Guide to the Regulatory Environment and Related Best Practices for Community Schemes

Contents

Background

The main purpose of this Guide is to enable the Trustees and Directors of Community Schemes, where they have elected not to make use of the services of a Managing Agent, to be able to self-manage the regulatory and compliance environment in which their scheme operates.

Management of sectional title schemes requires many administrative and secretarial tasks that have numerous legislative requirements. The Guide focuses on those areas most likely to be confronted by Trustees/Directors of Community Schemes.

By using the contents of the guide, Trustees/Directors/Estate Management will be guided in the processes and required procedures to be followed. The Guide will also assist Trustees/Directors/ Estate Management in their decision making in respect of a number of key areas governed by the act.

By following the best practices laid down in the Guide, will also go a long way in helping Trustees/Directors improve the overall level of governance within a Community Scheme/Body Corporate.

Where the services of a Managing Agent are used, the content can still be used to help educate Trustees/Directors and Estate Management in the key requirements of the Sectional Title Schemes Management Act (STSM Act) and with the correct compliance procedures to be followed.

Community Schemes Ombud Services Act (CSOS)

The requirements for every Community Scheme/Body Corporate are as follows:

1. Registration of the Community Scheme with CSOS.
2. Monthly payment of 2% of levy income to CSOS.
3. Submission of annual return to CSOS on prescribed form CS2 along with a copy of the latest financials within 4 months of the financial year end.
4. Lodgement of required documents with CSOS – house/conduct/management rules, filing of annual financial statements and annual budget. Community Scheme must be issued by the Ombud's (CSOS) Office with a certificate of approval of its phase 2/discretionary rules as contemplated in section 10 of the Sectional Titles Schemes Management Act.
5. The Act also lists the duties of Community Scheme Executives/Office bearers.
6. To notify the domicilium / service address of the Community Scheme/Body Corporate to the Ombud (CSOS).

What then are the respective sections in the Sectional Title Schemes Management Act (STSM Act)?

- Section 1 deals with the definitions under the Act
- Section 2 is about the Body Corporate
- Section 3 lists the Functions of the Body Corporate
- Section 4 lists the powers of the Body Corporate
- Section 5 lists the powers of the Body Corporate
- Section 6 deals with Meetings of the Body Corporate
- Section 7 is about the Trustees

- Section 8 details with the Fiduciary position of Trustees
- Section 9 deals with proceedings on behalf of the Body Corporate
- Section 10 deals with the Rules
- Section 11 deals with the effect of quotas and variations thereof
- Section 12 deals with the expropriation of common property
- Section 13 lists the duties of owners
- Section 14 details Insurance by owners
- Section 15 deals with the recovery from owners of unsatisfied judgments against bodies corporate and the non-liability of bodies corporate for debts and obligations of developers
- Section 16 deals with the appointment of Administrators
- Section 17 deals with the destruction of or damage to buildings
- Section 18 deals with the Sectional Title Schemes Management Advisory Council
- Section 19 deals with Regulations
- Section 20 deals with the amendment of the Sectional Titles Act – Act 95 of 1986
- Section 21 deals with Transitional arrangements
- Section 22 deals with the commencement of the Act

References in the Regulations to the STSM Act

- Regulation 1 deals with the definitions in the Regulations
- Regulation 2 deals with the minimum requirements for reserve funds
- Regulation 3 deals with other risks to be insured against
- Regulation 4 deals with the powers of a provisional curator ad litem and curator ad litem
- Regulation 5 deals with Notifications
- Regulation 6 deals with Rules
- Regulation 7 deals with the broadly representative nature of Advisory Council
- Regulation 8 deals with the effective date of the Regulations

References in the Prescribed Management Rules (PMR)

- All references in this guide are made from the Prescribed Management Rules – Annexure 1 of the STSM Act – (Trustees/Directors will need to investigate if the rules apply to their Community Scheme/complex or if these rules for the Community Scheme have been amended).
- PMR 1 is the Heading
- PMR 2 deals with the Interpretation
- PMR 3 deals with amendments and the binding nature thereof
- PMR 4 deals with the Service Addresses – previously called the "domicilium"
- PMR 5 to 8 deals with the Trustees
  5 – Trustees
  6 – Requirements for office and disqualification
  7 – Nomination, election and replacement
  8 – Payment and indemnity
- PMR 9 to 14 deals with Trustee meetings and decisions
  9 – General powers and duties
  10 – Validity of actions
  11 – Calling and attendance at meetings
  12 – Chairperson
  13 – Quorum
  14 – Voting

- PMR 15 to 20 deals with Owner's meetings
  15 – Notice
  16 – First general meeting
  17 – Annual and special general meetings
  18 – Chairperson
  19 – Quorum
  20 – Voting and representatives
- PMR 21 to 26 deals with Financial management
  21 – Financial year, functions and powers
  22 – Maintenance, repair and replacement plan
  23 – Insurance
  24 – Administrative and reserve funds
  25 – Contributions and charges
  26 – Financial records, budgets, reports and audit
- PMR 27 to 28 deals with Administrative Management
  27 – Governance documents and records
  28 – Executive Managing Agent and Managing Agents
- PMR 29 to 31 deals with Physical Management
  29 – Improvements to common property
  30 – Use of sections and common property
  31 – Obligation to maintain

References in the Prescribed Conduct Rules (PCR)

All references in this guide are made from the Prescribed Conduct Rules – Annexure 9 of the Act – the Trustees/Directors will have to investigate to see if these rules apply to their complex or if their complex has amended these rules.

PCR1 deals with the keeping of animals, reptiles and birds
PCR2 deals with refuse and waste disposal
PCR3 deals with vehicles
PCR4 deals with damage to common property
PCR5 deals with the appearance of section and exclusive use area
PCR6 deals with the storage of flammable materials
PCR7 deals with the behaviour of occupiers and visitors in sections and on common property
PCR8 deals with the eradication of pests

Duties, Election and Composition of Trustees

Section 3, 4 and 5 of the STM Act deals with the functions and powers of the Body Corporate.

