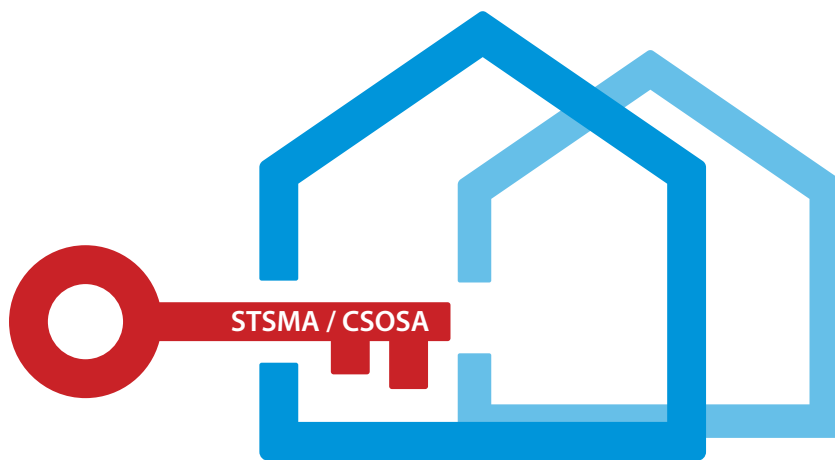


# KEY ISSUES *the* TRUSTEES of SECTIONAL TITLE SCHEMES *should know, include:-*

- *The fiduciary requirements*
- *Avoiding conflicts of interest*
- *Realising the responsibility when you accept nomination*
- *Being knowledgeable and informed to minimise your and the BC risks*
- *You are required to comply with Statutes of Law*
- *Being mindful that you hold the future of your investment and others, in your hands*



*With compliments from*



# HARLEV

PROPERTY MANAGEMENT

(PTY) Ltd

# The Key Issues that Trustees should Know

Compiled by Shirley Baillie of S Baillie and Associates, author and publisher of Keyword Access to the Sectional Title Legislation. [www.keywordaccess.co.za](http://www.keywordaccess.co.za)

This publication is intended to be used as a guide and information document only. It is not a legal document, nor does it encompass all that there is to know about Sectional Title. Whilst the greatest care has been taken in the compilation of this document, the author/publisher cannot accept responsibility for errors or omissions contained herein.

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**The latest Legislation governing the sectional title form of housing came into effect on the 7<sup>th</sup> of October 2016. The following Acts replace all previous legislation: -**

- **Community Schemes Ombud Service Act, 9 of 2011 and Regulations (CSOSA)**
- **Sectional Titles Schemes Management Act, 8 of 2011, Regulations and prescribed Management and Conduct Rules (STSMA)**
- **Sectional Titles Act 95 of 1986 as amended (STA)**

## **Notes and Abbreviations:**

Extracts of the relevant Acts are in italics but any words therein, which are **in bold** are put there by the publisher for emphasis.

Trustees are now known as **Scheme Executives** per the legislation, but the word "Trustees" is still used most often and will be used throughout this document.

<b>AGM</b>	Annual General Meeting
<b>BC</b>	Body Corporate
<b>CR</b>	Conduct Rules
<b>EMA</b>	Executive Managing Agent
<b>MR</b>	Management Rules
<b>MA</b>	Managing Agent
<b>ST</b>	Sectional Title

## **What CSOS Says:**

Refer Clause 14 (1) of the Regulations of the Community Schemes Ombud Service Act 9 of 2011 i.e.: **Duties of scheme executives**

