

## **MEMORANDUM ON THE OBJECTS OF THE SECTIONAL TITLES AMENDMENT BILL, 2020**

### **1. OBJECTS OF BILL**

The Sectional Titles Amendment Bill, 2020 ("the Bill"), seeks to amend the Sectional Titles Act, 1986 (Act No. 95 of 1986) ("the Act"), in order to—

- (a) amend certain definitions;
- (b) provide for the developer to answer questions put to the developer by the agents of the lessees;
- (c) provide that a certificate issued by an architect or a land surveyor must also comply with section 26(2) of the Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013) ("Spatial Planning and Land Use Management Act");
- (d) further provide for the amendment of sectional plans in respect of exclusive use areas;
- (e) further provide for the amendment and cancellation of a sectional plan upon an order of the court;
- (f) provide for the noting of a title deed in respect of the lapsing of a reservation in terms of section 25;
- (g) provide for a lease of part of the common property with the consent of the holders of registered real rights;
- (h) amend the provisions relating to the alienation of common property;
- (i) further provide for the cancellation of a mortgaged section and mortgaged exclusive use area;

- (j) also provide for a developer to submit a plan for subdivision or consolidation to the Surveyor-General for approval to subdivide, consolidate and to extend a section;
- (k) extend the registration of subdivision of a section, the consolidation of sections, and the extension of sections to a developer;
- (l) provide for the filing of replacement documentation in respect of lost or destroyed documentation;
- (m) amend the provisions relating to the extension of a scheme;
- (n) amend the provisions relating to participation quotas of sections;
- (o) regulate the membership of the sectional titles regulations board;
- (p) amend the transitional provision; and
- (q) provide for matters connected therewith.

## **2. CLAUSE BY CLAUSE ANALYSIS**

### **2.1 Clause 1**

2.1.1 Clause 1 of the Bill seeks to amend section 1 of the Act, which provides for the definitions used in the Act.

2.1.2 The current wording of the definition of "*exclusive use area*" makes reference to the exclusive use by only the "*owner or owners of one or more sections*". The definition can also be interpreted in a manner which may exclude any person other than the owner from using the exclusive use area, such as a lessee, *usufructuary* or even the owner's spouse or other member of the owner's household. The proposed amendment in clause 1(a) of the Bill aims to clarify the position.

2.1.3 The definition of “Sectional Titles Schemes Management Act” incorrectly makes reference to it being a 2010 Act. The proposed amendment in clause 1(b) of the Bill corrects the citation of the “Sectional Titles Schemes Management Act”.

## **2.2 Clause 2**

Clause 2 of the Bill seeks to amend section 4 of the Act, which deals with the approval of development schemes and provides for the developer to have a meeting with every lessee of a building in instances where part of such building is to be wholly or partially let for residential purposes. Section 4(3)(b) provides for the developer to answer all reasonable questions of lessees that are present at such meeting. A need has been identified to also provide for a lessee’s representative to act on behalf of such a lessee in instances where a lessee is absent from a meeting. Clause 2 of the Bill provides for this proposed amendment.

## **2.3 Clause 3**

Clause 3 of the Bill seeks to amend section 7 of the Act, which deals with the approval of the draft sectional plans by Surveyors-General and provides, amongst other things, for the submission of a certificate by an architect or land surveyor stating that the proposed division into sections and common property is not contrary to any operative town planning scheme. However, the interpretation of section 7(2)(a) is ambiguous and difficult to interpret, and the certificate is usually submitted without the architect or land surveyor giving any thought or consideration to its implications. The amendment proposed in clause 3 of the Bill seeks to address the

situation by providing that an architect or a land surveyor must comply with the provisions of section 26(2) of the Spatial Planning and Land Use Management Act.

## **2.4 Clause 4**

2.4.1. Clause 4 of the Bill seeks to amend section 14 of the Act, which deals with the amendment and cancellation of sectional plans.

2.4.2. Section 14 only provides for matters pertaining to sections that are affected by incorrect sectional plans. A need also exists to extend the ambit of section 14 to include exclusive use areas that are affected by incorrect sectional plans. The amendments proposed in clauses 4(a) and (b) of the Bill address the situation.

