1 of the *Housing Development Schemes for Retired Persons Act* 65 of 1988. Section 7(1) defines a retired person as fifty years or older together with the spouse of that person. Any person may purchase a housing interest in such a scheme, however, the occupation rights may only vest in retired persons and their spouses.

the common property.²⁸⁸ The life-rights ties the occupancy right of an investor to his life span. These occupancy rights are usually created by an agreement between the owner or management of the scheme and the beneficiary.²⁸⁹ With the addition of sections 4A-4C in terms of the *Retired Persons Amendment Act*,²⁹⁰ provision has been made to protect occupancy rights that are based on personal rights.²⁹¹ Therefore the same rights that are granted in terms of a long-term lease agreement registered in the deeds registry will be applicable to the owner of occupancy rights that are founded on personal rights. Consequently, these rights are regarded as statutory limited real rights and therefore rank in priority.²⁹²

2.6 Conclusion

In view of the discussion in the previous sections it is evident that a sectional title holder acquires ownership of his/her section and co-ownership of the undivided share in the common property which is apportioned by the participation quota.²⁹³ From a juridical point of view a section is classified as a corporeal principal entity and the sectional title holder acquires ownership hereof.²⁹⁴ The undivided share in the common property is classified as an incorporeal accessory thing. Independent existence of the section and the undivided share in the common property is not possible as it has been combined by statute.²⁹⁵ Sectional title schemes are managed according to the provisions of the *Sectional Titles Act*.²⁹⁶ The *Management Act* divided the *Sectional Titles Act*²⁹⁷ so that the

²⁸⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 516-518.

²⁸⁹ Section 1 of the *Housing Development Schemes for Retired Persons Act* 65 of 1988 together with regulation 15 thereof; Butler 1992 *TSAR* 16; Pienaar *Sectional titles and other fragmented property schemes* 468-470.

²⁹⁰ Section 3 of *Housing Development Schemes for Retired Persons Amended Act* 70 of 1990.

²⁹¹ Section 3 of the *Housing Development Schemes for Retired Persons Amended Act* 70 of 1990.

²⁹² The judgment *Boland Bank Bpk. v Engelbrecht* 1996 3 SA 537 (A) 551J-552A is of importance as the court held that the provisions of section 4A, 4B and 4C co-exist and therefore the application and interpretation hereof may not be done independent of one another. For a more comprehensive discussion hereof see Pienaar *Sectional titles and other fragmented property schemes* 468-470.

²⁹³ Section 1 and 32(1) of the *Sectional Titles Act* 95 of 1986 describes and provides for the participation quota and the terms hereof was confirmed in *Kennaway (Pty) Ltd v Controlling Body of the Kennaway Court Building* 1988 (EC).

²⁹⁴ Van der Walt and Pienaar *Property Law* 61.

²⁹⁵ *Sectional Titles Act* 95 of 1986.

²⁹⁶ *Sectional Titles Act* 95 of 1986.

²⁹⁷ 95 of 1986.

latter Act governs the registration process and the *Management Act* provides the management rules of the scheme.²⁹⁸ Both these statutes are in operation as from 7 October 2016.

A share block scheme, as defined by the *Share Block Control Act*,²⁹⁹ confers a personal right or interest to its shareholders in the use of immovable property.³⁰⁰ A share block scheme is usually conducted by a share block company that is registered at the commissioner of companies and intellectual property.³⁰¹ The functioning of the share block company is governed by the *Share Block Control Act*³⁰² and the *Companies Act*.³⁰³ It is imperative that a share block company is registered and functions as a profit company,³⁰⁴ as a nonprofit company does not have shareholders and is therefore not regarded a viable entity for the operation of a share block company.³⁰⁵ Even though a share block scheme is preferred to be conducted by a share block company it is not compulsory as other entities such as a trading cooperative, a closed corporation, a common-law association, an *inter vivos* trust or a partnership may confer occupancy rights to property to its respective members.³⁰⁶ However, should a share block scheme

²⁹⁸ The *Management Act* consists of s 35 and onward of the *Sectional Titles Act* 95 of 1986. In this regard also see Whittle 2010 *De Rebus* 11.

²⁹⁹ Section 1 of the *Share Block Control Act* 59 of 1980.

³⁰⁰ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2 para 1.5 (2014 Service 24). Even though the primary function of a share block company is to manage and control the immovable property that the company owns or leases, the share block company may manage and control movable property such as yachts. However, should a share block company manage and control movable property, statutory measures provided for in the *Share Block Control Act* 59 of 1980 and the *Companies Act* 71 of 2008 will not be applicable. In this regard also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 494–495.

³⁰¹ Section 185(1) and (4), 186(1)(a)(i), 187(4) and 189 of the *Companies Act* 71 of 2008 requires that the commissioner of the companies and intellectual property commissioner registers the share block company.

³⁰² 59 of 1980.

³⁰³ 71 of 2008. The *Companies Act* 71 of 2008 applies to share block companies insofar as the provisions thereof are not in conflict with the *Share Block Control Act* 59 of 1980 or are amended thereby. In this regard also see Pienaar *Sectional titles and other fragmented property schemes* 302–303.

³⁰⁴ As envisaged in the *Companies Act* 71 of 2008, a profit company may function in the form of a state-owned company, a private company, a personal liability company, alternatively a public company. This is discussed in more detail in Chapter 3.

³⁰⁵ Section 10(2) of the *Companies Act* 71 of 2008 specifies that s 35 thereof does not apply to nonprofit companies. In this regard see also Pienaar *Sectional titles and other fragmented property schemes* 304.

³⁰⁶ Pienaar *Sectional titles and other fragmented property schemes* 307.

be conducted by one of the mentioned entities, the *Share Block Control Act*³⁰⁷ and the *Companies Act*³⁰⁸ will not be applicable as each of these entities are governed by its own statute.³⁰⁹

A time-sharing scheme may be based on a sectional title scheme by virtue of the fact that a person's time-sharing interest is utilised as co-ownership shares in a sectional title unit. It may also be based on shares in a share block scheme, which is considered to be a more attractive option as the functioning thereof is less complicated than that of a sectional title scheme as a shareholder only obtains use and occupancy rights of the immovable property for a recurrent annual period and not permanent occupation thereof.³¹⁰ A time-sharing scheme may also function in terms of a club, a lease, floating time or a points system.

Retirement schemes are usually based on sectional titles, share blocks or life rights. From the discussion it is clear that it is preferred that retirement schemes are based on life rights.

The aim of the following chapter is to explain the various rules that govern each community scheme in order to understand the impact of the proposed statutory intervention.

³⁰⁷ 59 of 1980.

³⁰⁸ 71 of 2008.

³⁰⁹ This is discussed in more detail in Chapter 3.

³¹⁰ Pienaar *Sectional titles and other fragmented property schemes* 423.

3 Chapter 3: Rules and functioning of community schemes

3.1 Introduction

In this chapter an analysis is undertaken to describe the statutory rules governing community schemes. The focus is on the legal nature of these rules, the rights and duties of all parties involved, enforcement of the rules, sanctions for noncompliance with the rules and the current legal recourse available to the aggrieved parties in the respective community schemes. Reference will also be made to the *Management Act* and the *Ombud Service Act* with regard to the impact of mentioned legislation.

3.1.1 Legal nature of the rules governing sectional title schemes

As from 7 October 2016 a sectional title scheme is governed by the rules as stipulated in the regulations to the *Management Act*,³¹¹ as well as in the *Sectional Titles Act*.³¹² These rules are not derived from contract.³¹³ The management rules are contained in Annexure 1 of the regulations to the *Management Act*³¹⁴ and the conduct rules in Annexure 2 thereof. Once the first unit is alienated by the developer, a sectional title register is opened.³¹⁵ Hereafter the body corporate is established and the sectional title scheme is

³¹¹ Section 10 of the *Management Act* deals with the rules which re-enacted the provisions of the repealed s 35 of the *Sectional Titles Act* 95 of 1986.

³¹² The *Sectional Titles Act* 95 of 1986 as amended only deals with registration matters regarding sectional title schemes as section 35(2) has been repealed.

³¹³ In *Wiljay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent* 1984 2 SA 722 (T) the court determined that these rules are based on contract. The court based this judgement on the fact that these rules originates mutually between all parties. However, Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 464 explain that this theory is problematic as the rules differ extensively from ordinary contracts in that they may be amended by way of special resolution, making it binding on owners who may have voted against such amendment. Furthermore, an owner becomes a party to the contract upon registration of the unit irrespective of whether he/she was aware of the rules or not. In this regard also see *Lottering v Palm* 2008 2 SA 553 (D) 557 A-C. Pienaar *Sectional titles and other fragmented property schemes* 198–204 highlights the fact that the rules governing sectional title schemes differs from an ordinary contract between members of a common-law voluntary association. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 13.11 (2014 Service 24) in terms whereof it is explained that the rules are contractual due to the fact that the rules were effected by way of mutual agreement between the sectional owners.

³¹⁴ Section 10 of the *Management Act* deals with the rules which re-enacted the provisions of the repealed s 35 of the *Sectional Titles Act* 95 of 1986.

³¹⁵ Section 36(1) of the *Sectional Titles Act* 95 of 1986.

then regulated by the prescribed or adopted rules.³¹⁶ These rules regulate and govern the relationship of all parties involved in the sectional title scheme.³¹⁷ The hierarchy of these rules should not differ from what was provided previously in the *Sectional Titles Act*.³¹⁸ The provisions of the Act³¹⁹ prevail over conflicting provisions in both the management and/or conduct rules. The house rules which are established by the trustees, are subject to the Act, the management rules as well as the conduct rules.³²⁰ Previously, the *Sectional Titles Act*³²¹ required that the rules must be made available by the body corporate on application by an occupier and/or owner of the scheme as it is considered to be public documents.³²² However, as from 7 October 2016, the *Management Act*³²³ states that all rules that are substitutes, added to, amended or repealed by either the developer or by unanimous or special resolution of the body corporate must first be approved by the chief ombud.³²⁴ Therefore, it is imperative that the registration of the sectional plan and the opening of a sectional title register coincides with the approval of the chief ombud.³²⁵ For the sake of clarity, the previous management rules and conduct rules provided for in annexure 8 and 9³²⁶ respectively are discussed

³¹⁶ The repealed section 35(1) and (4) of the *Sectional Titles Act* 95 of 1986. Also see Carey Miller and Pope *Land title in South Africa* 220. Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 13.2 (2014 Service 24) highlights the importance of the document containing the rules of the sectional title scheme. Section 10(1) and (2) of the *Management Act*.

³¹⁷ Paddock *Sectional title survival manual* 9-1.

³¹⁸ 95 of 1986. Also see Paddock *Sectional title survival manual* 9-1.

³¹⁹ *Management Act*.

³²⁰ The house rules usually govern specific use of the common property, for example speed limits, noise and parking restrictions among others. Fines may also be imposed by the house rules for noncompliance. Statutorily the house rules are not classified as part of the body corporate's statutes as these rules bear no foundation in either the *Sectional Titles Act* 95 of 1986 nor the regulations thereto. Although the house rules endure divergent theories, the argument is made that the house rules governing the trustees' control over the common property bears foundations in the body corporate's responsibility as envisaged in the Act. In this regard see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 462-466.

³²¹ 95 of 1986.

³²² Section 36(1) of the *Sectional Titles Act* 95 of 1986.

³²³ Section 10 of the *Management Act* deals with the rules which re-enacted the provisions of the repealed s 35 of the *Sectional Titles Act* 95 of 1986.

³²⁴ Section 10(2) of the *Management Act*.

³²⁵ It is important to note that the prescribed management rules under section 10 of the *Management Act* may still be amended but only to the extent as prescribed by regulation. See ss 10(2)(a) and (b) of the *Management Act* and also Van der Merwe 2012 *TSAR* 635.

³²⁶ In terms of s 35 of the *Sectional Titles Act* 95 of 1986 which section has been repealed.

where after the current management rules and conduct rules provided for in annexure 1 and 2³²⁷ will be discussed.

3.1.1.1 Previous management rules in terms of the *Sectional Titles Act*

The previous model management rules as stipulated by Annexure 8 of the regulations to the Act were aimed at the management and administration of the sectional title scheme. The rules provided directives for the trustees and members of the body corporate regarding the administration of the scheme.³²⁸ The directives regarding trustees include matters regarding trustees' qualifications,³²⁹ appointment and election,³³⁰ tenure of office, remuneration,³³¹ indemnity,³³² meetings,³³³ functions, powers and duties,³³⁴ contributions and liability.³³⁵ The rules, furthermore, contain directives on the nature of improvements, both luxurious and nonluxurious,³³⁶ the safeguard of financial records,³³⁷ the managing agent,³³⁸ meetings of the owners,³³⁹ the rights and duties of owners and occupiers of sections,³⁴⁰ together with the arbitration procedure of disputes as provided for by the amended Act.³⁴¹

The management rules may be amended by way of unanimous resolution of the body corporate and will be binding on all sectional owners and occupiers of units.³⁴² The body

³²⁷ In terms of s 10 of the *Management Act*.

³²⁸ Annexure 8 rules 4-29 read with s 35(2)(a) of the *Sectional Titles Act* 95 of 1986.

³²⁹ Annexure 8 rule 5.

³³⁰ Annexure 8 rule 6.

³³¹ Annexure 8 rule 10.

³³² Annexure 8 rule 12.

³³³ Annexure 8 rules 15-24.

³³⁴ Annexure 8 rules 25-29.

³³⁵ Annexure 8 rules 30-31.

³³⁶ Annexure 8 rule 33.

³³⁷ Annexure 8 rule 36-39.

³³⁸ Annexure 8 rule 46-49. These rules provide for the appointment, powers and duties of the managing agents.

³³⁹ Annexure 8 rule 50-67.

³⁴⁰ Annexure 8 rule 68-70.

³⁴¹ Annexure 8 rule 71 of the *Sectional Titles Amendment Act* 44 of 1997. In this regard also see Paddock *Sectional title survival manual* 10-1-10-39 for a discussion of each rule.

³⁴² Section 10(2)(a) of the *Management Act*. According to the definitions envisaged in section 1 of the *Management Act* a unanimous resolution may be passed with at least eighty percent of the members present at the general meeting and all members must vote in favour of the resolution. Also see

corporate is obliged to inform the registrar of deeds regarding any amendment of the rules.³⁴³ However, the registrar is not obliged to determine the reasonableness or necessity of the proposed amendment, nor is the registrar involved in the enforcement thereof.³⁴⁴ The amended rule will subsequently become enforceable once notice of amendment has been filed at the deeds registry.³⁴⁵ The responsibility vests in the body corporate, trustees, managing agent, administrator or the court to apply and enforce the rules or amended rules.³⁴⁶

3.1.1.2 The new management rules in terms of the *Management Act*

As previously stated, section 10 of the *Management Act* governs the administration of sectional title schemes as from 7 October 2016. The rules envisaged in section 10 of the *Management Act* basically re-enacts the provisions in the repealed section 35 of the *Sectional Titles Act*³⁴⁷ but includes some major changes. Probably the most notable change entails that all rules that are substitutes, added to, amended or repealed by either the developer or by unanimous or special resolution of the body corporate must first be approved by the chief ombud.³⁴⁸ Once he/she is satisfied that the proposed amendment is reasonable a certificate to that effect must be issued by the chief ombud. The amended rule will subsequently become enforceable on the date on which a certificate has been issued by the chief ombud alternatively, the opening of the sectional title register, whichever is the latest.³⁴⁹ It is important to note that, as with the previous management rules in terms of Annexure 8 of the *Sectional Titles Act*,³⁵⁰ the body corporate and/or

Regulation 30(4) in terms whereof it is specified that at least fifty percent of the units in the scheme must be held by owners other than the developer. See also Paddock *Sectional title survival manual* 9-8. See also *Benson v Joelson* 1985 3 SA 566 (C) with regard to management rules that are substituted in accordance with the provisions of Act 66 of 1971.

³⁴³ Section 35(5)(a) of the *Sectional Titles Act* 95 of 1986. Annexure 1 form V contains the prescribed notification that is required to be submitted to the registrar of deeds regarding any amendments to the rules.

³⁴⁴ Section 35(5)(b) of the *Sectional Titles Act* 95 of 1986 which section has been repealed.

³⁴⁵ Section 35(5)(c) of the *Sectional Titles Act* 95 of 1986 which section has been repealed.

³⁴⁶ Pienaar *Sectional titles and other fragmented property schemes* 197–198.

³⁴⁷ 95 of 1986.

³⁴⁸ Section 10(2) of the *Management Act*.

³⁴⁹ Section 10(5)(d) of the *Management Act* 8.

³⁵⁰ Section 35 of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016.

developer may leave the rules intact without any amendments or substitutions thereto as there is no statutory obligation to amend the rules.

Upon perusal of section 10(3) of the *Management Act* it is notable that the rules ought to distinguish according to the use of units as it now specifically excludes the phrase "units put to substantially the same use" as provided for in the repealed section 35(3) of the *Sectional Titles Act*.³⁵¹ A further requirement for which no provision was made in the repealed section 35 of the *Sectional Titles Act*,³⁵² is noted in section 10(5) of the *Management Act*. In terms of this section, approval from the chief ombud is required for all amendments to the management and conduct rules. In these instances, Form B needs to be completed and submitted to the chief ombud who will then examine the intended amendments regarding its reasonableness, appropriateness and validity.³⁵³ Should the chief ombud be satisfied with the intended amendments, a certificate of approval will be issued and the amended rules will then be filed in the office of the chief ombud.³⁵⁴ The date on which these rules will be operational is provided for in section 10(5)(d) of the *Management Act*.

Most significant is the inclusion of certain obligations on the body corporate that were not previously contained in the repealed management rule 32 in annexure 8 of the *Sectional Titles Act*.³⁵⁵ Section 10(6) of the *Management Act* provides *inter alia* that a copy of the rules need to be kept,³⁵⁶ the rules must be made available for inspection at the meetings of trustees and owners;³⁵⁷ copies of the rules must be delivered to every person who becomes an owner or occupier of a unit³⁵⁸ and who must also receive copies

³⁵¹ 95 of 1986.

³⁵² 95 of 1986.

³⁵³ Section 10(5)(b) of the *Management Act*.

³⁵⁴ Section 10(5)(c) of the *Management Act*.

³⁵⁵ 95 of 1986.

³⁵⁶ Section 10(6)(a) of the *Management Act*.

³⁵⁷ Section 10(6)(b) of the *Management Act*.

³⁵⁸ Section 10(6)(c) of the *Management Act*.

of any amendments made to the rules;³⁵⁹ and lastly, upon request of a person authorised in writing by an owner, deliver a copy of the rules to such owner.³⁶⁰

Section 10(8) of the *Management Act* now clarifies that either management or conduct rules may be used to confer rights regarding the use and enjoyment in respect of certain parts of the common property upon members of the body corporate. The requirements in respect of the layout plan are identical to the repealed section 27A of the *Sectional Titles Act*.³⁶¹ The requirement entails that the lay-out plan needs to clearly indicate where the areas in question are situated. It must further indicate the purpose for which each area is used.³⁶²

Section 10(10)(a) and (b) of the *Management Act* provides that rules contained in Schedule 1 and 2, which were unaltered, lapsed on 1 June 1988. These rules are now replaced by the currently prescribed management and conduct rules contained in Schedule 1 and 2 respectively.³⁶³ In terms of Section 10(11) of the *Management Act* all unaltered management and conduct rules which were applicable to sectional title schemes prior to 1 June 1988 must remain in force.³⁶⁴ However, these rules are subject to substitution, addition, amendment or repeals as provided for in section 10(2)(a) and (b) of the *Management Act*. The rules will remain in force on condition it is not irreconcilable with any prescribed management rule envisaged in section 10(2)(a), in which event the current management rule concerned will be applicable. Lastly, section 10(12) of the *Management Act* confirms that management and conduct rules that have been made under the *Sectional Titles Act*³⁶⁵ are retained as it is regarded to have been made under the *Management Act*.

³⁵⁹ Section 10(6)(d) of the *Management Act*.

³⁶⁰ Section 10(6)(e) of the *Management Act*. Also see regulation 14 of the *Ombud Service Act* since all the above mentioned need to be read therewith.

³⁶¹ 95 of 1986.

³⁶² Van der Merwe 2012 *TSAR* 636.

³⁶³ Van der Merwe 2012 *TSAR* 636.

³⁶⁴ Van der Merwe 2012 *TSAR* 636.

³⁶⁵ 95 of 1986.

3.1.1.3 Conduct rules

The conduct rules previously stipulated in Annexure 9 of the regulations to the *Sectional Titles Act*,³⁶⁶ and currently contained in Annexure 2 of the *Management Act*, deals with the use and occupation of sections as well as the common property.³⁶⁷ More specifically, the module rules deal *inter alia* with matters such as pets,³⁶⁸ refuse disposal,³⁶⁹ vehicles on the common property,³⁷⁰ damage, alterations and additions to the common property,³⁷¹ the appearance of the scheme from an external view,³⁷² signs and notices that appear on the common property,³⁷³ littering,³⁷⁴ laundry,³⁷⁵ storage of flammable material and other dangerous acts,³⁷⁶ letting of units,³⁷⁷ as well as the eradication³⁷⁸ of pests.³⁷⁹

366 *Sectional Titles Act* 95 of 1986.

367 Section 35(2)(b) of the *Sectional Titles Act* 95 of 1986 and s 10(2)(b) of the *Management Act*.

368 Annexure 9 rule 1 of the *Sectional Titles Act* 95 of 1986. *Body Corporate of the Laguna Ridge Scheme v Dorse* 1999 2 SA 512 (D). Currently provided for in Annexure 2 rule 1 of the *Management Act*.

369 Annexure 9 rule 2 of the *Sectional Titles Act* 95 of 1986. Currently provided for in Annexure 2 rule 2 of the *Management Act*.

370 Annexure 9 rule 3 of the *Sectional Titles Act* 95 of 1986. Currently provided for in Annexure 2 rule 3 of the *Management Act*.

371 Annexure 9 rule 4 of the *Sectional Titles Act* 95 of 1986. Currently provided for in Annexure 2 rule 4 of the *Management Act*.

372 Annexure 9 rule 5 of the *Sectional Titles Act* 95 of 1986. Currently provided for in Annexure 2 rule 5 of the *Management Act*. A minor amendment in this rule is noted as it manages the appearance of sections together with the exclusive use area. The appearance with regard to the exclusive use area has not been mentioned in Annexure 9 rule 5 of the *Sectional Titles Act* 95 of 1986 and has been added to in Annexure 2 rule 5 of the *Management Act*.

373 Annexure 9 rule 6 of the *Sectional Titles Act* 95 of 1986. In this regard also see *Essa NO v Body Corporate of Kingsway House* (9931/2008) [2009] ZAKZHC 5 (20 February 2009). Annexure 2 rule 5(c) of the *Management Act* incorporated signs and notices.

374 Annexure 9 rule 7 of the *Sectional Titles Act* 95 of 1986. Annexure 2 rule 2 of the *Management Act* incorporated littering.

375 Annexure 9 rule 8 of the *Sectional Titles Act* 95 of 1986. No specific mention of laundry has been made in Annexure 2 of the *Management Act*.

376 Annexure 9 rule 9 of the *Sectional Titles Act* 95 of 1986. Annexure 2 rule 6 of the *Management Act* makes provision for storage of flammable materials and has been added to Annexure 9 rule 9 of the *Sectional Titles Act* 95 of 1986.

377 Annexure 9 rule 10 of the *Sectional Titles Act* 95 of 1986. No provision for the letting of units is made in Annexure 2 of the *Management Act*. However, a new provision is made in rule 7 which provides for the behaviour of occupiers and visitors in sections and on common property. This rule is broader than rule 10 contained in Annexure 9 of the *Sectional Titles Act* 95 of 1986.