- 14. (1) A scheme executive must**
- (a) *take **reasonable steps to inform and educate himself or herself about the community scheme**, its affairs and activities and the legislation and governance documentation in terms of which the community scheme operates.*
  - (b) *take **reasonable steps to obtain sufficient information and advice about all matters** to be decided by the scheme executives to enable him or her to make conscientious and informed decisions.*
  - (c) *unless excused by the chairperson of the scheme executives on reasonable grounds—*
    - (i) **attend all meetings** of the scheme executives; and
    - (ii) **attend the community scheme's annual general meeting** if it holds such a meeting.
  - (d) **exercise an active and independent opinion** with respect to all matters to be decided by the scheme executives; and
  - (e) *exercise **due diligence in relation** to any business of, and necessary preparation for and attendance at meetings of, the scheme executives or any committee to which such scheme executive is appointed.*

## **Key responsibilities and duties of the Trustees include:-**

Summed up in **STSMA clause 3(1)(t)**...

*“in general, to control, manage and administer the common property for the benefit of allowners.”*

And in **STSMA clause 7(1)**

*“The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed, or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.”*

To carry out their mandate, **the ST legislation gives Trustees certain powers**, primarily related to the day-to-day running. Some decisions, and those that might affect owners personally, need to be referred to the BC **so that they can give guidance or direction and vote via an ordinary, special, or unanimous resolution, thus making it a democratic process.**

**The Trustees' role can be summed up as being the executive arm of the BC.** Thus, the scope of their responsibilities and duties are aligned to the functions of the BC - reference **STSMA 3**

**Compliance with the three ST legislation Acts, and the restrictions/directions** given by the Owners at the AGM, is not only necessary but imperative, including:-

### **Enforcing compliance with the Management and Conduct Rules**

**Maintaining the Common Property.** This includes **ensuring that owners keep their own sections in good repair**, as required by STSMA 13(1)(c). Failure to do so, could negatively impact on the wellbeing of the building/s and the rights of other owners.  
**MR 31(2)(b).**

### **Financial oversight, including:-**

- Setting up and maintaining the Administrative Fund and the Maintenance Reserve Fund
- Adherence to both the administrative and maintenance budgets
- Maintain the necessary interest-bearing bank accounts and managing risk
- Payment of all creditors
- Ensuring the collection of levies, rentals and contributions
- Dealing with over-due accounts
- Ensuring CSOS levies are paid
- Obtaining a professional insurance valuation every three years
- Working with a ST specialist broker, to ensure all necessary and legislated insurance cover is in place which includes:-
  - building insurance cover
  - fidelity insurance cover
  - public liability

### **Employ and manage staff and contractors to maintain the building/s and CP**

e.g. Ensuring that the contractors have the correct credentials, do the work effectively, obtain competitive quotations on the same specs and ensure mandatory agreements are signed to limit liability.

### **Comply with the relevant legislation**

e.g. Municipal by laws, Council requirements, National Building Regulations, OSH Act, Constitution, ST legislation, Employment and Labour Law.

## More about Trustees

***Almost anyone (but not the MA who does not own a section in the BC or an employee of the BC) can be a trustee*** including a non-owner or a tenant. One may question why a non-owner would volunteer to do this unpaid job? A tenant may wish to be a trustee since he/she has an interest in the community in which he/she lives or may be planning to buy there in the future or is a relative of the owner.

There is no such thing as a **“perfect” Trustee**. Certain people could be considered more **ideal than others, as Trustees**. e.g. those that provide much needed skills/attributes that a BC would find useful. This would be financial, building, engineering, law, HR, ST legislation training or extensive gardening experience. When accepting nomination, the potential trustees need to understand that there is a **legal requirement for them to “inform and educate” themselves on their respective community scheme legislation**.

The **number of Trustees** is decided on, at the AGM by the owners. Then the owners vote on those nominated, to decide who will fill the vacancies. **The minimum number is 2 and there is no maximum**, but 5 to 7 is a good balance. If there are not sufficient people nominated at the AGM to fill the vacancies, or resignations occur during the year, then the remaining trustees can co-opt a new Trustee to fill any vacancy.