Section 3 – Functions of the Body Corporate

- To establish an administrative fund to cover the estimated annual operating costs :

The fund must be reasonably sufficient to cover the following:

- Repair, maintenance and administration of the common property – this includes reactionary maintenance
- The payment of the Council accounts
- The payment of insurance premiums
- Costs for the discharge of any duty or other obligation of the BC
- To establish a reserve fund to reasonably cover the cost of future maintenance and repair of the common property:

This was introduced by the STSM Act in 2016.

The fund must be used for planned maintenance and is envisioned to prevent recurring special levies.

- To require the owners to pay contributions to these funds:

It remains preferable for Body Corporates to show the contributions to these funds separately by reflecting them as separate amounts on statements i.e. to have an admin fund levy and a reserve fund levy. They still need to be added together to constitute the monthly levy, but they are shown separately.

- To require the Developer – who has a Section 25 rights reserved to extend the scheme – to make the necessary contributions to the funds:
- To determine the amounts for the contributions
- To raise the contributions
- To open and operate separate bank accounts for the funds
- To insure the building(s) against all risks as prescribed
- To insure against such risks as the BC may determine by special resolution
- Then to quote from the STSM Act – "subject to section 17 and to the rights of the holder of any sectional mortgage bond, forthwith to apply any insurance money received by it in respect of damage to the building, in rebuilding and reinstating the building or buildings in so far as this may be effected".

Section 7 explains the functions and powers that must be performed by the Trustees.

In a new sectional title development, all the registered owners are trustees until the first general meeting of the body corporate takes place. At this meeting the owners have to nominate the people who they would like as their trustees.

The Act requires that any nominations for trustees have to be made in writing and must be provided to the chairman or the managing agent no less than 48 hours before the AGM starts. Nominations must be signed by both the nominator and the nominee, and nominations not meeting these requirements will be deemed invalid.

Deciding on the number of trustees

The Sectional Titles Schemes Management Act (STSMA) requires that an agenda is followed at the AGM. With regards to the election of the trustees, the first point of order is to decide how many trustees the body corporate wants to appoint.

Most commonly, three to seven trustees are appointed but this entirely depends on the number of units in the schemes. The STSMA only provides a directive for schemes where there are less than four owners of primary sections in the scheme. Here all the owners automatically become trustees of the body corporate without needing to be elected.

As voting at trustee meetings are determined by way of a majority vote, it is more efficient to elect an uneven number of trustees. This means that, when there are 5 trustees and they need to vote on a resolution, there can never be a deadlock.

Where there is an even number of trustees and a deadlock is reached, the responsibility lies with the chairman to cast an additional vote which will then determine the outcome. This is not an ideal situation as it provides the chairman with an unfair advantage – one which may not be in the best interest of the body corporate.

For this reason, it is advisable for the body corporate to elect an uneven number of trustees. This will ensure that any decisions the trustees take are based on a majority decision and not left to the chairman to determine the outcome of the vote.

Fiduciary Position of Trustees/Directors

Section 8 details with the Fiduciary position of Trustees.
The fiduciary position of trustees is established in terms of Section 40(2) of the STA, which stipulates that "each trustee of a Body Corporate shall stand in a fiduciary relationship to the Body Corporate".

This implies that a trustee shall in relation to the Body Corporate:

i) Act honestly and in good faith (which holds that they shall exercise their powers to manage the affairs of the Body Corporate in the interest and for the benefit of the Body Corporate and shall not act without, or exceed, their powers);

ii) Avoid any material conflict between their own interests and those of the Body Corporate.

Destruction and Damage to Buildings

Section 17 deals with instances where there has been the destruction of or serious damage to buildings.

- To pay the insurance premiums
- To maintain the common property and to "keep it in a state of good and serviceable repair"
- To comply with any notice or order of any competent authority requiring repairs or work to be done to the land or buildings
- When receiving a reasonable request; to provide the names and addresses of the Trustees or of the members of the BC
- To notify the following of the domicilium / service address of the BC:
    - The Chief Ombud
    - The local Council
    - The Registrar of Deeds
- To ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property:
- To maintain any plant, machinery, fixtures and fittings used in connection with the common property and sections and to keep them in a state of good and serviceable repair
- Subject to what falls under the Council's obligations to maintain and repair including renewal where reasonably necessary, pipes, wires, cables and ducts existing on the land
- If any owner or bondholder or any person authorised by the owner or bondholder requests a copy of the insurance policy and/or proof that the insurance premiums have been paid – it must be given to them

Powers of the Body Corporate

- To appoint such agents and employees as they see fit
- By special resolution decide to purchase / acquire / take transfer / mortgage / sell / give transfer / hire or let units – when essential for the proper fulfilment of its duties:
- To purchase / hire / acquire movable property:
    - For the use of owners
    - For their enjoyment
    - For their protection
    - For the protection of the common property
    - In connection with the enjoyment of the common property
- Where practical to establish and maintain lawns, gardens and recreational facilities on the common property
- To pass a special resolution to borrow money – if it is required in the performance of the functions or the exercise of the powers of the BC
- If they have borrowed money, they have the power to secure the repayment of the loan and interest on it by mortgaging any property owned by the BC or by a notarial bond over future levies
- To invest money in terms of the administrative fund:

The omission of reference to the reserve fund is dealt with in PMR 21

- To enter into an agreement with an owner for the provision of amenities or services, including the power to rent a portion of the common property to any owner / occupier by way of a lease (other than a lease as per Section 5(1)(a)) And you need a special resolution for the lease
- To do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property

It is to be noted that even though Section 4 of the STSM does not specifically mention the power of the BC to enter into contracts with the Council for the supply of services, this is covered by Section 4(1)(i) and PMR 21(3)(e).