378 Annexure 9 rule 11 of the *Sectional Titles Act* 95 of 1986. This is now contained in rule 8 of Annexure 2 of the *Management Act*.

379 Van der Merwe *Constitutionality of the rules governing sectional title schemes* 42–43. Also see *Sectional titles, share blocks and time sharing*, vol 1, para 13.3 (2014 Service 24).

These rules may be amended by the developer when he/she applies for the opening of a sectional title register, alternatively by way of special resolution.³⁸⁰ It is statutorily prescribed that no amendments of the conduct rules may be in conflict with the prescribed management rules or any provisions of the Act.³⁸¹ As with the management rules, the body corporate is also obliged to inform the registrar of deeds of any amendment to the conduct rules.³⁸² The registrar is not obliged to determine the reasonableness or validity thereof. However, if the amendment has been made by the developer, the registrar needs to be satisfied that the amendment is not in conflict with the Act and/or regulations.³⁸³ The registrar is also not involved in the enforcement of any rule. The enforcement and application of the rules remains the responsibility of the body corporate, managing agent, administrator or the court.³⁸⁴

In terms of the *Management Act*, approval from the chief ombud is required for any amendment and will come into operation on the date the certificate is issued by the chief ombud or the opening of the sectional title register, whichever is the latest.³⁸⁵ Minor amendments to the conduct rules have been highlighted. The majority of the rules are retained and only colloquial and systematic adjustments have been made.

³⁸⁰ Section 10(2)(b) of the *Management Act*. Section 35(2)(b) of the *Sectional Titles Act* 95 of 1986. Also see Pienaar *Sectional titles and other fragmented property schemes* 197–198. In this regard the definition in s 1(1) of the *Management Act* clearly dictates that seventy-five percent of the votes passed by members of the body corporate who are present at the general meeting or who agreed thereto in writing, calculated both in value and numbers, constitutes a special resolution.

³⁸¹ See para 3.1.1 in.

³⁸² Section 35(5)(a) of the *Sectional Titles Act* 95 of 1986 as well as regulation 30(6). Annexure 1 form V contains the prescribed notification required to be submitted to the registrar of deeds.

³⁸³ Chief Registrar's Circular 18 of 1997 para A17. Furthermore, the chief registrar has determined that any restriction placed on ownership by the rules may only be registered if it relates to the use and enjoyment of sections as well as the common property. In this regard see Chief Registrar's Circular 3 of 1993 together with ss 35(2) and 44(1)(d) and (e) of the *Sectional Titles Act* 95 of 1986 as well as ss 10(2) and 13(1)(d) and (e) of the *Management Act*.

³⁸⁴ See para 3.3.

³⁸⁵ Section 10(5)(d) of the *Management Act*.

3.1.1.3 House rules in terms of the *Sectional Titles Act*

The house rules are rules which the trustees or the body corporate adopt and such rules usually regulate the daily management of the scheme.³⁸⁶ Even though the creation of house rules are not statutorily prohibited, the validity thereof is often questioned as it has no definitive content.³⁸⁷ One reason for this is that the house rules cannot be enforced properly as they cannot be construed as domestic statutes of the body corporate.³⁸⁸ There are, however, two aspects that have to be taken into consideration with reference to the enforcement of house rules. Firstly, sections 35(4) and 38(j) of the Act³⁸⁹ specify that the body corporate is responsible for the enforcement of the management and conduct rules. Secondly, the body corporate is responsible for the control, administration and management of the common property to the benefit of all owners. Although it is clear that the trustees do not have the capacity to adopt or enforce rules that regulate or restrict the use of a section,³⁹⁰ they may exercise their general power to require written consent with regard to the use of the common property in certain circumstances.³⁹¹ In such instances the house rules may be enforced.³⁹² It may therefore be argued that the trustees are exercising their statutory powers by adopting house rules as they are the custodians for the control, management and administration of the common property.

³⁸⁶ House rules are also referred to as trustee directives. Examples hereof include noise restrictions, speed limits and directives regarding parked vehicles that contravene the house rules. In this regard see Wood-Bodley 2003 *South African Law Journal* 605.

³⁸⁷ Wood-Bodley 2003 *South African Law Journal* 606.

³⁸⁸ In this regard see Pienaar *Sectional titles and other fragmented property schemes* 203-204 were the problems of the enforcement of the house rules are explained. Pienaar is also of the view that the wording of the Act and regulations is indicative thereof that the house rules do not enjoy the same powers as the management and conduct rules.

³⁸⁹ *Sectional Titles Act* 95 of 1986. These sections have been repealed as from 7 October 2016.

³⁹⁰ Rules that are restrictive in nature should be dealt with in the management and/or conduct rules. In this regard also see Durham CM 2015 <http://paddocksblog.com/2015/05/21/house-rules-in-sectional-title-schemes>.

³⁹¹ Annexure 8 rule 68(1)(vi) and annexure 9 rules 1(1) and 3(1). These rules have been repealed as from 7 October 2016. Also see Pienaar *Sectional titles and other fragmented property schemes* 203-204.

³⁹² Sections 36(4) and 37(1)(r) of the *Sectional Titles Act 95 of 1986* have been repealed. See s 2(5) and s 3(1)(s) of the *Management Act*.

3.1.1.4 Rules in terms of the *Management Act*

Although minor changes in grammar are noted in the *Management Act*,³⁹³ the most notable change regarding the rules is seen in section 10(2)(a) and (b) that requires the approval of the chief ombud before any of the prescribed management or conduct rules may be amended.³⁹⁴ A further innovation is seen in section 10(5) that requires the approval of the chief ombud for all future amendments of the management and conduct rules. Section 10(6) also compels the body corporate to keep a copy of all of the rules and to make it available to all owners and for inspection at meetings of trustees and owners. It is therefore evident that section 10(6) imposes much wider obligations on the body corporate in comparison to the obligations contained in rule 32 of the prescribed management rules. Sections 10(7) and (8) also clarify that either the management or conduct rules may be used to make rules or to confer rights to sectional owners in respect of exclusive use and enjoyment of the common property.³⁹⁵

The amendments to the previous prescribed rules contained in Annexure 8 pertained to the nominations for the election of trustees, a sectional owner's right to attend a trustee meeting, additional levies from owners by trustees, as well as the responsibility regarding the maintenance of exclusive use areas.

The first notable amendment is seen in rule 7 of Annexure 8 that made provision for the nomination of trustees.³⁹⁶ The amendment concerns the rectification of the reference to

³⁹³ See s 10(1) and s (2) of Act 8 of 2011. These changes mainly entail the substitution of the word "shall" with the word "must" as well as "control" with "regulate".

³⁹⁴ In *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.13 (2014 Service 24) Van der Merwe explains that the regulations to the *Ombud Service Act* need to make provision for the lodging of rule applications before the registration of a scheme as the registration of a sectional plan and opening of a sectional title register needs to be synchronised with the approval of the rules by the chief ombud.

³⁹⁵ Section 27A of the *Sectional Titles Act* 95 of 1986 has been repealed by s 10(7) and s (8) of the *Management Act*. Also see *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.13 (2014 Service 24) in this regard.

³⁹⁶ The initial amendment to rule 7 of Annexure 8 was made by the 2013 regulations of the *Sectional Titles Amendment Act* published GN 196 in GG 36241 of 14 March 2013 in terms whereof an embargo was placed on the nomination and election of owners as trustees if the owners are in arrears with the payment of their levies. In Maree 2013 *MCS Courier Newsletter* the amendment was welcomed as owners who are in default would eventually gain control of the trustees and could therefore manage to bar resolutions with the aim of instituting action against such defaulters. However, Maree is further of opinion that the 2013 regulations have overall been poorly drafted and states that it is a "seriously

nonexisting subclauses to rule 64 and includes the provision that a person who is in breach of rule 64 may not be nominated or appointed as a trustee.³⁹⁷ Such a person is furthermore not permitted to nominate another person as a trustee.³⁹⁸

Subrule 15(5)³⁹⁹ has been substituted by regulation 6(b) of the *Sectional Titles Amendment Regulations* of 2015 and provides that an owner is entitled to attend the meetings of trustees *upon invitation* to do so. However, such an owner is not entitled to vote thereat.⁴⁰⁰ Therefore, an owner's fundamental right to attend the meetings of trustees has been detached from as an owner is now only permitted to attend such meetings upon invitation. A further restriction is that, even if an owner receives an invitation to attend a meeting of trustees, he/she is no longer permitted to speak at such meetings.⁴⁰¹ According to Van der Merwe, this curbs the democratic participation of owners in respect of the day-to-day management of the scheme. He further argues that the very reason why owners have been permitted not only to attend, but also to speak at trustee meetings since 1997, was to make the conduct and decisions of the trustees more transparent. It also made it difficult for autocratic trustees to avoid owners with legitimate grievances. Furthermore, it provided a platform for owners to voice their concerns and to sort out misunderstandings.⁴⁰²

retrogressive step". This regulation is now envisaged in rule 7 of the regulations to the *Management Act*.

³⁹⁷ The erroneous reference was made to rule 64(1) and (2) in the amendment regulations. It has since been rectified to refer to rule 64(a) and (b).

³⁹⁸ The *Sectional Title Amendment Regulations* of 2015 underscored the importance of the manner in which defaulters should be dealt with by adding a further provision stating that a person who is in arrears and/or remains in arrears with the payment of levies, or remains in breach of the conduct rules despite written notices to comply in terms of rule 64(a) and (b) will not be permitted to nominate a person for election as a trustee. Thus, an owner who is in breach of rule 64 may not be nominated nor appointed as a trustee and may further not nominate anyone else as a trustee. Also see Van der Merwe 2016 *TSAR* 130 in this regard. Rule 6(4) of the regulations to the *Management Act* sets out the grounds for disqualification of a trustee to hold office.

³⁹⁹ This subrule regarding the right of sectional owners to attend trustee meetings, was included in GN 1422 of 31 October 1997 and provided that an owner will be entitled to attend and speak at the meetings of trustees but will, however, not be entitled to vote thereat.

⁴⁰⁰ In this regard see rule 15(5) of the regulations to the *Management Act* read with rule 20(2).

⁴⁰¹ Van der Merwe 2016 *TSAR* 131 explains the tug of war between the interests of efficiency and conduciveness to transparency the legislature had to face in this respect.

⁴⁰² Van der Merwe 2016 *TSAR* 130-131.

A further amendment has been made to rule 31 in respect of the continuous collection of levies.⁴⁰³ This amendment is noted in subrule (4Aa) and reads as follows:

After the expiry of a financial year and until they become liable for contributions in respect of the ensuing financial year, owners are liable for contributions in the same amounts and payable in the same instalments as were due and payable by them during the expired financial year. Provided that the trustees may, if they consider it necessary and by written notice to the owners, increase the contributions due by owners by a maximum of 10% excluding capital expenditure to take account of the anticipated increased liabilities of the body corporate. Such increase shall be ratified or changed after the annual general meeting by the trustees once the body corporate has approved or amended the schedule of income and expenditure.⁴⁰⁴

Despite the numbering of the subrule that is incorrect, it seems that the wording of the rule may give rise to more uncertainties and disputes.⁴⁰⁵ Three factors contribute in this regard. Firstly, reference has been made to "capital expenditure", but this is not defined in the rules of the Act,⁴⁰⁶ nor is it seen elsewhere in the rules. Determining the exact scope thereof is therefore problematic and is consequently open for speculation.⁴⁰⁷ A further uncertainty is seen in the wording "a maximum of 10 percent excluding capital expenditure".⁴⁰⁸ This questions whether or not the capital expenditure is to be included in the increase of levies or whether it should be added to the levies irrespective of the 10 percent increase.⁴⁰⁹ Lastly, with regard to the amendment of management rule 31, the manner in which the provision seems to permit the trustees to ratify or change the increase of the levies after the budget had been approved. This will most certainly amount to an increase of disputes as trustees

⁴⁰³ The *Sectional Title Amendment Regulations* of 2013 published in GG 36241 R196 14 March 2013 deleted subrule (4A) of rule 31 pertaining to the liability of owners to make contributions to the administrative fund as prescribed in s 37(1)(a) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. However, Regulation 6(c) of the *Sectional Title Amendment Regulations* of 2015 seems to have revived the deletion of the subrule with the insertion of subrule 4(Aa). Also see Bauer 2015 <http://www.rebosa.co.za/trustees-must-take-note-of-amendments-to-management-rules/> in this regard. See rule 21 of the regulations to the *Management Act*. Specific reference is made to rule 21(3)(h) with regard to the collection of levies.

⁴⁰⁴ Prescribed management rule 31(4Aa) contained in Annexure 8 of the *Sectional Titles Act* 95 of 1986.

⁴⁰⁵ Maree 2015 *MCS Courier Newsletter* 3.

⁴⁰⁶ *Sectional Titles Act* 95 of 1986.

⁴⁰⁷ Maree 2015 *MCS Courier Newsletter* 3.

⁴⁰⁸ Prescribed management rule 31(4Aa) contained in Annexure 8 of the *Sectional Titles Act* 95 of 1986.

⁴⁰⁹ In this regard see rule 26(1)(e) of the regulations to the *Management Act*.

are not entitled to such discretion and must only determine and allocate the increase to levies in accordance to the amount of the approved budget.⁴¹⁰

The final amendment is seen in the substitution of rule 70(b)⁴¹¹ with regulation 6(d) of the *Sectional Titles Amendment Regulations* of 2015 in respect of the maintenance of exclusive use areas. This amendment vests the responsibility in the owners to attend to any required maintenance on improvements that have been made to their exclusive use areas.⁴¹² This provision was in direct conflict with the repealed section 37(1)(b) of the *Sectional Titles Act*⁴¹³ which determined that it was the responsibility of the body corporate to attend to the costs of insurance and maintenance of exclusive use areas.⁴¹⁴ The provision also failed to take the repealed provisions of section 44(1)(c) into account which provided that part of the duty of an owner is to repair and maintain his/her section and keep the exclusive use areas clean and tidy.⁴¹⁵ Van der Merwe is of the opinion that the only way to remedy this discrepancy was to amend section 44(1)(c) so that it vests the primary obligation on an owner and the holder of an exclusive use area to maintain their sections and exclusive use areas and to keep it in a good state of repair. The exclusive use area should furthermore be required to be kept neat and tidy by the holders thereof. According to Van der Merwe, this amendment should align section 44(1)(c) with section 37(1)(b) and rule 70(b).⁴¹⁶ In the event that a holder does not comply with this requirement the last part of rule 70(b) will be applicable. This part entails that the body corporate may attend to necessary repairs to uphold the harmonious appearance of the scheme and recover the reasonable costs thereof from the holder. However, this may only be

⁴¹⁰ Maree 2015 *MCS Courier Newsletter* 3.

⁴¹¹ Prescribed management rule 70 in Annexure 8 of the *Sectional Titles Act* 95 of 1986.

⁴¹² Van der Merwe 2016 *TSAR* 132.

⁴¹³ The *Sectional Titles Act* 95 of 1986.

⁴¹⁴ Maree 2015 *MCS Courier Newsletter* 3 and also see Bauer 2015 <http://www.rebosa.co.za/trustees-must-take-note-of-amendments-to-management-rules>.

⁴¹⁵ Section 44(1)(c) of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016. Also see Van der Merwe 2016 *TSAR* 132. The substitution of rule 70(b) is also in conflict with the judgment in *Body Corporate of the Solidatus Scheme No SS 23/9 v De Waal* 1977 3 ALL SA 91 (T).

⁴¹⁶ Van der Merwe 2016 *TSAR* 132.

done after the trustees or managing agents have issued a warning to the holder requesting same.⁴¹⁷

Prior to the enactment of the *Management Act* a further uncertainty that the amendment to rule 70 created was with the phrase "as the case may be".⁴¹⁸ Even though it was not clear on whose behalf the managing agents or trustees issued a warning to a defaulting holder, it had generally been accepted that this warning was issued on behalf of the body corporate. The perception that the wording now creates is that the trustees or managing agents may give notice to a holder on their own behalf. This is problematic as a managing agent is not regarded to be an officer of the body corporate and is therefore not entitled to represent the body corporate in any action unless the managing agent has been duly authorised to do so under a specifically delegated authority.⁴¹⁹ Van der Merwe suggests that in order to remedy this, the reference to the managing agent should be deleted and secondly, the phrase "on their behalf" should be replaced with "on behalf of the body corporate" in the last part of rule 70.⁴²⁰

A further important observation, prior to the enactment of the *Management Act*, was that no amendment had been made to the prescribed management rule 71 contained in the initial annexure 8 of the regulations to the Act. This is significant as this was the only dispute resolution mechanism that made provision for statutory arbitration available to aggrieved parties in sectional title schemes. If rule 71 remained intact, a party may not be compelled to take part in the prescribed ombud procedure. Therefore, if it was left intact, an escape route would have been created as a party may then not be compelled to take part in the ombud procedure.⁴²¹ The rules in terms of the *Management Act* do not include any reference to arbitration, and the *Ombud Service Act* only prescribes voluntary mediation. Therefore parties may, in

⁴¹⁷ This coincides with the judgement handed down in *De la Harpe v Body Corporate of Bella Toscana* 2015 JOL 33930 (KZD). Also see footnote 100 regarding the section in the *Sectional Titles Act* 95 of 1986 that have been repealed.

⁴¹⁸ Van der Merwe 2016 *TSAR* 133.

⁴¹⁹ Van der Merwe 2016 *TSAR* 133.

⁴²⁰ Van der Merwe 2016 *TSAR* 133.

⁴²¹ Pienaar *Sectional titles and other fragmented property schemes* 228.

terms of the *Ombud Service Act*, revert to arbitration if it is their choice to do so, or in circumstances where the management rules have been amended by the developer or body corporate to prescribe compulsory arbitration, which will seldom be the case.

3.2 Rights and duties of parties

In modern South African law a threefold legal relationship arises when one purchases an apartment in a sectional title scheme.⁴²² This legal relationship includes that a purchaser firstly becomes the titleholder or owner of the apartment that he/she has purchased; secondly the purchaser becomes the joint or common owner of the common property; and thirdly the purchaser becomes a member of the body corporate.⁴²³ These three legal components can only be dealt with in unity with one another and it is impossible to alienate or burden these components individually.⁴²⁴ The concept of sectional titles is considered to be a form of fragmented property and thus the essence of sectional titles is discussed, namely a sectional title unit as immovable property; common property and exclusive use areas; the participation quota as well as the body corporate as a sectional title community.⁴²⁵

Sectional title schemes mainly function by virtue of the body corporate and the trustees. As stated in Chapter 2, a sectional owner becomes a member of the body corporate once the property is transferred into his/her name.⁴²⁶ Once a sectional owner becomes a member of the body corporate, he/she incurs obligations toward the body corporate and other sectional owners regarding the use of their sectional title unit.⁴²⁷ In light hereof,

⁴²² Van der Merwe CG 1992 *Stell LR* 131.

⁴²³ Van der Merwe CG 1992 *Stell LR* 131. Also see Van der Merwe *Sectional titles, share blocks and time sharing* vol1, para 2.1 (2014 Service 24) it is also further explained that the "three-fold unity" has been developed by Bärmann.

⁴²⁴ Sections 16(3) and 36(2) of the *Sectional Titles Act* 95 of 1986.

⁴²⁵ Pienaar *Sectional titles and other fragmented property schemes* 58. Also see Van der Merwe CG 1992 *Stell LR* and also Mostert H and Pope A (eds) *The principles of the law of property in South Africa* 100–101 for a more extensive explanation of the nature of sectional ownership.

⁴²⁶ Section 2(1) of the *Management Act*.

⁴²⁷ Section 10 of the *Management Act*.

the manner in which the rules influence the rights and duties of the sectional owner,⁴²⁸ body corporate,⁴²⁹ trustees⁴³⁰ and managing agent⁴³¹ will be discussed.

3.2.1 Sectional owner

The use rights of sectional owners are governed by the *Management Act*,⁴³² regulations to the Act as well as the rules of the scheme.⁴³³ Even though a sectional owner obtains full ownership of his/her unit, his/her use right and enjoyment thereof remains restricted by the rules. The rules intend to create a neighbourly environment for all occupiers.⁴³⁴ Therefore provision has also been made to enforce the rules should a sectional owner or occupier not adhere thereto.⁴³⁵ In terms of the rules, sectional owners and duly authorised occupiers have certain obligations they are required to comply with.⁴³⁶ These requirements include the payment of levies;⁴³⁷ that each owner's section is required to be kept in a good state of repair and to keep the exclusive area in a tidy condition;⁴³⁸ that an owner may not cause a nuisance to any other resident while exercising his/her use right;⁴³⁹ that an owner is prohibited from damaging the reputation⁴⁴⁰ of the scheme

⁴²⁸ See para 3.2.1.

⁴²⁹ See para 3.2.2.

⁴³⁰ See para 3.2.3.

⁴³¹ See para 3.2.4.

⁴³² *Sectional Titles Act* 95 of 1986. Conditions imposed on sectional owners will be reasonable. In this regard see section 44 of the *Sectional Titles Act* 95 of 1986. Also see Van der Merwe *Constitutionality of the rules governing sectional title schemes* 50-51.

⁴³³ As discussed in section 3.1.

⁴³⁴ Van der Merwe *Constitutionality of the rules governing sectional title schemes* 50-51.

⁴³⁵ Annexure 8 rule 71. The recourse available is discussed in more detail in Chapter 4.

⁴³⁶ Section 32 of the *Sectional Titles Act* 95 of 1986. Also see Van der Merwe and Erasmus 1999 *THRHR* 260 with regard to the enforcement mechanisms for compliance and sanctions for noncompliance. Also see section 3.3.

⁴³⁷ Sections 32(3)(c) and 37(1)(a) of the *Sectional Titles Act* 95 of 1986.

⁴³⁸ Sections 44(1)(c) of the *Sectional Titles Act* 95 of 1986 read with s 13(1)(c) of the *Management Act*.

⁴³⁹ Section 44(1)(e) of the *Sectional Titles Act* 95 of 1986 read with s 13(1)(e) of the *Management Act*. In *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 120G it was held that the aim of neighbour law with regard to sectional ownership is that neighbouring occupiers and owners are not unreasonably prejudiced or burdened by their use of their property. Also see Van der Merwe *Sectional Titles, share blocks and time sharing* vol 1 (2014 Service 24) para 8.2.2.1 where it is explained that a nuisance must not be the consequence of an abnormal prejudice or inconvenience.

⁴⁴⁰ Annexure 9 rule 5. Pienaar *Sectional titles and other fragmented property schemes* 243 highlights that the model rule makes no reference to the exclusive use areas in this regard and suggests that the rule must be amended so as to include exclusive use areas.

or to prejudice the harmonious or aesthetic appearance of the scheme;⁴⁴¹ and that an owner may not use his unit for any other purposes other than what was indicated on the sectional plan unless they have obtained written consent of all the other owners in the scheme.⁴⁴²

Despite all the restrictions the rules may create, sectional ownership is still worthy of the same status as landownership.⁴⁴³ The reason for this is that the South African judicial system provides for sufficient measures to invalidate draconian provisions which are considered to be incompatible with modern sectional ownership.⁴⁴⁴

3.2.2 Body corporate

The functions of the body corporate prescribed in the *Management Act*⁴⁴⁵ closely resemble the functions of the body corporate as prescribed in the *Sectional Titles Act*.⁴⁴⁶ The body corporate acts through its trustees and is mainly responsible for the administration and the management of the scheme.⁴⁴⁷ Subsequent hereto the body corporate is also responsible to enforce the provisions of the Act, the regulations to the Act and the rules of the scheme.⁴⁴⁸

⁴⁴¹ Annexure 8 rule 68(1)(i). In this regard also see *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate* 2003 5 SA 1 (C) 61-7A where occupants of a unit engaged in prostitution and drug dealing whereby they were in deliberate violation of the conduct rules. Even though the court granted an interdict, no eviction order could be granted by the court due to the lack of precedent with regard to such a strong limitation on the property rights (G-I). Also see Pienaar *Sectional titles and other fragmented property schemes* 234-237.