2.4.3. Section 14(8) of the Act provides for the cancellation of a sectional plan by a court order. The proposed amendment seeks to clarify the position in instances where a body corporate is in existence and the court makes an order for the cancellation of the sectional plan.

## **2.5 Clause 5**

Clause 5 of the Bill seeks to amend section 15B of the Act, which provides for the registration of the transfer of ownership in a sectional title scheme. Section 15B of the Act is silent on the noting of the lapsing of a right reserved in terms of section 25(1) of the Act. The addition of subsection 1(e), as proposed in clause 5 of the Bill, provides for the noting of the relevant title deed upon application by the developer, or by the body corporate in instances where the developer is no longer in existence.

## **2.6 Clause 6**

2.6.1. Clause 6 of the Bill seeks to amend section 17 of the Act, which deals with the alienation and letting of the common property in a scheme. In terms of section 17(4)(b), the registrar shall not register a lease over land which forms part of the common property, unless such lease is made subject to all the rights of the owner of the section. Section 17 does not provide for the lease to be subjected to the rights of holders of real rights in terms of sections 25 and 27. The amendment of section 17(4)(b), as proposed in clause 6(a) of the Bill, seeks to give effect to this.

2.6.2. Section 17(4B) provides for the alienation of a portion of the common property on which an exclusive use area or part thereof is registered. However, registration of the transfer of the common property can only be affected after cancellation of the exclusive use area, or the part thereof, that is situated on the common property that is to be transferred. The Act does not provide for dealings with a part of an exclusive use area. The proposed amendment of section 17(4B)(a) and (b), as contained in clause 6(b) of the Bill, seeks to rectify the position.

2.6.3. The amendment proposed to section 17(4C), as contained in clause 6(c) of the Bill, is consequential to the amendment of section 17(4B), referred to in paragraph 2.6.2.

## **2.7 Clause 7**

Clause 7 of the Bill seeks to amend section 18 of the Act which makes the provisions of sections 56 and 57 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), applicable with the transfer of a mortgaged unit and mortgaged common

property, and the cession of a mortgaged lease of a unit and mortgaged real right over a unit. The said section, however, is silent in respect of the cancellation, under section 17, of a mortgaged section, exclusive use area, and real rights of extension. Clause 7 of the Bill seeks to provide for the necessary inclusion.

## **2.8. Clause 8**

Section 21 of the Act provides for the approval of sectional plans for the subdivision and consolidation of sections. Section 21 does not provide for a developer, prior to the establishment of the body corporate, to cause a land surveyor or architect to submit a draft sectional plan of subdivision or consolidation, as the case may be, to the Surveyor-General for approval. Clause 8 of the Bill seeks to insert section 21(1A) in the Act, to provide for a developer, prior to the establishment of the body corporate, to cause a land surveyor or architect to submit a draft sectional plan of subdivision or consolidation, as the case may be, to the Surveyor-General for approval.

## **2.9 Clause 9**

2.9.1. Clause 9 of the Bill seeks to amend section 22 of the Act, which deals with the registration of a subdivision of a section. The proposed insertion of sections 22(1A) and 22(2A), seeks to provide for a developer to apply for the registration of a sectional plan of subdivision of a section, prior to the establishment of a body corporate.

2.9.2. Section 22(5) provides for the endorsement of deeds that have been registered against the title deed of the section in order to reflect such subdivision.

However, section 22(2) that provides for the lodgement of the relevant title deeds for purposes of endorsement, omits reference to the lease. Clause 9 of the Bill, seeks to insert section 22(2)(cA) in order to provide for the inclusion of a lease.

2. 9.3. Clauses 9(c) and (d) of the Bill, seeks to amend section 22(2)(d) and delete section 22(2)(e) of the Act. Section 22(2)(d) of the Act provides for the issuing of certificates of registered sectional titles in favour of the persons entitled thereto in terms of a partition agreement. However, the correct position upon subdivision is for the certificates of registered sectional title to be issued in the names of the joint owners of the original unit. Partition transfers may then be registered subsequent to the issuing of the certificate of registered sectional titles.