Additional powers of the Body Corporate

- May after passing a unanimous resolution and with the written permission from any Section 25 right holder do the following:
    - Alienate any part of the common property
    - Enter into a long-term lease or a lease with a person / company other than an owner / occupier
- May – subject to Section 17(1) of the STA – deal with such common property or part thereof in terms of the resolution.
- May execute any deed required for this purpose (including any deed required under the STA)
- May – with the written consent of ALL owners as well as ALL bondholders – alienate, exercise or cede a right of extension of the scheme (by the addition of sections)
- May; with a unanimous resolution; extend the period of the Section 25 right that was reserved
- May – with the written consent of all owners – purchase land to extend the common property. Subject to Section 5(2)
- May – by unanimous resolution – give owners exclusive use rights in terms of the plans
- May – by special resolution – cancel an exclusive use right that was created in terms of the plans
- May – by special resolution – create servitudes
- Must – if approved by special resolution – approve the extension of a section
- May generally exercise any power and perform any function conferred or imposed on the body corporate in terms of this Act or the Sectional Titles Act.
- May (by written resolution of the Trustees) decide to join organisations or subscribe to services to further its purpose.

The CSOS Act also lists the duties of Scheme Executives -this includes the Trustees of a Sectional Title Scheme.

Chairman/Chairperson

The STSM Act determines that (at the first Trustee meeting after the AGM) the Trustees must elect a Chairperson/Chairman.
The Chairman will have a casting as well as a deliberate vote only at Trustee meetings- not at General meetings.
Other than this and having to chair Trustee and General meetings the Chairman does not have any other powers that the other Trustees do not have in terms of the Act.

What is new in the STSM Act are the duties of a Chairperson of a meeting:

PMR 18(3) A chairperson must—

- maintain order, regulate the orderly expression of views and guide the members and other participants through the business of the meeting in accordance with the common law of meetings;
- ensure that all motions and amendments proposed are within the scope of the notice and powers of the meeting;
- ensure that the scheme's rules, the minute books and any other documents relevant to the items of business on the agenda are available at the meeting;
- act fairly, impartially and courteously to all members and others entitled to attend the meeting;
- ensure that all members and other persons entitled to speak are able to express their views without unnecessary disturbance or interruption;

(f) adjourn the meeting, when it is not able to complete or continue with its business;

- make decisions on points of procedure;
- settle disputes by giving rulings on points of order; and
- surrender the chair to a temporary chairperson elected by the members for any period during which the chairperson wishes to engage in the debate of any item of business.

(4) A chairperson at a general meeting must not—

- from the chair, attempt to influence members' views on any item of business; or
- disclose in advance of a vote how the chairperson intends to vote on any item of business

Rules

One of the duties of a Trustee/Director is the enforcement of the Rules governing the Community Scheme.

The different types of Rules can be explained as follows:
The 1971 Sectional Titles Act introduced the system of Rules.

Rules created under this Act were called Schedule 1 and Schedule 2 Rules. Schedule 1 Rules were the Management Rules (what is currently known as Annexure 1 of the STSM Act) and Schedule 2 Rules were the Conduct Rules (what is currently known as Annexure 2 of the STSM Act).

In the few schemes where on 1 June 1988 the Schedule 1 Rules have never been altered and thus applied in their original form, the Prescribed Management Rules (Annexure 8) replaced those pre-existing Rules on that date.

Similarly, the Prescribed Conduct Rules (Annexure 9) replaced any unaltered pre-existing Schedule 2 Rules that applied to a Body Corporate on that date. And subsequent to the new STSM Act, Annexure 8 and 9 were replaced with Annexure 1 and 2.

If on 1 June 1988 the Schedule 1 or 2 Rules of a Body Corporate had been altered, they remain in force, as part of either the Management or Conduct Rules respectively, only to the extent that they were not irreconcilable with any prescribed Management Rule. In addition, the pre-existing Rules that remained in force were supplemented by any Rule that appeared in the prescribed Management or Conduct Rules but were absent from the pre-existing Rules.

The Schedule 1 Rules also sometimes make provision for House Rules to be set in place. Any scheme that operates on Annexure 1 and 2 Rules cannot have House Rules.

Schedule 1 and Annexure 1 Rules consists of clauses governing the basic constitution of the Community Scheme/Body Corporate and the rights of individual owners. These rules may be amended only by unanimous resolution of the Community Scheme/Body Corporate.

Schedule 2 and Annexure 2 Rules deal more with the personal behaviour of the members of the Community Scheme/Body Corporate. These rules may be amended only by special resolution of the Community Scheme/Body Corporate.

Dispute Resolution

Any dispute between the body corporate and an owner or between owners arising out of or in connection with or related to the Act, the Management rules or the Conduct rules, save where an interdict or any form of urgent or other relief may be required or obtained from a Court having jurisdiction, shall be determined by approaching the CSOS – Community Schemes Ombud Service.

The costs for an application being R50 for Conciliation by CSOS and if that does not resolve the issue, it can go to Adjudication (cost being R100).

Annual General Meetings

The STSM Act stipulates that the Body Corporate should have an Annual General Meeting (AGM) every year within four months after the Body Corporate's financial year end.

It is one of the duties of Trustees to ensure that the accounts of the Body Corporate are audited on an annual basis by independent auditors appointed by the Body Corporate at an Annual General Meeting.

The draft Annual Financial statements (AFS) need to be approved by the Trustees before the auditors will produce the final AFS.

There also needs to be a proposed budget approved by the Trustees to be tabled at the meeting for final approval by the AGM.

The Chairperson must prepare and sign a Trustee report for the year that has been passed. This must be added to the notices of the meeting.

The Trustees/Directors then need to decide on a date for the AGM – this should upon receipt by owners, give them at least 14 days notice of the meeting.