⁴⁴² Section 13(1)(g) of the *Management Act*. In this regard it is important to note that consent may not be denied unreasonably. If an owner is of the opinion that consent has been denied unreasonably, he/she may apply for a court order. See para 44(2)(a) of the *Sectional Titles Act* 95 of 1986 read with section 13(2) of the *Management Act* for the procedure he/she will be required to follow in this regard. Also see *Cujè-Jakoby v Kaschub* 2007 3 SA 345 (C) paragraph 10 for accepted standards of reasonableness in this regard. See para 13 of the *Management Act* for the full list of duties of owners as well as Pienaar *Sectional titles and other fragmented property schemes* 234-237 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 8.2.2.3 (2014 Service 24) for a full discussion thereof.

⁴⁴³ Van der Merwe *Sectional Titles, share blocks and time sharing*, vol 1, para 8.2.3 (2014 Service 24).

⁴⁴⁴ Van der Merwe *Sectional Titles, share blocks and time sharing*, vol 1, para 8.2.3 (2014 Service 24).

⁴⁴⁵ Section 3 of Act 8 of 2011.

⁴⁴⁶ The repealed ss 37(1)-(3) of the *Sectional Titles Act* 95 of 1986.

⁴⁴⁷ The repealed ss 35(2)(a)-(b) of the *Sectional Titles Act* 95 of 1986. This is now envisaged in section 10(2)(a)-(b) of the *Management Act* and Annexures 1 and 2 thereof.

⁴⁴⁸ As discussed in Chapter 3. Also see s 36(4) of the *Sectional Titles Act* 95 of 1986 together with s 2(5) of the *Management Act*.

The functions of the body corporate that are statutorily prescribed include the responsibility to maintain the common property, to establish a maintenance fund for this purpose⁴⁴⁹ and to insure the buildings and the common property.⁴⁵⁰ The *Ombud Service Act*⁴⁵¹ makes provision for any owner to approach the ombud service if they are of the view that insufficient provision has been made in the budget for maintenance regarding the administrative fund to obtain an order that declares the contribution that was levied on owners as incorrect and to further order the adjustment thereof.⁴⁵² The *Management Act*⁴⁵³ supports this by providing the body corporate with the necessary recourse to recover the contributions that were accrued when the trustees passed a resolution so as to effect a swifter application to an ombud instead of the time-consuming procedure by any competent court that has the necessary jurisdiction to attend to the matter.⁴⁵⁴ This Act further provides that the successor in title will be liable for the pro rata payment of these contributions from the date upon which ownership has been transferred.⁴⁵⁵

With regard to special contributions,⁴⁵⁶ the terms of management rule 31(4)⁴⁵⁷ was regulated by the *Sectional Titles Amendment Act*.⁴⁵⁸ This regulation is now better

⁴⁴⁹ Section 3(1)(a) and (b) of the *Management Act* in terms whereof specific provision has been made for the establishment of such a fund with amounts that are reasonably sufficient to attend to the future maintenance of the common property. However, these amounts may not be less than the amounts as prescribed by the minister. Interestingly s 4(g) of the mentioned Act only makes provision for the investment of the money in the administrative fund and is silent with regard to the investment of money in the reserve fund. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.7 (2014 Service 24).

⁴⁵⁰ Pienaar *Sectional titles and other fragmented property schemes* 150-151.

⁴⁵¹ Section 39(1)(c) of the Act.

⁴⁵² Section 39(1)(c) of the Act. In this regard also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 8.2.2.3 (2014 Service 24).

⁴⁵³ Section 3(2) of Act 8 of 2011.

⁴⁵⁴ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.6 (2014 Service 24).

⁴⁵⁵ Section 3(2) of the *Management Act*.

⁴⁵⁶ This is usually for unforeseen expenditure that has not been budgeted for in the annual budget. These unforeseen instances include for example a lift that broke. It is the duty of the body corporate to maintain the common property and therefore they may use the special contributions. This duty of the body corporate was highlighted in *Faiga v Body Corporate of Dumbarton Oaks* 1997 2 SA 651 (W). In this matter the court determined that the body corporate is delictually liable for injuries sustained upon exiting a lift that had not stopped level with the floor. The court highlighted that the basis of liability was due to the bodies corporate that breached their duty by not notifying the users of the lift of this default.

⁴⁵⁷ Management rule 31(4) of the regulations to the *Sectional Titles Act* 95 of 1986.

⁴⁵⁸ 11 of 2010.

regulated by the *Management Act*.⁴⁵⁹ The recovery of such a contribution is also regulated by the *Management Act*⁴⁶⁰ whereby provision has been made that the ombud may be approached in these instances.⁴⁶¹

Another alteration pertains to the opening and operation of a bank account by the body corporate.⁴⁶² There is also a modification with regard to the function to maintain the common property.⁴⁶³ The *Sectional Titles Act*⁴⁶⁴ determines that the body corporate has to "properly" maintain the common property and further specifies the upkeep of the elevators. It may be assumed that the wording in the *Management Act* still obliges the body corporate to properly maintain the common property which includes the upkeep of the elevators despite the fact that the Act only refers to this function of the body corporate as "maintenance" and does not clearly specify "properly maintain".⁴⁶⁵

The final alteration is the new obligation of the body corporate to notify the chief ombud in addition to the local municipality and registrar of its *domicilium citandi et executandi*.⁴⁶⁶ Van der Merwe⁴⁶⁷ explains that this notification to the chief ombud is regarded as essential due to the fact that the ombud service is partially financed by the levies that are collected from community schemes. Another reason for this is because the chief ombud is regarded as the custodian of the rules that governs sectional title schemes.⁴⁶⁸

⁴⁵⁹ Section 3(3) of Act 11 of 2010. This section specifies that any special contribution becomes due upon the passing of a resolution.

⁴⁶⁰ Section 3(2) of Act 11 of 2010.

⁴⁶¹ In this regard also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.6 (2014 Service 24).

⁴⁶² Section 3(1)(g) *Management Act* and the repealed s 37(1)(e) of the *Sectional Titles Act* 95 of 1986. Van der Merwe cautions that the wording of "financial institution" may be too widely interpreted by some managing agents and trustees. In this regard see *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.6 (2014 Service 24).

⁴⁶³ Section 3(1)(1) of the *Management Act* and the repealed s 37(1)(j) of the *Sectional Titles Act* 95 of 1986.

⁴⁶⁴ The repealed s 37(1)(j) of the *Sectional Titles Act* 95 of 1986.

⁴⁶⁵ In this regard also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.6 (2014 Service 24).

⁴⁶⁶ Section 3(1)(o) of the *Management Act* read with section 37(1)(m) of the *Sectional Titles Act* 95 of 1986.

⁴⁶⁷ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.6 (2014 Service 24).

⁴⁶⁸ Sections 4(1)(d) and 22(1)(b) of the *Ombud Service Act*.

Notably the remainder of the functions of the body corporate are stated in the *Management Act*.⁴⁶⁹

In the event of the body corporate failing to fulfil its functions and duties, the aggrieved members will have the following recourse measures available.⁴⁷⁰ They may lodge an application for an interdict compelling the trustees of the body corporate to fulfil its functions and duties.⁴⁷¹ An application may also be lodged for the appointment of an administrator to fulfil the functions and duties on behalf of the body corporate.⁴⁷² They may also call for a special general meeting with the purpose of removing the existing trustees and electing other trustees who will be required to fulfil these statutory functions and duties.⁴⁷³ Lastly, the aggrieved members may also lodge an application for the appointment of a curator *ad litem* to recover damages that the body corporate has failed to recover.⁴⁷⁴

3.2.3 Trustees

The trustees, as the executive and management organ, together with the body corporate, are responsible to adhere to the functions as envisaged in the management rules and resolutions of the general meetings of the body corporate.⁴⁷⁵ Upon perusal of the *Management Act*, it is notable that section 7(1) thereof mirrors section 39(1) of the

⁴⁶⁹ Sections 3(1)(h)–(k), (m), (n), (p), (q), (r), (s) and (6) of Act 8 of 2011. Previously contained in s 37(1)–(3) of the *Sectional Titles Act* 95 of 1986.

⁴⁷⁰ In this regard also see *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 5 SA 414 (W) para 8.

⁴⁷¹ Sections 37(1) and 39(1) of the *Sectional Titles Act* 95 of 1986 have been repealed. The abovementioned is currently envisaged in s 3(1) and s 7(1) of the *Management Act*.

⁴⁷² This application was contained in the repealed s 46 of the *Sectional Titles Act* 95 of 1986 and entailed that the administrator had to perform these functions and duties excluding the body corporate thereto. This is now envisaged in section 16 of the *Management Act*.

⁴⁷³ A special meeting may be convened in terms of Annexure 8 rule 13(e) of the regulations to the *Sectional Titles Act*.

⁴⁷⁴ Section 36(6) of the *Sectional Titles Act* 95 of 1986 which has been repealed as from 7 October 2016. See s 2(7) with regard to the *locus standi* of the body corporate. Also see s 41 of the repealed *Sectional Titles Act* 95 of 1986. Section 9 of the *Management Act* currently provides for the appointment of a *curator ad litem*.

⁴⁷⁵ See s 37, s 38 and s 39(1) together with Annexure 8 rules 28–44 of the *Sectional Titles Act* 95 of 1986 which have been repealed as from 7 October 2016. This is currently envisaged in s 3, 4, 5 and 7(1) of the *Management Act*.

*Sectional Titles Act*⁴⁷⁶ and provides that the trustees are to exercise the functions and powers of the body corporate which must be subject to the Act, rules and any restriction imposed or direction granted at a general meeting.⁴⁷⁷ Section 7(3) of the *Management Act* is an exact duplication of section 39(2) in terms whereof the trustees are regarded as the owners of land for the purposes of an agreement entailing the beacons and boundaries of the common property envisaged in the *Land Survey Act*.⁴⁷⁸ Section 7(2) of the *Management Act* makes provision for an additional function that has been extracted from section 21(1) of the *Sectional Titles Act*⁴⁷⁹ empowering the trustees to receive applications by owners regarding the subdivisions or consolidations of sections and subsequently granting permission thereto which permission may not be unreasonably withheld. Section 8 of the *Management Act* resembles section 40 of the *Sectional Titles Act*⁴⁸⁰ and the only notable difference is the replacement of the word "shall" by the word "must". The *Management Act* makes no mention of fiduciary duties that have been breached nor does it provide directives in this regard. However, section 40(3) of the *Sectional Titles Act*⁴⁸¹ makes specific reference to a trustee's *mala fide* or grossly negligent Act that causes a breach of the fiduciary duty and provides directives thereto.

3.2.4 Managing agent

The appointment of a managing agent, together with its functions, powers and duties are envisaged in the management rules.⁴⁸² The rules clearly determine that this is required to be agreed upon in writing. Pienaar⁴⁸³ explains that certain functions and powers may create a fiduciary relationship with the body corporate or the trustees while other functions and powers will be based on the ordinary principles of agency. This will have a

⁴⁷⁶ 95 of 1986.

⁴⁷⁷ A notable difference is the replacement of the word "shall" to "must". In this regard also see *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.10 (2014 Service 24).

⁴⁷⁸ 8 of 1997. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.13.10 (2014 Service 24) in this regard.

⁴⁷⁹ 95 of 1986.

⁴⁸⁰ 95 of 1986.

⁴⁸¹ Section 40(3) of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016.

⁴⁸² Annexure 8 rule 46(1).

⁴⁸³ Pienaar *Sectional titles and other fragmented property schemes* 191-192.

direct influence on the liability of the managing agent.⁴⁸⁴ It must further be borne in mind that the appointment of a managing agent does not pardon the trustees from their functions, powers and duties.⁴⁸⁵ Pienaar also lists the powers and duties that may be expected from the managing agents. This entails the collection of levies and contributions; attending to the payment of expenses of the scheme; the fulfilment of obligations towards the public and local authority on behalf of the scheme; the management and administration of the scheme on behalf of the body corporate; advising the body corporate on their role; attending meetings if required; record keeping of the administration of the scheme; and providing assistance with the enforcement of the rules.⁴⁸⁶

3.3 Enforcement of the rules and sanctions for noncompliance

The social harmony and financial stability of the scheme are safeguarded by the rules of the scheme. Generally, owners adhere to the rules, but in practice one does encounter owners who have a total disregard for the rules and who are deliberately and continually breaching the rules. In these instances, the trustees are authorised to enforce the rules of the body corporate and may therefore issue sanctions for noncompliance. An aggrieved party may institute proceedings on behalf of the body corporate if the trustees fail to remedy such a breach. Here, specific reference will be made with regard to mechanisms for the enforcement of the rules as well as the sanctions for noncompliance with financial and nonfinancial obligations in terms of the *Sectional Titles Act*.⁴⁸⁷

3.3.1 Directives with regard to the breach of financial obligations

Sections 3.3.1 and 3.3.2 highlight directives as provided for previously. As from 7 October 2016 arrear levies may be recovered by lodging an application to the ombud.⁴⁸⁸ It is

⁴⁸⁴ Pienaar *Sectional titles and other fragmented property schemes* 191-192. Also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 475.

⁴⁸⁵ Annexure 8 rule 28(1), (2) and 46(1) read with s 39(1) of the *Sectional Titles Act* 95 of 1986. These sections have been repealed as from 7 October 2016. This is currently envisaged in section 7(1) of the *Management Act*.

⁴⁸⁶ Pienaar *Sectional titles and other fragmented property schemes* 191-192.

⁴⁸⁷ 95 of 1986.

⁴⁸⁸ Section 3(2) of the *Management Act*.

important to understand that provision has been made with regard to the breach of financial and nonfinancial obligations. Previously, if an owner has breached his/her duty by being in default with levy contributions, the trustees may institute legal proceedings against such an owner.⁴⁸⁹ In these instances the trustees were entitled to recover the arrear amount, the legal costs⁴⁹⁰ for instituting the proceedings as well as the interest that has accrued.⁴⁹¹ The management rules also expressly determined that owners who are in default regarding their levies are not entitled to vote for ordinary resolutions at general meetings.⁴⁹² However, this deprivation did not include the owners' voting rights with regard to participation to a special and/or unanimous resolution regarding the management of the scheme, as this had an impact on all owners of the scheme.⁴⁹³

Registration of transfer of ownership of a sectional title unit may not be registered in the deeds registry without a conveyancer's certificate confirming that at date of registration the body corporate has certified that all monies have been paid or that provision has been made for payment hereof.⁴⁹⁴ This is referred to as the restraint or embargo provision, which is enforced on the alienation of a unit⁴⁹⁵ and is discussed in detail in section 4.1.1.1.

The movable assets of a defaulting owner may also have been attached and sold in execution once an order to that effect has been obtained by the body corporate.⁴⁹⁶ Only if the body corporate received a return of *nulla bona* may the unit of the defaulting owner be attached and sold in execution.⁴⁹⁷ The body corporate's rights ranked higher than that

⁴⁸⁹ Sections 37(1) and 47 of the *Sectional Titles Act* 95 of 1986 and Annexure 8 rules 30 and 31(1). Also see Van der Merwe *Constitutionality of the rules governing sectional title schemes* 65.

⁴⁹⁰ Annexure 8 rule 31(5). As from 7 October 2016 arrear levies may be recovered by lodging an application to the ombud in terms of s 3(2) of the *Management Act*.

⁴⁹¹ Section 37(5) of the *Sectional Titles Act* 95 of 1986 read with Annexure 8 rule 31(6). In this regard also see Van der Merwe and Erasmus 1999 *THRHR* 261.

⁴⁹² Annexure 8 rule 64(a).

⁴⁹³ Van der Merwe *Constitutionality of the rules governing sectional title schemes* 66.

⁴⁹⁴ Section 15B(3)(A)(i)(aa) of the amended *Sectional Titles Act* 95 of 1986 and also Van der Merwe *Constitutionality of the rules governing sectional title schemes* 66.

⁴⁹⁵ Pienaar *Sectional titles and other fragmented property schemes* 212-213. Also see Segal *SALJ* 553. See para 4.1.1.1.

⁴⁹⁶ Annexure 8 rule 36. Also see section 66(1)(a) of the *Magistrates' Court Act* 32 of 1944 read with the *Uniform Rules of the High Court* 45(1) GN R48 in GG 999 of 12 January 1965). Also see Van der Merwe *Constitutionality of the rules governing sectional title schemes* 66-67.

⁴⁹⁷ A *nulla bona* return confirms that there are not sufficient movable assets that can be attached to cover the debt. The immovable property may only be attached upon the receipt of a *nulla bona* return.

of mortgage bond holders as the body corporate was entitled to claim the proceeds of the sale.⁴⁹⁸ If the defaulting owner leased his/her unit, the rent that was due to him/her could also have been attached by the body corporate.⁴⁹⁹ Provision was also made for sanctions such as administration orders,⁵⁰⁰ emolument attachment orders⁵⁰¹ and garnishee orders⁵⁰² in the *Magistrates' Courts Act*.⁵⁰³ Another alternative was to institute sequestration proceedings against the defaulting owner. However, the latter option would most probably amount to the incurring of high costs and was also a time consuming route to follow.⁵⁰⁴

3.3.2 Directives with regard to the breach of nonfinancial obligations

The management rules could also provide for financial penalties in instances where rules regarding the administration, management and control of the common property were being violated.⁵⁰⁵ In terms of these rules a sectional owner who was in constant and deliberate breach of the conduct rules, despite being issued with written warnings, may have been denied a voting right. However, this was only applicable for ordinary resolutions and therefore regarded as an ineffective measure as the sectional owner would still be permitted to vote in the case of unanimous and/or special resolutions.⁵⁰⁶ The trustees or managing agent may also have issued a written notice to sectional owners requesting them to attend to maintenance of their sections or the exclusive use area. Should the sectional owner be in default hereof after thirty days, the trustees or the

⁴⁹⁸ Pienaar *Sectional titles and other fragmented property schemes* 212-220. Also see *Barnard NO v Regspersoon van Aminie* 2001 3 SA 973 (SCA).

⁴⁹⁹ Section 68 of the *Magistrates' Court Act* 32 of 1944. Also see Van der Merwe *Constitutionality of the rules governing sectional title schemes* 67 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.11 (2014 Service 24) in this regard.

⁵⁰⁰ Section 74-74W of the *Magistrates' Court Act* 32 of 1944.

⁵⁰¹ Section 65J of the *Magistrates' Court Act* 32 of 1944.

⁵⁰² Section 72 of the *Magistrates' Court Act* 32 of 1944.

⁵⁰³ 32 of 1944.

⁵⁰⁴ In this regard see Van der Merwe *Constitutionality of the rules governing sectional title schemes* 66-67.

⁵⁰⁵ Sections 37(1)(r) and 38(j) of the *Sectional Titles Act* 95 of 1986 which sections have been repealed as from 7 October 2016. This is now envisaged in ss 3(1)(t) and 4(i) of the *Management Act*. Also see Pienaar *Sectional titles and other fragmented property schemes* 209-211 and Nel 2003 *De Rebus* 30 in this regard.

⁵⁰⁶ Annexure 8 rule 64(b). Also see Pienaar *Sectional titles and other fragmented property schemes* 209.

managing agent may attend to the necessary repairs and recover the reasonable costs from the sectional owner.⁵⁰⁷ Furthermore, the rules determined that the owners would be liable for all legal costs on an attorney-and-client scale if legal action was required to be instituted against the sectional owners. These costs included collection commission, charges and expenses incurred by the body corporate.⁵⁰⁸

The conduct rules also made provision for relief of certain violations. These included the removal of a vehicle that is on the common property without the necessary consent. This removal was at the expense of the owner of such a vehicle and the trustees could also not be held liable for such a removal.⁵⁰⁹

A court order may have been obtained in instances where an interdict or urgent relief was required. The enforcement hereof was sanctioned by rule 71(1) of the management rules.⁵¹⁰ These court orders normally gave effect for specific performance, an interdict,⁵¹¹ an action for damages, and for the payment of legal costs.⁵¹² However, it was cautioned that one should be mindful when following the path of litigation, as it is an expensive and time-consuming enforcement mechanism and may even disturb the social cohesion in a sectional title scheme.⁵¹³

3.4 Legal nature of legislation governing share block schemes

There are a few distinctions between share block schemes and sectional title schemes. One distinction is that the rules of a share block scheme are based on a contract and the application thereof may be reviewed by the court.⁵¹⁴ The use agreement concluded

⁵⁰⁷ Annexure 8 rule 70. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.34 (2014 Service 24) in this regard.

⁵⁰⁸ Annexure 8 rule 31(5). Also see Pienaar *Sectional titles and other fragmented property schemes* 209.

⁵⁰⁹ Pienaar *Sectional titles and other fragmented property schemes* 209 – 211.

⁵¹⁰ In this regard see section 3.1.1.2 in terms whereof it is explained that in terms of s 10(2)(a) previous rules will remain in force on condition that the rules are not irreconcilable with the prescribed management rules envisaged in s 10(2)(a) of the *Management Act* 8.

⁵¹¹ *Body Corporate Montpark Drakens v Smuts* (22380/05) [2006] ZAGPHC 38. Also see Van der Merwe *Constitutionality of the rules governing sectional title schemes* 68.

⁵¹² Annexure 8 rule 31(5) of the *Sectional Titles Act* 95 of 1986. Also see Van der Merwe *Constitutionality of the rules governing sectional title schemes* 68.

⁵¹³ Pienaar *Sectional titles and other fragmented property schemes* 221. Also see sections 4.1.1.2–4.1.1.4 for a discussion on the remedies that are available.

⁵¹⁴ Pienaar *Sectional titles and other fragmented property schemes* 361.

between the company and the shareholder dictates the terms and conditions whereby the immovable property of the share block scheme must be used.⁵¹⁵ The company is obliged to keep a copy of this signed agreement at the share block company alternatively at a place which the registrar was notified of.⁵¹⁶ A copy of this must furthermore be lodged with the Companies and Intellectual Property Commission.⁵¹⁷

A second distinction is that the share block scheme is also governed by management and conduct rules. However, these rules are not statutorily prescribed and are contained in a separate set of rules other than the use agreement.⁵¹⁸ A third distinction is that the financial duties of directors are statutorily prescribed and not contained in the management or conduct rules.⁵¹⁹

The use rights of the share block scheme are also constitutionally protected and therefore it is evident that the same constitutional principles that apply to the use restrictions of a sectional title scheme will be applicable to share block schemes.⁵²⁰ In order to understand the functioning of a share block scheme, a brief overview is given of the rights and duties of directors and share block holders in a share block scheme.⁵²¹

3.4.1 Rights and duties of directors

The directors are regarded as the managing organ of a company. However, their power is restricted in that they are only permitted to exercise the powers that fall within the capacity of the company which capacity is restricted to its main object.⁵²² The main object of a share block scheme vests in the operation of the immovable property owned or, alternatively, leased by the share block company.⁵²³ Consequently, any Act that is

⁵¹⁵ Sections 1 and 7(2) of the *Share Block Control Act* 59 of 1980.

⁵¹⁶ Section 7(3) of the *Share Block Control Act* 59 of 1980.

⁵¹⁷ Pienaar *Sectional titles and other fragmented property schemes* 359.

⁵¹⁸ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 5.4 (2014 Service 24).