## **2.10 Clause 10**

2.10.1 Section 23 of the Act deals with the registration of a consolidation of sections in a scheme. Clause 10 of the Bill seeks to amend section 23 of the Act, by inserting sections 23(1A) and 23(2A) in order to provide for a developer, prior to the establishment of the body corporate, to apply for the registration of a sectional plan of consolidation of two or more sections.

2.10.2 Section 23(2) of the Act provides for the endorsement of deeds that have been registered against the title deed of the section in order to reflect such consolidation. Clause 10 of the Bill seeks to amend section 23(2) of the Act, by inserting section 23(2)(cA), in order to provide for the lodgement of the relevant title deeds for purposes of endorsement, to include the reference to the lease.

## **2.11 Clause 11**

2.11.1 Clause 11 of the Bill seeks to amend section 24 of the Act, which deals with the registration of an extension of a section in a scheme.

2.11.2 The proposed insertion of sections 24(3A) and 24 (6AA) seeks to provide for a developer, prior to the establishment of the body corporate, to cause a land surveyor or an architect to submit a draft sectional plan of extension of a section, to the Surveyor-General for such approval.

2.11.3 Clause 11 of the Bill also seeks to amend section 24(6) of the Act, which provides for the documentation that must accompany an application to the registrar for the registration of a sectional plan of extension of a section, by including a lease in the list of documentation that must accompany the said application.

## **2.12 Clause 12**

2.12.1 Clause 12 of the Bill seeks to amend section 25 of the Act, which deals with the extension of a scheme by the addition of sections and exclusive use areas.

2.12.2 Section 25(2) of the Act provides for the filing in a deeds registry of, amongst others, a plan to scale showing the part of the common property affected by the reservation to extent the scheme, a plan to scale showing the manner in which buildings are to be subdivided into sections and exclusive use areas, and a schedule indicating the estimate participation quotas of all the sections. The proposed insertion of section 25(2A), seeks to provide for replacement documentation to be filed in instances where such documentation has been lost or destroyed.

2.12.3 Section 25(5A)(a) of the Act only makes reference to the inclusion of a unit in the relevant sectional title register. Clause 12 of the Bill seeks to amend section 25(5A)(a), to also include an exclusive use area.

2.12.4 Section 25(6) of the Act provides for a body corporate to apply for the extension of a scheme in instances where no reservation was made by a developer in terms of section 25(1), or if such a reservation was made, and had lapsed. Such a right may be exercised by the body corporate with the written consent of all the members of the body corporate and bondholders of all units in the scheme. The proposed amendment to section 25(6) seeks to insert a proviso that the body corporate shall only exercise or alienate or transfer such right with the written consent of all the members of the body corporate, the mortgagees of the units and real rights over the units, and the holders of registered real rights over the units in the scheme and who shall not withhold such consent without good cause in law.

2.12.5 The proposed amendments of sections 25(10)(c) and 25(10)(dA) of the Act, seeks to eliminate the duplication in sections 25(10)(c) and section 25(10)(dA), which provides for the lodgement and endorsement of mortgage bonds registered against the certificate of real right of extension.

### **2.13 Clause 13**

Clause 13 of the Bill seeks to amend section 26 of the Act, which deals with the extension of schemes by the addition of land to the common property. Clause 13 seeks to provide for the addition of subsections (8) and (9), in order to provide for a

developer, prior to the establishment of the body corporate, to apply for the registration of a plan of extension of the common property.

#### **2.14 Clause 14**

Clause 14 of the Bill seeks to amend section 27 of the Act, by the insertion of subsection (5A), in order to make it possible for a developer, prior to the establishment of the body corporate, to cancel its rights to the exclusive use of parts of the common property. The Act is silent in respect of the cancellation of rights to exclusive use by developers.

#### **2.15 Clause 15**

Clause 15 of the Bill seeks to amend section 32 of the Act, which deals with the participation quotas of sections. Sections 32(1) and (2) contain provisions pertaining to the determination of participation quotas and make such provisions subject to section 48 of the Act. Section 48 of the Act has been repealed by the Sectional Titles Schemes Management Act, 2011 (Act No. 8 of 2011). Clause 15 seeks to substitute the reference to section 48 of the Act, with the reference to section 17 of the Sectional Titles Schemes Management Act.

