

HOW BODY CORPORATE RULES WERE CHANGED ON 7 OCTOBER 2016

(Including a description of the process for compiling a consolidated set of rules and a list of the requirements for valid rules, categorised by the type of rule)

1 Introduction

For the last 45 years there have been an ever-increasing number of sectional title bodies corporate, each with its own two sets of rules. The first major overhaul of body corporate rules was in 1988 when the Sectional Titles Act, No. 95 of 1986 (*“the 1986 ST Act”*) came into effect and repealed the Sectional Titles Act, No. 66 of 1971 (*“the 1971 ST Act”*). When on 7 October 2016 (*“the commencement date”*) the provisions of the Sectional Titles Schemes Management Act, No. 8 of 2011 (*the “SMST Act”*) came into operation, the law again made extensive changes to the rules of the existing bodies corporate. This article will examine the effect of the STSM Act on the rules of existing bodies corporate.

2 Effect of STSM Act on unaltered prescribed rules

Where neither the developer nor the body corporate established under either the 1971 ST Act or the 1986 ST Act (*“an existing body corporate”*) had amended any of the rules prescribed under those Acts, on the commencement date those rules were entirely replaced by the management and conduct rules prescribed under the STSM Act and set out in Annexures 1 and 2 to its regulations. (S 60(7) and 60A(7) of the 1986 ST Act as well as s 10(10) and 21 of and R 6(2) under the STSM Act).

3 Effect of STSM Act on prior amendments and additions to the rules

3.1 Previously amended or added rules apply, unless they conflict with newly prescribed rules

Where a developer or an existing body corporate had amended the text of a management or conduct rule prescribed under the 1971 ST Act or the 1986 ST Act, or made additional rules, those changed rules only remained in force on the commencement date if they were not irreconcilable (they did not conflict) with any of the newly prescribed rules and could validly have been made under the STSM Act. In addition, the rules that remained in force were supplemented (added to) by any prescribed management rule that made a new provision that did not apply under the previous rules. (S 10(11) of the STSM Act). The requirements for continued validity of an amended or additional scheme rule are set out in 5 to 9 below.

3.2 Process to consolidate the rules that apply to an existing body corporate

Trustees should start with a copy of the management and conduct rules prescribed under the STSM Act, as all of these will apply to the body corporate:

- except in the unusual circumstances described in 4 below, and
- unless they have been amended or replaced by another rule that remains in force because it does not conflict with the prescribed rules and it complies with the requirements for a valid rule.

Any rule that had never been amended must be removed, because unchanged rules no longer apply - they are entirely replaced by the newly prescribed rules.

The trustees should then examine each of the rules that the body corporate has amended or added, checking their content and effect against:

- the provisions in the prescribed rules, to ensure that there is no conflict; and

- the requirements for continued validity, described in 5 to 9 below.

If an amended or added rule conflicts with any of the prescribed rules, it ceased to apply on the commencement date. If, for example, an additional management rule allowed the body corporate to debit a financial penalty to an owner's account without the member's prior consent or the authority of an order by a judge, adjudicator or arbitrator, that provision is in conflict with the newly prescribed management rule 25(5), so it ceased to apply on the commencement date. An example of an irreconcilable amended conduct rule is one that prohibited all pets in the scheme, which prohibition is in conflict with the newly prescribed conduct rule 1, which therefore replaced the amended rule on the commencement date.

Where the text of an amended or added rule addresses a topic in a way that does not contradict the newly prescribed rules, that rule remains in force and must not be deleted. For example, if an amended conduct rule includes a requirement for a particular application form that owners and occupiers must submit to the trustees in making their application for permission to keep a pet, that requirement must not be deleted because it is not in conflict with the prescribed rule and it could have been made under the STSM Act. Any such amended or added rule must be added to the prescribed rules.

In this process the trustees should also make a note of any rules that:

- confer exclusive use rights,
- vary the effects of the participation quotas in regard to the value of votes or the liability for contributions, or
- impose either a financial or a maintenance obligation on members,

as their new consolidated set of rules will have to include a prominent reference to these important provisions.

The amended or added rules that remain valid must be added to the rules prescribed under the STSM Act to make up the body corporate's consolidated management and conduct rules. The trustees must include in the consolidation the prominent reference referred to above and an index of the rules, so as to make it easy for the reader to find important topics. Finally, the consolidated rules must be delivered to owners and occupiers and must be made available at trustee and owner meetings (S 10(6) of the STSM Act and prescribed management rule 27(1)(b) and (c)).