⁵¹⁹ Section 19(1) of the *Share Block Control Act* 59 of 1980.

⁵²⁰ Section 25 of the *Constitution of the Republic of South Africa* 108 of 1996. Also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 579.

⁵²¹ See para 2.3.2 for a discussion of the legal nature of share block schemes.

⁵²² Pienaar *Sectional titles and other fragmented property schemes* 221.

⁵²³ Section 7(1), 8(1)(a)-(c) of the *Share Block Control Act* 59 of 1980. Also see *Van Staden v Fourie* 1989 (3) SA 200 (A) 212H-213A. Pienaar *Sectional titles and other fragmented property schemes* 339.

superfluous of the company's capacity, is regarded to be void.⁵²⁴ Restrictions of the directors entail that they may only alienate immovable property or, alternatively, cede any right to the immovable property by way of a special resolution obtained by a general meeting.⁵²⁵ Furthermore, the loan obligation of the company may only be increased upon the approval of a resolution of seventy-five percent of all members.⁵²⁶ The same principle is applicable regarding company assets that are to be encumbered.⁵²⁷ The directors' power to convert a share block scheme into a sectional title scheme is also restricted⁵²⁸ and the provisions in this regard are governed by the *Share Block Control Act*.⁵²⁹

The directors are obliged to govern and administer the levy fund which is regarded as the sole income of a share block scheme which must be used to maintain the property of the scheme.⁵³⁰ A trust account at a building society or bank must be opened by the directors and the funds which are deposited saved. Interest incurred therein must be used for the redemption of the company's loan obligation.⁵³¹ Proper financial records must also be kept at the registered office of the company. These records are required to be drafted in an official language and must reflect the allocated loan contributions received from shareholders or members.⁵³² A further duty is that a specimen of the use agreement needs to be lodged with the registrar of companies before any agreement may be concluded with the shareholder or member.⁵³³ The directors must also furnish a prospective seller with the necessary information in order for the seller to be able to draft

⁵²⁴ Section 8(1)(d) of the *Share Block Control Act* 59 of 1980. Section 8(1)(d)(i) further determines that if a third party who acted in good faith was prejudiced by a person who exercised a void act on behalf of the company, the third party may hold such a person personally liable. Pienaar *Sectional titles and other fragmented property schemes* 339.

⁵²⁵ Section 8(1)(c) of the *Share Block Control Act* 59 of 1980. Pienaar *Sectional titles and other fragmented property schemes* 339.

⁵²⁶ Section 14(1) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 340.

⁵²⁷ Section 14(1) of the *Share Block Control Act* 59 of 1980.

⁵²⁸ Pienaar *Sectional titles and other fragmented property schemes* 341.

⁵²⁹ 59 of 1980.

⁵³⁰ Butler *The use and control of share blocks in South African law* 1987 224-228. Just as with sectional title schemes, the levy fund is for the maintenance of the scheme.

⁵³¹ Sections 15(1)-(2) and 15(4)(a) of the *Share Block Control Act* 59 of 1980. Section 15(4)(b) further determines that trust money may not be attached in a writ of execution.

⁵³² Section 14(3) of the *Share Block Control Act* 59 of 1980.

⁵³³ Section 7(5) of the *Share Block Control Act* 59 of 1980 and also regulation 5 of the *Share Block Companies Regulations*.

the sale agreement.⁵³⁴ All immovable property of the share block scheme should be insured against damages.⁵³⁵ Lastly, the directors have a fiduciary duty to exercise their powers and duties *bona fida* and solely for the benefit of the company.⁵³⁶

3.4.2 Rights and duties of shareholders or members

Any person who has an interest in the company is regarded as a member.⁵³⁷ Each member has the right to vote at any meeting of the company.⁵³⁸ A shareholder or member also obtains the right to use their share in the share block scheme.⁵³⁹ This occupancy right is determined in the use agreement⁵⁴⁰ which also determines the use of common areas.⁵⁴¹ Shareholders or members also have the right to dividends and payment on winding-up. Shareholders or members may take part in the surplus on the winding-up of the company. However, this participation may only take place after all claims of creditors and the costs of the winding-up have been settled in full.⁵⁴² If the right to shares in a share block company has been sold prior to incorporation of that company, the shareholders or members will be protected in that no other person will be considered for a sale of shares before the incorporation of the share block company.⁵⁴³ If requirements regarding the content of share sale contracts have not been met, the shareholder or member is protected in that the contract is regarded as null and void.⁵⁴⁴

⁵³⁴ Section 17(4) of the *Share Block Control Act* 59 of 1980 read with schedule 2.

⁵³⁵ Section 19(1) of the *Share Block Control Act* 59 of 1980. In this regard also see Butler *The use and control of share blocks in South African law* 1987 234-239.

⁵³⁶ Pienaar *Sectional titles and other fragmented property schemes* 351.

⁵³⁷ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 4.1 (2014 Service 24).

⁵³⁸ Sections 3(1)(b), 10(a) and 57 of the *Companies Act* 71 of 2008. Also see s 3(1)(b) of the *Share Block Control Act* 59 of 1980. See also Butler *The use and control of share blocks in South African law* 1987 177-183.

⁵³⁹ Section 10(b) of the *Share Block Control Act* 59 of 1980. See also Butler *The use and control of share blocks in South African law* 1987 174-177.

⁵⁴⁰ Section 7(2) of the *Share Block Control Act* 59 of 1980.

⁵⁴¹ Pienaar *Sectional titles and other fragmented property schemes* 368.

⁵⁴² Sections 342(1) and 366(2) of the *Companies Act* 71 of 2008.

⁵⁴³ Section 5A(1) of the *Share Block Control Act* 59 of 1980. Pienaar *Sectional titles and other fragmented property schemes* 371-372 explains the exceptions to this rule.

⁵⁴⁴ Section 17(1) and 18(2) of the *Share Block Control Act* 59 of 1980.

The memorandum of incorporation may make provision for compulsory loans by its shareholders or members.⁵⁴⁵ All members of the company are obliged to contribute to the loan obligation of the company⁵⁴⁶ as well as to the levy fund.⁵⁴⁷ They further have the duty to maintain the immovable property of the share block company and to familiarise themselves with the rules of the company.⁵⁴⁸

3.5 Sanctions for noncompliance

Although the enforcement of sanctions is undesired, it is necessary in certain circumstances in order to uphold the social harmony and ensure the financial stability of the scheme. Unlike sectional title schemes, no statutory provision regarding sanctions are made in the *Share Block Control Act*.⁵⁴⁹ The sanctions are usually contained in the use agreement, articles, memorandum, or additional rules.⁵⁵⁰ The enforcement measures that are usually used is to convince shareholders or members by means of resolutions that are passed at general or shareholders meetings. Another alternative is that directors may issue warnings or in instances of a more serious nature issue written warnings.⁵⁵¹ However, these measures are not that effective as it is regarded as *soft enforcement*.⁵⁵² Additional measures may therefore be required. These measures entail that shareholders may be denied their voting right should they persist breaching the rules or contractual obligations.⁵⁵³ In terms of the use agreement, provision is usually made that directors may recover expenses for the general and required maintenance to a shareholder's property needed due to failure on the part of the shareholder. Even though litigation is always an option in share block schemes by virtue of the fact that it is based on contract,

⁵⁴⁵ Section 3(c) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 377 in this regard.

⁵⁴⁶ Section 14(3) of the *Share Block Control Act* 59 of 1980. Also see Pienaar *Sectional titles and other fragmented property schemes* 377 in this regard.

⁵⁴⁷ Section 13(1) of the *Share Block Control Act* 59 of 1980.

⁵⁴⁸ Pienaar *Sectional titles and other fragmented property schemes* 378-379.

⁵⁴⁹ 59 of 1980.

⁵⁵⁰ Butler *The use and control of share blocks in South African law* 1987 196-201.

⁵⁵¹ Pienaar *Sectional titles and other fragmented property schemes* 382.

⁵⁵² Pienaar *Sectional titles and other fragmented property schemes* 382.

⁵⁵³ This sanction is not considered to be effective as the shareholders who are in constant breach might seldom attend general meetings. In this regard also see Pienaar *Sectional titles and other fragmented property schemes* 382.

caution must be exercised when considering this option due to the negative impact this might have on the social cohesion of the share block scheme.⁵⁵⁴ It is therefore recommended that the additional rules, articles of memorandum or the use agreement makes provision for compulsory mediation and arbitration procedures. However, serious violation warrants litigation in the form of an interdict.⁵⁵⁵ In the instances where a shareholder or member is in default with his financial obligations, the company may establish a lien over the shareholder or member's share blocks.⁵⁵⁶

3.6 Time-sharing scheme

Developers who use the share block method to operate a time-sharing scheme with regard to immovable property are not only bound to the provisions of the *Share blocks Control Act*,⁵⁵⁷ but also⁵⁵⁸ to the *Property Time-Sharing Control Act*,⁵⁵⁹ Therefore, the *Property Time-Sharing Control Act*⁵⁶⁰ dictates the provisions regarding the contents of a contract for alienation of a time-share;⁵⁶¹ contracts containing certain provisions which is regarded to be invalid;⁵⁶² restrictions on the advertising of time-shares;⁵⁶³ information to which prospective purchasers are entitled to;⁵⁶⁴ as well as the restriction on the receipt of consideration.⁵⁶⁵ However, time-sharing schemes using the share block method are

⁵⁵⁴ Pienaar *Sectional titles and other fragmented property schemes* 383.

⁵⁵⁵ In this regard see Pienaar *Sectional titles and other fragmented property schemes* 383.

⁵⁵⁶ Pienaar *Sectional titles and other fragmented property schemes* 383.

⁵⁵⁷ 59 of 1980.

⁵⁵⁸ Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.7 (2014 Service 24). Also see Butler *The use and control of share blocks in South African law* 1987 32-33.

⁵⁵⁹ 75 of 1983.

⁵⁶⁰ 75 of 1983.

⁵⁶¹ Section 4 of the *Property Time-sharing Control Act* 75 of 1983. Also see Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.7 (2014 Service 24). See further Butler *The use and control of share blocks in South African law* 1987 32-33.

⁵⁶² Section 5(1) of the *Property Time-sharing Control Act* 75 of 1983. Also see Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.7 (2014 Service 24). See further Butler *The use and control of share blocks in South African law* 1987 32-33.

⁵⁶³ Section 6 and regulation 3 of the *Property Time-sharing Control Act* 75 of 1983. Also see Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.7 (2014 Service 24). See further Butler *The use and control of share blocks in South African law* 1987 32-33.

⁵⁶⁴ Regulation 4 of the *Property Time-sharing Control Act* 75 of 1983. Also see Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.7 (2014 Service 24). See further Butler *The use and control of share blocks in South African law* 1987 32-33.

⁵⁶⁵ Section 7 of the *Property Time-sharing Control Act* 75 of 1983. See further Butler *The use and control of share blocks in South African law* 1987 32-33.

not subject to the provisions of the *Property Time-Sharing Control Act*⁵⁶⁶ due to the fact that the *Share Blocks Control Act*⁵⁶⁷ replicates the protection provided for investors in such schemes.⁵⁶⁸ Time-sharing developers and prospective purchasers of share blocks in time-sharing schemes are relieved from the compliance with the problematic management regulations⁵⁶⁹ envisaged in the *Property Time-Sharing Control Act*.⁵⁷⁰ It may be assumed that this exemption is mainly due to the fact that the rules which are applicable to share block companies warrants that time-sharing schemes using the share block method will be properly managed.⁵⁷¹

3.7 Retirement schemes

As discussed in Chapter 2 a retirement scheme may be managed as a sectional title scheme, a share block scheme, based on life rights, or based on occupancy rights as limited real rights. With regard to the management of retirement schemes, a scheme based on life rights seem to be the most popular option. When comparing the rights and duties of members in retirement schemes and time-sharing schemes it is notable that the contract formalities, content of contracts, remedies for purchasers with regard to non-compliance of formalities, the requirements for advertising as well as the purchasers' rights with regard to documentation is so to say identical to one another. Both schemes require contracts to be in writing and signed by all relevant parties. It is therefore regarded to be based on common law principles. Sections 4 and 5 of the *Property Time-Sharing Control Act*⁵⁷² and section 4 of the *Housing Development Scheme for Retired Persons Act*⁵⁷³ prescribe requirements regarding the contents of these contracts.⁵⁷⁴ With reference to both schemes the non-compliance with formalities grants the purchaser the

⁵⁶⁶ 75 of 1983.

⁵⁶⁷ 59 of 1980.

⁵⁶⁸ Section 10 of the *Property Time-sharing Control Act* 75 of 1983. Also see Sonnekus *Sectional titles, share blocks and time sharing*, vol 2, para 1.7 (2014 Service 24).

⁵⁶⁹ Regulation 2 of the *Property Time-sharing Control Act* 75 of 1983.

⁵⁷⁰ Act 75 of 1983.

⁵⁷¹ Butler *The use and control of share blocks in South African law* 1987 32-33.

⁵⁷² 75 of 1983.

⁵⁷³ 65 of 1988.

⁵⁷⁴ With regard to both schemes, these sections are applicable in addition to other statutory requirements such as s 17(1) of the *Share Block Control Act* 59 of 1980 read with schedule 2 thereof.

rights to take legal action within two years from the date on which the contract was concluded.⁵⁷⁵ All relevant information is required to be disclosed in advertisements regarding these two schemes.⁵⁷⁶

3.8 Conclusion

In this chapter a statutory analysis has been undertaken in order to provide a description of the rules governing each scheme. The various types of rules as well as the legal nature of these rules were analysed in order to understand the functioning and scope of the application of the rules of the different schemes. A brief discussion followed regarding the enforcement mechanisms available in each scheme together with the effectiveness of the sanctions for non-compliance. The impact of the *Management Act* and the *Ombud Service Act* on sectional title schemes has also been highlighted. Therefore, it may be concluded that the rules together with its enforcement mechanisms are imperative to uphold the social cohesion and ensure the financial stability in each scheme.

The discussion in this chapter also served to identify the legal recourse which is available to the aggrieved parties in the different schemes, therefore making it necessary in the next chapter to critically analyse and evaluate disputes that may arise in each scheme, together with the effectiveness of the various methods of dispute resolution that is available.

⁵⁷⁵ In this regard see Pienaar *Sectional titles and other fragmented property schemes* 439–443 and 478–479.

⁵⁷⁶ With regard to time-sharing see s10 of the *Property Time-Sharing Control Act* 75 of 1983, s 141(4) and 157 of the *Companies Act* 61 of 1973 as well as Butler "Time-sharing" LAWSA 1st Reissue (2002) para 483. With reference to retirement schemes see regulation 3 of the *Housing Development Scheme for Retired Persons Act* 65 of 1988 and Butler *TSAR* 225.

4 Chapter 4: Remedies and settlement of disputes

4.1 Introduction

Disputes are inevitable when it comes to fragmented property schemes, mainly due to the fact that these schemes usually involve a large number of residents in a high-density living space. The disputes that arise in fragmented property schemes are mainly in respect of the application and enforcement of the rules. It is, therefore, imperative to protect the social cohesion and community spirit of each scheme when solving these disputes. The aim of this chapter is to explore the various avenues whereby disputes may be settled in the various community schemes.⁵⁷⁷

4.1.1 Remedies in sectional title schemes

The remedies available in sectional title schemes include the embargo principle⁵⁷⁸ which entails a sanction for the noncompliance of financial obligations.⁵⁷⁹ In terms hereof the registrar of deeds may not register the unit in the name of the new owner if levies in respect of that unit are in arrears.⁵⁸⁰ In terms of the *Sectional Titles Act*⁵⁸¹ a body corporate could institute legal proceedings in order to recover the arrear levies.⁵⁸² However, in terms of the *Management Act*, the body corporate may only recover arrear levies in terms of the lodgement of an application to the ombud service.⁵⁸³ Arbitration was prescribed in terms of annexure 8 rule 71(2) in terms of the *Sectional Titles Act*.⁵⁸⁴ However, arbitration in terms of this rule was not mandatory and therefore aggrieved parties could follow the litigation route if they chose to. In terms of the *Ombud Service*

⁵⁷⁷ In terms of s 1 of the *Ombud Service Act* community schemes include the following: sectional title schemes; share block schemes; property owners' associations that were established for the administration of a development; housing schemes for retired persons and any other scheme or arrangement in terms of which there is shared use of, and responsibility for parts of land and buildings. It is clear that the Act defines community schemes in such a way as to include every scheme.

⁵⁷⁸ Section 15B(3)(A)(i)(aa) of the amended *Sectional Titles Act* 95 of 1986.

⁵⁷⁹ In this regard see section 3.3.1.

⁵⁸⁰ See para 4.1.1.1 for a full discussion of the embargo principle.

⁵⁸¹ Section 37(2) of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016.

⁵⁸² Litigation is discussed in section 4.1.1.2.

⁵⁸³ Section 3(2) of the *Management Act*.

⁵⁸⁴ 95 of 1986. Arbitration is discussed in section 4.1.1.3.

*Act*⁵⁸⁵ an aggrieved party in any scheme⁵⁸⁶ may still lodge an application to the ombud service to have the matter resolved by way of arbitration. This alternative dispute resolution too is not mandatory as none of these statutes determines that this route *must* be followed. Instead, in the wording of section 38 of the *Ombud Service Act*⁵⁸⁷ it is clear that any person *may* make an application if he/she is materially affected by a dispute.⁵⁸⁸ For clarity, the legal action and different forms of dispute resolution in sectional title schemes are discussed.

4.1.1.1 Embargo principle

As discussed in section 3.3.1, the embargo principle comes into play when there is a dispute regarding arrear levies. The effect hereof is that transfer of a unit cannot take place once the embargo principle applies. The embargo principle is therefore a remedy when it comes to recovering arrear levies. In *Body Corporate of Fish Eagle v Group Twelve Investments*⁵⁸⁹ the court confirmed that a body corporate of a sectional title scheme has a statutory obligation to obtain funds by charging levies as provided for in section 37⁵⁹⁰ read with section 39⁵⁹¹ of the *Sectional Titles Act*. A sectional owner may not withhold the payment of these levies for whatever reason. The judgement further held that the trustees may not bypass this statutory obligation by a decision that the collection of arrear levies be done by way of negotiations instead of litigation. Therefore, a sectional owner who is in arrears with his/her levies will be liable for the cost of collection together with the interest on the arrear levies.⁵⁹² A further sanction that may be imposed on sectional owners if payment of their levies is withheld, is a veto on the right to vote for ordinary

⁵⁸⁵ Section 38 of the *Ombud Service Act* read with regulation 19 thereof.

⁵⁸⁶ This includes share block schemes, time-sharing schemes and retirement schemes.

⁵⁸⁷ Section 38 of the *Ombud Service Act* read with regulation 19 thereof.

⁵⁸⁸ Section 38(1) of the *Ombud Service Act*.

⁵⁸⁹ 2003 5 SA 414 (W).

⁵⁹⁰ Section 37 of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016.

⁵⁹¹ Section 39 of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016.

⁵⁹² Section 37(2) of the *Sectional Titles Act* 95 of 1986. Also see rule 64(a) and (b) of Annexure 8 of the prescribed management rules (which have been repealed as from 7 October 2016) and *Barnard NO V Regspersoon van Aminie* 2001 3 SA 973 (SCA) 982C-D. Also see Van der Merwe 1996 *THRHR* 367 – 387 and Pienaar *Sectional titles and other fragmented property schemes* 157.

resolutions at general meetings.⁵⁹³ A body corporate may, as a final recourse, have to attach a sectional owner's unit and sell it in execution.⁵⁹⁴

The *Sectional Titles Act*⁵⁹⁵ places an embargo on the transfer of a unit if there are outstanding levies.⁵⁹⁶ Therefore, with the registration of transfer of a sectional title unit in a deeds registry, a conveyancer's certificate must be submitted to the registrar in terms of the provisions of the *Sectional Titles Act*⁵⁹⁷ confirming that all monies due to the body corporate have been paid in full or alternatively that satisfactory provision has been made for the payment thereof before a unit may be transferred by the registrar.⁵⁹⁸ Other alternatives available to the body corporate include that payment may be made in terms of a conditional guarantee or by depositing the money into the conveyancers' trust account, accompanied with a undertaking that the agreed amount will be paid to the body corporate upon registration of the transfer.⁵⁹⁹

The courts have been confronted with various constructions of the nature of the embargo provision, being construed as a tacit lien, or a preferent right in favour of the body corporate ranking above a previously registered mortgage.⁶⁰⁰ The Supreme Court of Appeal provided some clarity in this regard in *First Rand Bank Ltd v Body Corporate of Geovy Villa*⁶⁰¹ by determining the significance of the embargo provision in the case of a

593 Rule 64(a) and (b) of Annexure 8 of the prescribed management rules which have been repealed as from 7 October 2016.

594 In *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) the Supreme Court of Appeal determined that the security of a first mortgage creditor supersedes the preference created by the embargo provisions of the *Sectional Title Scheme Act* 95 of 1986. Du Bois *et al Wille's Principles of South African Law* chapter 22.

595 95 of 1986.

596 Du Bois *et al Wille's Principles of South African Law* chapter 22.

597 95 of 1986.

598 Section 15B(3)(a)(i)(aa) of the *Sectional Titles Act* 95 of 1986. The certificate that the conveyancer produces to the registrar is the levy clearance certificate that the managing agent or trustees have issued in terms whereof they confirm the amount that is due and payable for a specified period. This provision places an embargo on the transfer of a unit that is arrear in levies. In terms of section 15B(3)(a)(i)(aa) of the amended *Sectional Titles Act* 95 of 1986 in effect remains the same except for the reference to section 2(1) of the *Management Act* that has been included.

599 Darrol 2007 *De Rebus* 57. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.1.2.4 (2014 Service 24).

600 Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.1.2.4 (2014 Service 24).

601 2004 3 SA 362 (SCA).

transfer from an insolvent estate.⁶⁰² In terms of section 89(1) of the *Insolvency Act* 24 of 1936 the embargo provision may be applied as part of the cost of realisation of the scheme. The significance of the embargo principle was further highlighted in *Nel NO v Body Corporate of the Seaways Building*⁶⁰³ where the interpretation of section 15B(3)(a)(i)(aa)⁶⁰⁴ of the *Sectional Titles Act* was in dispute.⁶⁰⁵ In this matter the liquidator averred that this section is not applicable in the instances of insolvency.⁶⁰⁶ The court determined that the managing agent remains entitled to the outstanding levies irrespective of the sellers' insolvency. Therefore, the managing agent has a preference to payment of the outstanding levies above a previously registered mortgage. Once the debt has been paid the conveyancer will be in a position to deliver the levy certificate to the registrar which in turn will trigger the registration of the transfer. Only hereafter will the mortgagee be in a position to exercise his/her security right. In other words, only after the registration of the transfer, the mortgagee's security right will be satisfied out of the proceeds of the sale.⁶⁰⁷

In *First Rand Bank Ltd v Body Corporate of Geovy Villa*⁶⁰⁸ the Supreme Court of Appeal determined that in cases were the transfer was from a solvent estate, the embargo provision may not be construed as a security right in terms whereof a managing agent will have the same preference as in the case of an insolvent estate.⁶⁰⁹ A judgement creditor's claim for arrear levies is not preferential to the claim of the holder of a mortgage

⁶⁰² *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) para 27. In this regard also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.1.2.4 (2014 Service 24). See also Maree *MCS Courier Newsletter* 4.

⁶⁰³ 1996 1 SA 131 (SCA).

