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# PART 1 - WHEN DOES A TRUSTEE HAVE TO PAY OUT OF HIS OWN POCKET?

## (THE FINANCIAL RISKS OF BEING A TRUSTEE!)

By Alan Levy  
Alan Levy Attorneys Notaries & Conveyancers

# LEGAL DEFINITION OF A FIDUCIARY RELATIONSHIP

A relationship in which one party places special trust, confidence, and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party.



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# SECTIONAL TITLES SCHEMES MANAGEMENT ACT 8 OF 2011 (STSMA)



# SECTION 8 - FIDUCIARY POSITION OF TRUSTEES

- (1) Each trustee of a body corporate must stand in a fiduciary relationship to the body corporate.
- (2) Without derogating from the generality of the expression “fiduciary relationship”, the provision of subsection (1) implies that a trustee—
  - (a) must in relation to the body corporate act honestly and in good faith, and in particular—
    - (i) exercise his or her powers in terms of this Act in the interest and for the benefit of the body corporate; and
    - (ii) not act without or exceed those powers; and
  - (b) must avoid any material conflict between his or her own interests and those of the body corporate, and in particular— (i) not receive any personal economic benefit, direct or indirect, from the body corporate or from any other person; and
  - (ii) notify every other trustee of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the body corporate, as soon as such trustee becomes aware of such interest.



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## SECTION 8 - FIDUCIARY POSITION OF TRUSTEES (2)

(3) A trustee of a body corporate who acts in breach of his or her fiduciary relationship, is liable to the body corporate for—

(a) any loss suffered as a result thereof by the body corporate; or

(b) any economic benefit received by the trustee by reason thereof.

(4) Except as regards the duty referred to in subsection (2)(a)(i), any particular conduct of a trustee does not constitute a breach of a duty arising from his or her fiduciary relationship to the body corporate if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognisant of all the material facts.



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# PREScribed MANAGEMENT RULES (PMR's)



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# PMR's 6(3)- REQUIREMENTS FOR OFFICE AND DISQUALIFICATION

(3) A trustee who has any direct or indirect personal interest in any matter to be considered by the trustees must not be present at or play any part in the consideration or decision of the matter concerned.



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# PMR's 8(4)- PAYMENT AND INDEMNITY

(4) The body corporate must indemnify a trustee who is not a managing agent against all costs, losses and expenses arising as a result of any official act that is not in breach of the trustee's fiduciary obligations to the body corporate.



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# COMMUNITY SCHEMES OMBUD SERVICE ACT - REGULATIONS

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# REGULATION 14 - DUTIES OF SCHEME EXECUTIVES

- (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 –



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# REGULATION 14 - DUTIES OF SCHEME EXECUTIVES

- (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.
- (2) The obligations of a community scheme executive in terms of sub-regulation (1) are in addition to and do not derogate from the fiduciary obligations of a scheme executive in terms of the common law or any applicable statute.



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# SUMMARY

A Trustee Only has to pay out of his own pocket if he acts in breach of the Fiduciary Relationship (the relationship of trust and reliance).

If he acts in breach of the Fiduciary Relationship he is liable for:

- Any loss suffered as a result by the Body Corporate (as a legal entity);
- Any economic benefit received by the trustee by reason of his breach;

A breach of the Fiduciary Relationship does not occur where the Trustee obtains the written approval of all the owners who were aware of all the material facts. This does not apply to a section (2)(a)(i) breach.



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## PART 2 - DUTIES AND POWERS OF TRUSTEES

By Alan Levy  
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# SECTION 7 - TRUSTEES OF BODY CORPORATE

(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.

(2) (a) In addition to the functions contemplated in subsection (1), the trustees of the body corporate must receive and may consent to applications for subdivision of sections or consolidation of sections, made by the owners of sections.

(b) Such consent must not unreasonably be withheld by the trustees.

(3) For the purposes of an agreement in respect of the beacons and boundaries of the common property required in terms of the Land Survey Act, 1997 (Act No. 8 of 1997), the trustees are deemed to be the owner of the land.

