



Paddocks

• PRESS •

WHAT IS PADDOCKS PRESS?

An ad-hoc **free** digital newsletter published to educate and update the sectional title community.

Forward the newsletter to anyone you think may be interested. To be added to the mailing list, please...

Visit www.paddocks.co.za and sign up in 1 easy step.

TRUST MONEY, TRUST ACCOUNTS AND MANAGING AGENTS — WHAT ARE THE BASIC RULES?



By Dr Gerhard Jooste

Over the years Managing Agents have developed two basic ways in which they manage the trust money of their clients. Some have created individual current accounts for each client and others have a central current account into

which all monies are deposited. The question that we ask in this article is: **what are the legal requirements in South Africa pertaining to the keeping of trust monies by a Managing Agent, and are the abovementioned practices in accordance with these requirements?**

Block Company have been defined as Estate Agents. Accordingly the Estate Agency Affairs Act (EAAA) applies to Managing Agents and a Managing Agent is obliged to possess a valid Fidelity Fund Certificate in order to act as a Managing Agent. It also means that Managing Agents must manage trust monies in accordance with the stipulations of the EAAA.

Managing Agents are defined as Estate Agents

The first important point to understand in this regard is that since 1981 Managing Agents that collect or receive levies for a Body Corporate or a Share

What are Trust Monies?

The EAAA defines Trust Monies as "money or other property entrusted to an ... (to page 2)

INSIDE THIS ISSUE:

Trust Money, Trust Accounts and Managing Agents—What are the basic rules?	1
Sectional Title Survival Manual—January 2008	1
Advanced University Tuition for Sectional Title Practitioners	3
Previously disadvantaged scholarships	4
Back to Basics with Judith van der Walt	5
Q & A with the Professor	6

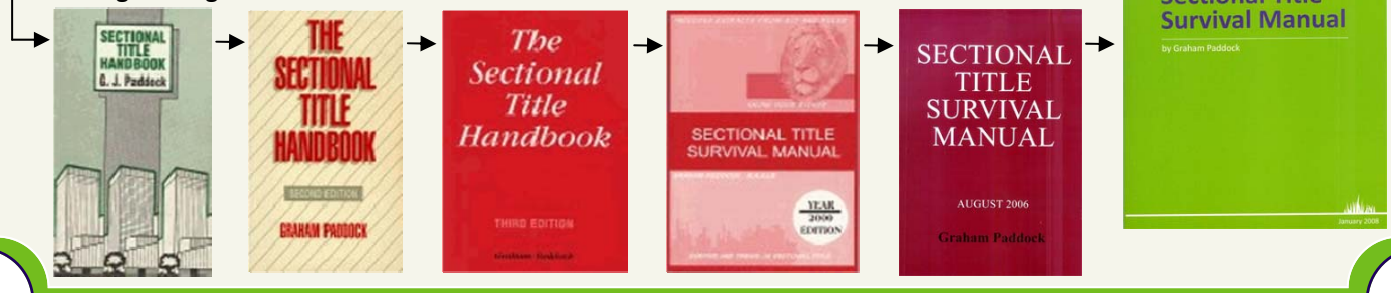
SECTIONAL TITLE SURVIVAL MANUAL - JANUARY 2008 EDITION - NOW AVAILABLE IN ENGLISH AND AFRIKAANS

The January 2008 edition has been fully revised and is now available in both English and Afrikaans. The Afrikaans version has been translated and en-

hanced by Prof. C.G van der Merwe and Ilse van der Merwe. The book retails at R265, which includes post & packaging. Order from Amy—021 674 7818

or amy@paddocks.co.za. ■

Pictures of the books - through the ages



. . . TRUST MONEY, TRUST ACCOUNTS AND MANAGING AGENTS — WHAT ARE THE BASIC RULES ?

(from page 1) ...estate agent in his or her capacity as an estate agent”.

Managing Agents often argue that if monies are deposited directly into a client’s account they are not ‘collecting or receiving’ trust monies and need not adhere to the EAAA. However Prof Henk Delpont thoroughly analysed the meaning of the word “collect” in an article in 2004 and came to the conclusion that the EAAA uses the word ‘collect’ in both its narrower and wider meaning and the wider meaning he defined as “the steps routinely taken to gather payment from persons normally willing to pay, such as sending invoices, reminder letters, etc”. From this it is clear that a Managing Agent can hardly argue that he/she falls outside the sphere of the EAAA.

The Estate Agency Affairs Act requirements

What does the EAAA stipulate in relation to trust money? Sections 29 and 32 are the most important sections in this regard.