The current Trustees can **appoint an Alternate Trustee**. e.g. if a Trustee is unavailable for an extended period,

**A quorum** at a Trustee meeting is 50%.

**Proxies are not permissible** at Trustee meetings.

**Nominations for Trustees** are called for, and a nomination form will be included in the AGM Pack. If not sufficient, then nominations can be taken from the floor at the AGM. Nominees need to be **nominated by an owner**, or he/she can nominate him/herself. The nomination form needs to be signed by the nominee indicating willingness to serve. Providing a **short resume of what the nominated person/s** could contribute gives the owners the opportunity to consider who the best candidates might be.

**Removing a trustee** before the end of the term is possible, but since the owners voted the trustee in, a Special General Meeting would need to be called and a **normal resolution taken by the owners**, to vote out that Trustee. When the notice goes out, the reason for proposing the resolution for removing the trustee needs to be included with wording that will not run the risk of defamation.

Every **resolution that the Trustees, as an Executive Body, are permitted to take, according to legislation, must be voted on** and a majority obtained. The numbers in favour and against need to be recorded. If the outcome is an equal number of votes, then the **Chairperson can exercise a casting vote**. (This is in addition to the vote cast by the chairperson in his/her role as one of the trustees.)

Even if the budget was approved at the AGM, there needs to be a majority vote by the Trustees on that particular expenditure.

This can be made less cumbersome by the Trustees passing a detailed **Financial Procedure Policy** (preferably at the first Trustee meeting after the AGM). This will set out the number of Trustees needed to authorise different levels of expenditure and would also include allowing the MA to pay standard accounts, or the Building Manager to spend a certain amount provided it is in the Budget. This usually includes the Trustees giving authority for the MA alone to issue any **levy clearance certificate**.

**Even if a trustee resolution has been taken, at least two trustees, or one trustee and the MA, must sign or authorise every document for it to be valid and binding.**

**Lack of adherence by the trustees to the resolution requirements** does not absolve the BC of their obligations, should it be found later that a trustee appointment was invalid, or the trustee was disqualified.

**Trustees may not be paid** but they may claim back approved legitimate expenses which may accrue in their role as Trustee. It is necessary for the financial records for the claimants to provide receipts/invoices. **Remuneration to a Trustee who is an owner Trustee, can be permitted**, but only if a special resolution is passed by the owners at the AGM and the cost is included in the budget. **Non-owner Trustees are entitled to be remunerated** if this is included in the budget and this is approved by a simple majority.

**A Professional Trustee who is not an owner**, is someone well versed in ST matters (e.g. attorney or ST Consultant) so the knowledge which this trustee brings to the BC, is at a professional level of expertise. This cost would need to be in the budget and approved by the owners via an ordinary resolution taken at an AGM.

Trustees take on the roles of the duties, responsibilities and powers as set out in the ST Legislation. **Trustees may never delegate their responsibilities but may delegate some/all of their duties** to the MA. These duties will be set out in a Service Level Agreement between the BC and the MA via a Management Contract. This needs to be in a **written contract**, specifically setting out the roles of each party to ensure the smooth running of the BC in terms of the legislation. **The term of the contract** may not be more than 3 years. The MA can be reappointed at this stage, but only if a new contract is entered into. The MA Contract can be terminated by either party before that, on certain conditions as set out in the ST Legislation.

**The MA reports to the BC through the Trustees** and may not make decisions without the Trustees' instruction or relevant Trustee authority contained in a Trustee resolution. Even if the duty is delegated by the Trustees to the MA, the **Trustees are still responsible for the work being carried out**. i.e. Trustees may not absolve themselves of responsibility. e.g. the Audited Annual Financial Statements need to be signed off by two trustees, as they are ultimately responsible for the financial and accounting records, even if the MA is doing the actual work.