The notice of any general meeting must be accompanied by at least the following:

- an agenda
- a copy (or comprehensive summary) of any document that is to be considered or approved at the meeting
- a proxy form (in the prescribed format)

The order of business of the AGM is prescribed by the STSM Act:

- Confirm proxies, nominees and other representatives of owners and issue voting cards
- Determine that there is a quorum
- Elect a person to chair the meeting (if necessary)
- Present proof of notice of the meeting or waivers of notice
- Approve the agenda (this does not mean that items can be added to the agenda at the meeting – it only means that the order of the agenda (as circulated) needs to be approved
- Approve the minutes of the previous general meeting (if any)
- Deal with unfinished business (if any)
- Deal with any business requested by 25% of the owners or bondholders (of at least 25% of the primary sections) (if any)
- Receive reports from the Trustees/Directors or other committees (It is important to note that this is a "Trustee/Director" report and not a "Chairperson" report. The Trustees must give their input and be aware of what is said in the report. It must be signed by two Trustees or one Trustee and the Managing Agent)
- Approve the schedule of insurance replacement values (The STSM Act stipulates that the BC must do a replacement valuation every three years and table this to the AGM. The STSM Act also stipulates that the Body Corporate must prepare for each AGM schedules showing estimates of:
    - The replacement value of the buildings and all improvements to the common property
    - The replacement value of each unit (excluding the member's interest in the land included in the scheme)
    - Determine the extent of insurance cover ito the following:
        - Public liability
        - Loss of funds
        - Other risks the owners want the BC to be insured for
- Approval of the admin fund budget and the reserve fund budget

It is important that the budgets be approved by the Trustees/Directors before being tabled to owners at the AGM. If the Trustees/Directors have not approved the budgets, it will be difficult to get to owners to approve it.

- Consider the annual financial statements (AFS)

It should be noted that the Act does not say "approval of the annual financial statements". This is because the draft AFS have to be approved by the Trustees/Directors before the Auditor will issue the final set of accounts – these are also signed by the Auditors.

- Appoint an auditor (only if it will be proposed that new auditors be appointed is it necessary to attach details of the proposed new auditors – i.e. quotes from various auditors).

- Determine the number of Trustees (unless there is 4 or less members that are owners of primary sections; or where there is an Executive Managing Agent)
- Election of Trustees/Directors (if applicable as per the above)
- Report on the rules (this no longer is the responsibility of the Auditor)
- Deal with any new or further business

The agenda item "General" has always been a contentious one as it appears that this gives owners the impression that they can add anything to the meeting without proper notice being given. This point now removes the need for the item "General". It still does not mean that an owner can't add new agenda points under this item. Should owners at the meeting raise points / issues that are not on the agenda it is advisable that they be given the opportunity to raise them, but it is important to explain to them that these cannot be discussed or voted on at the meeting given that proper notice of these have not been given to all owners.

These items should then be taken as directions to the incoming Trustees/Directors to investigate and possibly table at the next general meeting for discussion and voting thereon.

- Give directions or restrictions to the Trustees
- Dissolve the meeting

The complete pack and notices should be sent to all owners and bondholders – to the domicile they selected/held on record.

If one of the owners subsequently comes forward with something they want to add to the agenda, it cannot be done as the Act states that at least 14 days' notice must be given with details of all agenda points attached.

Notice

PMR 15(6) states that notice of the AGM must be delivered to:

1. The service address of the members. The service address is the primary section registered in the member's name, unless that member has given the body corporate written notice to change the address to another physical, postal or fax address within South Africa or to an email address.
2. The most recent physical, postal, fax or email address that non-members notified the body corporate in writing.
3. The physical address of the section is the service address for any legal process or delivery of document to an occupier of a section.

Content of notice

The written notice must specify the place, date, and hour of the meeting. Where AGM meetings are held in person the meeting must be held in the local municipal area in which the scheme is located, unless:

1. The body corporate have made arrangements for attendance at the AGM by telephone or Zoom in terms of PMR 17(10).

2. The members have decided by special resolution in terms of PMR 15(4) to hold it elsewhere.

PMR 15(3) requires that the notice must be accompanied by at least the agenda for the AGM; a comprehensive summary of any document to be considered or approved by the members; and a proxy appointment form in the prescribed format.

PMR 17(7) requires that the agenda must contain the descriptions of the general nature of all business to be decided at the meeting and a description of the matters that will be voted on at the meeting including the proposed wording of any special or unanimous resolution.

Shorter notice period

PMR 15(7) provides two situations in which an AGM can be called on shorter notice periods:

1. The trustees can resolve to call an AGM on 7 days' notice in circumstances where there is urgency. In this circumstance the trustees must justify the short notice by setting out the reasons for such resolution. Furthermore, the trustees cannot use the shorter notice period to call an AGM where a resolution is to be taken to consider unnecessary improvements to common property or e.g. the installation of pre-payment meters.
2. In circumstances where all persons entitled to attend a meeting agree in writing, the meeting can be called on less than 14 days' notice. In these circumstances the notice period can be any number of days as long as the persons affected all agree thereto in writing.

Longer notice period

Section 6(2) requires that there be 30 days' written notice to all the members of the body corporate specifying the proposed resolution for situations where there is a unanimous or special resolution on the agenda of the AGM.

This notice must be delivered by hand to each member or sent by pre-paid registered post to the address of a member's section in the scheme or sent by pre-paid registered post to the physical or postal address in South Africa that the member has chosen in writing for such notice. In addition, such notice may also be sent to a member by fax or email.

PMR 15(9) states that voting at a meeting may proceed despite the lack of notice if all persons entitled to receive notice in writing waive their right to notice.

