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GUIDELINE

Taking of Special Resolutions

Requirements of the sectional titles schemes management act (“stsma”), the sectional titles schemesmanagement regulations made under the stsma (“regulations” or “reg”) & the new prescribed management rules contained in annexure 1 to the regulations (“PMR”)

BORROWING POWERS OF A BODY CORPORATE

A body corporate may borrow money if it is authorised to do so by a **special resolution** taken by the **members** of the body corporate.

- STSMA sec 4(e) states that: “The body corporate may exercise the powers conferred upon it by or under this Act or the rules, and such powers include the power upon special resolution, to borrow moneys required by it in the performance of its functions or the exercise of its powers”.
- A special resolution by the members of a body corporate is therefore required before the trustees may (i) resolve to enter into a Propell loan agreement (i.e. before the trustees may sign a trustee resolution) or (ii) sign any Propell loan agreement or security document.
- We propose that the wording of the proposed special resolution mirror the wording of STSMA sec 4(e), so that the special resolution reads as follows:

SUGGESTED WORDING FOR A SPECIAL RESOLUTION AUTHORISING THE BODY CORPORATE TO BORROW MONEY:

The members resolve that the Body Corporate may borrow moneys required by it in the performance of its functions or the exercise of its powers. For purposes hereof, the Body Corporate may enter into any agreements and withdraw funds in terms of such agreements. The trustees are hereby directed, in terms of Section 7(1) of the Act, to implement this special resolution when required.

Who are the “members” of the body corporate?

- A body corporate is established on the date that any person other than the developer becomes an owner of a unit in the scheme. The members of the body corporate comprise of (i) all owners and (ii) the developer. The developer ceases to be a member when he ceases to have a share in the common property (which, in terms of the Sectional Titles Act, is when the ownership in every section is held by any person or persons other than the developer) – Sectional Titles Act sec 34(2), STSMA sec 2(1) and (2)

“Owner” means, as per STSMA sec 1:

- The person in whose name the unit is registered at a deeds registry
- If the unit is registered in the name of both spouses married in community of property or in the name of only one spouse and it forms part of the joint estate of both spouses in a marriage in community of property, either one or both spouses are considered to be the owner
 - The person in whom ownership is vested by statute (including the trustee in an insolvent estate, the liquidator of a company or close corporation which is an owner, the executor of an owner who has died, or the representative of an owner who is a minor or of unsound mind, recognised by law);
 - If a unit is subject to a lease for a period of 99 years or longer which is registered in a deeds registry, “owner” means the holder of such lease.

DEFINITION OF “SPECIAL RESOLUTION”

- STSMA sec 1 – “special resolution” means a resolution:
 - (a) passed by at least 75% calculated both in value and in number, of the votes of the members of a body corporate who are represented at a general meeting; or
 - (b) agreed to in writing by members of a body corporate holding at least 75% calculated both in value and in number, of all the votes.
- Members of a body corporate have the option of passing a special resolution (i) at a general meeting or (ii) in writing. Differences between the two options are summarised below:

	Special resolution - general meeting	Special resolution - in writing
Who passes the resolution	Members present at a meeting	All members in scheme
% required – votes calculated in value	75% of PQ present at meeting	75% of total PQ
% required – votes calculated in number	75% of members present at meeting	75% of all members
Additional requirements	Yes (notice of meeting, quorum required, agenda and minutes in prescribed format, etc)	No

DEFINITION OF “SPECIAL RESOLUTION”

- The STSMA and PMR refer to “votes calculated in value” as well as “votes calculated in number”.
- As per STSMA sec 6(6): *“When votes are calculated in value, each member’s vote is calculated either (a) as the total of the quotas allocated to the sections registered in that member’s name; or (b) in accordance with a rule made in terms of section 10(2), whichever is applicable.”*
 - In other words: a member’s “total vote in value” equals the total of the PQ of each section owned by that member
 - Alternatively, if a body corporate changed its Prescribed Management Rules and made a new rule which prescribes how votes are to be calculated, votes shall be calculated in accordance with such new rule
- As per STSMA sec 6(7): *“When votes are calculated in number, each member has one vote.”*
 - Each member has one vote, regardless of the number of sections that the member owns

For illustrative purposes:

- Let's imagine a scheme with 10 units
- A owns 5 units (total PQ of all units = 50%), B owns 3 units (total PQ of all units = 30%), and C and D each owns one unit (PQ of 10% for each unit)
- For "votes calculated in value", for example:
 - 80% of the votes calculated in value can be made up by A (50%) + B (30%) = 80%
 - 50% of the votes calculated in value can be made up by B (30%) + C (10%) + D (10%) = 50%
- For "votes calculated in number", for example:
 - 75% of the votes calculated in number can be made up by any 3 of the 4 members ($3 \div 4 = 75\%$)

Option 1 – Pass a special resolution at a general meeting

STEP 1 – GIVE 30 DAYS NOTICE OF THE MEETING 30 DAYS

At least 30 days prior notice must be given before a meeting of a body corporate where a special resolution will be taken – STSMA sec 6(2).