Section 29 obliges a Managing Agent to keep a record of all trust money received and to ensure that an audit is done. This audit must be done within four months after the financial year end of the Managing Agent. The point that Managing Agents and their auditors often miss is that **all** trust monies, whether in an individual account (for the Body Corporate only) or in a collective account, must form part of the audit report of the Managing Agent, and the Auditor of the Managing Agent must report to the Estate Agency Affairs Board (EAAB) on **all** trust monies.

Section 32 obliges a Managing Agent to open a trust account or accounts with a bank. All monies received on behalf of clients must be deposited into such current account or accounts forthwith. Only after the monies have been deposited into this (subsection (1)) current account may it be transferred to a (subsection (2)) savings or interest bearing account. Both the abovementioned accounts must be in the name of the Managing Agent and must bear reference to section 32(1) or (2) (as the case may be) of the Act. Every account must be reconciled every 30 days. In practical terms a Managing Agent can open one trust account for all his clients collectively or separate trust accounts for each of his clients. Whichever the Managing Agent chooses, **both accounts or groups of accounts are trust accounts, and must be in the name of the Managing Agent and contain a reference to the Act.**

It is of interest that the Managing Agent is required to notify the EAAB forthwith of the details of the current account (Bank name and account numbers). There is no such requirement for the savings or interest-bearing accounts. This is probably the case because trust funds may not be deposited directly into a savings account.

To clarify matters further the EAAB stated in 2004 in a letter to NAMA that trustees may not have signing powers on the trust accounts of Managing Agents and neither may Managing Agents have signing powers on the accounts of the Bodies Corporate. This is interpreted as the intention of the Act to distinguish clearly between, and separate, the powers and control of the

Trustees and the Managing Agents.

The Sectional Title Act and Management Rules

Quite often Trustees and Managing Agents argue that the Prescribed Management Rules (PMR) 41 to 44 in the Sectional Title Act provide for more options when handling the monies of the Body Corporate. PMR 41 instructs the Trustees to deposit all monies in a bank account of the Body Corporate. PMR 42 then makes the proviso that the Trustees may authorize a Managing Agent ‘to administer and operate’ these accounts of the Body Corporate. It further provides that the trustees may authorize the Managing Agent to deposit the monies in a trust account in terms of the EAAA. It leaves the impression that the Trustees have the option to instruct the Managing Agent to either manage their funds on their own account or alternatively on the trust account of the Managing Agent. However, although the Management Rules provide two options, the EAAA closes down one of the options for Managing Agents and leaves us only with one option namely: **to receive and manage trust funds on a trust account.**

Conclusion

Managing Agents may open one trust account for all their clients or a separate trust account for each client. All these accounts must be opened according to the requirements of section 32(1) of the EAAA. All these accounts must be included in the report that the auditor of the Managing Agent send to the EAAB annually. ■

ADVANCED UNIVERSITY TUITION FOR SECTIONAL TITLE PRACTITIONERS

Over the past 2 years the University of Cape Town together with Paddocks, has educated over 900 people from throughout Southern Africa in the management of sectional title property. *"There is no doubt that the sectional title property management industry is becoming more professional"* says Prof. Graham Paddock, the author and convener of the course.

Paddocks, together with the University of Cape Town, Faculty of Law: Professional Development Project, has recently opened registrations for the first Advanced Sectional Title Scheme Management Course. Prof. Paddock notes that *"increasingly, practical implementation expertise is required of portfolio managers and those who manage them to manage sectional title bodies corporate on a day-to-day basis. The provision of an advanced level of service can also be a significant competitive advantage in the highly competitive property management industry"*.

About the course:

This five-week course, offered in English by distance learning combined with a three-day intensive MBA-style workshop, will immerse students in advanced legal aspects of scheme management. It will equip them with advanced para-legal skills in the management of schemes and assist them to be highly competitive in the property management industry. The course is compiled and presented by sectional title specialists Prof. Graham Paddock and Judith van der Walt.

The course is run in two parts over a 5-

week period:

Part 1: Self-study with Expert Support

During the first four weeks of the course, students research and discuss six advanced scheme management topics. These topics are presented through six modules, which include reading material (articles, extracts and case law), self-test quizzes and an online discussion forum specific to each advanced topic. Students are required to actively participate in each module.

Advanced Topics:

- Financial and maintenance obligations in mixed schemes
- Individual and en-masse extension of sections
- Extension of schemes and fractionalising scheme extension rights
- Sectional title meeting law and procedures
- Creating exclusive use rights and appropriate conditions
- Providing for and enforcing financial sanctions

Part 2: Interactive Workshops

After the four-week self-study period is complete, students attend a three-day interactive workshop offered in Johannesburg and Cape Town. Each advanced topic is presented, discussed and debated during this workshop.