Special Resolutions

In terms of the Act there are a number of instances where a special resolution needs to be passed by the Community Scheme/Body Corporate. There are two ways of obtaining a special resolution:

1. **By having a meeting**
    - At least 30 days written notice must be given of the meeting

- The notice must either be given by hand or sent by registered post
- The notice of the meeting must specify the resolution needed
- At the meeting a quorum (as determined by the number of units in the complex) must be present or represented
- At least 75% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners present or represented at the meeting must then approve the resolution in order for it to be passed

2. **By passing a round robin resolution.**
   - In this regard all owners are approached to give their written approval of the resolution
   - At least 75% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners must then approve the resolution in order for it to be passed

In terms of the Act all owners may vote for a special resolution – regardless of the fact that they may be in arrears with their levies or in contravention with any of the rules. If the Community Scheme/Body Corporate is unable to obtain a special resolution it may approach the CSOS Ombud for relief.

Unanimous Resolutions

In terms of the Act there are a number of instances where a unanimous resolution needs to be passed by the Community Scheme/Body Corporate. There are two ways of obtaining a special resolution:

1. **By having a meeting**
   - At least 30 days written notice must be given of the meeting
   - The notice must either be given by hand or sent by registered post
   - The notice of the meeting must specify the resolution needed
   - At the meeting a quorum of at least 80% of all owners must be present or represented
   - 100% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners present or represented at the meeting must then approve the resolution in order for it to be passed
   - Any owner that abstains from voting will be regarded as a vote in favour of the resolution
   - Where the resolution adversely affects any owner, they must give written approval for the resolution to be passed.

2. **By passing a round robin resolution.**
   - In this regard all owners are approached to give their written approval of the resolution
   - 100% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners must then approve the resolution in order for it to be passed.

In terms of the Act all owners may vote for a unanimous resolution – regardless of the fact that they may be in arrears with their levies or in contravention with any of the rules.

If the Community Scheme/Body Corporate is unable to obtain a unanimous resolution, it can approach the Ombud (CSOS) for relief.

Attendance

In terms of PMR 11(3), members, registered bondholders, holders of future development rights and the body corporate's appointed managing agent may attend the meetings and may further speak on any matter on the agenda. However, no one, other than the trustees, may propose any motion or vote.

Should any part of the meeting deal with issues relating to contraventions of the STSM Act and the rules of the body corporate, or any matter that the trustees resolve that the presence of the attendees will unreasonably interfere with the interests of the body corporate or a person's privacy, the trustees may request that any such attendees leave the meeting.

Quorums

At the meeting, an attendance register for all owners to sign must be provided. This will be used to determine the quorum present.

A quorum is the minimum number of people who should be present or represented at a meeting before the meeting can legally start.

PMR 19 deals with this and stipulates that business may not be dealt with at a general meeting unless a quorum is present.

The STSM Act (since 7 Oct 2016) stipulates that the quorum needed for a general meeting is as follows:

- Where there are less than 4 primary sections or less than 4 members:
    - Two thirds of the value of the votes of members
    - And they must be entitled to vote
- For any other schemes:
    - One third of value of the votes of members
    - And they must be entitled to vote

With the following new provisions (since 7 October 2016):

- At least two people must be present unless all the sections in the scheme are registered to one person
- When calculating the value of the votes (in terms of the quorum) the votes of the Developer must not be taken into account
- The value of the votes of any sections registered in the name of the BC must not be taken into account and the BC must not be considered to be a member

The emphasis is here on “entitled to vote”. If an owner is in arrears with their levies and a court or adjudicator has given a judgment or order for the payment of that amount or the owner is in contravention of the Conduct Rules and a court or an adjudication has ordered that owner to refrain from breaching such a rule (and there are no special or unanimous resolution to be passed at the meeting) then he/she is not entitled to vote and therefore will not form part of the quorum.(This can lead to the situation where there is a room full of people but not enough of them are entitled to vote so you do not have a quorum for the meeting and the meeting cannot start).

PMR 19(4) states that if within half-an-hour from the time appointed for a general meeting a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same place and time, and if at the adjourned meeting a quorum is not present within half-an-hour of the time appointed for the meeting, the owners present in person or by proxy and entitled to vote shall form a quorum.

At the adjourned meeting there must be at least 2 owners present in person (one person present in person with proxies does not form a quorum).

It is therefore very important to always make sure that you will have a quorum present at the AGM by getting as many proxies as you can as you don’t want just two people present at the adjourned meeting, being able to make decisions on your behalf.

Proxies

An owner who cannot attend a meeting can appoint someone as their proxy to attend the meeting and vote on their behalf. A provision was added in the STSM Act (since 7 October 2016) that a person must not act as a proxy for more than two members. With the emphasis on “member” – it does not say “section”.

Ito PMR 20 a proxy does not have to be a member but must not be the Managing Agent; an employee of the Managing Agent or an employee of the Community Scheme/Body Corporate.

The PMR also provides that a proxy must be in the prescribed form and must be either:

- Delivered to the BC 48 hours before the time of the meeting OR
- Handed to the Chairperson at the start of the meeting

Under the previous Act – before 7 Oct 2016 – it was stipulated that the proxy must be handed to the Chairperson before the start of the meeting. The amendment provides that when proxies are handed in 48 hours before the meeting there is still enough time to verify the proxies and ensure that each person only has a maximum of two members’ proxies.
It is important to remember that if an owner is not entitled to vote at a meeting their proxy will also not be able to vote on their behalf.

It is one of the duties of the Trustees/Directors to compile minutes of each meeting (Trustee/Director meetings and General meetings) and it is also stipulated in PMR 9 that the minutes must be circulated to all persons entitled to notice of the meeting – not later than 7 days after the meeting.

It is a good practice to have the minutes signed twice within 48 hours of the AGM. They should be declared as a true copy of the proceedings by the Chairperson and one Trustee or the Managing Agent directly after the meeting and then approved at the next AGM and signed by the Chairperson and one Trustee/Director or the Managing Agent again. The reasoning behind this is that minutes that are not signed are worthless – so for a year (until the next AGM) you have no minutes to give to owners, banks etc

At the AGM the owners, by approving the proposed budget, decide what the annual levies should be. The Act states that within 14 days after the meeting the Trustees/Directors should pass a resolution on how these levies will be payable and notify all owners of this within the 14 day period. E.g. Annually, weekly or monthly/on or before the first day of each month?