There are **limitations placed on Trustees** who must act in line with the ST legislation and the directions and restrictions placed on them at the AGM. If they do not, **Trustees can**, in certain circumstances, **be held personally liable**, hence the need for Trustees to be educated and knowledgeable. However, the BC should indemnify a trustee against

*"...all costs, losses and expenses, arising as a result of any official act that is not in breach of the Trustee's fiduciary obligation to the body corporate." MR 8(4)*

If the **decision is more than the Trustees are permitted to take**, then the resolution can be put before the BC at the AGM, or a Special General Meeting can be called by the Trustees to obtain the necessary permission of the owners via a special resolution or a unanimous resolution. In both cases, the legislative requirements need to be met, e.g. requisite notice period, reason/s for the meeting, the proposed resolution/s and the necessary quorum needs to be present.

In addition to taking their Fiduciary Duties seriously, Trustees need to **avoid any Conflict of Interest**. Trustees may not capitalise or receive monetary reward which could come about because of their position as a Trustee and knowledge arising therefrom (similar to “insider trading” in the stock market). If the Trustee owns or participates in a business or is related to anyone who is wishing to provide or is providing a service/product to the BC, the relevant trustee cannot take part in any decisions in this regard. This is known as having a **conflict of interest**. It is suggested that, at the beginning of each Trustee meeting, the Trustees be asked if anyone has any conflict of interest to declare, which is then recorded.

**Minutes need to be kept of all Trustees meetings** and there is **no such thing as an informal Trustees meeting**. Resolutions must be minuted with a record of those who voted in favour and against. **Minutes are legally required to be sent out within 7 days**. Until they are signed off at the next trustee meeting, they can be headed “DRAFT,” but they need to be provided to the trustees, MA and all those owners who have asked to receive them, within that timeframe. A set signed by the Chairman, after a Trustee resolution to this effect, needs to be given to the MA for keeping in the minute book, if keeping Governance Documents is one of the duties outsourced to the MA in terms of the Management Contract.

As an alternative to a Trustee meeting, when a decision needs to be taken on an urgent basis, then a **Round Robin Resolution** can be taken. The proposed resolution should be sent to all Trustees who need to vote in writing in favour or against, and a majority is needed. A time limit for returning the vote may be placed on the notice to get a quick decision one way or the other. At the following Trustee meeting, the outcome of the Round Robin Resolution must be ratified and included in the minutes of that meeting.

**Attendance at Trustee meetings:-** any Bond Holder, an Owner or a future development rights holder may attend Trustees meetings and may talk on an item but may not vote or introduce any new item to the agenda. Trustees who are unable to attend need to be excused by the Chairperson. There are special circumstances in which an owner or bondholder may not attend certain parts of the meeting. **MR 11(3)**.

**Meetings of Trustees** should be held on a regular basis to ensure prompt attention to matters which need Trustee decisions to ensure the smooth running of the BC. There is no prescribed number.

The **first meeting after the AGM, of the Trustees**, should be held as soon as possible and **not later than two weeks**. This meeting, if correctly structured, will give direction, set up the planning for the year, contribute to the smoother running of the BC, and minimise the risks of key elements being overlooked.