⁶⁰⁴ Section 15B(3)(a)(i)(aa) of the *Sectional Titles Act* 95 of 1986 provides that a deeds registrar may not register the transfer of a unit alternatively of an undivided share therein unless a conveyancer's certificate has been produced which certificate confirms that at the date of registration a body corporate is deemed to be established in terms of section 36(1) and that the body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, alternatively that provision has been made to the satisfaction of the body corporate for the payment thereof.

⁶⁰⁵ 95 of 1986.

⁶⁰⁶ *Nel NO v Body Corporate of the Seaways Building* 1996 1 SA 131 (SCA) para 131I and 135C.

⁶⁰⁷ Section 89(1) of the *Insolvency Act* 24 of 1936 makes provision for an embargo to form part of the cost of realisation within the scheme. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.1.2.4 (2014 Service 24).

⁶⁰⁸ 2004 3 SA 362 (SCA).

⁶⁰⁹ 2004 3 SA 362 (SCA) para 30-31.

bond.⁶¹⁰ Therefore, a body corporate is not entitled to sell a unit in execution⁶¹¹ without the necessary reference to the security afforded to a bank by virtue of the mortgage bond. Consequently, the preference granted to a body corporate or a local authority in terms of section 15B(3)(a)(i)(aa)⁶¹² (in respect of a levy certificate) and 15(3)(b)⁶¹³ (in respect of a municipal clearance certificate) is not the same as the preference granted in terms of section 66(2) of the *Magistrates' Court Act*,⁶¹⁴ in the case of execution procedure.⁶¹⁵ It is therefore clear that the preference of a body corporate's claim for arrear levies does not supersede the preference of a holder of a mortgage bond in the instances where a unit is to be sold in execution in terms of section 66(2).⁶¹⁶

The usual practice entails that the conveyancer requests the managing agent or the trustees to furnish him/her with a levy certificate that confirms the amount that is due and payable up to a specified date. Payment of the said amount is then required before the conveyancer's levy certificate can be submitted to the registrar of deeds and registration of the transfer can take place. Alternatively, the conveyancer undertakes to pay the said amount once registration of the transfer has been effected. This undertaking is most sufficient as the conveyancer will then be personally liable if the monies are not paid to the body corporate.⁶¹⁷

In practise it also occurs that the managing agent or trustees issue a levy certificate without taking into account the special levies which are imposed on a sectional owner. This is problematic as it is extremely difficult to recover these levies.⁶¹⁸ Such an example

⁶¹⁰ *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA). Also see Van der Merwe 1996 *THRHR* 367.

⁶¹¹ Execution in terms of section 66(2) of the *Magistrates' Court Act* 32 of 1944.

⁶¹² Take note that this section has been amended in the *Sectional Titles Act* 95 of 1986.

⁶¹³ Take note that this section has been amended in the *Sectional Titles Act* 95 of 1986.

⁶¹⁴ Act 32 of 1944.

⁶¹⁵ *Magistrates' Court Act* 32 of 1944.

⁶¹⁶ *Magistrates' Court Act* 32 of 1944.

⁶¹⁷ Maree *MCS Courier* (October 2010) 7.

⁶¹⁸ Maree *MCS Courier* (October 2010) 7 explains that in these instances a new sectional title owner will not be automatically liable for special levies that may still be due. Therefore, Maree suggests that all future payment of special levies should be secured before a levy certificate is issued. This may be problematic by virtue of the fact that payment of the special levies is not yet due and payable. He advises that all relevant parties must reach an agreement in terms whereof the new sectional owner accepts responsibility to make payment once the special levies become due and payable.

is seen in *Bowie v The Body Corporate of Cape Royale*.⁶¹⁹ In this matter the managing agent was required to provide the amount due and payable by the seller for a specified period. The seller then paid the full amount on 17 February 2011 for the period until 31 March 2011 as specified. However, the managing agent then refused to furnish the conveyancer with the levy certificate despite the fact that the seller has paid the amount and is not in default of any levies. Consequently, the registration of transfer of the seller's unit was delayed. On 2 March 2011 the seller instituted action against the managing agent in order to compel them to deliver the levy clearance certificate. The managing agent then averred that he was entitled to withhold the levy certificate until the seller also paid the special levies that the trustees were in the process of imposing. The special levies were imposed in terms of a decision that the trustees made on 3 March 2011. This decision was made a day after the seller instituted action against the managing agent and therefore the seller only became aware of such levies after he instituted action. The court determined that the managing agent made no mention of special levies when they issued the levy certificate, nor made any reference thereto when the seller paid the amount in advance.⁶²⁰

The court noted that the trustees made this decision a day after action was instituted by the seller. Furthermore, the court highlighted that in terms of this decision the special levies were only due and payable as from 1 April 2011. Therefore, the court came to the conclusion that this decision was made by the trustees, by virtue of the action that had been instituted against the managing agent and that this decision should have been made during their annual general meeting. The court concluded further that the managing agent was not entitled to withhold the levy certificate due to the fact that the seller had paid the amount in full as determined by them in the levy clearance certificate. Furthermore, the decision regarding special levies would have probably been made during the annual general meeting had it not been for the action that was instituted against them. Therefore, the seller was entitled to the protection provided by section 37(2A)⁶²¹

⁶¹⁹ 2011 ZAWCHC 73.

⁶²⁰ *Bowie v The Body Corporate of Cape Royale* 2011 ZAWCHC 73 paras 1–6.1.

⁶²¹ Section 37(2A) of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016.

and the managing agent was obliged to deliver the levy clearance certificate immediately after the seller had paid the amount determined therein.⁶²²

A municipal clearance certificate is a further requirement before registration of transfer can take place. The *Local Government Municipal System Act*⁶²³ provides that immovable property may only be transferred if the relevant municipality provided a municipal clearance certificate confirming that all monies due and payable relating to rates and taxes for that specific property have been paid, which amount includes municipal service fees payable during the two years preceding the date on which the application has been lodged for the municipal clearance certificate.⁶²⁴ The local municipality has a preferential right to the payment of the outstanding amount in respect of municipal fees, surcharges on fees, property rates and other municipal taxes, levies and duties that have been imposed on the property, ranking above a previously registered mortgage bond against the property.⁶²⁵

Though it is rare, a sectional title scheme may also be operated by a homeowners' association in terms of regulation 30 of the *Sectional Titles Act*.⁶²⁶ The reason why the operation in terms of a homeowners' association is exceptional, is mainly due to the fact that homeowners' associations are not universal in the sense that they are not operated uniformly, as is the case with bodies corporates, which are operated in terms of legislation. Homeowners' associations are managed in terms of each association's own founding documentation but still bound by the regulations of the *Sectional Titles Act*.⁶²⁷

622 *Bowie v The Body Corporate of Cape Royale* 2011 ZAWCHC 73 para 6.2–8.

623 32 of 2000.

624 Section 118(1)(b) of the *Local Government Municipal Systems Act* 32 of 2000. The usual practice entails that once the conveyancer has obtained the levy clearance certificate from the managing agent or the trustees and the municipal clearance certificate from the local municipality the property may be registered for transfer.

625 Section 118(3) of the *Local Government Municipal Systems Act* 32 of 2000. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.1.2.9 (b) (2014 Service 24). In *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* (SCA) 29 March 2005 (Case 240/2003) unreported, the court confirmed that the word "amount" in section 118(3) of the *Local Government Municipal Systems Act* 32 of 2000 referred to the array of debts that are secured by a single charge or hypothec.

626 95 of 1986.

627 95 of 1986. Also see Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 27–28.

A sectional title scheme on the other hand is managed in accordance with the provisions of the *Sectional Titles Act*.⁶²⁸

The distinction between management of a scheme in terms of a homeowners' association and management in terms of the provisions of the *Sectional Titles Act*⁶²⁹ is of importance as management, by virtue of a homeowners' association, is not similar to the management provisions by a body corporate of a scheme.⁶³⁰

This was highlighted in two recent judgements that were handed down by the Supreme Court of Appeal, regarding the right of a homeowners' association to prevent a transfer in the instances where an owner is insolvent or unable to pay overdue levies.⁶³¹ These judgements provided much deserved clarity in practice.⁶³² In *Willow Waters Homeowners Association (Pty) Ltd v Koka*⁶³³ the legal question was whether a title deed condition that restrained an owner from transferring a property without a levy clearance certificate from the homeowners' association can be construed as a personal right or a limited real right.⁶³⁴

The court compared the embargo provision in the title deed to the provisions of section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*⁶³⁵ and section 118 of the *Local Government Municipal System Act*.⁶³⁶ The court came to the conclusion that the aim of these prohibitions is to provide security for the outstanding amounts due to the bodies corporate and local municipalities.⁶³⁷ The homeowners' association argued that the restraint on the transfer of the property in this matter constituted a real right in favour

⁶²⁸ 95 of 1986.

⁶²⁹ 95 of 1986.

⁶³⁰ Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 27-28.

⁶³¹ Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 27-28. Paddock 2015 <http://www.paddocks.co.za/paddocks-press-newsletter/investment-of-body-corporate-funds/>.

⁶³² Paddock 2015 <http://www.paddocks.co.za/paddocks-press-newsletter/investment-of-body-corporate-funds/>.

⁶³³ 2014 ZASCA 220.

⁶³⁴ Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 27-28.

⁶³⁵ 95 of 1986.

⁶³⁶ 32 of 2000.

⁶³⁷ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 paras 24-25.

of the homeowners' association.⁶³⁸ The mortgagee, however, was of the opinion that the homeowners' association only gained a mere personal right by virtue of the restraint and not a real right. The court stated that there are two requirements that need to be met in order to determine whether a condition in this regard is a real right in terms of the subtraction from the *dominium* test. In light hereof the court relied on the judgements handed down in *Cape Explosive Works Ltd v Denel (Pty) Ltd*⁶³⁹ and *Erlax Properties (Pty) Ltd v Registrar of Deeds*.⁶⁴⁰ The first requirement is that the intention of the creator of the right must be to bind the current owner as well as the successors in title.⁶⁴¹ The second requirement is that the right must be of such a nature that registration thereof results in a "subtraction from dominium" of the land against which it is registered.⁶⁴²

With reference to the first requirement the court concluded in *Willow Waters Homeowners Association (Pty) Ltd v Koka*⁶⁴³ that the aim of the embargo was simply to create security for the payment of a debt similar to a lien or a mortgage bond.⁶⁴⁴ It is therefore imperative that all successive owners in the township are also bound hereby.⁶⁴⁵ This requirement was clearly met in this matter.⁶⁴⁶ With regard to the second requirement, the court concluded that one of the rights that ownership comprises of is the right to use or to exclude others from using the property or to give others rights in respect thereof.⁶⁴⁷ Another one of the rights or competencies which ownership comprises, is the right to dispose of the property or *ius disponendi*.⁶⁴⁸ If this right of ownership is

⁶³⁸ Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 27-28. Paddock 2015 <http://www.paddocks.co.za/paddocks-press-newsletter/investment-of-body-corporate-funds/>.

⁶³⁹ 2001 3 SA 569 (SCA).

⁶⁴⁰ 1992 1 SA 879 (A).

⁶⁴¹ *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) par 12.

⁶⁴² In *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) at 885B it was determined that it must be a burden against the land.

⁶⁴³ 2014 ZASCA 220.

⁶⁴⁴ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 para 20.

⁶⁴⁵ In *Cowin NO v Kayalami Estate Homeowners Association* 2014 ZASCA 221 it was determined that in insolvency the liquidators of the insolvent estate are also bound by this security.

⁶⁴⁶ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 para 25 also states that the embargo provision also serves as security for the collection of municipal services fees to bodies corporates for electricity, water, rates and taxes.

⁶⁴⁷ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 para 22. In this regard also see *Van den Berg v Dart* 1949 4 SA 884 (A) AT 885; *Mobile Telephone Networks (Pty) Ltd v SMI trading CC* 2012 6 SA 638 (SCA) para 17.

⁶⁴⁸ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 para 22.

limited to such an extent that the owner is prohibited from gaining the full fruits of the disposition it will be regarded as a restriction on the rights of ownership.⁶⁴⁹

The embargo provision in this matter does restrict its *ius disponendi* by virtue of the fact that the provision subtracts from the *dominium* of the land against which it is registered.⁶⁵⁰ Therefore, the second requirement is also met for it to be a real right.

Ultimately, the court concluded that a homeowners' association is entitled to withhold the levy certificate until all outstanding amounts have been paid. This condition in the title deed restricts the owner from transferring the property and gives rise to a real right that is binding to all persons. This includes the insolvent estate of a member of a homeowners' association. Therefore, the homeowners' association will also be entitled to prevent the transfer of the property until all amounts due by the insolvent has been paid up to date. It is clear that in both solvent and insolvent matters the homeowners' association will be entitled to withhold their levy certificate until they have received full payment of all outstanding amounts.

In *Cowin NO v Kyalami Estate Homeowners Association*,⁶⁵¹ a case similar to *Willow Waters Homeowners Association (Pty) Ltd v Koka*,⁶⁵² the owner as member of the homeowners' association became insolvent. The homeowners' association's claims for outstanding levies to be paid in full as one of the costs of the realisation of the property was not recognised by the trustees who wound up the insolvent estate.⁶⁵³ In this matter the trustees were of opinion that the homeowners' association was an unsecured creditor and therefore its claim was unsecured. This would have the effect that the homeowners' association's loss would have to be borne by other homeowners as the insolvent estates did not have enough money to pay creditors, which included secured creditors such as

⁶⁴⁹ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 para 22. Also see *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C).

⁶⁵⁰ In this regard also see *Edelor (Pty) Ltd v Champange Castle Hotel (Pty) Ltd* 1972 3 SA 684 (N) at 689F-690B. Also *Venter v Minister of Railways* 1949 2 SA 178 (E).

⁶⁵¹ 2014 ZASCA 221.

⁶⁵² 2014 ZASCA 220.

⁶⁵³ *Cowin NO v Kayalami Estate Homeowners Association* 2014 ZASCA 221 para 8. Also see Paddock 2015 <http://www.paddocks.co.za/paddocks-press-newsletter/investment-of-body-corporate-funds/>.

the bondholders. However, the court made a similar judgement as in *Willow Waters Homeowners Association (Pty) Ltd v Koka*.⁶⁵⁴

In both matters the arguments by the association together with the *amici curiae* who joined in each matter were successful. The court⁶⁵⁵ also highlighted the effect of the embargo provision in these matters by stating that it is analogous to the embargo provision envisaged in section 118 of the *Local Government Municipal System Act*⁶⁵⁶ and section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*.⁶⁵⁷ It is therefore imminent that the embargos preclude the registrar from registering the transfer of a property without a clearance certificate from the municipality and a levy clearance certificate from a conveyancer indicating that all amounts due have been paid up to date.

Sonnekus⁶⁵⁸ criticises the judgement in *Willow Waters Homeowners Association (Pty) Ltd v Koka*.⁶⁵⁹ He is of the opinion that the court erred by the assumption that every restriction of an owner's right must be construed as a limited real right by virtue of the fact that all limited real rights restrict the rights of owners.⁶⁶⁰ He states that this right of the homeowners' association cannot be construed as a limited real right. However, I submit that he confuses the management of a homeowners' association with that of a body corporate in terms of the *Sectional Titles Act*.⁶⁶¹ Sonnekus⁶⁶² also does not take into account the expansion of the application of the subtraction of the *dominium* test.⁶⁶³

4.1.1.2 Litigation

Rule 71 of the management rules, previously provided remedies for disputes that arose between sectional owners *inter se* or between the body corporate and sectional

⁶⁵⁴ 2014 ZASCA 220

⁶⁵⁵ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 para 24.

⁶⁵⁶ 32 of 2000.

⁶⁵⁷ 95 of 1986.

⁶⁵⁸ Sonnekus 2015 *TSAR* 405–431.

⁶⁵⁹ 2014 ZASCA 220.

⁶⁶⁰ Sonnekus 2015 *TSAR* 425.

⁶⁶¹ 95 of 1986.

⁶⁶² Sonnekus 2015 *TSAR* 405–431.

⁶⁶³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 55–57. Also see *Ex Parte Geldenhuis* 1926 OPD 155.

owners.⁶⁶⁴ The rule stipulated that if a dispute arose, the aggrieved party is required to notify the other party or parties in writing thereof. Furthermore, the aggrieved party was also required to furnish the trustees and managing agent, if any, with copies of the notices the aggrieved party has served on the other party or parties. Most disputes between sectional owners *inter se* or between the body corporate and sectional owners are in respect of the enforcement of the rules. Litigation still remains a possible avenue for aggrieved parties under the new statutes as arbitration is not mandatory.⁶⁶⁵ Ideally, the litigation route should only be taken in extremely urgent matters that cannot be referred to arbitration. Alternatively, if a matter has been referred for arbitration and it was unsuccessful, the only other option available will be to litigate. Most authors also caution against the negative impact that litigation may have on the social cohesion of the scheme.⁶⁶⁶ However, to lodge a High Court application due to a conduct rule that has been breached by an owner who, for example, keeps a pet in a section does make a mockery of the judicial system.⁶⁶⁷ Therefore, the more appropriate solution is now provided for in the *Management Act* and the *Ombud Service Act*⁶⁶⁸ in terms whereof provision is made for mediation or arbitration procedures in instances such as these.⁶⁶⁹

Rule 71(1) provided that an interdict or any other form of urgent relief *may* be obtained from a court. The wording in rule 71(1) makes it possible for parties to avoid the procedure as stipulated in rule 71(1) and immediately start with the litigation process. The litigation process is an extremely expensive and time consuming way to solve a dispute and has a negative impact on the community spirit of the scheme.⁶⁷⁰ It is therefore evident that a wide interpretation of rule 71 did not make explicit provision for

⁶⁶⁴ Annexure 8 to the *Sectional Titles Act* 95 of 1986. In this regard see section 3.1.1.2 in terms whereof it is explained that according to s 10(12) of the *Management Act* rules made under the *Sectional Titles Act* 95 of 1986 are retained unless it is in conflict with the management rules prescribed in rule 10 of the *Management Act*. Therefore, aggrieved parties may still choose to litigate.

⁶⁶⁵ See para 4.1.1.

⁶⁶⁶ Pienaar *Sectional titles and other fragmented property schemes* 220–221.

⁶⁶⁷ *Body Corporate of Laguna Ridge Scheme No 152/1987 v Dorse* 1999 2 SA 512 (D). Also see Nel 2003 *De Rebus* 29–31. See also Ryan en Pienaar 2007 *TSAR* 442.

⁶⁶⁸ Section 38 of the *Ombud Service Act* read with regulation 19 thereof.

⁶⁶⁹ Pretorius *Dispute Resolution* 94–100 and also Butler 1998 *Stell LR* 258–259

⁶⁷⁰ Section 46(2)(c) of the *Magistrates' Court Act* 32 of 1944 provides that only a high court has jurisdiction over matters that require specific performance. Therefore, litigation costs are fairly expensive.

a dispute resolution process that was a cost effective a faster procedure and had a positive effect on the social cohesion of the scheme.⁶⁷¹ In this respect the court provided a directive in *Body Corporate of Greenacres v Greenacres Unit 17*⁶⁷² by determining that the wording of rule 71(1) must be widely interpreted in order to include almost every dispute that might arise between sectional owners *inter se* or between the body corporate and sectional owners. These disputes may be resolved by means of mediation or arbitration. The latter interpretation is necessitated by the explicit reference in rule 71(1) regarding disputes that arose from or are related to the provisions of the *Sectional Titles Act*⁶⁷³ together with the management and conduct rules of the scheme.⁶⁷⁴ In *Pinewood Park Scheme No 202 v Dellis (Pty) Ltd*⁶⁷⁵ the Supreme Court of Appeal determined that the management rules set out in the Act⁶⁷⁶ are consensual as it may be amended by the body corporate.⁶⁷⁷ Rule 71 did not make provision for compulsory arbitration. Therefore, arbitration will only be compulsory if the body corporate amends rule 71 to provide for compulsory arbitration.⁶⁷⁸

The new statutes are welcomed as the amended *Sectional Titles Act*⁶⁷⁹ does not confer unlimited power to choose alternative dispute resolution measures to solve community scheme administration disputes. Therefore, an applicant will only be able to apply for a court order for certain categories of disputes which are characterised under the headings of the *Ombud Service Act*, which include financial issues;⁶⁸⁰ behavioural issues;⁶⁸¹

⁶⁷¹ Maree 1998 *De Rebus* 32.

⁶⁷² *Body Corporate of Greenacres v Greenacres Unit 17 CC 2008 3 SA 176* (SCA).

⁶⁷³ 95 of 1986.

⁶⁷⁴ Pienaar *Sectional titles and other fragmented property schemes* 223.

⁶⁷⁵ 2012 ZASCA 105.

⁶⁷⁶ *Sectional Titles Act* 95 of 1986.

⁶⁷⁷ The developer or the body corporate may amend or remove rule 71 by way of unanimous resolution. This procedure is prescribed in regulation 30(1) and (4) of the *Sectional Titles Act* 95 of 1986.

⁶⁷⁸ Pienaar *Sectional titles and other fragmented property schemes* 230.

⁶⁷⁹ 95 of 1986.

⁶⁸⁰ Section 39(1)(a)-(f) of the *Ombud Service Act*.

⁶⁸¹ Section 39(2)(a)-(d) of the *Ombud Service Act*.

scheme governance issues;⁶⁸² general meetings;⁶⁸³ management services;⁶⁸⁴ reparations pertaining to private and common areas⁶⁸⁵ and general and other issues.⁶⁸⁶

As mentioned in Chapter 3, a body corporate of a sectional title scheme is an association with perpetual succession that comes into existence by the operation of the Act.⁶⁸⁷ Legal proceedings may be instituted by the body corporate to compel owners to adhere to the rules and recover damages.⁶⁸⁸ In terms of the *Sectional Titles Act*⁶⁸⁹ an owner may institute proceedings on behalf of the body corporate if the body corporate fails or refuses to institute proceedings. In these matters both the owner and the body corporate must have suffered damages or have been deprived from a benefit.⁶⁹⁰ Legal proceedings to recover damages in these instances must relate to disputes regarding any contract that has been concluded by the body corporate;⁶⁹¹ any damage to the common property;⁶⁹² any dispute regarding the land or buildings of the scheme for which the body corporate itself or the owners are jointly liable for;⁶⁹³ any dispute regarding the exercising of the body corporate's powers or the performance or nonperformance of the duties prescribed

⁶⁸² Section 39(3)(a)-(d) of the *Ombud Service Act*.

⁶⁸³ Section 39(4)(a)-(e) of the *Ombud Service Act*.

⁶⁸⁴ Section 39(5)(a)-(b) of the *Ombud Service Act*.

⁶⁸⁵ Section 39(6)(a)-(b) of the *Ombud Service Act*.

⁶⁸⁶ Section 39(7)(a)-(b) of the *Ombud Service Act*. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 18.3.1-18.3.2 (2014 Service 24).

⁶⁸⁷ Section 36(1) of the *Sectional Titles Act* 95 of 1986. In this regard see also section 3.3.2 and also Paddock *Sectional title survival manual* 8.1. This is now envisaged in section 2(7) of the Management Act.

⁶⁸⁸ According to s 36(6) of the *Sectional Titles Act* 95 of 1986 a body corporate may institute action against another party and action may also be instituted against the body corporate in its own name. Also see Paddock *Sectional title survival manual* 8.1. As from 7 October 2016 this section has been deleted from the amended *Sectional Titles Act* 95 of 1986.

⁶⁸⁹ 95 of 1986.

⁶⁹⁰ Section 41(1) read with s 36(6) of the *Sectional Titles Act* 95 of 1986.

⁶⁹¹ Section 36(6)(a) of the *Sectional Titles Act* 95 of 1986 which section has been deleted in terms of s 20 of the *Management Act*.

⁶⁹² Section 36(6)(b) of the *Sectional Titles Act* 95 of 1986 which section has been deleted in terms of s 20 of the *Management Act*.