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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

1) A body corporate must perform the functions entrusted to it by or under this Act 15 or the rules, and such functions include—

- (a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs—
  - (i) for the repair, maintenance, management and administration of the common property (including reasonable provision for future maintenance and repairs);
  - (ii) for the payment of rates and taxes and other local municipality charges for the supply of electricity, gas, water, fuel and sanitary or other services to the building or land;
  - (iii) for the payment of any insurance premiums relating to the building or land; and
  - (iv) for the discharge of any duty or fulfilment of any other obligation of the body corporate



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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(b) to establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property but not less than such amounts as may be prescribed by the Minister;

(c) to require the owners, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the owners of sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules, to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs;



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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(d) to require from a developer who is entitled to extend the scheme in terms of a right reserved in section 25(1) of the Sectional Titles Act, to make such reasonable additional contribution to the funds as may be necessary to defray the cost of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or part;

(e) to determine the amounts to be raised for the purposes of paragraphs (a), (b) and (c);

(f) to raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections;



# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(g) to open and operate an account with any registered bank or any other financial institution;

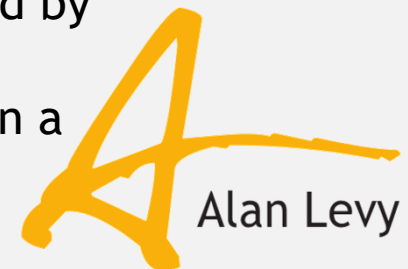
(h) to insure the building or buildings and keep it or them insured to the replacement value thereof against fire and such other risks as may be prescribed;

(i) to insure against such other risks as the owners may by special resolution determine;

(j) 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;

(k) to pay the premiums on any insurance policy effected by it;

(l) to maintain all the common property and to keep it in a state of good and serviceable repair;



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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(m) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building;

(n) to comply with any reasonable request for the names and addresses of the persons who are the trustees of the body corporate in terms of the rules or who are members of the body corporate;

(o) to notify the chief ombud, the local municipality concerned and the registrar of its domicilium *citandi et executandi*, which is its address for service of any process;

(p) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property;

(q) 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;



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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(r) subject to the rights of the local municipality concerned, to maintain and repair including renewal where reasonably necessary, pipes, wires, cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property;

(s) on the written request of any owner or registered mortgagee of a section, to produce to such owner or mortgagee, or any person authorized in writing by such owner or mortgagee, the insurance policy effected by the body corporate and the receipt for the last premium in respect thereof; and

(t) in general, to control, manage and administer the common property for the benefit of all owners.

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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(2) Liability for contributions levied under any provision of subsection (1), save for special contributions contemplated by subsection (4), accrues from the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by an application to an ombud from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of such ownership.

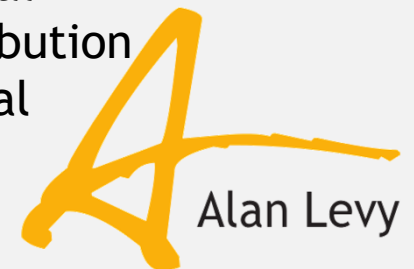


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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(3) Any special contribution becomes due on the passing of a resolution in this regard by the trustees of the body corporate levying such contribution and may be recovered by the body corporate by an application to an ombud, from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of such ownership.

(4) “Special contribution”, for the purposes of this section, means any contribution levied under subsection (1) other than contributions which arise from the approval of the estimate of income and expenditure at an annual general meeting of a body corporate, determined to be a contribution to be levied upon the owners during the current financial Year.



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# SECTION 3 - FUNCTIONS OF BODY CORPORATE

(5) The body corporate must, annually or whenever there is a change in levy, certify in writing—

(a) the amount determined as the contribution of each owner;

(b) the manner in which such contribution is payable; and

(c) the extent to which such contribution has been paid by each owner.

(6) The body corporate is, for the purposes of effecting any insurance under subsection (1)(h), considered to have an insurable interest for the replacement value of the building and must, for the purposes of effecting any other insurance under that subsection, be considered to have an insurable interest in the subject matter of such insurance.



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# SECTION 4 - POWERS OF BODY CORPORATE

The body corporate may exercise the powers conferred upon it by or under this Act or the rules, and such powers include the power—

(a) to appoint such agents and employees as the body corporate may consider fit;

(b) when essential for the proper fulfilment of its duties and upon special resolution, to purchase or otherwise acquire, take transfer of, mortgage, sell, give transfer of or hire or let units;

(c) to purchase, hire or otherwise acquire movable property for the use of owners for their enjoyment or protection or in connection with the enjoyment or protection of the common property;

(d) where practicable, to establish and maintain on the common property suitable lawns, gardens and recreation facilities;

(e) upon special resolution, to borrow moneys required by it in the performance of its functions or the exercise of its powers;



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# SECTION 4 - POWERS OF BODY CORPORATE

(f) to secure the repayment of moneys borrowed by it and the payment of interest thereon, by notarial bond over unpaid contributions whether levied or not, or by mortgaging any property vested in it;

(g) to invest any moneys of the fund referred to in section 3(1)(a);

(h) to enter into an agreement with any owner or occupier of a section for the provision of amenities or services by the body corporate to such section or to the owner or occupier thereof, including, upon special resolution, the right to let a portion of the common property to any such owner or occupier by means of a lease other than a lease contemplated in section 5(1)(a);

(i) to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.