The Act does not state anything about how levies will be payable and it is up to the Trustees/Directors to decide what is most practical and realistic. The new levies only become payable on the passing of this resolution by the Trustees.

Voting

At the meeting, a motion proposed by any one trustee does not need to be seconded and must be determined by a resolution of the majority of the trustees present and voting, in terms of PMR 14(1). Each trustee, in terms of PMR 14(2), has only one vote in number, except the chairperson, who has a casting vote if there is a tie in votes.

A trustee, who has any direct or indirect personal interest in a matter to be discussed, considered or voted on by the trustees, including any contract to which the trustee is a party, is disqualified from voting, as set out in PMR 14(3). Furthermore, in terms of PMR 6(3), should a trustee have such an interest, they must not be present at, or play any part in the consideration or decision of the matter.

Members of body corporates must meet annually to deal with certain legislated agenda items and resolutions. The Sectional Titles Schemes Management Act 8 of 2011 (the "STSM Act") allows for these meetings to occur physically where members meet face-to-face, or remotely where members meet over the phone, or via an online video conferencing forum such as Zoom. Suitable notice periods for the AGM must be given to owners within a Body Corporate.

Minutes

In terms of PMR 9(e), the trustees must compile minutes of each meeting, and distribute these to the persons entitled to receive notice of the meeting not later than 7 days after the meeting. Furthermore, in terms of PMR 27(4), any member may request access to, or copies of, such minutes within 10 days of their written request.

Directions and Restrictions to the Trustees

At every Annual General Meeting there is an agenda item - "Directions and Restrictions to the Trustees/Directors". The right of owners to direct and or restrict the Trustees/Directors is a very important one.

By this the General Meeting is instructing the Trustees/Directors to do or not to do certain things during the period until the next Annual General Meeting.

An example of a restriction could be that the Trustees/Directors would not be allowed to spend more than a specified amount on a project/initiative before they call a Special General Meeting and consult the owners in this manner.

An example of a direction will be that the Trustees/Directors are requested to investigate the implications of installing a new access control system and then to call a Special General Meeting to consult owners on this matter.

It is important that the Community Scheme/Body Corporate is very clear on the restriction and the wording in the minutes in order to avoid potential future arguments about what exactly was decided at the specific meeting.

It is to be noted that directions and restrictions are only valid from AGM to AGM, they do not automatically continue to be in place indefinitely

Managing Agent

A Managing Agent can be appointed in order to assist the Trustees/Directors in the management of the Community Scheme and enforcement of the Rules of the Community Scheme/Body Corporate. This includes the management of the common property and the collection of levies.

The Managing Agent is appointed in terms of the STSM Act and is bound to the Community Scheme/Body Corporate in terms of a legal contract which must contain: the terms and conditions, obligations, fees and duties (secretarial and financial) of the Managing Agent to the Community Scheme/Body Corporate.

It is important to understand exactly what services are provided and what are not.

Improvements to the common property

It is important to differentiate between what is regarded as maintenance and what is regarded as an infrastructural or other improvement. Repairs to an access control system will be regarded as maintenance but installing a new access control system or an upgraded version will be regarded as an improvement.

Improvements are then differentiated to either be a necessity (non-luxurious improvement) or not a necessity (luxurious improvement). The arguments for necessity will be based on a number of factors including the financial position of the Community Scheme, the potential risk to residents and the urgency of the issue.

PMR 29 deals with the approval needed for both these types of improvements.

Alterations made by Owners

Owners are allowed to make alterations to their sections but there are conditions to this.

PMR 30

The body corporate must take all reasonable steps to ensure that a member or any other occupier of a section or exclusive use area does not—
(d) make alterations to a section or an exclusive use area that are likely to impair the stability of the building or interfere with the use and enjoyment of other sections, the common property or any exclusive use area
(e) do anything to a section or exclusive use area that has a material negative affect on the value or utility of any other section or exclusive use area
(g) construct or place any structure or building improvement on an exclusive use area which in practice constitutes a section or an extension of the boundaries or floor area of a section without complying with the requirements of the Act and the Sectional Titles Act; provided that the body corporate may by ordinary resolution —

- give consent for such a structure or building improvement, if they are satisfied that it does not require compliance with such requirements;
- prescribe any reasonable condition in regard to the use or appearance of the structure or building improvement; and
- withdraw any consent if the member or other occupier of a section breaches any such condition.

Should an owner want to make alterations to the common property they would need the approval of all owners. It is advisable the owner rather be given exclusive use rights to this portion of the common property in which case they will only need an ordinary resolution to be passed by the Community Scheme/Body Corporate – the Community Scheme/Body Corporate can impose reasonable conditions in terms of the construction and future maintenance.

Should an owner wish to increase the floor area of their section, Section 24 of the Sectional Titles Act deals with this.

It will first need to be determined if the area is already part of their section (included in the floor area shown on the sectional plan) or if it is part of the common property (it does not matter if it is part of his exclusive use area).

Balconies are a specific area where this is relevant. If part of the Sectional plan, only permission of Trustees/Directors is required. If not reflected on a Sectional plan, it will need to follow Section 24 of the STMS Act.

Exclusive Use Areas

The Act makes provision for exclusive use rights to be allocated to certain areas of the common property. Exclusive use rights can only be given to owners of sections in the scheme – if someone is no longer an owner, they forfeit their exclusive use right to that area.

There are three types of exclusive use areas (EUA's):

- EUA's created under the 1971 Act
- EUA's created in terms of Section 5(1)(e) of the STSM Act and Section 27 of the ST Act (shown on the sectional plans)

- EUA's created in terms of Section 10(7) of the STSM Act (shown in the rules of the scheme)

EUA's created under Section 5 are the best option but the most difficult and most costly to obtain, but these areas can be mortgaged and sold to new owners of the section it is linked to.

EUA's created under Section 10 are only set out in the rules – that means they can easily be taken away from an owner when the rules are amended.

Owners are sometimes under the impression that they have exclusive use rights to an area – e.g. a garden where there is a wall built around the area and access can only be gained to it through a specific unit.

If exclusive use rights have not been created in terms of one of the above ways, then it is definitely not an exclusive use area and technically any owner can insist on access to the area in question.

Levy Collection

The Trustee/Directors after each Annual General Meeting pass a resolution for levies to become payable. The standard resolution is that levies are payable monthly in advance before the 1st of the month to avoid interest and credit control procedures.

It is important that Trustees/Directors/Estate Management/Managing Agents have a standard collection process that is rigidly followed.

Should no payment reflect on client's account by the 7th of the month, interest should be raised automatically and backdated pro rata in line with the aforementioned arrears interest resolution. As a gesture of goodwill certain debt collecting charges should also not raised until the 7th of each month.

It is recommended that an SMS and formal letter/email should be sent to each owners whose account is in arrears beyond 7 days. This should be done at selective weekly intervals over the month depending on the status of the arrears.

- A letter/email should be sent to all owners who have made only partial payment of their accounts and is meant largely as a courteous payment reminder.
- A letter/email and SMS should be sent to unit owners who are not delinquent but who have not made payment since their latest levy was billed for. This letter is just a courteous reminder that payment is due, and explains in further detail why timeous payment of levies is so critically important
- By the middle of a month, a letter/email and SMS should be sent to all the unit owners whose payments are still outstanding. This is a formal demand and advises that continued lack of payment or unwillingness to enter into a payment arrangement, will result in a legal handover of the account. This will attract legal collection fees and could lead to a negative listing on ITC/Credit Records (this being in line with the regulations to the STSM Act which now has set this as a peremptory requirement).
- A letter/email and SMS should be sent around the 25th of each month to owners whose accounts have already been handed over to attorneys. The letter details the

effect of a civil judgment taken against them and urges them to enter into a payment arrangement and to maintain payment of current levies billed for, which if not done, will result in multiple judgments against them.

During the total process mentioned above, telephone calls should be made to owners, and emails sent, informing them of the outstanding amount and urging the unit owner to enter into an arrangement to repay the levies due.

Legal Collections Process

According to decisions taken at Trustees/Directors'/other meetings of Community Schemes/Bodies Corporate, the following legal process should as a matter of best practice be followed: (Decisions taken are with regard to the time period, i.e. whether it should be handed over when an owner is in arrears with 3 months' payments or whether longer periods of non-payment should be allowed).

- Arrears accounts should be handed over to debt collectors/attorneys for collection, who should first interrogate every account and consider alternative methods of collection prior to selecting an attorney to hand over the accounts to for formal collection in a court of law if they don't themselves do this;..
- Instructions should then be sent to the selected attorney to commence legal action, which instruction must be acknowledged by the attorney as having been received;
- The Attorney must contact the owner/s and inform them that their account/s is now with attorneys' for legal action and a formal letter of demand must be sent to the unit owner/s by the attorney;
- The owners should be informed that continued default will lead to multiple judgements being sought:

The legal process now commences. This is normally a lengthy process as it is heavily regulated by legislation and is also subject to many external factors that can cause further delays. The legal process can also be suspended/stopped at any time if a payment arrangement is made with the owner, provided all the requirements for a valid payment arrangement have been met.
During this period, it is important that there are still attempts to collect all the outstanding debt and dues owing to the Community Scheme/Body Corporate.

Once the legal process has commenced the Trustees/Directors/Estate Management/Managing Agents must ensure that the attorneys are acting in the best interest of the Community Scheme/Body Corporate and are doing so in the most cost-effective manner.

The Sectional Title Schemes Management Act stipulates that an owner is liable for all reasonable legal costs and disbursements – as taxed or agreed by the member – that the Community Scheme/Body Corporate incurred in collecting the arear levies or other amounts owing to the Community Scheme/Body Corporate; or in enforcing compliance with the Acts or Rules.

Reserves

The retention and maintenance of required levels needs to be in line with levy income and as laid down in STSMA regulations:

In terms of the STSM Act, the following is prescribed:

- ***Less than 25%***

  If the body corporate reserve fund at the end of the financial year is less than 25% of the levy income generated during that year, the body corporate must provide for a reserve amount equal to 15% of the levy income for the new financial year.

- ***Equal to or more***

  If the body corporate reserve fund at the end of the financial year is equal to or more than the levy income generated during that year, the body corporate is not obliged to make provision for a reserve amount in the new budget.

- ***More than 25%***

  If the body corporate reserve fund at the end of the financial year is more than 25% but less than 100% of the levy income in that year, the body corporate must make provision for a reserve amount equal to the repairs and maintenance items provided for in the new budget.

Trustees/Directors must ensure that any expenditure from reserves (both in MMR plan and outside of this) is approved by a resolution of Trustees/Directors and at AGM. Prescribed Management Rule ("PMR") 24(2), contained in Annexure 1 of the Regulations to the Act. PMR 24(5)(b) sets out the circumstances in which Trustees may utilise funds from the reserve fund for expenses not included in the MR&R plan.

Maintenance

When maintenance or repairs are needed a number of questions need to be asked to determine the responsibility for the costs thereof.

- Everything on the common property is the responsibility of the Community Scheme/Body Corporate – with the exception of the geysers – the Act specifically makes the "hot water installation" the responsibility of the relevant owner.
- Everything inside a section is the responsibility of the owner
- If it is an exclusive use area the rules creating the exclusive use rights will determine who will be responsible for maintenance. If the exclusive use rights were created on the sectional plans the Community Scheme/Body Corporate will be responsible for the maintenance (to be funded by the exclusive use levies recovered from these owners)
- In terms of the Act the responsibility for outside windows and doors will be split 50/50 between the owner and the Community Scheme/Body Corporate.
- Should there be a problem between two (or more) sections there is no common property involved and the matter should be settled between the two (or more) owners. The Community Scheme/Body Corporate should not get involved other than to give the relevant owners each other's contact details.
  If the owner of the section where the problem originates from refuses to have the necessary repairs done, the Community Scheme/Body Corporate can enforce PMR 70 and give the owner a deadline to do the maintenance failing which the Community Scheme/Body Corporate will have it done for their account.
  The Community Scheme/Body Corporate representatives can however, not force their way into any section.

Should any maintenance be needed on the common property an owner should contact their Trustees/Directors/Estate Management/Managing Agent.

In terms of decisions made by the Trustees/Directors or a direction given by the owners at a General meeting, a determined number of quotes will need to be obtained for the maintenance needed. Unless pre-approved service providers are in place, this should be at least three.

Insurance

A formalised process around claims needs to be put in place by the Trustees/Directors in tandem with Estate Management and/or Managing Agents where applicable.

This involves registration of the claim within the required time frame since the incident (normally 30 days), completion of the required claims form and verification of the claim with the owner. All claims should be recorded in an appropriate system by the Trustees/Directors/Estate Management/Managing Agent. All claims must also have an exact date of loss.

The appointment of preferred pre-approved contractors can alleviate a number of administration issues associated with insurance claims around prompt response/action, value for money, payment settlements and excesses.

Note - There can only be an insurance claim if there is an insured peril/event covered in the policy which has occurred. To avoid any prejudice and further damages/liability, the insurer always needs to be made aware of any impending claim immediately.

TYPES OF EVENTS THAT WILL NOT BE COVERED BY BUILDING INSURANCE

This type of insurance only covers the fixtures and fittings of the property concerned and not any moveable items. The majority of claims may well be subject to scrutiny by an assessor appointed by the insurer.

The following events will not be covered under a building policy:

- **RISING DAMP**
- **ROOF LEAKS (DUE TO MAINTENANCE)** it is the Community Scheme/Body Corporates responsibility to maintain the roof of the premises and ensure regular maintenance is done as this forms part of the Common Property.
- **STRUCTURAL CRACKS**
- **LEAKING PIPES** – whether it is inside a wall or external, leaking pipes are not covered at all and will be for the owners account to repair that would include the breaking of a wall, tiles etc. if so required. If the leaking pipe has caused resultant damages inside the unit a claim can be submitted for this, provided that the leak was not ongoing for months on end and not attended to. The insurer then has the right to repudiate the claim based on a lack of maintenance.
- **BURST PIPES** – These are generally also not covered, but may be in certain circumstances. If a claim is submitted for a burst pipe, the owner would need to get it attended to and get the plumber to submit a full report as to the cause of the burst pipe for further consideration by the insurer.

- As part of piping – leak detection is not covered by the insurers – should a leak detector needs to be called out to trace a leak, it will be for the owners account.
- **OLD DAMAGE** – any old damages inside a unit will also not be covered.
- **DEFECTIVE DESIGN, DEFECTIVE MATERIALS, POOR WORKMANSHIP & DEVELOPER ISSUES** – none of these items are covered by insurance under any circumstances. New developments will not be covered for any developer issues for the first 5 years of cover as these items need to be referred back to the developer to attend to (this includes items under the headings above).
- In terms of excess payments on any insurance claim the Prescribed Management Rules of the Act states the following:

PMR29(4)

The owner of a section is responsible for any excess payment in respect of their section payable in terms of a contract of insurance entered into by the Community Scheme/Body Corporate: provided that owners may by special resolution determine that the Community Scheme/Body Corporate is responsible for excess payments in respect of specified damage.

Home Owners Associations

A homeowners' association (HOA) is a legal body in which the individual properties are exclusively owned, while the communal infrastructure and facilities are owned by the association. This communal property can include boundary walls, security entrances, club houses and can also include the roads and bulk infrastructure services for water and electricity supply.

Each owner must be a member of the HOA so that they are bound by the governance documentation to ensure that they are legally liable to make contributions towards the HOA communal costs and abide by the other rules applicable to the estate.

There are two types of legal structure that are used to create or establish an HOA:

1. A non-proflt company.
2. A common law association.

Where a HOA is incorporated as a common law association, its primary governance documentation is a written constitution. The common law also has detailed rules that apply to such associations.

Where a HOA is incorporated as a non-profit company, its primary governance documentation is the memorandum of incorporation. The Companies Act 71 of 2008 regulates non-profit companies, and the content of the MOI cannot contradict any provision in the Companies Act.

The purpose of these fundamental governance documentation is to detail the purpose and regulate the rights and responsibilities of the HOA including the executives and the members.

In both forms the governance documentation applicable are considered to be a contract that binds every member of the HOA. The members are also bound to the provisions in these documents because the title deed conditions imposed in regard to the individual properties in the estate must set out that any registered owner of such a property is a member of the HOA and obliged to comply with its governance documents, and that no registration of any transfer can take place until the HOA has issued a clearance certificate confirming that all amounts due to the HOA by the person transferring the property have been paid. The constitution and MOI will also require that any sale agreement must include a reference to these obligations.

It often occurs in practice that these documents make provision for the executives to make regulations, rules and architectural guidelines that are binding on the members. The terms of the abovementioned documents cannot contravene or contradict any term in the constitution or MOI. The rules and regulations should be reasonably necessary, apply equally to all members and be within the scope of the executive's rule-making authority as set out in the primary governance documentation. The constitution or MOI can also refer to other documents such as agreements with the local municipality or other service providers and can incorporate such external documents by specific reference.

There is no legislation that specifically governs the operation of HOAs, as there is for sectional title schemes. It is these governance documents that have to be followed in managing HOAs.