⁶⁹³ Section 36(6)(c) of the *Sectional Titles Act* 95 of 1986 which section has been deleted in terms of s 20 of the *Management Act*.

by the Act or any management rule⁶⁹⁴ as well as any claim determined by way of a special resolution against the developer.⁶⁹⁵

An owner who desires to institute legal proceedings is required to serve a written notice on the body corporate in terms of which the owner requires the body corporate to institute legal proceedings within one month from the date on which the notice has been served.⁶⁹⁶ The notice must also inform the body corporate of the intention of the owner to lodge an application to the court upon the body corporate's failure to institute legal proceedings.⁶⁹⁷ If the body corporate fails to comply with this notice and does not institute legal proceedings, the owner may apply to the court for the appointment of a *curator ad litem* to act on behalf of the body corporate in this regard.⁶⁹⁸ The *curator ad litem* will be entitled to institute and conduct proceedings on behalf of the body corporate.⁶⁹⁹ The court will appoint a provisional *curator ad litem* to conduct an investigation into the matter at hand and report its findings on the return day of the provisional order.⁷⁰⁰ However, the court will only grant the appointment of a provisional *curator ad litem* if it is satisfied that no proceedings have in fact been instituted by the body corporate;⁷⁰¹ that there are indeed *prima facie* grounds for the institution of legal proceedings;⁷⁰² and that an investigation into such grounds and the desirability of the

⁶⁹⁴ Section 36(6)(d) of the *Sectional Titles Act* 95 of 1986 which section has been deleted in terms of s 20 of the *Management Act*.

⁶⁹⁵ Section 36(6)(e) of the *Sectional Titles Act* 95 of 1986 which section has been deleted in terms of s 20 of the *Management Act*.

⁶⁹⁶ Section 41(2)(a) of the *Sectional Titles Act* 95 of 1986 which has been repealed as from 7 October 2016. This is now envisaged in s 9(2)(a) of the *Management Act*.

⁶⁹⁷ Section 41(2)(a) of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016. This is now envisaged in s 9(2)(a) of the *Management Act*.

⁶⁹⁸ Section 41(2)(b) of the *Sectional Titles Act* 95 of 1986 has been repealed as from 7 October 2016. This is now envisaged in s 9(2)(b) of the *Management Act*.

⁶⁹⁹ Section 41(2)(b) of the *Sectional Titles Act* 95 of 1986 which has been repealed as from 7 October 2016. This is now envisaged in s 9(2)(b) of the *Management Act*.

⁷⁰⁰ Section 41(3) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. This is now envisaged in s 9(3) of the *Management Act*.

⁷⁰¹ Section 41(3)(a) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. This is now envisaged in s 9(3)(a) of the *Management Act*.

⁷⁰² Section 41(3)(b) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. This is now envisaged in s 9(3)(b) of the *Management Act*.

institution of legal proceedings are justified.⁷⁰³ The court will consider the report of the provisional *curator ad litem* on the return day and will consequently determine if the required legal proceedings are desirable or not.⁷⁰⁴ Depending on the outcome hereof the court will either confirm or discharge the appointment of the *curator ad litem*.⁷⁰⁵ If the court is satisfied to appoint a curator, it will also provide the necessary directives for the curator to conduct the required legal proceedings on behalf of the body corporate.⁷⁰⁶

4.1.1.3 Arbitration

As seen from the preceding discussion, arbitration under the previous rule 71⁷⁰⁷ was not compulsory but may have been agreed upon by aggrieved parties.⁷⁰⁸ Van der Merwe⁷⁰⁹ is of the opinion that rule 71(2)⁷¹⁰ must have been amended by either the body corporate or the developer in order to compel parties to arbitrate before litigation procedures.⁷¹¹ However, the court may intervene in terms of section 37(2) of the *Sectional Titles Act*⁷¹² in the case of arrear levies. Therefore, there exists a distinction between the application of rule 71(1)⁷¹³ regarding disputes and section 37(2) of the *Sectional Titles Act*⁷¹⁴ regarding the collection of arrear levies.⁷¹⁵ In *Body Corporate of Fish Eagle v Group*

⁷⁰³ Section 41(3)(b) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. Also see Paddock *Sectional title survival manual* 8.11. This is now envisaged in s 9(3)(b) of the *Management Act*.

⁷⁰⁴ Section 41(4) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. This is now envisaged in s 9(4) of the *Management Act*.

⁷⁰⁵ Section 41(4) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. Also see Paddock *Sectional title survival manual* 8.11. This is now envisaged in s 9(4) of the *Management Act*.

⁷⁰⁶ Section 41(4) of the *Sectional Titles Act* 95 of 1986 which section has been repealed as from 7 October 2016. Also see Paddock *Sectional title survival manual* 8.11. This is now envisaged in s 9(4) of the *Management Act*. Further directives have been provided for in s 9(5)-(7) of the *Management Act*.

⁷⁰⁷ Annexure 8 rule of the *Sectional Titles Act* 95 of 1986.

⁷⁰⁸ In terms of Annexure 8 rule 71(2) of the *Sectional Titles Act* 95 of 1986 the matter may be referred for arbitration by any party if the matter has not been resolved within fourteen days from the date on which the notice was served. This is now provided for in s 38 of the *Ombud Service Act* read with regulation 19 thereof.

⁷⁰⁹ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.2.5 (2014 Service 24).

⁷¹⁰ Annexure 8 rule 71(2) of the *Sectional Titles Act* 95 of 1986.

⁷¹¹ Maree 1998 *De Rebus* 32. Also see the discussion *Pinewood Park Scheme No 202 v Dellis (Pty) Ltd* 2012 ZASCA 105 in section 4.1.1.2.

⁷¹² 95 of 1986.

⁷¹³ Annexure 8 rule 71(1) of the *Sectional Titles Act* 95 of 1986.

⁷¹⁴ 95 of 1986.

⁷¹⁵ Pienaar *Sectional titles and other fragmented property schemes* 223.

*Twelve Investments*⁷¹⁶ the court confirmed that it falls within the ambit of the functions and powers of trustees to impose levies in an amount which they deem fit.⁷¹⁷ The court further confirmed that these levies are due and payable on or before a date that is determined by the trustees.⁷¹⁸ Consequently, the court determined that sectional owners may not dispute his or her liability with regard to the payment of such levies based on the submission that the levies are excessive or disproportionate.⁷¹⁹

Pienaar⁷²⁰ explains that if there was a dispute regarding the outstanding levies, the dispute must be referred to an arbitrator, if demanded by a party to the matter, in terms of rule 71(2). In the event where the dispute arose after litigation proceedings have been instituted, but before an order has been granted, the matter must still be referred for arbitration if requested by a party to the matter.⁷²¹ Hereafter it is in the discretion of the court to make the arbitration award an order of court.⁷²² In the light of the wide ambit of rule 71(1) there seems to be no reason as to why a dispute regarding outstanding levies is to be excluded from arbitration.⁷²³ In order to avoid this ambiguity, Van der Merwe proposes that the last part of rule 71(1) should have been amended to read that the dispute "shall" be determined in terms of rule 71.⁷²⁴

⁷¹⁶ 2003 5 SA 414 (W).

⁷¹⁷ In terms of s 37(1)(b) these levies may be imposed at the discretion of the trustees. Also see *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 5 SA 414 (W) 420B-C, E and Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 33.

⁷¹⁸ *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 5 SA 414 (W) 419G. Also see Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 33.

⁷¹⁹ *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 5 SA 414 (W) 420E-F. Also see Naude 2016 *Die regsaard en afdwingbaarheid van heffings by deeltitelskemas* 33. In terms of section 39(1)(c) of the *Ombud Service Act* a sectional owner may approach the service to determine if the amount of the levies is too excessive and if so, for an order to amend same. Also see section 1.1.2.2 of chapter 5.

⁷²⁰ Pienaar *Sectional titles and other fragmented property schemes* 223.

⁷²¹ This is on the condition that no order has been granted by the court before the request for arbitration.

⁷²² Pienaar *Sectional titles and other fragmented property schemes* 223.

⁷²³ Pienaar *Sectional titles and other fragmented property schemes* 223. Also see *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 3 SA 176 (SCA) paragraph 10. This has now been rectified by the *Management Act* by virtue thereof that section 3(2) provides that an application be lodged to the ombud service in the event of arrear levies.

⁷²⁴ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.2.5 (2014 Service 24).

Rule 71(3)-(8) provided for the procedure that should be followed in the case of arbitration.⁷²⁵ This procedure may have been amended by the developer or the body corporate.⁷²⁶ Bear in mind that this would entail the amendment of rule 71 (a management rule) and therefore it has to be done by way of unanimous resolution during a special or annual meeting.⁷²⁷ Rule 71(2) required an aggrieved party to notify all affected parties in writing regarding the nature of the dispute. Copies of these notices have to be served on the trustees and the managing agent. Any party to the matter may request that the matter be referred to arbitration if the dispute is not resolved within fourteen days after the notices have been served.⁷²⁸ Owners are automatically joined in the arbitration proceedings if all of these owners have a dispute with the body corporate arising out of substantially the same cause of action and therefore requires substantially the same order.⁷²⁹ An arbitrator needs to be appointed within three days after the notice has been served. If there is no consensus between the parties regarding the appointment of an arbitrator within the prescribed three days, the registrar of deeds of the deeds registry where the scheme is registered may be requested to appoint an arbitrator within seven days after receiving a written request to this effect.⁷³⁰

When determining the appointment of an arbitrator, the nature of the dispute together with the cost implications should be taken into consideration. It is imperative that an impartial qualified person with sufficient experience is appointed to preside over the arbitration.⁷³¹ The provisions of the *Arbitration Act*⁷³² are *mutatis mutandis* applicable to arbitrations in terms of the *Sectional Titles Act*.⁷³³ The arbitration process was usually

⁷²⁵ Annexure 8 rule 71 of the *Sectional Titles Act* 95 of 1986.

⁷²⁶ This procedure is discussed in sections 3.1.1.1 and 3.1.1.2.

⁷²⁷ Ryan en Pienaar 2007 *TSAR* 443.

⁷²⁸ Annexure 8 rule 71(2) of the *Sectional Titles Act* 95 of 1986.

⁷²⁹ Annexure 8 rule 71(1) of the *Sectional Titles Act* 95 of 1986. Also see Pienaar *Sectional titles and other fragmented property schemes* 224 in this regard.

⁷³⁰ Annexure 8 rule 71(4) of the *Sectional Titles Act* 95 of 1986. In this regard also see *BOE Bank Ltd v Body Corporate of the Towers Scheme* (2005) JOL 13224 (D) where parties were granted an extension of the seven-day period by virtue of the complexity of the dispute. Pienaar *Sectional titles and other fragmented property schemes* 224 explains that the appointment of an arbitrator by the registrar is subject to the payment of the prescribed fees.

⁷³¹ Annexure 8 rule 71(3) of the *Sectional Titles Act* 95 of 1986.

⁷³² 42 of 1965.

⁷³³ 95 of 1986 and Regulation 39 of the *Sectional Titles Act* 95 of 1986. Also see Van der Merwe 1999 *SALJ* 624-625.

held informally or according to the procedures set by the arbitrator.⁷³⁴ Rule 71(5)⁷³⁵ determined that where possible, arbitration must be concluded within twenty one days after referral, alternatively, after security for costs has been furnished.⁷³⁶ The arbitrator was required to make his award within seven days after the completion of the arbitration which award is final and binding.⁷³⁷ Any affected party may lodge an application to the court for the decision to be made an order of the High Court.⁷³⁸ The arbitrator was also entitled to make a cost order that he deemed appropriate.⁷³⁹

There is no provision in respect of arbitration in the rules in terms of the *Management Act*. Furthermore, the *Ombud Service Act* does not prescribe compulsory mediation or any form of arbitration, but only *voluntary* mediation. Therefore parties can revert to arbitration if they choose to do so or if the management rules are amended by the developer or body corporate to prescribe either compulsory or voluntary arbitration.

4.1.1.4 Mediation

Unlike arbitration,⁷⁴⁰ mediation in South Africa is not statutorily defined.⁷⁴¹ At first glance this should not seem problematic, however, this makes it extremely difficult to differentiate mediation from other alternative dispute resolution processes as there is no coherent theoretical base.⁷⁴² Generally defined,⁷⁴³ mediation is a voluntary process in terms whereof parties recruit the services of an independent third party, a mediator, who

⁷³⁴ Pienaar *Sectional titles and other fragmented property schemes* 224.

⁷³⁵ Annexure 8 rule 71(5) of the *Sectional Titles Act* 95 of 1986.

⁷³⁶ Pienaar *Sectional titles and other fragmented property schemes* 224.

⁷³⁷ Annexure 8 rule 71(6) and 71(7) of the *Sectional Titles Act* 95 of 1986.

⁷³⁸ Annexure 8 rule 71(7) of the *Sectional Titles Act* 95 of 1986. Also see *Lindsay v Trustees of the Charleen Body Corporate* (2007) JOL 18373 (N) paras 46 and 47 and also *BOE Bank Ltd v Body Corporate of the Towers Scheme* (2005) JOL 13224 (D).

⁷³⁹ Annexure 8 rule 71(6) of the *Sectional Titles Act* 95 of 1986.

⁷⁴⁰ Arbitration is managed in terms of the *Arbitration Act* 42 of 1965.

⁷⁴¹ Brand, Steadman & Todd *Commercial Mediation: A user's guide to court-referred and voluntary mediation in South Africa* 2012 10. The 2002 United Nations Commission on International Trade Law Model Law on International Commercial Conciliation has not been adopted by South Africa. Furthermore, South Africa does not have any statute that makes provision for the procedural aspects of mediation.

⁷⁴² Boulle and Rycroft *Mediation, Principles, Process, Practice* 3. Also see Faris 2006 *CILSA* 1-3.

⁷⁴³ Pretorius *Dispute Resolution* 39.

facilitates the negotiations⁷⁴⁴ and assists the parties to reach a mutually acceptable agreement. There is no winning or losing party.⁷⁴⁵ Parties either reach a mutually acceptable agreement or there is no result.⁷⁴⁶ Should the mediation process be unsuccessful the parties may resort to formal litigation proceedings.⁷⁴⁷

The mediator's main function is to facilitate a settlement in order to reach a mutually acceptable agreement for the disputing parties.⁷⁴⁸ A mediator does, therefore, not have the authority to make a finding of fact or law. The mediator is furthermore not permitted to make a ruling regarding the credibility of a party in the mediation process.⁷⁴⁹

Mediation processes are dealt with privately and without prejudice, which is central to this form of dispute resolution.⁷⁵⁰ What makes mediation beneficial is the fact that matters are resolved much faster than by way of litigation.⁷⁵¹ It is also a more informal and flexible process and much more cost-effective.⁷⁵²

⁷⁴⁴ Brand, Steadman & Todd *Commercial Mediation: A user's guide to court-referred and voluntary mediation in South Africa* 2012 20 explains that mediation is a process in which parties to a dispute reach an agreement by virtue of negotiations. Also see Maclons *Mandatory Court Based Mediation* 11-12.

⁷⁴⁵ Ramsden *The law of Arbitration: South African and International Arbitration* 2.

⁷⁴⁶ Ramsden *The law of Arbitration: South African and International Arbitration* 2. Also see Maclons *Mandatory Court Based Mediation* 11-12.

⁷⁴⁷ Meintjes-Van der Walt, Singh, du Preez et al *Introduction to South African Law* 205. Also see Jordaan 2012 *De Rebus* 19 regarding disputing parties' "right to have their day in court".

⁷⁴⁸ Rule 80(1)(a) of the amendment of the rules regulating the conduct of the proceedings of the magistrate's court in terms of the *Rules Board for Courts of Law Act* 107 of 1985 where provision is made for court-annexed mediation. Also see Alexander *International and Comparative Mediation: Legal Perspectives* 30; Spencer and Brogan *Mediation Law and Practice* 156 and Maclons *Mandatory Court Based Mediation* 11-12.

⁷⁴⁹ Rule 80(1)(b) of the amendment of the rules regulating the conduct of the proceedings of the magistrate's court in terms of the *Rules Board for Courts of Law Act* 107 of 1985 where provision is made for court-annexed mediation. Also see Brand, Steadman & Todd *Commercial Mediation: A user's guide to court-referred and voluntary mediation in South Africa* 2012 20; Ramsden *The law of Arbitration: South African and International Arbitration* 2 and Maclons *Mandatory Court Based Mediation* 11-12.

⁷⁵⁰ Spencer and Brogan *Mediation Law and Practice* 85-87. Also see Boulle and Nesic 2001 *Mediation: Principles Process Practice* 41-42 and Maclons *Mandatory Court Based Mediation* 11-12.

⁷⁵¹ Ryan en Pienaar 2007 *TSAR* 445-447. However, Maree 2001 *De Rebus* 13-14 and also Maluleke 2005 *De Rebus* 43 differs and state that although mediation is much more cost effective than litigation it may be more time consuming.

⁷⁵² Brand, Steadman & Todd *Commercial Mediation: A user's guide to court-referred and voluntary mediation in South Africa* 2012 24-28

In South Africa disputes that are resolved by way of mediation are usually dealt with by an ombudsperson. The ombudsperson's office for every sector is established and governed by legislation.⁷⁵³ The provisions of the *Ombud Service Act* provides for the establishment of a ombud service for community schemes.⁷⁵⁴ The functions of this ombud service include *inter alia* the development and provision of a dispute resolution service⁷⁵⁵ and the training of conciliators, adjudicators and employees.⁷⁵⁶ With regard to these functions, provision has been made for conciliation⁷⁵⁷ and arbitration proceedings.⁷⁵⁸ The conciliation proceedings are instituted after the service has perused the application and hold the view that the prospect of the parties reaching a mutually acceptable agreement is fairly high. The chief ombud will then appoint an independent conciliator whose function is to facilitate a settlement in order for the disputing parties to reach a mutually acceptable agreement. It would seem that this form of dispute resolution is in line with mediation as discussed.

Should the conciliation process fail, the ombud must refer the matter for adjudication.⁷⁵⁹ An adjudicator will be appointed by either the chief ombud or the parties themselves. However, both the parties may only select an adjudicator from the list provided by the ombud. The appointed adjudicator is required to determine how the dispute at hand is to be resolved and must consequently make an order to this effect.⁷⁶⁰

4.1.2 Share blocks

As explained in Chapter 2, a share block company has a real right of ownership or a registered long-term lease in respect of the immovable property. A shareholder on the other hand has a personal right, as his/her relationship with the share block company is

⁷⁵³ Ryan en Pienaar 2007 *TSAR* 445-447. Also see chapter 5 paragraph 1.1.1.

⁷⁵⁴ Le Roux and Botha *Management of sectional title schemes and home owners' associations: Important Legal principles provided by the courts* 27-28.

⁷⁵⁵ Section 4(1)(a) of the *Ombud Service Act*.

⁷⁵⁶ Section 4(1)(b) of the *Ombud Service Act*.

⁷⁵⁷ Section 47 of the *Ombud Service Act*.

⁷⁵⁸ Section 48 of the *Ombud Service Act*.

⁷⁵⁹ Section 48 of the *Ombud Service Act*.

⁷⁶⁰ Section 48 of the *Ombud Service Act*. Durham 2016 <https://paddocksblog.com/2016/06/08/the-community-schemes-ombud-service/>.

contractual by nature and therefore the application thereof may be reviewed by a court.⁷⁶¹ Therefore, if the management rules⁷⁶² of a share block scheme, which is preferably supplementary to the use agreement,⁷⁶³ do not make provision for alternative dispute resolution procedures, aggrieved parties may make use of the alternative dispute measures prescribed in the *Companies Act*⁷⁶⁴ alternatively, they will have no other option than litigation. Fortunately, the Department of Justice and Constitutional Development amended the *Rules Board for Courts of Law Act*⁷⁶⁵ in order to adhere to section 34 of the *Constitution*⁷⁶⁶ by making provision for court-annexed mediation and providing directives in this regard.⁷⁶⁷ In light of this amendment, aggrieved parties may request to mediate before litigation proceedings are initiated or even during litigation proceedings. In the latter instance the court proceedings will be stayed until the completion of the mediation process. This constitutes clear directives for aggrieved parties who are not financially capable to entertain litigation proceedings. Consequently, this provides access to quality justice to all aggrieved parties and by so doing preserving the relationship between all parties that may be strained by the adversarial nature of litigation.⁷⁶⁸

4.1.3 *Ombud Service Act*

The aim of the *Ombud Service Act* is to establish an independent dispute resolution service for community schemes⁷⁶⁹ whereby disputes may be resolved in an efficient

⁷⁶¹ See para 2.3.2 and also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 224.

⁷⁶² These rules deal with matters similar to the house or conduct rules of sectional title schemes.

⁷⁶³ The reason why it is advisable to have a separate set of management rules other than the use agreement is due to the fact that it is easier to amend these rules as the use agreement will normally provide directives as to the amendment of these rules by the directors. A use agreement may only be amended by way of unanimous resolution. In this regard also see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 224.

⁷⁶⁴ Section 166 and 167 of the *Companies Act* 71 of 2008.

⁷⁶⁵ 107 of 1985.

⁷⁶⁶ Section 34 of the *Constitution* determines that everyone has the right to resolve their dispute in a court alternatively, where appropriate in any other independent and impartial tribunal or forum. Also see *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 201 as well as *Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC) 8.

⁷⁶⁷ R 183 in GG 37448 of March 2014.

⁷⁶⁸ With regard to time-sharing based on clubs see section 2.4.2 and in respect of retirement schemes that are based on life rights see section 2.5.1.

⁷⁶⁹ According to section 1 of the *Ombud Service Act* community schemes is defined to include sectional title schemes, share block schemes, home owners' associations, housing schemes for retired persons

and cost-effective manner. In terms of the *Ombud Service Act* the ombud service is established as a juristic person⁷⁷⁰ that would operate as a national public entity which is listed in terms of the *Public Finance Management Act*.⁷⁷¹ The executive authority of the ombud service is vested in the minister of human settlements who is required to establish a national head office and regional offices where required.⁷⁷²

The Act makes provision for the board of the service to appoint a chief ombud and chief financial officer who will attend to the head office. The Act further provides that the board of service appoints an ombud, deputy ombud, adjudicators and conciliators to attend to the regional offices.⁷⁷³ The functions of the ombud service entail the development and provision of a dispute resolution service;⁷⁷⁴ the training of conciliators, adjudicators and employees;⁷⁷⁵ the regulation, monitoring and quality control of the scheme governance documentation;⁷⁷⁶ to take custody of scheme governance documentation;⁷⁷⁷ and to provide education, information, documentation and other services to the public.^{778 779}

Van der Merwe⁷⁸⁰ underscores an important function of the chief ombud to inspect and approve the rules of community schemes. He avers that the rules were merely lodged with a deeds registry as part of the sectional title register previously and that

and any other scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings. Also see *Sectional titles, share blocks and time sharing*, vol 1, para 18.2.1 (2014 Service 24).

⁷⁷⁰ Section 3(1) of the *Ombud Service Act*. Also see *Sectional titles, share blocks and time sharing*, vol 1, para 18.2.1 (2014 Service 24).

⁷⁷¹ 1 of 1999. Also see Section 3(2) of the *Ombud Service Act*. Also see *Sectional titles, share blocks and time sharing*, vol 1, para 18.2.1 (2014 Service 24).

⁷⁷² Section 3(3) of the *Ombud Service Act*. Also see *Sectional titles, share blocks and time sharing*, vol 1, para 18.2.1 (2014 Service 24).

⁷⁷³ Section 21(2) of the *Ombud Service Act*. Also see Van der Merwe 2014 *Stell LR* 403.