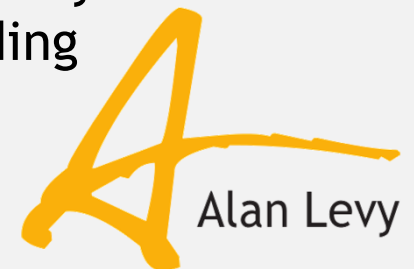
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# SECTION 5 - ADDITIONAL POWERS OF BODY CORPORATE

(1) In addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate—

(a) may, upon unanimous resolution, on direction by the owners and with the written consent of any holder of a right of extension contemplated in section 25 of the Sectional Titles Act, alienate common property or any part thereof, or let the common property or any part thereof under a lease, and thereupon the body corporate may, subject to section 17(1) of the Sectional Titles Act, deal with such common property or such part thereof in accordance with the direction and may execute any deed required for this purpose, including any deed required under the Sectional Titles Act;



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# SECTION 5 - ADDITIONAL POWERS OF BODY CORPORATE

(b) may, with the written consent of all the owners as well as the written consent of the mortgagee of each unit in the scheme, alienate, or in terms of the Sectional Titles Act exercise or cede, a right of extension of the scheme by the addition of sections: Provided that an owner or mortgagee may not withhold such approval without good cause in law;  
(c) may, upon unanimous resolution by the owners, enter into a notarial agreement to extend the period stipulated in the condition referred to in section 25(1) of the Sectional Titles Act. 5

(d) may, subject to subsection (2), purchase land to extend the common property, if duly authorized thereto in writing by all the owners;

(e) may, upon unanimous resolution by the owners, request the delineation and cession of exclusive use rights to particular owners in terms of section 27(2) of the Sectional Titles Act;

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# SECTION 5 - ADDITIONAL POWERS OF BODY CORPORATE

(f) may, upon special resolution by owners, enter into a notarial deed of cancellation of an exclusive use right in terms of section 27(5) of the Sectional Titles Act;

(g) may, upon special resolution by the owners, execute on behalf of the owners a servitude or a restrictive agreement burdening the land shown on the relevant sectional plan and may accept on their behalf a servitude or restrictive agreement benefiting such land, as contemplated in section 29 of the Sectional Titles Act;

(h) must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or floor area of a section in terms of the Sectional Titles Act; and

(i) 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.



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## SECTION 5 - ADDITIONAL POWERS OF BODY CORPORATE

(2) Land purchased by a body corporate in terms of subsection (1)(d)— (a) must be registered in the name of the body corporate in terms of the Sectional Titles Act and the Deeds Registries Act, 1937 (Act No. 47 of 1937); and

(b) is considered to be owned by the owners of sections in the building concerned in the same proportion as their participation quota as contemplated in section 26(2) of the Sectional Titles Act.



# PMR 9 – GENERAL POWERS AND DUTIES

The trustees must—

- (a) meet to carry out the body corporate's business, adjourn and otherwise regulate their meetings as they think fit, subject to the provisions of the Act, these rules and the common law of meetings;
- (b) exercise the body corporate's powers and functions assigned and delegated to them in terms of section 7(1) of the Act in accordance with resolutions taken at general meetings and at meetings of trustees;
- (c) apply the body corporate's funds in accordance with budgets approved by members in general meeting;



# PMR 9 - GENERAL POWERS AND DUTIES

(d) appoint any agent or employee in terms of section 4(a) of the Act in terms of a duly signed written contract; and  
(e) compile minutes of each trustee and general meeting in accordance with rule 27(2)(a) and distribute these to the persons entitled to notice of the meeting concerned as soon as reasonably possible, but not later than 7 days after the date of the meeting.