Who should attend?

Anyone with a working knowledge of

scheme management and particularly those who render high-level management services and advice to developers and schemes, including trustees, managing agents, attorneys, scheme auditors and accountants and dispute resolution service providers.

Students must have successfully completed the UCT Sectional Title Scheme Management course or be certified by Paddocks Learning as having sufficient industry experience to participate meaningfully in the educational programme.

Registration closes on the 22nd February and the course runs from the 3rd of March until mid April 2008. For those interested in this course, please contact Christina on 021 674 7818 or christina@paddocks.co.za for further information. ■

ADVERTISEMENT



Stellenbosch University is pleased to announce that registrations are now open for the popular Certificate in Wine Evaluation, **which is now available to students throughout South Africa.**

For further details and registration forms, please contact Candice on 021 683 3633 or candice@getsmarter.co.za

PREVIOUSLY DISADVANTAGED STUDENTS GIVEN A CHANCE IN SECTIONAL TITLE PROPERTY SALES



The University of Cape Town, Department of Construction Economics and Management (UCT) together with Paddocks are offering 5 scholarships for previously disadvantaged individuals (PDIs) from throughout the country to attend a specialist 10-week distance-learning course in the sales of sectional title property.

"With over 200 students having graduated from this course in 9 months, there is no doubt that the property industry is becoming more professional" says Prof. Graham Paddock, the author and convener of the course. Many people don't understand the complexities of sectional title property, which often leads to dissatisfaction by the parties or difficulties for the body corporate after a sale has been completed. Consumers throughout South Africa now have the power to choose a competent real estate agent to assist them in buying or selling their most important investment.

At the Institute of Estate Agents' 70-year dinner, which was held in Cape Town during 2007, Mrs Mapetla, the CEO of the Estate Agency Affairs Board, called on her audience to assist in creating an industry where PDIs are given a chance to become real estate professionals.

Sam Paddock, managing director of Paddocks, explains that it is Paddocks' view that PDIs should be given a chance to participate in this exciting industry.

One of the ways to empower the previously disadvantaged is through education and the course providers are therefore offering 5 full scholarships for the next course, which begins on the 25th of February 2008.

These scholarships cover all tuition fees, courseware and lecture support to the value of R5,000.

The UCT Specialist Sectional Title Realtor Certificate Course is now firmly positioned as the industry's benchmark course. This course is conducted over a 10-week period and is presented nationally via a combination of distance and contact-based learning.

For those interested in the qualification or who would like to apply for the scholarship, please contact Christina on 021 674 7818 or e-mail christina@paddocks.co.za for further information. ■



Above: UCT Sectional Title Specialist Realtor students at the Cape Town workshop in October 2007.

BACK TO BASICS

BY JUDITH VAN DER WALT

The Powers of Trustees



Judith van der Walt

There is a common misconception amongst sectional title owners that the trustees of the body corporate are more important than the ordinary members of the body corporate, with the chairperson being the most important of them all. This misconception stems from the fact that the trustees are seen to have the power to make certain decisions affecting the entire scheme without consulting or taking the views of the other members of the scheme into account.

The trustees are the executive body of the body corporate, appointed to make day-to-day decisions on behalf of all owners, and they do not have to call a meeting of owners every time a decision has to be taken. If they believe that it is necessary to raise a special levy to fund unbudgeted repairs to the common property they do not need to consult with the owners before raising

the levy. Similarly, trustees are entitled to enter into short term rental agreements with owners to rent out a part of the common property for up to ten years. Trustees are also entitled to appoint employees, for example a gardener, caretaker or managing agent.

The trustees may also initiate a process to obtain approval of non-luxurious improvements to the common property, such as the installation of security fences, but if any owner asks for a meeting to discuss the issues the trustees can only proceed if the meeting approves the proposals by special resolution.

But the Sectional Titles Act of 1986 provides for limitations on the discretion of the trustees and allows the owners to impose checks and balances to ensure that the trustees do not act outside the scope of their mandate, as provided for in the Act and implied by the budget approved at the last annual general meeting. Perhaps most impor-

tantly, the Act allows owners, by majority vote at any general meeting, to give directions to or place restrictions on the trustees, for example setting a maximum amount that the trustees may spend without consulting the other owners or directing them to act in a particular way in certain circumstances.