⁷⁷⁴ Section 4(1)(a) of the *Ombud Service Act*.

⁷⁷⁵ Section 4(1)(b) of the *Ombud Service Act*.

⁷⁷⁶ Section 4(1)(c) of the *Ombud Service Act*.

⁷⁷⁷ Section 4(1)(d) of the *Ombud Service Act*.

⁷⁷⁸ Section 4(1)(d) of the *Ombud Service Act*.

⁷⁷⁹ Pienaar *Sectional titles and other fragmented property schemes* 228. Also see Van der Merwe 2014 *Stell LR* 403 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 18.2.4 (2014 Service 24).

⁷⁸⁰ Van der Merwe 2014 *Stell LR* 403.

they were not inspected for their appropriateness.⁷⁸¹ He further holds the view that the scheme rules held in various land deeds registries are in a state of disarray. He explains that in terms of this Act,⁷⁸² the bylaws will be attended to by electronic means and also be made available to the public on request.⁷⁸³

However, Pienaar⁷⁸⁴ is of the view that these functions are too ambitious. He explains that the provision of an ombud service and the provision of training and education in terms of the Act seem feasible, but that the regulation, monitoring and quality control of the scheme governance documentation, and being custodian and information office of the communal scheme governance documents, will be extremely challenging. An example of this is that any amendment to the rules must first be approved by the ombud before it can be implemented, which may in all probability result in chaos. He highlights that the latter function falls within the discretion of the minister of human settlements and is formulated fairly wide. He further highlights the cost implications of the implementation of these functions and foresees possible delays with the opening of sectional title registers and the administration of registered schemes.⁷⁸⁵

4.1.3.1 Funds of the service

Parliament will be responsible for the establishment of the initial stage of the ombud service⁷⁸⁶ and to date has made a contribution of R40 million.⁷⁸⁷ Furthermore, all employees will become members of the Government Employees' Pension Fund.⁷⁸⁸ Hereafter, the operation of the service will mainly be funded by the levies collected from community scheme owners and cost recovery fees that would be charged for

⁷⁸¹ An important aspect to keep in mind is that in the case of share blocks there is no statutory form prescribed for the rules, they are contained in the use agreement.

⁷⁸² *Ombud Service Act*.

⁷⁸³ Van der Merwe 2014 *Stell LR* 403.

⁷⁸⁴ Pienaar *Sectional titles and other fragmented property schemes* 228. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 18.2.4 (2014 Service 24).

⁷⁸⁵ Pienaar *Sectional titles and other fragmented property schemes* 228.

⁷⁸⁶ Van der Merwe 2014 *Stell LR* 404.

⁷⁸⁷ Maree 2015 *De Rebus* 18 - 20.

⁷⁸⁸ Section 21(6) of the *Ombud Service Act*. Also see Pienaar *Sectional titles and other fragmented property schemes* 229.

various services rendered by the ombud service.⁷⁸⁹ The manner in which these levies are to be determined and collected still needs to be disclosed in the regulations which are yet to be published.⁷⁹⁰

Van der Merwe is of opinion that the ombud service would obtain a reasonable income from the furnishing of scheme documentation. This income further includes ordinary and special contributions which may be claimed through the regional offices of the ombud service instead of the normal debt collection procedures provided for by the *Magistrates' Court Act*.⁷⁹¹ Pienaar⁷⁹² on the other hand states that although these fees together with the educational fees collected from parties who obtained such services may be sufficient to bear the costs of rendering the service. He is, however, not convinced that the costs of the establishment and functioning of the offices of record for sectional title governance documentation, together with the monitoring and quality control services, would be sufficient as this would need to be financed mainly by the levies from sectional schemes. This is problematic as most sectional title schemes are barely able to acquire sufficient funding for maintenance costs, insurance and basic expenses.⁷⁹³ To add to the financial burden of a sectional title scheme, a body corporate, as a party to the ombud service, will be accountable for the adjudicator's costs if they were unsuccessful.

Pienaar⁷⁹⁴ also highlights the provisions regarding the training and educational aspects as a necessity and regard it to be cost effective as these functions do not encompass large administration costs. When the *Community Scheme Ombud Service Bill*⁷⁹⁵ was published, the Law Society also asserted that the Bill has no financial

⁷⁸⁹ Section 22 of the *Ombud Service Act*.

⁷⁹⁰ Maree 2015 *De Rebus* 18 - 20.

⁷⁹¹ 32 of 1944. Also see Van der Merwe 2014 *Stell LR* 404.

⁷⁹² Pienaar *Sectional titles and other fragmented property schemes* 228-229.

⁷⁹³ Pienaar *Sectional titles and other fragmented property schemes* 229.

⁷⁹⁴ Pienaar *Sectional titles and other fragmented property schemes* 229.

⁷⁹⁵ GN 686 in *GG* 33366 of 9 July 2010.

benefit due to the high costs in creating an infrastructure that is not really a necessity.⁷⁹⁶

4.1.3.2 Alternative dispute resolution mechanisms

The handling of disputes is set out in Chapters 3 to 5 of the *Ombud Service Act*. Any person, including an association, in a community scheme who is affected by a dispute from matters relating to financial issues;⁷⁹⁷ matters relating to conduct;⁷⁹⁸ governance issues;⁷⁹⁹ conduct of meetings;⁸⁰⁰ management issues;⁸⁰¹ matters pertaining to maintenance to private or communal areas;⁸⁰² or access to information or documents,⁸⁰³ may apply to the ombud service to have the dispute adjudicated.⁸⁰⁴ After the ombud service has examined the application together with all other required information the service may reject the matter,⁸⁰⁵ attempt to facilitate a settlement of the dispute,⁸⁰⁶ or alternatively, refer the matter to an adjudicator.⁸⁰⁷ The matter will then be referred to an adjudicator who has been appointed by the ombud service if it qualifies for a waiver or alternatively a discount of the services fees.

If the application does not qualify for a waiver or a discount of services fees, the parties may come to an agreement regarding an adjudicator which they nominate from the ombud's list of adjudicators. However, if in these instances the parties do

⁷⁹⁶ Whittle 2010 *De Rebus* 11.

⁷⁹⁷ Section 39(1)(a)-(d) of the *Ombud Service Act*.

⁷⁹⁸ Section 39(2)(a)-(d) of the *Ombud Service Act*.

⁷⁹⁹ Section 39(3)(a)-(d) of the *Ombud Service Act*.

⁸⁰⁰ Section 39(4)(a)-(e) of the *Ombud Service Act*.

⁸⁰¹ Section 39(5)(a)-(b) of the *Ombud Service Act*.

⁸⁰² Section 39(6)(a)-(g) of the *Ombud Service Act*.

⁸⁰³ Section 39(7)(a)-(b) of the *Ombud Service Act*.

⁸⁰⁴ In this regard also see Pienaar *Sectional titles and other fragmented property schemes* 230-231,⁸⁰⁴ Van der Merwe 2014 *Stell LR* 404 -405; *Sectional titles, share blocks and time sharing*, vol 1, para 18.3 (2014 Service 24) and Maree 2015 *De Rebus* 18-20.

⁸⁰⁵ Section 42(a)-(e) of the *Ombud Service Act*.

⁸⁰⁶ Section 47 of the *Ombud Service Act*.

⁸⁰⁷ Section 48(1)-(4) of the *Ombud Service Act*.

not reach an agreement regarding an adjudicator, the ombud service will assign the matter to an adjudicator.⁸⁰⁸

Hereafter chapter 4 of the *Ombud Service Act* prescribes a fairly modest procedure. Upon the investigation of the application the adjudicator is required to identify the applicable principles of the law and to act informally and swiftly. The adjudicator is also under no obligation to apply the rules evidence.⁸⁰⁹ Parties are entitled to legal representation and the adjudicator is invested with specific investigative powers.⁸¹⁰ An adjudicator's subsequent order is enforceable in either a magistrate's court or a high court depending on the nature and extent of the relief that was granted.⁸¹¹ A cost order may also be made against the parties⁸¹² and any party may also appeal to the High court in respect of a question of law.

The ombud service does not have unlimited jurisdiction. Therefore, the orders that the ombud service may grant is limited to one or more of the twenty-eight listed in the *Ombud Service Act*.⁸¹³ Upon perusal of the Act it is notable that the orders are divided into six categories: orders regarding financial issues;⁸¹⁴ behavioural⁸¹⁵ and scheme governance issues;⁸¹⁶ general meetings;⁸¹⁷ management services;⁸¹⁸ works pertaining to private and common areas⁸¹⁹ and general and other issues.⁸²⁰

⁸⁰⁸ Section 48(3) of the *Ombud Service Act*. In this regard also see Pienaar *Sectional titles and other fragmented property schemes* 231-232.

⁸⁰⁹ Section 50(a)-(c) of the *Ombud Service Act*.

⁸¹⁰ Sections 51 and 52 of the *Ombud Service Act*. Also see Pienaar *Sectional titles and other fragmented property schemes* 232.

⁸¹¹ Pienaar *Sectional titles and other fragmented property schemes* 232.

⁸¹² Sections 53(2) and 54(1)(b) read with s 29(1)(e) of the *Ombud Service Act*.

⁸¹³ Section 39 of the *Ombud Service Act*.

⁸¹⁴ Section 39(1)(a)-(f) of the *Ombud Service Act*.

⁸¹⁵ Section 39(2)(a)-(d) of the *Ombud Service Act*.

⁸¹⁶ Section 39(3)(a)-(d) of the *Ombud Service Act*.

⁸¹⁷ Section 39(4)(a)-(e) of the *Ombud Service Act*.

⁸¹⁸ Section 39(5)(a)-(b) of the *Ombud Service Act*.

⁸¹⁹ Section 39(6)(a)-(b) of the *Ombud Service Act*.

⁸²⁰ Section 39(7)(a)-(b) of the *Ombud Service Act*. Also see Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 18.3.1–18.3.2 (2014 Service 24).

4.1.3.3 Disputes resolution for share block schemes

Pienaar⁸²¹ made a significant observation by questioning to what extent the duplication of the functions⁸²² with the provisions of the *Companies Act*⁸²³ is prevented in the case of share block schemes. This is important as the rules of a share block scheme are based on contract. The application thereof may therefore be reviewed by the court.⁸²⁴ In this regard specific reference is made to the voluntary court-annexed mediation rules of the magistrates' courts,⁸²⁵ which are enabled and supported by the *Rules Board for Courts of Law Act*⁸²⁶ as well as the *Jurisdiction of Regional Courts Amendment Act*.⁸²⁷ These rules make provision for a dispute to be referred to mediation prior to the commencement of litigation, alternatively after the commencement of litigation, but before judgement is handed down.⁸²⁸

Parties to a dispute are required to obtain authorisation if they desire to refer their dispute to mediation during the course of the trial.⁸²⁹ The presiding officer also has the discretion to inquire into the possibility of mediation after the commencement of the trial but before judgement is handed down. Should the parties wish to rather mediate, the presiding officer may afford them the opportunity to do so.⁸³⁰ The rules further provide that the parties to the mediation will be liable for the fees of the mediator except when the services of a mediator are provided for free.⁸³¹ The tariffs

⁸²¹ Pienaar *Sectional titles and other fragmented property schemes* 228.

⁸²² See para 1.1.2.

⁸²³ Section 166 and 167 of the *Companies Act* 71 of 2008.

⁸²⁴ See para 3.4. Also see the amendment of the rules regulating the conduct of the proceedings of the magistrate's court in terms of the *Rules Board for Courts of Law Act* 107 of 1985 where provision is made for court-annexed mediation.

⁸²⁵ In this regard also see Joubert 2013 <http://mastermediators.co.za/opinion-on-the-new-rules-for-court-directed-mediation/>.

⁸²⁶ 107 of 1985.

⁸²⁷ Section 9 of Act 31 of 2008.

⁸²⁸ Rule 75(1) of the amended *Magistrates' Court Rules*.

⁸²⁹ Rule 75(1) of the amended Magistrates' Court Rules. Also see Maclons *Mandatory Court Based Mediation* 123-124.

⁸³⁰ Rule 75(2) of the amended *Magistrates' Court Rules*. Also see Maclons *Mandatory Court Based Mediation* 123-124.

⁸³¹ Rule 84(1) of the amended Magistrates' Court Rules. Also see Maclons *Mandatory Court Based Mediation* 123-124.

with regard to the mediators will be determined by the minister and will subsequently be published in the *Government Gazette*.⁸³²

Furthermore, the *Companies Act*⁸³³ already provides for mediation, as a portion of the Act dictates the required procedures for alternative dispute resolution measures.⁸³⁴ The long title of the *Companies Act*⁸³⁵ furthermore makes provision for a companies tribunal to facilitate alternative dispute resolution procedures. The question which now arises is whether parties to a share block scheme are bound by the voluntary court-annexed mediation rules of the magistrates' courts in terms of the *Rules Board for Courts of Law Act*,⁸³⁶ *Companies Act*⁸³⁷ or the *Ombud Service Act*.

4.2 Mediation in existing ombud services

A number of ombud services have proved to be successful in the financial sector with the sole purpose of excluding litigation.⁸³⁸ These include the ombud service for both short-term and long-term insurance; commercial banks which are independent financial institutions as well as a pension fund mediator which is statutorily instituted in terms of the *Pension Funds Amendment Act*.⁸³⁹

4.2.1 Ombud service for long term insurance

This service, which was instituted by the Life Offices' Association of South Africa, operates as an impartial and independent mediator between insurers and insured persons with the sole purpose of reconciling the parties. An investigation is lodged after the service has received a written complaint. Hereafter, the service makes an order which is binding on all members of that business sector. This service may grant an order determining that a

⁸³² Rule 84(3) of the amended *Magistrates' Court Rules*. Also see Maclons *Mandatory Court Based Mediation* 123 -124.

⁸³³ 71 of 2008.

⁸³⁴ Part C of the *Companies Act* 71 of 2008. Also see Maclons *Mandatory Court Based Mediation* 69.

⁸³⁵ 71 of 2008.

⁸³⁶ 107 of 1985.

⁸³⁷ 71 of 2008.

⁸³⁸ Ryan and Pienaar 2007 *TSAR* 445.

⁸³⁹ 11 of 2007.

claim must be paid partially or in full. It may even grant an order that damages must be paid to a policyholder. However, the amount of damages may not exceed R10 000.⁸⁴⁰

4.2.2 Ombud service for short term insurance

This service was instituted and financed by the South African Insurance Association with the purpose of effectively and impartially solving disputes between insurers and consumers. An investigation is conducted if an insured's claim has been rejected and the insured is of the opinion that the claim should have been approved. If parties agree to mediation, the service has jurisdiction over matters pertaining to corruption, negligence encroachment of mandate and serious misconduct of an insurer.

4.2.3 Ombud service for commercial banks

This service was instituted by the board of banks and operates as an impartial and independent mediator between the banks and their clients who are either natural persons or legal persons with a maximum annual business turnover of R5 000 000 (five million rand). The purpose and aim of this service is to ensure just and equitable treatment of the bank's clients.⁸⁴¹ The service facilitates a dispute resolution process between parties. The service may suggest a settlement if the parties do not come to an agreement and determine that the bank pays damages to a client. The amount of damages may however not exceed R100 000 (one hundred thousand rand). The service will have jurisdiction over all banks that are members of its board. The impartial nature of the service is ensured by virtue of a contractual stipulation between the board of banks and its members which determines that the service may not be dismissed if one of its members does not agree with a finding of the service. However, parties are not bound by a determination made by the service. If parties wish to make the order of the service binding, it must be made an order of court. The service is also subject to review. To date no member has disregarded an order of this service.⁸⁴²

⁸⁴⁰ Ryan and Pienaar 2007 *TSAR* 445 also see Barrie 1984 *JSAL* 17-28 in this regard.

⁸⁴¹ Ryan and Pienaar 2007 *TSAR* 445.

⁸⁴² Ryan and Pienaar 2007 *TSAR* 446.

4.3 Conclusion

The purpose of this chapter was to explore the various dispute resolution mechanisms available in community schemes. Contentious and often a source of conflict is the enforcement of the conduct and management rules in community schemes. Sectional title schemes have various dispute mechanisms. A sanction that was discussed, was the embargo provision. This is not a dispute resolution mechanism, but a measure to enforce financial obligations. This measure entails that an embargo provision may be implemented if an owner is in default with the payment of his levies and may even obtain judgement against him/her if he/she fails to remedy it.⁸⁴³ The difference between the collection of outstanding levies from a solvent sectional title owner and an insolvent sectional title owner has also been illustrated. The body corporate will have no preference above a previously registered mortgage for the payment of outstanding levies if an action has been instituted against a solvent owner. However, this would not be the case in the event of an insolvent owner by virtue of the fact that the embargo is housed as part of the cost of realisation of the scheme.⁸⁴⁴

The distinction between management of a scheme in terms of a homeowners' association and management in terms of the provisions of the *Sectional Titles Act*⁸⁴⁵ was also highlighted in *Willow Waters Homeowners Association (Pty) Ltd v Koka*⁸⁴⁶ where the court determined the two requirements that need to be met for a condition in a title deed to be construed as a real right. The court further compared the embargo provision of section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*⁸⁴⁷ to section 118 of the *Local Government Municipal System Act*⁸⁴⁸ and found the two forms of embargo to be similar as both have the same legal effect. Property may only be registered if both a municipal clearance

⁸⁴³ See para 3.3.1.

⁸⁴⁴ See para 4.1.1.1. Also see Constas *De Rebus* 16-17 and Darrol *De Rebus* 57-58.

⁸⁴⁵ Act 95 of 1986.

⁸⁴⁶ 2014 ZASCA 220.

⁸⁴⁷ Act 95 of 1986.

⁸⁴⁸ Act 32 of 2000.

certificate by the municipality and a levy certificate by the conveyancer have been submitted to the registrar.⁸⁴⁹

In *Body Corporate of Greenacres v Greenacres Unit 17*⁸⁵⁰ the Supreme Court of Appeal determined that a matter may only be referred for arbitration if a dispute existed. However, the question whether arbitration is compulsory remained unanswered. In *Pinewood Park Scheme No 202 v Dellis (Pty) Ltd*⁸⁵¹ the Supreme Court of Appeal held that the management rules set out in the Act⁸⁵² are consensual as it may be amended by the developer or the body corporate in part or in its entirety.⁸⁵³ Therefore, it may not be construed that rule 71 provides for compulsory arbitration. Consequently, arbitration will only be compulsory in terms of rule 71 if the rules are amended to make provision therefore.

The arbitration procedure seems to be a more favourable route for aggrieved parties as the costs thereof are considerably less than that of litigation. Although an award of an arbitrator is binding on the parties, it does not constitute a precedent. Arbitration procedures may now also be used in the case of arrear levies.⁸⁵⁴ The disadvantage of arbitration as set out in rule 71 was that no provision was made for disputes between the body corporate and the developer, trustees or an occupier. These instances usually required an interdict issued by a court and therefore placed a restraint on the arbitration procedure. Even though it is much more time consuming, mediation seems to be the most cost effective route.

What became notable regarding the functions of the ombud is that the examination, approval, filing, preservation and amendments of the rules of sectional title schemes is

⁸⁴⁹ *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2014 ZASCA 220 para 24-25.

⁸⁵⁰ *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 3 SA 176 (SCA).

⁸⁵¹ 2012 ZASCA 105.

⁸⁵² 95 of 1986.

⁸⁵³ The developer or the body corporate may amend or remove rule 71 by way of unanimous resolution. This procedure is prescribed in regulation 30(1) and (4) of the *Sectional Titles Act* 95 of 1986.

⁸⁵⁴ See s 3(2) of the *Management Act*. Previously, court intervention was required in terms of s 37(2) of the *Sectional Titles Act* 95 of 1986 but this section has been repealed.

that it is a highly skilled task which requires well-trained employees. According to Maree⁸⁵⁵ this is a matter of great concern.

The effectiveness of dispute resolution aspects of the *Ombud Service Act* remains an uncertainty. The reason for this is that the *Sectional Titles Amendment Regulations* of 2015 did not amend rule 71 of the prescribed management rules contained in annexure 8 of the regulations to the Act⁸⁵⁶ in any way. There is no provision in respect of arbitration in the rules in terms of the *Management Act* and the *Ombud Service Act* does not make mediation in terms of the Act compulsory. Therefore, no explicit provision was made that an application to the ombud service suspends any court or arbitration proceedings.⁸⁵⁷ It has also been made clear that there is no intention to modify the current prescribed rules. Consequently, the current rule 71 in respect of arbitration will then not be in accordance with the *Management Act* and the *Ombud Service Act* unless the rules are amended by either the developer or body corporate.

Apart from the procedures prescribed in the *Ombud Service Act*, the voluntary court-annexed mediation rules of the magistrates' courts in terms of the *Rules Board for Courts of Law Act*,⁸⁵⁸ also provide for voluntary mediation. The application of the rules of a share block scheme is subject to review by a court and here the *Companies Act*⁸⁵⁹ also provides for voluntary mediation.⁸⁶⁰ The *Ombud Service Act* does not explicitly determine that if a party applies to the ombud service, the relief sought in terms of the voluntary court-annexed mediation rules of the magistrates' courts in terms of the *Rules Board for Courts of Law Act*,⁸⁶¹ alternatively the *Companies Act*,⁸⁶² as may be the case with share block schemes, will be suspended. It would seem as if parties to a community scheme have an array of choices when faced with a dispute. No reference is made to mandatory dispute resolution in any one of the three mentioned statutes. Therefore, if an aggrieved party

⁸⁵⁵ Maree 2015 *De Rebus* 18-20.

⁸⁵⁶ 95 of 1986.

⁸⁵⁷ Annexure 8 of the *Sectional Titles Act* 95 of 1986.

⁸⁵⁸ 107 of 1985.

⁸⁵⁹ 71 of 2008.

⁸⁶⁰ Section 1.1.1.

⁸⁶¹ 107 of 1985.

⁸⁶² 71 of 2008.

still chooses to issue summons instead of lodging an application to the ombud service, it will be well within his/her right to do so.

The separation of registration and managerial issues is welcomed. However, the effectiveness of two different departments administering these three statutes also remains to be seen. Especially in view of the fact that the ability of the Department of Human Settlements has been questioned in the past with regard to unnecessary administrative measures with the *Rental Housing Act* 50 of 1999.⁸⁶³

⁸⁶³ De la Harpe 2002 *PELJ* 1.

5 Chapter 5: Conclusion

5.1 Introduction

This dissertation sets out to address the research problem posed in Chapter 1,⁸⁶⁴ namely the suitability of mediation for different kinds of community schemes, as well as an in depth analysis of the *Sectional Titles Act*,⁸⁶⁵ the *Management Act*⁸⁶⁶ and the *Ombud Service Act*.⁸⁶⁷ According to section 1 of the *Ombud Service Act*, sectional title schemes; share block schemes; property owners' associations that were established for the administration of a development; housing schemes for retired persons and any other scheme or arrangement in terms of which there is shared use of; and responsibility for parts of land and buildings are all defined as community schemes. A comprehensive investigation regarding the functioning of different community schemes, together with the current applicable legislation governing such schemes has been conducted.⁸⁶⁸ This is regarded as imperative in order to fully understand the scope and impact of the *Management Act* and the *Ombud Service Act*.

In the introductory chapter it is explained that conflict in fragmented property schemes is inevitable due to a large number of people occupying a high-density community scheme.⁸⁶⁹ Often, these types of housing schemes experience difficulty in resolving disputes between members *inter se* and members and the governing body, resulting in expensive and time-consuming litigation.⁸⁷⁰ In view of Chapter 1 it is clear that a more effective dispute resolution system will be welcomed given the fact that it is imperative to protect the social cohesion of community schemes in order to secure the harmonious functioning of each scheme.