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## PART 3 - TRUSTEES MEETINGS

By Alan Levy  
Alan Levy Attorneys Notaries & Conveyancers

# PMR 11 - CALLING AND ATTENDANCE AT MEETINGS

- (1) A trustee may at any time call a meeting of trustees by giving all other trustees not less than seven days written notice of the time and place of the meeting and by setting out an agenda for the meeting: Provided that –
- (a) in cases of urgency a trustee may give such shorter notice as is reasonable in the circumstances; and
  - (b) notice need not be given to any trustee who is absent from the Republic unless the meeting is one referred to in sub-rule (5), but notice must be given to any replacement trustee appointed for that trustee.
- (2) The trustees may by written resolution set the dates of and a standard agenda for their future meetings and delivery of a copy of this resolution is considered adequate notice of all such future meetings.



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# PMR 11 - CALLING AND ATTENDANCE AT MEETINGS

(3) Members, registered bondholders, holders of future development rights and the managing agent may attend trustee meetings and may speak on any matter on the agenda, but they are not entitled to propose any motion or to vote; provided that such persons are not entitled to attend those parts of trustee meetings that deal with —

- (a) discussions of contraventions of the Act or rules; or
- (b) any other matters in respect of which the trustees resolve that the presence of any such persons would unreasonably interfere with the interests of the body corporate or any person's privacy.



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# PMR 11 - CALLING AND ATTENDANCE AT MEETINGS

(4) If a member, a registered mortgagee or the holder of a future development right in writing requests notice of trustee meetings, the trustees must deliver to that person a copy of a notice of a meeting referred to in sub-rule (1), a resolution referred to in sub-rule (2) and a notice of any adjournment of such a meeting; provided that the body corporate may recover from the person concerned the costs of delivery of such documents.



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# PMR 11 - CALLING AND ATTENDANCE AT MEETINGS

- (5) The trustees may make arrangements for attendance at a trustee meeting by telephone or any other method, if the method –
- (a) is accessible to all trustees and other persons entitled to attend the meeting;
  - (b) permits all persons participating in the meeting to communicate with each other during the meeting; and
  - (c) permits the chairperson to confirm, with reasonable certainty, the identity of the participants.
- (6) A person who attends a meeting as provided under sub-rule
- (5) is considered present in person at the meeting



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# PMR 13 - QUORUM

(1) At a trustee meeting, 50 per cent of the trustees by number, but not less than two, form a quorum.

(2) If the number of trustees falls below the number necessary to form a quorum, the remaining trustee or trustees may continue to act, but only to—

(a) appoint replacement trustees to make up a quorum; or

(b) call a general meeting.



# PMR 13 – QUORUM

(3) If at any trustee meeting a quorum is not present within minutes of the appointed time for the meeting, the trustees present, but not less than two, must adopt interim resolutions in respect of each item on the agenda.

(4) An interim resolution adopted by trustees in terms of sub rule

(3) does not take effect unless it is confirmed—

(a) at the next trustee meeting at which a quorum is present; or

(b) by written resolution signed by all the trustees.



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# PMR 14 – VOTING

- (1) A motion at a trustee meeting –
  - (a) does not have to be seconded; and
  - (b) must be determined by resolution adopted by the majority of the trustees present and voting.
- (2) Each trustee is entitled to one vote; provided that if the deliberative votes of the trustees, including that of the chairperson, are tied, the chairperson has a casting vote, unless there are only two trustees.
- (3) A trustee is disqualified from voting in respect of –
  - (a) any proposed or current contract or dispute with the body corporate to which the trustee is a party; and
  - (b) any other matter in which the trustee has any direct or indirect personal interest.



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# PMR 14 – VOTING

(4) Trustees must adopt decisions by resolutions adopted by majority vote: Provided that resolutions may be put to the vote —


- (a) at trustee meetings; or
- (b) by a notice sent to each trustee which contains the text of any proposed resolutions and instructs the trustees to indicate their agreement to the resolution by their signature, which signatures must be received by the body corporate before expiry of the closing date specified in the notice.



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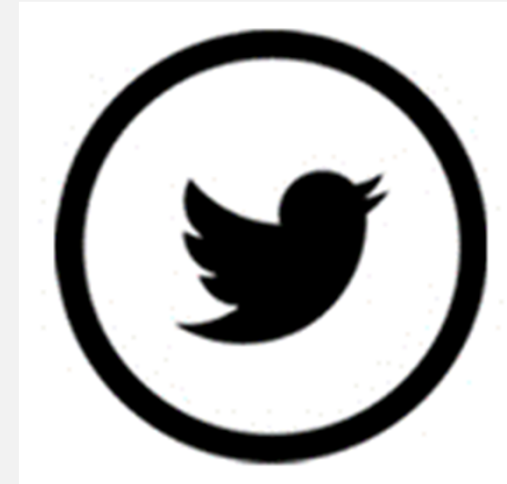
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