Unlike additional rules and amendments made after the commencement date, rules validly made by a developer or a body corporate before this date that do not conflict with the newly prescribed rules and which comply with the requirements set out in 5 to 9 below continue to apply in terms of the STSM Act. They do not need to be adopted by new body corporate resolutions or to be approved by the chief ombud of the CSOS.

4 Exception for bodies corporate of subsidiary schemes

The only bodies corporate whose rules were not automatically amended on the commencement date were those of schemes where the developer had, on opening the sectional title register, imposed a title condition that assigned the body corporate's functions and powers to an association and required that all body corporate members be members of that association. This type of title deed condition is designed to allow a single overarching management association to administer a number of different types of property developments, including sectional title and other forms of community scheme.

The management rules prescribed under the STSM Act do not apply to this type of "subsidiary" body corporate (R 6(5) under the STSM Act and repealed regulation 30 under the 1986 ST

Act). However, any management rule substituted in terms of this provision will only be enforceable if it complies with the requirements set out in 5 to 9 below.

5 Primary requirements for the continued validity of rules

The rules of existing bodies corporate are considered to have been made under the STSM Act (S 10(12) of the STSM Act). This means that they remain in force, subject to any subsequent repeal or amendment, as long as they do not conflict with the newly prescribed rules and comply with the requirements for rules under the STSM Act.

All body corporate rules must:

- “provide for the regulation, management, administration, use and enjoyment of sections and common property” (S 10(2) of the STSM Act),
- be reasonable and apply equally to all owners of units (S 10(3) of the STSM Act), and
- be appropriate to the scheme (S 10(5)(b) of the STSM Act).

In addition:

- no conduct rule may conflict with any prescribed management rule (Proviso to s 10(2)(b) of the STSM Act), and
- no rule can be in conflict with any provision of the STSM Act, the Constitution of the Republic of South Africa Act, No. 108 of 1996, the Community Schemes Ombud Service Act, No. 9 of 2011 (“*the CSOS Act*”) or any other applicable national, provincial or municipal legislation.

6 Additional requirements for and possible provisions in exclusive use rules

An exclusive use rule, which may be either a management or a conduct rule, must:

- confer exclusive use rights on one or more members of the body corporate,
- specify a particular purpose for the use of each exclusive use area, and
- include a scale layout plan showing the location of each exclusive use area (S 10(7) and (8) of the STSM Act read with repealed s 27A of the 1986 ST Act).

Such a rule may also include provisions:

- regulating the use of the exclusive use area for the specified purpose,
- specifying what, if any, movable items may be stored or kept in the exclusive use area,
- regulating changes to the external appearance of the exclusive use area,
- requiring the payment of additional contributions to defray the body corporate’s costs incurred in insuring and maintaining the exclusive use area,
- regulating the body corporate’s and the member’s respective roles in maintenance and repairs in the area, bearing in mind the body corporate’s statutory obligation to maintain all the scheme’s common property, and
- regulating any other aspect that arises directly from the use and enjoyment of the exclusive use area, for example the installation, servicing and maintenance of an item such as an air-conditioning unit, gas cylinder, a water tank or a solar panel, the trimming of tree branches and roots or the maintenance of a fence or wall between such exclusive use areas.

7 Additional requirements for and examples of participation quota modification rules

A rule made in terms of section 11(2)(a) of the STSM Act or the repealed section 32(4) of the 1986 ST Act must modify one or more of the variable effects of the participation quotas. The rule may:

- allocate a different value to a section owner's vote, and/or
- modify the liability of the owner of any section to make contributions to the body corporate's:
 - expenses, or
 - unsatisfied judgment debts.

There are a wide range of circumstances in which it may be reasonable for a rule to require that voting values or owner liabilities should be allocated other than in accordance with the participation quotas of sections or their measured floor areas.

7.1 Incremental liability for lift expenses

A simple example is a rule that exempts the ground floor owners from contributing to the costs of maintenance, repair and replacement of a lift and requires that these costs be recovered only from the owners on the higher floors. The rule might also divide the liability for the costs relating to the lift among the owners of dwellings on each higher floor on the basis of how many stories they must travel in the lift to reach their dwelling.

7.2 Levy stabilization funds

A more complicated example is a rule that makes provision for an “*exit levy*” or “*levy stabilization fund*” in a retirement development. Members or their deceased estates are obliged to pay the body corporate a set percentage of the unit's sale price or of the profit on the sale, which payment is credited to the scheme's administrative or reserve fund and serves to reduce the contributions the body corporate needs to levy on the remaining owners from time to time. It has been suggested that such a provision cannot be validly included in a body corporate's rules because it is in the nature of a servitude that can only be registered as a title deed condition. However, this type of provision is often included in the governance documentation of all types of retirement developments, including sectional title schemes.