⁸⁶⁴ See para 1.2.

⁸⁶⁵ Act 95 of 1986.

⁸⁶⁶ GN 518 in *GG* 34367 of 14 June 2011.

⁸⁶⁷ GN 519 in *GG* 34368 of 14 June 2011. Also see Chapter 4 regarding the analysis of the proposed statutes.

⁸⁶⁸ See Chapters 2, 3 and 4.

⁸⁶⁹ See para 1.1 and section 4.1.

⁸⁷⁰ See para 1.1 and also Pienaar *Sectional titles and other fragmented property schemes* 220-221.

As mentioned in the introductory chapter it is estimated that 780 000 sectional title units are registered in South Africa.⁸⁷¹ This is not only indicative of its popularity, but also that it is the most preferred community scheme given the current economic and social environment. In light hereof it is likely that the demand for sectional title schemes would increase over the years to come.⁸⁷² The importance of highlighting this is that upon perusal of the consultation paper drafted by the investigators⁸⁷³ and ultimately the statutes, sectional title schemes are the most affected by the changes brought about by the *Management Act* and the *Ombud Service Act*.

The hypothesis stated that the cost of establishing and running the offices of record for sectional title and other community schemes' governance documentation, and the rendering of monitoring and quality control services, will have to be funded mainly by such schemes. It further stated that the provision of an ombud service and the training and educational aspects of the Act⁸⁷⁴ are necessary and will probably be more cost effective due to the fact that these functions do not entail the huge administration costs of an administrative body with quality control, monitoring and recording functions.⁸⁷⁵

After a thorough analysis, the following three themes namely, the nature of community schemes; the rules and functioning of community schemes as well as the remedies and settlement of disputes were dealt with.

5.2 Conclusions

5.2.1 The nature of community schemes

The Department of Rural Development and Land Reform is primarily responsible for the registration and survey issues in respect of the *Sectional Titles Act*.⁸⁷⁶ However, the

⁸⁷¹ See para 1.1 footnote 3 and Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 1.8 (2014 Service 24).

⁸⁷² Booyse *A critical analysis of the financial and social obligations* 246.

⁸⁷³ Paddock, Van der Merwe and Maluleke *Sectional Title Ombudsman investigation: Consultation paper to inform the design of a sectional titles dispute resolution system*.

⁸⁷⁴ *Ombud Service Act* 9 of 2011.

⁸⁷⁵ Pienaar *Sectional titles and other fragmented property schemes* 228-229.

⁸⁷⁶ Act 95 of 1986. Also see *Sectional titles, share blocks and time sharing*, vol 1, paras 1.13.1 and 18.1.1 (2014 Service 24).

department is not sufficiently equipped to attend to and administer the large volume of complaints regarding managerial issues that have been submitted in respect of sectional title schemes.⁸⁷⁷ As mentioned in the introductory chapter, arbitration mechanisms, as provided for in the previous management rules,⁸⁷⁸ more specifically in terms of rule 71 thereof, have proved to be ineffective in practice.⁸⁷⁹ It highlighted that there were disparities between the approaches theoretically and the required approach that needed to apply in this regard. It has furthermore been established that litigation is extremely expensive and time consuming, but moreover it was highlighted that most of the disputes often tend to make a mockery of the judicial system.⁸⁸⁰ In light of this the Department of Land Affairs (now the Department of Rural Development and Land Reform) appointed consultants in 2004 to propose a dispute resolution structure for sectional title schemes that operates separately from the provisions pertaining to registration and survey matters.⁸⁸¹ As a result thereof the *Management Act* and the *Ombud Service Act* were drafted and promulgated, with effect from 7 October 2016.

Chapter 2 focused on two aspects regarding community schemes. Firstly, it provided a historical overview of how sectional title schemes,⁸⁸² share block schemes,⁸⁸³ time-sharing schemes⁸⁸⁴ and retirement schemes⁸⁸⁵ came into being. Secondly, this chapter illustrated the conceptual understanding of the legal nature and functioning of community schemes.⁸⁸⁶ It further explains that an owner of a sectional title unit does not only own

877 Maluleke 2005 *De Rebus* 43.

878 Annexure 8 and 9 to the *Sectional Titles Act* 95 of 1986.

879 Maluleke 2005 *De Rebus* 43.

880 See para 4.1.1.2 4.

881 Paddock, Van der Merwe & Maluleke *Sectional Title Ombudsman investigation: Consultation paper to inform the design of a sectional titles dispute resolution system* unpublished paper of the Department of Housing.

882 See para 2.2.1 for a historical overview of sectional titles.

883 See para 2.3.1 for a historical overview of share block schemes.

884 See para 2.4.1 for a historical overview of time-sharing schemes.

885 See para 2.5.1 for a historical overview of retirement schemes.

886 See para 2.2.1.4 regarding the legal nature and functioning of a sectional title scheme; section 2.3.2 regarding the legal nature and functioning of share block schemes; section 2.4.2 regarding the legal nature and functioning of time-sharing schemes and section 2.5.1 regarding the legal nature and functioning of retirement schemes.

his/her unit⁸⁸⁷ but he/she also owns an undivided share in the common property which⁸⁸⁸ is apportioned by the participation quota.⁸⁸⁹

The fact that the *Sectional Titles Act*⁸⁹⁰ was divided into a leaner *Sectional Titles Act* and the *Management Act* was also highlighted. The latter Act will govern the registration process and the *Management Act* will make provision for the management rules of the scheme.⁸⁹¹ This ultimately separates the registration and consumer matters.

The legal nature regarding share blocks has also been thoroughly described. The manner in which the share block company is required to operate is prescribed and governed by the *Share Block Control Act*⁸⁹² and the *Companies Act*.⁸⁹³ It became evident that the operation and functioning of share block schemes by virtue of a share block company that is registered with the commissioner of companies and intellectual property is the more favourable option.⁸⁹⁴ The less favourable option is the operation of a share block scheme by virtue of a trading cooperative, a closed corporation, a common-law association, an *inter vivos* trust or a partnership. The reason why these entities are a viable means of operation entails that it may confer occupancy rights to property to its respective members, which is required in share block schemes.⁸⁹⁵ However, if a share block company is operated in terms of these entities, the *Share Block Control Act*⁸⁹⁶ and

⁸⁸⁷ See para 2.2.1.1 regarding the discussion of a sectional title unit as immovable property.

⁸⁸⁸ See para 2.2.1.2 for a discussion of the common property and exclusive use areas.

⁸⁸⁹ See para 2.2.1.3 regarding the participation quota.

⁸⁹⁰ 95 of 1986.

⁸⁹¹ The *Management Act* consists of s 35 and onward of the *Sectional Titles Act* 95 of 1986 without any adjustments of amendments thereto. In this regard also see Whittle 2010 *De Rebus* 11.

⁸⁹² 59 of 1980.

⁸⁹³ 71 of 2008. The *Companies Act* 71 of 2008 applies to share block companies insofar as the provisions thereof are not in conflict with the *Share Block Control Act* 59 of 1980 or are amended thereby. In this regard also see Pienaar *Sectional titles and other fragmented property schemes* 302-303.

⁸⁹⁴ See para 2.3.2 and also s 185(1) and (4), 186(1)(a)(i), 187(4) and 189 of the *Companies Act* 71 of 2008 which requires that the Commissioner of the companies and intellectual property Commissioner registrars the share block company. Also see para 3.4.

⁸⁹⁵ Pienaar *Sectional titles and other fragmented property schemes* 307.

⁸⁹⁶ 59 of 1980.

the *Companies Act*⁸⁹⁷ will not be applicable as each of these entities are governed by its own statute.⁸⁹⁸

It is, furthermore, imperative that a share block company is registered as a profit company, as nonprofit companies are not regarded as viable entities for the operation of share block companies as they do not have shareholders.⁸⁹⁹

Time-sharing schemes may be based on either a sectional title scheme or alternatively a share block scheme. These schemes may also function by virtue of a club or a lease or alternatively floating time and a points system. The most favourable option for the functioning of a time-sharing scheme is by means of shares in a share block scheme as the holder obtains use and occupancy rights to the immovable property for a recurrent annual period and not permanent occupation thereof.⁹⁰⁰ This is considered to be less complicated than sectional title schemes where time-sharing interests are utilised as co-ownership shares in a sectional title unit.

Retirement schemes may be based on sectional titles, share blocks, or alternatively, life rights. By virtue of the discussion in Chapter 2, it is clear that life rights are the most favoured option for retirement schemes. The reason for this seems to be that the occupancy rights are based on personal rights. This entails an agreement concluded between the beneficiary of the housing interest and the grantor who is usually the owner; or alternatively the management of the accommodation, membership of a club, organisation or a voluntary association.⁹⁰¹

5.2.2 Rules and functioning of community schemes

In Chapter 3 a statutory analysis was used to describe the rules that govern each community scheme. The purpose of this analysis was to identify the legal recourse

⁸⁹⁷ 71 of 2008.

⁸⁹⁸ This was discussed in more detail in Chapter 3.

⁸⁹⁹ See para 2.3.2. Section 10(2) of the *Companies Act* 71 of 2008 also specifies that s 35 thereof does not apply to nonprofit companies. In this regard see also Pienaar *Sectional titles and other fragmented property schemes* 304.

⁹⁰⁰ Pienaar *Sectional titles and other fragmented property schemes* 423.

⁹⁰¹ Pienaar *Sectional titles and other fragmented property schemes* 468-469. Also see s 1 of the *Housing Development Schemes for Retired Persons Act* 65 of 1988.

available to aggrieved parties in the different schemes. The management rules envisaged in annexure 8, the conduct rules envisaged in annexure 9 and the house rules (which are, unlike the management and conduct rules, not statutorily prescribed) govern sectional title schemes. The hierarchy of these rules are set out and the importance of each is explained.⁹⁰²

This chapter briefly discussed the current enforcement mechanisms available in each scheme in order to ensure financial stability.⁹⁰³ The effectiveness of the sanctions for noncompliance has been addressed. Although these sanctions are undesirable, it remains necessary to uphold the social cohesion of each scheme.

The enforcement of the rules in each scheme is contentious and often a source of conflict. There exists an array of dispute mechanisms with regard to sectional title schemes. Firstly, the embargo on the alienation of a unit in the case of arrear levies was discussed. This provision is envisaged in section 15B(3)(a)(i)(aa) of the *Sectional Titles Act*.⁹⁰⁴ The embargo principle is not a dispute resolution mechanism *per se*, but rather a means to enforce financial obligations specifically with regard to arrear levies. An important distinction is made regarding the application of the embargo provision in solvent and insolvent estates. To illustrate, the judgements in *Cowin NO v Kyalami Estate Homeowners Association*⁹⁰⁵ and *Willow Waters Homeowners Association (Pty) Ltd v Koka*⁹⁰⁶ were scrutinised. Both these matters have similar facts in that the members of the homeowners' association became insolvent. The court provided much needed clarity by highlighting that a body corporate has no preference over a previously registered mortgage regarding the payment of outstanding levies if an action has already been instituted against a solvent owner. This would, however, not be the case in the event of an insolvent owner, because the embargo is housed as part of the cost of realisation of

⁹⁰² See para 3.1.1.1 for a discussion of the management rules; section 3.1.1.2 for a discussion of the conduct rules and section 3.1.1.3 regarding the house rules.

⁹⁰³ See para 3.3 regarding the enforcement of the rules and sanctions for noncompliance in respect of sectional title schemes and section 3.5 regarding the enforcement of the rules and sanctions for noncompliance in respect of share block schemes.

⁹⁰⁴ 95 of 1986.

⁹⁰⁵ 2014 ZASCA 221.

⁹⁰⁶ 2014 ZASCA 220.

the scheme.⁹⁰⁷ The court provided further clarity regarding the distinction between management of a scheme in terms of a homeowners' association and management in terms of the provisions of the *Sectional Titles Act*⁹⁰⁸ in *Willow Waters Homeowners Association (Pty) Ltd v Koka*⁹⁰⁹ where the court stated that the two requirements that need to be met for a condition in a title deed should be construed as a real right.⁹¹⁰

5.2.3 Remedies and settlement of disputes

The previous recourse available in sectional title schemes is provided for in management rule 71.⁹¹¹ This rule made provision for the settlement of disputes by way of arbitration, which procedure was regarded as more favourable to the social cohesion of the scheme.⁹¹² However, the wording of rule 71 was fatally flawed by virtue of the vague wording.⁹¹³ The intention of the legislator may have entailed that arbitration procedures be compulsory, but this intention was defeated by stating "other relief" in rule 71(1).⁹¹⁴

Consequently, every conceivable court action was encompassed by the rule due to the exclusion of the specific court action that may have been obtained in terms of the rule. Therefore, nothing was left to be determined by means of arbitration. A further defect was seen in rule 71(2) in terms whereof an aggrieved party "may" demand that the dispute be referred for arbitration.⁹¹⁵ The use of the word "may" was considered to be

⁹⁰⁷ See para 4.1.1.1. Also see Constas *De Rebus* 16-17 and Darrol *De Rebus* 57-58.

⁹⁰⁸ 95 of 1986.

⁹⁰⁹ 2014 ZASCA 220.

⁹¹⁰ See para 4.1.1.1 in this respect. The two requirements entail the security for the payment of a debt and secondly, the right to use or to exclude others from using the property, alternatively, to give others rights in respect thereof.

⁹¹¹ Annexure 8 of the *Sectional Titles Act* 95 of 1986. Also see section 4.1.1.

⁹¹² Pienaar *Sectional titles and other fragmented property schemes* 220-221.

⁹¹³ Maree 1998 *De Rebus* 31-32.

⁹¹⁴ Maree 1998 *De Rebus* 31-32, Ryan and Pienaar 2007 *TSAR* 441. Also see section 4.1.1.2. This was also seen in *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 3 SA 176 (SCA). Also see section 1.2 and 4.1.3 in this regard.

⁹¹⁵ See para 4.1.1.2 and especially section 4.1.1.3.

permissive rather than mandatory.⁹¹⁶ The wording of rule 71 was in its entirety so defective that it may be safely ignored by parties intending to litigate.⁹¹⁷

In this regard the judgement of the Supreme Court of Appeal is of importance as it determined that a matter may only be referred for arbitration if a dispute existed. Unfortunately, the court did not provide clarity regarding whether or not arbitration is compulsory in terms of rule 71,⁹¹⁸ due to the fact that the management rules provided for in Annexure 8 are consensual, as it may be amended by the developer or the body corporate in part or in its entirety.⁹¹⁹ For this very reason it may not be construed that rule 71 provided for compulsory arbitration. The Supreme Court of Appeal also emphasised this in *Pinewood Park Scheme No 202 v Dellis (Pty) Ltd*.⁹²⁰ Thus, arbitration would only be compulsory in terms of rule 71 if the rules are amended to make specific provision for this. A further flaw in rule 71 entails that no provision has been made for disputes between the body corporate and the developer, trustees or an occupier.

One of the most significant changes brought about by the *Ombud Service Act*⁹²¹ is that arrear levies may now be recovered by way of application to the ombud.⁹²² Previously, in terms of the repealed section 37(2) of the *Sectional Titles Act*,⁹²³ court intervention was required in the case of arrear levies. However, the use of the word "may" in the *Ombud Service Act*⁹²⁴ is indicative that it is permissive and not mandatory.⁹²⁵

In terms of the *Sectional Titles Act*⁹²⁶ the arbitration procedure was considered to be a more favourable route for aggrieved parties as the cost thereof is considerably less than

⁹¹⁶ Van der Merwe *Sectional titles, share blocks and time sharing*, vol 1, para 9.1.1-9.1.2 (2014 Service 24).

⁹¹⁷ Ryan and Pienaar 2007 *TSAR* 441. Also see section 4.1.1.2.

⁹¹⁸ Annexure 8 of the *Sectional Titles Act* 95 of 1986.

⁹¹⁹ The developer or the body corporate may amend or remove rule 71 by way of unanimous resolution. This procedure is prescribed in regulation 30(1) and (4) of the *Sectional Titles Act* 95 of 1986.

⁹²⁰ 2012 ZASCA 105.

⁹²¹ Chapter 4 will focus on the recourse proposed by the *Ombud Service Act*.

⁹²² Section 3(2) of the *Ombud Service Act*.

⁹²³ Act 95 of 1986.

⁹²⁴ 9 of 2011.

⁹²⁵ Booyens *A critical analysis of the financial and social obligations* 76.

⁹²⁶ 95 of 1986.

that of litigation. However, a disadvantage of arbitration was that, although the award of an arbitrator is binding, it does not constitute a precedent. After the enactment of the *Management Act* and the *Ombud Service Act*, the mediation and arbitration proceedings will still be regarded most favourable to the social cohesion, but since the statutes still make use of the word "may", parties "may" still choose to litigate. This can be remedied if the rules are amended to make provision for mandatory arbitration. Should the rules remain unamended in this regard, sectional title schemes will struggle with the same issues as was the position under the previous rule 71.⁹²⁷ This finding is prudent as it is seen from practice that since the previous rule was rarely amended, it may lead to the inference that it is unlikely that the rules under the *Ombud Service Act*⁹²⁸ will be amended in future to provide for mandatory arbitration.

A discrepancy with regard to share block schemes is noted as the *Companies Act*⁹²⁹ already provides for alternative dispute resolution measures.⁹³⁰ Furthermore, the rules of the magistrates' courts have made provision for voluntary court-annexed mediation which rules are enabled and supported by the *Rules Board for Courts of Law Act*.⁹³¹ No amendment to the *Companies Act*⁹³² was made in this regard, nor is it specified in the *Ombud Service Act*⁹³³ that disputes concerning share block schemes are to be resolved in terms of the *Ombud Service Act*.⁹³⁴ It would therefore seem as if members in a share block scheme have a choice as to the dispute resolution system they wish to follow.

5.3 Concluding remarks

The aims and objectives of the enactment of the *Management Act* and *Ombud Service Act*⁹³⁵ crystallised in the findings of the dissertation. Firstly, it entails the separation of

⁹²⁷ Annexure 8 of the *Sectional Titles Act* 95 of 1986.

⁹²⁸ 9 of 2011.

⁹²⁹ 71 of 2008.

⁹³⁰ Also see sections 4.1.2 and 5.1.2.3 in this regard.

⁹³¹ 107 of 1985. Also para 4.1.2.

⁹³² 71 of 2008.

⁹³³ Chapter 4 focused on the recourse proposed by the *Ombud Service Act*.

⁹³⁴ Chapter 4 focused on the recourse proposed by the *Ombud Service Act*.

⁹³⁵ Chapter 4 focused on the recourse proposed by the *Ombud Service Act*.

registration and consumer matters, leaving the leaner *Sectional Titles Act*⁹³⁶ to attend to registration matters, whilst the *Management Act* will attend to consumer matters. At first glance this separation may be welcomed as it is now an obligation that the management rules first be examined by the Chief Ombud for approval. However, the *Management Act*⁹³⁷ only makes provision for the Chief Ombud to approve the substitution, addition, amendment or repeal of rules and not for the approval of rules.

Furthermore, no provision has been made for arbitration in the rules in terms of the Management Act nor does the Ombud Service Act provide for compulsory mediation or any form of arbitration as it only makes provision for voluntary mediation. Therefore, parties can revert to arbitration if they so prefer, or if the developer or body corporate amends the management rules to provide for either compulsory or voluntary arbitration.

It is further concluded that it is likely that the legislator had intended for a compulsory arbitration procedure in addition to the voluntary mediation procedure to be provided for in terms of the *Ombud Service Act*. However, one must admit that the use of the word "may" has the effect that the dispute resolution provided for in terms of the *Ombud Service Act* seems to still have the undesired effect that arbitration will remain voluntary, unless the rules are amended by either the developer or the body corporate so as to provide for compulsory arbitration. Therefore, the rules remain consensual in nature. As seen from practise and as previously stated, it is submitted that the prospects of the rules being amended by developers and or bodies corporate are fairly dim. Consequently, if the rules are not amended by either the developer or the body corporate, no party may be compelled to take part in the prescribed ombud procedure. This is indicative of the fact that if the developer and/or body corporate of a sectional title scheme do not amend the rules to provide for compulsory arbitration, the application of this statute will have flaws similar to that of the previous management rule 71 in this respect. In addition, the effectiveness of two different departments administering these three statutes remains to be seen.

⁹³⁶ 95 of 1986.

⁹³⁷ Section 10 of the *Management Act*.

Overall, the critical analysis of arbitration has indicated that the reason as to why the previous management rule 71 was ineffective was mainly due to the fact that the developer and/or the body corporate did not amend the rule to compel aggrieved parties to arbitrate. This is irrespective of the fact that provision has also been made for them to do so. Consequently, aggrieved parties were left with the option of litigation, if they so preferred. It is therefore highly likely that if the *Sectional Titles Act*⁹³⁸ envisaged a section that made arbitration in sectional title schemes compulsory instead of leaving it to be consensual in nature, many disputes would have been resolved more effectively. This in turn would have rendered the drafting of the *Ombud Service Act* redundant.

Apart from the aim of the *Ombud Service Act*⁹³⁹ to provide a more effective dispute resolution system, it also made provision for arrear levies to be recovered by application to the ombud.⁹⁴⁰ Yet again, the successful application thereof remains to be seen as the word "may" bestows a discretion upon the parties whether to lodge an application to the Chief Ombud or to approach the court for relief.

Furthermore, it is submitted that certain amendments are required in order for the *Ombud Service Act* to function successfully with regard to share block schemes. Briefly, the most important amendment entails an addendum to the *Companies Act*⁹⁴¹ to the effect that disputes which arise in share block schemes are to be resolved by virtue of the *Ombud Service Act*. This is imperative since share block schemes are based on contract of which the enforcement may be reviewed by the court, rendering the *Companies Act*⁹⁴² the applicable statute in these matters.⁹⁴³ This view is strengthened by the fact that the *Companies Act*⁹⁴⁴ has already made provision for alternative dispute resolution measures. The opinion is held that aggrieved parties in share block schemes are left with the

⁹³⁸ 95 of 1986.

⁹³⁹ Chapter 4 focused on the recourse proposed by the *Ombud Service Act*.

⁹⁴⁰ Section 3(2) of the *Ombud Service Act*.

⁹⁴¹ 71 of 2008.

⁹⁴² 71 of 2008

⁹⁴³ See para 3.4.

⁹⁴⁴ 71 of 2008.

discretion to litigate if they so choose. It is unfathomable that the legislator intended for this to be the case regarding share block schemes.

A further dispute resolution measure, which may be applied successfully, is seen in the voluntary court-annexed mediation which has officially been launched in terms of the rules of the magistrates' courts. These rules are enabled by the *Rules Board for Courts of Law Act*⁹⁴⁵ together with the *Jurisdiction of Regional Courts Amendment Act*⁹⁴⁶ in order to give effect to section 34 of the *Constitution*.⁹⁴⁷ This strengthens the opinion that an addendum to the *Companies Act*⁹⁴⁸ is paramount.

After comparing the previous dispute resolution measures available to aggrieved parties in community schemes to the provisions provided for in the *Management Act* and the *Ombud Service Act*, it is concluded that although these statutes attempted to transform the sectional title landscape on a theoretical level, the successful application and enforcement thereof remains to be seen in respect of all community schemes.

⁹⁴⁵ 107 of 1985.

⁹⁴⁶ 31 of 2008.

⁹⁴⁷ 108 of 1996. Also see section 4.1.2 in this regard.

⁹⁴⁸ 71 of 2008.

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LIST OF ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
Management Act	Sectional Titles Schemes Management Act 8 of 2011
Ombud Service Act	Community Schemes Ombud Service Act 9 of 2011
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg