



Biccari Bollo Mariano Attorneys

September 2010 SS6/10



# Sectionally speaking



- 1. It was here ..... and we felt it!**
- 2. The question of fines**
- 3. Hi from Marina**
- 4. Word of thanks**
- 5. An amendment to consider**



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Sectionally speaking

## 1. Bye, bye!!!

As the sun sets on the World Cup we can pat ourselves on the back for a job well done. It truly was an event that we shall for a long time to come, talk about, cry about, laugh about, but most importantly, be extremely proud of. We proved the naysayers SO wrong and from the opening ceremony to the final whistle, South Africa was the winner.

So now what? We hear about post-event blues and overall depression once all the hype and excitement has waned, but let's not fall into that trap. We have nothing to be depressed about and everything to be positive about. The most important thing is to keep the positive vibe going and make sure that South Africa remains firmly on the map for all the right reasons.





## 2. To fine or not to fine

We are confronted daily with conduct rules containing provisions for fines for transgressions or requests to draft rules containing such clauses for contravention of the rules. Quite simply.....we don't agree! Legislation, the Conventional Penalties Act to be precise, does allow for fines to be imposed by bodies other than the Police for example, as long as the fine is proportionate



to the offence...and therein lies the loophole...who determines the proportion? Bring on the highly efficient if somewhat overzealous chairman who is of the opinion that a R500 fine is justified for a parking violation within his complex? If the errant owner is smart, or has a smart attorney, he can quite simply refuse to pay on the basis that the body corporate is not empowered to enforce such a penalty as it does not form part of the monthly levy and, according to the Conventional Penalties Act, the trustees must prove that they have the approval of each and every owner in the scheme to impose fines! We are very much of the opinion that arbitration is a far better deterrent as the award made by an arbitrator can be made an order of the High Court and is thus quite onerous. Arbitration also sets a precedent that owners in the scheme will take heed of in as much as they will be made aware that the trustees are serious about upholding the rules of the complex. And one must not forget that an owner who continuously contravenes the rules might be quite happy to simply pay a fine and carry on regardless! Then what? The objective of the trustees to uphold the rules by imposing fines has fallen flat on its face!

A clause in the conduct rules specifying that owners will be brought to book by way of Management Rule 71 of the Sectional Titles Act, and the implications thereof is a far better option. Sure, it will cost the body corporate money upfront in the form of legal fees, but these can at least in part be recovered when the arbitrator makes his costs order simultaneously with his award. We urge trustees to re-think their fines policies and possibly amend their rules accordingly or at least discuss the matter at the next AGM!!!



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### 3. Greeting from Marina

Greetings to all the Sectional Titlers out there! We were remiss for the months of June and July. Honestly speaking, I think that a combination of World Cup ending blues, being in an armed robbery, and having the worst flu ever set me back a tad. But we're back, stronger than ever, ready to fight another day!

So, our 2010 World Cup highlight is a thing of the past, and it's time to get back to reality and see to it that your complex is spruced up. Flags will be taken down, (if they were allowed up in the first place) and the daily routine will proceed. Many of our complexes had foreign visitors staying who definitely added some flavour to the hum-drum pace of life, possibly more than necessary.

An interesting observation was that the Ekurhuleni Council in our neck of the woods unequivocally stated that it would not be attending to noise nuisance complaints during the soccer. The message was clear – chill out and join in the fun. For the good people in a complex a few roads away from a nightclub frequented every evening by our Australian guests, the message was cold comfort – particularly as most residents are elderly and would not have been inclined to join in the fun dancing to Christina Aguilera's – "Not myself tonight" or even Kesha's – "Blah Blah Blah".

All in all though, everyone coped admirably, and any percipient individual would admit that our country did us proud, and that we all really did get into the swing of things. A few clients even conveyed to me their surprise that they actually spoke to their neighbours and got to know more about the community in their schemes. Undoubtedly South Africans became friendlier for a month, and boy, what a difference that makes! The way in which you respond to people, will determine how they respond to you. That sage sentence, taken to heart would coalesce the diverse, often tetchy people living in close proximity...but that's just my opinion. I don't mind disputes... in fact in my profession, I rather thrive on them.