Trustees should, whenever it is practical, consult with the members of the body corporate before making decisions which have a significant impact on their finances or use of the common property. At each annual general meeting the owners give the trustees financial instructions by approving a particular budget, if they feel it is necessary they can also draw up a list of issues giving the trustees specific directions or imposing particular restrictions on their actions. For as long as the trustees act within the scope of the provisions laid down in the Act and any additional restraints or directions which they decide, the members of the body corporate can rest assured that the management of the scheme is in capable hands. ■

IMPORTANT TRAINING DATES TO REMEMBER

UCT Sectional Title Specialist Realtor Course

Start Date: 25 February 2008; Registrations close: 15 February 2008

UCT Advanced Sectional Title Scheme Management Course

Start date: 3rd March 2008; Registrations close 22nd February 2008

UCT Sectional Title Scheme Management Course

Start date: 17th June 2008; Registrations Close: 6th June 2008



Q & A WITH THE PROFESSOR



**Prof Graham
Paddock**

QUESTION 1

Q1. Last year at a special general meeting the developer/chairman put a new conduct rule to the vote. Seven people voted for the rule and fifty seven voted against it, with no owners abstaining. The chairman said after the meeting that the resolution had been passed, while I argued that it had not. When the minutes of the meeting were distributed they showed that the votes had been overwhelmingly in favour of the resolution.

I immediately queried the position, but I could not get any straight answers. I suspect that the chairman has, in calculating the votes, considered that he can exercise the rights of purchasers under sale agreements, but not all the current owners are first time buyers who signed agreements giving him any rights. The chairman has now said he will not enter into further discussions with me on the topic.. In the meantime the trustees consider that the rule has been made.

Can the trustees refuse to deal with my complaints that due process was not followed in making the rule? What can I do?

A1. On the voting as you record it, it seems that no special resolution could have been taken. But clearly the chairman has a different view. And the background does seem complex, bearing in mind current owners purchased their units under different sale agreements, some of which may have given the developer special voting rights.

There is nothing in the Act or prescribed rules which obliges the trustees to continue correspondence with you on the point, but you are entitled to inspect all the books and records of the body corporate, including any records kept of the voting process.

I suggest the following:

1. Decide how strongly you feel about this issue;
2. Find out if other owners share your concerns, i.e. lobby for careful adherence to due process and the rejection of any rules made other than in accordance with the Act, and see whether other owners feel as strongly as you do about this particular process;
3. If yours is not an isolated dissatisfaction, get some local legal advice, particularly whether to...
4. Declare a dispute with the trustees under PMR 71.

The difficulty with steps 3 and 4 is that they will take considerable time and could cost considerable amounts of money, even if your views are upheld . As yet there is no Community Scheme Ombud Service.

If you and other owners are not prepared to spend the money required to take on the chairman and trustees (which may be a sensible decision), here are some alternatives to 3 and 4.

1. Set out on paper your views as to the irregularities, logically and without any acrimonious comments, and distribute this to all owners;
2. Go to every trustee and general meeting and exercise your right to speak and to vote at owner meetings, in all cases reminding trustees and owners of the formal requirements for rule-making as well as other trustee and owner actions;
3. Develop a good relationship with the managing agent, who is professionally responsible to ensure that due process is observed;
4. Try to get elected as a trustee. Alternatively lobby for the election of some other owner who thinks as you do in this regard;
5. Go to <http://www.sto.co.za> and at no cost educate yourself in regard to sectional title management matters so as to acquire the knowledge you need to give reliable input at body corporate meetings. If you are not computer literate and Internet-

. . . Q & A CONTINUED

connected, spend the money and learn the skills - it will be very much cheaper than legal fees.

Good governance in a sectional title community is not a short-term issue. The developer and his contracts will only hold sway for a short initial period. Concentrate on the long term.

QUESTION 2

Q2: I am the chairman of our scheme's trustees. An owner has appropriated part of the common property next to his section by erecting a concrete panel wall on the scheme boundary. This was approved some time ago by previous trustees who thought it would increase this owner's security and proper plans were approved for it. Now part of this area has been covered with a roof and enclosed.

The owner's section has not been extended to include any enclosed area and the open areas are not subject to exclusive use rights, so the owner has "de facto" rights without incurring the additional expenses and liabilities he would if was given formal rights to the area

We wrote to the owner telling him that he must extend his section to include the enclosed area and agree to take exclusive use rights to the rest, all at his expense, but he has refused. He says that he has

been advised by his attorney that:

1. The moment the trustees agreed to his building the wall, they forfeited the piece of land it enclosed;
2. The wall is properly approved and is a fixture;
3. The approved building plans get registered at the Deeds Office, so the enclosed area is part of his unit.