#### **2.16 Clause 16**

2.16.1 Clause 16 of the Bill seeks to amend section 54 of the Act. The Executive Council of the Law Society of the Republic of South Africa ('LSSA') nominates one conveyancer for appointment by the Minister as member of the Sectional Titles Regulations Board. However, the LSSA is represented by two conveyancers on the Deeds Registries Regulations Board, established in terms of section 9 of the Deeds

Registries Act. The amendment of section 54(2)(c)(i), in clause 16(b) of the Bill is necessary and is in line with the provisions of section 9 of the Deeds Registries Act. The amendment in clause 16(a) is consequential to the amendments proposed in clauses 16(b) and (c).

2.16.2 There is a need for a representative of the board to have practical knowledge on matters pertaining to the registration of sectional title units and the opening of sectional title registers. The insertion of section 54(2)(c)(vii) as proposed in clause 16(c) of the Bill seeks to address this matter by providing for the appointment of a registrar of deeds, deputy registrar of deeds, or assistant registrar of deeds with the necessary practical knowledge, as the ninth member of the board. The amendment is also in line with the provisions of section 9 of the Deeds Registries Act.

2.16.3 The amendment of section 54(5), as proposed in clause 16(d) of the Bill, is consequential to the amendment of section 54(2)(c).

2.16.4. The conditions applicable to the appointment of members of the board must also apply to the appointment of alternate members of the board. The insertion of section 54 (9A) as proposed in clauses 16(e) is a necessary step.

## **2.17 Clause 17**

Clause 17 of the Bill seeks to provide for the addition of section 55(2) in order to provide for Regulations to be published in the *Gazette* at least one month before the date specified in the relevant notice as the date of commencement thereof.

### **2.18 Clause 18**

Clause 18 of the Bill seeks to amend section 60 of the Act which deals with savings and transitional provisions in respect of transactions registered in terms of the Sectional Titles Act, 1971 (Act No. 66 of 1971). Section 60 (3) provides for an owner who has acquired a right to the exclusive use of parts of the common property, to request the body corporate to transfer such right to the owner by means of a notarial deed. However, those rights were not delineated on the 1971 sectional plans; it was created in the rules. The body corporate cannot cede the rights without causing it to be delineated on the plans. The amendment of section 60(3), as proposed in clause 18 of the Bill, seeks to provide for the body corporate to have exclusive use areas depicted on sectional plans and to cede it to the relevant owners.

### **2.19 Clause 19**

Clause 19 contains the short title of the Bill.

## **3. FINANCIAL IMPLICATIONS FOR STATE**

None.

## **4. DEPARTMENTS/ BODIES/ PERSONS CONSULTED**

The Law Society of South Africa

The South African Council for the Architectural Profession

The South African Council for Professional and Technical Surveyors

Banking Association of South Africa

The Institute of Estate Agents of South Africa

The National Association of Managing Agents

## **5. CONSTITUTIONAL IMPLICATIONS**

None.

## **6. COMMUNICATION IMPLICATIONS**

To be undertaken by the Department of Agricultural, Land Reform and Rural Development.

## **7. PARLIAMENTARY PROCEDURE**

7.1 Parliament is vested with national legislative authority and has the legislative authority to enact the Bill.

7.2 In *Tongane v Minister of Agriculture and Land Affairs, 2010 (6) SA 214 (CC)*, the Constitutional Court ruled on the test to be used when tagging a Bill. The Court held in paragraph 70 of that judgment, that the "test for determining how a Bill is to be tagged must be broader than that for determining legislative competence". The Court held that the tagging test focuses on all provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 to the Constitution, and not on whether any of its provisions are incidental to its substance.

7.3 We have considered all the provisions in the Bill in light of Schedule 4 and 5 to the Constitution, and found that the purpose and effect of the Bill does not in a substantial manner deal with any of the matters listed in Schedule 4 or 5 to the

Constitution. The primary objective of the Bill is to further provide for matters pertaining to sectional titles and the registration thereof.

7.4 The State Law Advisers and the Department of Agricultural, Land Reform and Rural Development are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since the Bill does not in a substantial measure pertain to matters listed in Schedules 4 and 5 to the Constitution.

7.5 The State Law Advisers and the Department of Agricultural, Land Reform and Rural Development are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.