7.3 Segmented mixed-use schemes

The most complicated examples of this type of rule are found in mixed-use schemes, where rules provide for the owners in different “*segments*” of the scheme to have as much decision-making autonomy and ring-fenced financial responsibility as is permissible under the STSM Act. The developer may make rules that divide the scheme into, for example, residential, commercial, retail, parking garage and hotel segments. The rules typically provide that all scheme expenses that can be attributed to a particular segment must be recovered from the owners of units in that segment. Any scheme expenses which are common to all segments are recovered from all owners.

While the allocation of actual participation quotas amongst the sections in the residential segments of a mixed scheme must be in accordance with their measured floor areas (S 32(1) of the 1986 ST Act), this type of rule can, subject to consumer protection provisions (S 11(2)(b), (c) and (d)), be used to modify the contribution liability and/or voting rights that attach to sections in any part of the building, including those that are put to residential use. The developer can be creative and, subject to financiers' approval and market acceptance, allocate expenses in accordance with other criteria. So, for example, the commercial segment owners could contribute to its expenses in proportion to the assessed value of their properties, as re-valued

from time to time. If the hotel segment includes rooms that are separate sections, the owners could contribute to the hotel segment's running costs in proportion to the income earned from their rooms. The retail units could contribute to their segment's expenses in proportion to their retail turnovers.

The administrative functions of the body corporate in a mixed scheme may also be segmented, with the owners in each segment having different voting values for decisions that affect only their segment and those that affect the entire scheme. Owners in each segment can, in effect, be given the right to elect their own trustees. The trustees and the owners for and in each segment can be given the right to take decisions in regard to issues and expenses that affect them, subject to the consensus requirements and resolutions required in terms of the STSM Act.

Where an expense or issue affects a number of segments, but not all of them, the authority to take the decision and the funding obligation can be aligned with ownership of units in the appropriate segments. Decisions that affect all segments can be taken by all owners and expenses that affect all segments can be funded by all owners.

8 Additional requirements for other management rules

Management rules:

- can only deal with:
 - the regulation, management and administration of the body corporate, and
 - the rights and obligations of sectional owners as members,
- can cover any issue relevant to how the body corporate is operated and managed, including the functions and duties of its trustees and the rights and obligations of its members as such,
- can include positive and negative obligations on the body corporate, chairpersons, trustees and members, obliging or entitling them to do particular things and restricting their right to do other things, but
- cannot validly impose rights or obligations on members in their use and enjoyment of sections or the common property, because these can only be included in the scheme's conduct rules.

9 Additional requirements for other conduct rules

Conduct rules:

- can only deal with the regulation and management of the behaviour of owners and occupiers in their "*use and enjoyment of their sections and the common property*",
- must be designed to prevent a nuisance or interference with the rights of others under sections 13 (1) (a), (d), (e) or (g) of the STSM Act,
- must not limit any owner's right to use a section, an exclusive use area or the common property unless the limitation is designed to prevent a nuisance or interference referred to above and the rule is a proportionate response to the harm that would be suffered as a result of the breach (S 25(1) of the Constitution of the Republic of South Africa Act, No. 108 of 1996),
- can include positive and negative obligations on owners and occupiers, obliging or entitling them to do particular things and restricting their right to do other things, but
- cannot validly deal with a body corporate management issue, because such a provision can only be included in the scheme's management rules.

10 Challenges to the validity of body corporate rules

Before the commencement date, disputes in regard to the validity of body corporate rules could only be heard by the High Court or a private arbitrator. Under the CSOS Act, the trustees as well as any owner or occupier can bring an application, at very little cost, for:

- *an order requiring the association to approve and record a new scheme governance provision;*
- *an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision; or*
- *an order declaring that a scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision—*
 - *to remove the provision;*
 - *if appropriate, to restore an earlier provision;*
 - *to amend the provision; or*
 - *to substitute a new provision.* (Section 39(3)(b), (c) and (d) of the CSOS Act).

Even if a rule was accepted for filing at the deeds registry before the commencement date or it has since been approved by the chief ombud of the CSOS, any person with a material interest in the administration of a scheme who believes that a body corporate rule is invalid or unreasonable can apply to the CSOS to have it removed or changed. For example, a CSOS adjudicator can give an order that *“the body corporate’s conduct rule 12 headed “Fines and other penalties” is invalid because it is in conflict with management rule 25(5) prescribed under the STSM Act. The body corporate is required to approve and record a new rule removing the invalid provision.”*

Graham Paddock

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