A2: The trustees who agreed to the owner putting up the wall should have at the same time insisted on the owner taking exclusive use rights to any area of common property which was then cut off from use by other owners. But the fact that they failed to do so does not mean that this part of the common property is "forfeited". The wall may well be a fixture, but it is part of the common property and, as such, is owned by all owners of sections. The fact that this particular owner erected it does not mean that it belongs to him or that he alone can decide what is done with it. When building plans are approved by a local authority there is no automatic amendment to a scheme's sectional plans approved by the Surveyor-General and registered at the Deeds Registry.

The situation you describe can only be regularized by an extension of the section

under section 24 of the Act, to the extent that the owner has in fact extended his floor area and increased the size of his flat, and by the body corporate conferring exclusive use rights on that owner for the rest of that area, under either section 27 or 27A of the Act. This will require at least special resolutions by the body corporate and could involve getting consents from all bondholders.

I suggest that the body corporate should demand that the owner agree to implement these processes, under the body corporate's supervision and at his expense. If the owner refuses or fails to agree within a reasonable time, say three weeks, the trustees should hand the issue over to a specialist sectional title attorney, first to audit the legal situation and then to compel the owner to rectify the position. As long as it is successful, The body corporate will be able to recover from the owner all its legal costs spent in compelling that owner to comply with the Act and rules of the scheme.

The biggest danger is that the body corporate does nothing. Then the owner will at some stage sell and a new owner will argue: *"But it was like this when I bought it. You issued a levy clearance certificate for the transfer. You knew about the problem, you did nothing. I am the innocent victim of your maladministration."* ■

Advertise on Sectional Titles Online

Contact Robyn on 021 674 7818 or robyn@paddocks.co.za

www.sfo.co.za

THANKS TO THE CONTRIBUTORS

Prof. Graham Paddock

Paddocks

021 674 7818—www.paddocks.co.za

Dr. Gerhard Jooste

Pro Admin

012 481 6070 —www.proadmin.co.za

Judith van der Walt

Paddocks

021 674 7818—www.paddocks.co.za

Published by **Paddocks Press**

021 674 7818

editor@paddocks.co.za

ACTIVE TRUSTEE TRAINERS

Franz Holm

Tel: 021 979 0285

Email: franz@holm.co.za

Charles Baker

Tel: 084 251 4439

Email:

Charles@connecta-realty.co.za

Quintus van Rensburg

Tel: 035 789 8575

Email:

quintus@fabsproperties.co.za

Louis Lenhoff

Tel: 011 680 6848

Email: louisl@kprsa.co.za

James Williams

Tel: 021 531 5847

Email: jamesw@worldonline.co.za

Glen Smit

Tel: 039 3a17 3015

Email: glen.smit@pamgolding.co.za

Karen Bleijs

Tel: 011 880 8023

Email: kbleijs@vrblaw.co.za

Cecil Coleman, Jose de

Carvalho and Alice Lourens

Tel: 011 867 3773

Email: josedc@colprop.co.za

ABOUT PADDOCKS

Paddocks is a specialist sectional title firm providing a range of products and services through its **Learning, Consulting, Development, Publishing,** and **Software** divisions.

Prof. Graham Paddock is the head of Paddocks, an authority on Sectional Title law and practice and an adjunct Professor at the University of Cape Town. He is the Project Manager and one of the lead consultants to the Department of Housing in the restructuring of the Sectional Titles Act and the establishment of an Ombuds Service.

Learning

Together with the Universities

of Cape Town and Stellenbosch as well as the National Association of Managing Agents and other professional organisations, Paddocks Learning offers several sectional title certificate courses, seminars and conferences.

Consulting

Graham Paddock leads the consulting division and is assisted by Judith van der Walt. Paddocks Consulting delivers consulting, drafting and representation services, primarily to sectional title bodies corporate, but also to developers, owners and others involved in schemes. They consult to various levels of central and local

government and act as mediators and arbitrators of sectional titles disputes. The consulting team also offers conveyancing services.

Development

Paddocks Development leverages the firm's sectional title expertise to complete niche sectional title property developments in the Western Cape.

Publishing

Since 1983, Graham Paddock has written sectional title books, pamphlets and training manuals for trustees and managing agents. Paddocks Publishing sets, prints and publishes a range of electronic

and 'hard copy' sectional title publications by Graham and other authors which make Sectional Title expertise easily accessible to the South African population at large.

Software

Paddocks Software designs and manages the production and distribution of a variety of software tools which provide substantial efficiency gains to those involved in sectional title management and consulting.

Please see

www.paddocks.co.za for more information