## Items for the Agenda for this first meeting should include:-

- **Election of the Chairman**
- **Allocation of Portfolios**, specifically Treasurer and Secretary. **Arrange subcommittees** if required. Subcommittees have no voting rights, but they can play a vital part in assisting the Trustees with doing the groundwork, putting forward recommendations and bringing input and enlightenment to portfolios. e.g. Financial and Maintenance. Trustees will then be able to make a more informed decision when voting.
- **Trustees need to take a resolution to confirm to the owners the increase** in the Maintenance Reserve and Admin levies, in line with the budget approved at the AGM. This needs to be carried out within 14 days and sent out to all owners setting out what their levies will be, when they are due, what interest rate will be charged on overdue amounts, and other requirements in terms of the legislation.
- **Set the Credit Policy & Hand-over procedure.** e.g., at what stage owners in arrears will be handed over; what steps will be taken to lead up to that point; what the interest rate will be (note the maximum permitted is 24% per annum).
- Set up a **Financial Procedure Policy**. This would include matters such as the allocation of the level of authority to each trustee or to various trustees, to purchase goods or make payments. This would also include the spending power by the Supervisor/Building Manager and MA. All must be within the limits of the Budgets, and on the understanding that all the Trustees are ultimately responsible for the finances, meaning that there must be trust between the Trustees.
- **All documents need to be signed by a minimum of two trustees** after the relevant Trustee resolution has been taken.
- **Review limitations and directions** given by the owners at the AGM.
- **Trustees to review all Service Level Agreements (Contracts with outside parties)** to familiarise themselves with the terms, and to see that they are current and relevant, particularly that of the Management Contract.
- Reviewing and implementing the **10-year Maintenance Plan**.
- **Set banking procedures**, changing signatories as necessary, formalising the levels of payment authorities and control of the payment of creditors accounts.
- Set up a **communication platform**. e.g. bulk SMS, whether emails from owners are to be sent to the MA or all Trustees or just the Portfolio Trustee. Will there be a Whatsapp group or similar between the owners and trustees? Establish what the maximum response time should be for answering of correspondence.
- **Set meeting dates for the year**. Decide what format they will take and who will do minutes and send out the notices and agenda.
- **MAs are not required to attend all meetings**. Decide how many they attend and when, and what function they will play. Ensure these aspects are covered in the Management Contract. MAs, in fact, need an invitation to attend a Trustee meeting. Ensure that they receive a copy of all the minutes for their records.

## **Alternative Option to having Trustees run a BC.**

The STSMA has created the opportunity for the Trustees of a BC **to be replaced entirely** by an **Executive Managing Agent (EMA)**. This external company/individual employed by a BC is mandated to perform the functions and exercise the powers that would ordinarily be performed by the Trustees. This would include being responsible for the day-to-day decisions that the Trustees would normally make. **MR 28**

### **P.S. Final suggestions for Trustees include: -**

- **Recognise the responsibility** that comes with this role of being a Trustee. You are tasked with looking after your own and/or someone else's investment, which could be the biggest investment made in anyone's lifetime.
- With taking up the responsibility of being a Trustee, comes the need to **adhere to fiduciary duties** and to **be informed, objective** and "squeaky clean" on all levels.
- Give your full commitment- do not be a piece of "dead wood." It causes administrative nightmares. It can hold other Trustees back from making the necessary decisions in respect of the correct functioning of the BC with a negative effect to all the owners. **The Trustees are only as strong as their weakest link.**
- You will learn more "on the job," but you **need to start with a base line of understanding.**
- **Continue to upskill** - the ST legislation is in its infancy. Daily CSOS Adjudication Orders and Court Orders are carving the ST future. Even ST experts are learning every day!
- **Attend Trustee training events and webinars** some of which are virtual and other live. Many are recorded, so register and listen at your leisure. Subscribe to receive newsletters. e.g., TVDM, BBM Law, STBB, Stratafin, Paddocks, Addsure, The Advisory, NAMA, CSOS etc. Ensure the Trustees possess ST handbooks e.g., Demystifying Sectional Title (Marina Conostas and Karen Bleijs), Keyword Access to the Sectional Title Legislation (S. Baillie), or any of the books that Paddocks publishes. **Always allow for education in your annual budget.**
- **Work with respect and knowledge with the MA** - if the MA is not working FOR you, look at your options. There is a wide range of MAs, who bring their individual style and experience, and one will suit a BC better than another.
- **Understand the role of the MA** and how to best relate to the MA.  
<https://www.tvdmconsultants.com/webinars/practical-steps-to-convert-complicated-sectional-title-relationships-to-manageable-ones>
- Accepting nomination and becoming a Trustee, may not bring about all that YOU would like to see happen. But as a Trustee, you are there to **bring about the best possible outcome for the majority of owners**, in the **best interest of the BC** as a whole.