But, back to sprucing things up. Spring is in the air, and there is no better time to get things in order. At a recent Trustees' seminar I gave, the advice which was apposite as we were discussing illegal structures on common property, urged the Trustees to take the bull by the horns and decide how to deal with people who put up their own awnings, or who argue that they can place a fountain on their exclusive use area without Trustee permission because Mrs Poggenpoel in number two did it.

(...cont.)



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## Greeting from Marina (cont.)

All stuff and nonsense. Trustees should decide what it is that they will accept, and put it in writing; - for example structures that have been up for fifteen years, or arrangements made by Developers from years back.

By the way, I digress, but I tell all my developer clients to avoid engaging personally with owners during the building of a new development. Developers are often eager to please, at the beginning anyway, and will give in to owner demands simply to keep the peace. I've seen Developers agree verbally that Mrs Soonjee can have an extra ten square metres, (of common property may I add!) just to calm her down because her tiles are skew. These personal arrangements muddy the waters, and are dangerous.

Right, so the Trustees should then place their plans in writing, or even better in newsletters. All our clients who regularly send out newsletters to owners have less queries, complaints and abuse. When people feel part of the community, and part of the plans going forward, there is more goodwill generated. Owners who feel disconnected from the Trustees, and ambushed by their unilateral decisions are more likely to take matters all the way to arbitration. There is nothing wrong with Trustees sending out a diplomatic well worded letter advising exactly how things must work, and that there are policies on issues like extensions, advertising in windows, placing washing on balconies, etc etc.

My feeling is that Trustees are often not certain of how far they can go. At all my seminars I spell it out: As Trustees you have a fiduciary duty towards all the owners to act in the best interests of the complex. It's not a popularity contest, but it's not a power trip either. There is a middle ground, which if navigated correctly will keep all owners in the complex stable and content. Well, let me qualify that. Some owners will never be content, and most decidedly not stable. In fact, I believe that any entrepreneuring psychologist would make a fantastic living offering his services solely to Bodies Corporate, the owners of which are being traumatised by one or two loose cannons in the building.

Going forward Trustees should be persuaded to take a stand, take control of the building, and most importantly take whatever medication you can to keep it all together.



#### 4. Seminar success

Thank you to Annette Laing from Annette Laing Properties who gave Marina the opportunity to give a seminar to Trustees at the Newlands Cricket Club on the 31st of July.

Lovely event, well organised!!



#### 5. Management rule 39(2)

There's a 2010 amendment to the Management Rule which would be of interest to the Trustees. This rule deals with the delivery of annual financial statements, estimates, and the Trustees' report to owners and bondholders in advance of the Annual General Meeting.

The gist of the amendment is as follows:

Before the amendment: Delivery was deemed to have been effected when the documents were sent by prepaid post to the owner's domicile.

After the amendment, Rule 39(2) says that the documents must still be sent to owners and bondholders 14 days before the Annual General Meeting, but there is no provision as to how the documents must be sent. The documents must still be sent to bondholders at their address as shown on the Body Corporate's records, but the place for delivery to owners seems at first glance to be unspecified. It seems now, on one interpretation of this rule that these documents can be sent to owners by email, by hand, courier or other method. To avoid confusion, the Trustees should get owners to agree in writing to their email addresses being utilised for the purposes of delivery. We must move with the times and also ensure that in future we draft the rules in a clear, easy to understand manner. It is beyond me why the drafters of rules leave everything open to interpretation. Stipulate exactly what you wish to say – the trend worldwide is that legislation must be in a more accessible format to the lay person. It's time we caught up!



Ready to serve...



Nationwide!

*Standing: (left to right) Trevor Simon (Jhb); Kelly Northmore (Dbn); Jannie Cornelissen (Cpt). Seated: (left to right) Emile Strydom (Pta); Marina Constas (Jhb).*



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