- It is our interpretation that "a meeting of the body corporate where a special resolution will be taken" includes both an annual general meeting (AGM) and a special general meeting (SGM).
- Therefore, if a special resolution is to be taken at an AGM, this notice requirement shall be applicable, which means that 30 days' notice will be required for such AGM.
- The PMR refers to shorter notice periods under certain instances,
- (see PMR sec 15(1) and 15(7)).

We are of the opinion that the provisions of the STSMA will trump the PMR, and hence that – despite the provisions of PMR sec 15 – 30 days’ notice will always be required for any meeting where a special resolution will be taken (whether it is an annual general meeting or a special general meeting).

NOTICE

Requirements in STSMA sec 6(2) and (3) in respect of a meeting where a special resolution will be taken:

- Notice to be in writing and must specify the proposed resolution
- We propose that the wording of the proposed special resolution mirror the wording of STSMA sec 4(e), so that the special resolution reads as follows:

Special resolution:

- The members resolve that the Body Corporate may borrow moneys required by it in the performance of its functions or the exercise of its powers. For purposes hereof, the Body Corporate may enter into any agreements and withdraw funds in terms of such agreements.
- Notice to be delivered by hand to a member; or
- Sent by pre-paid registered post to the address of the member’s section; or
- Sent by pre-paid registered post to another physical or postal address in SA chosen by the member in writing.

STSMA sec 6(4) states that “In addition to subsection (2), a notice contemplated in subsection (2) may also be sent to a member by fax or email”.

- It is our interpretation that notice by fax or email may only be sent in addition to notice by hand or prepaid registered post (in other words, if notice by hand or prepaid registered post was given first). Notice cannot be sent by email or fax only.

REQUIREMENTS IN THE PMR IN RESPECT OF NOTICE REQUIRED FOR GENERAL MEETINGS:

Notice to be given to all members, all registered bondholders, all holders of future developmental rights and the managing agent – PMR sec 15(1)

Notice to be accompanied by at least the following – PMR sec 15(3)

- An agenda
- A copy or comprehensive summary of any document to be considered or approved.
- We recommend that details of (i) the purpose of the borrowing and (ii) details of the financing options (both from Propell and other prospective lenders) be provided to the members).
- Proxy appointment form in the prescribed format (Form C: Notification, appointment of proxy and acceptance of mandate , which can be found in Annexure 3 to the Regulations)Quibus etur sequissequi consequere lique adisquatus consectetur aspiet adis dencidienis nimagnim fugit mod eatemolupta

STEP 2 – HOLD THE GENERAL MEETING ATTENDANCE

- Members may attend personally or may be represented by a proxy – STSMA sec 6(5)
- PMR sec 20(5) – A member’s appointment of a proxy in terms of section 6 (5) of the Act and the proxy’s acceptance of the mandate must, except in the case of an appointment in a mortgage bond, be substantially in the prescribed Form and must be (a) delivered to the body corporate 48 hours before the time of the meeting;
- or (b) handed to the chairperson before or at the start of the meeting.
- Prescribed proxy appointment form – see Form C in Annexure 3 to the Regulations
- A person cannot act as proxy for more than two members – STSMA sec 6(5)
- Practically, this means that Mr X can vote 3 times (once on behalf of himself as owner, once on behalf of owner A and once on behalf of owner B)
- A proxy cannot be the managing agent / an employee of the managing agent / the body corporate – PMR sec 20(6)

- Attendance register to be taken as the minutes of the meeting must contain (amongst other things) the following information – PMR sec 27(2)
 - Names of persons present
 - Role of persons present (e.g. chairperson / trustee / owner / proxy / representative)
 - Details of the authorisation of proxies or other representatives

QUORUM

No business can be transacted at a general meeting unless a quorum is present or represented – PMR sec 19(1)

PMR sec 19(2) - A quorum is -

- For a scheme with 3 primary sections or less or a body corporate with 3 members or less: $\frac{2}{3}$ of the total votes of members in value ($\frac{1}{3}$ of the total PQ of members)
- A “primary section” is defined as “a section designed to be used for human occupation as a residence, office, shop, factory or for any other type of use allowed in terms of local municipal bylaws, not being a utility section” – Regulations sec 1(b)
- For any other scheme: $\frac{1}{3}$ of the total votes of members in value ($\frac{1}{3}$ of the total PQ of members)

Additional conditions:

- Except if all sections in a scheme is registered in the name of the same person, at least two persons must be present to form a quorum.
- When calculating the required PQ to constitute a quorum, the following is not taken into account:
 - the PQ of sections registered in the name the developer – PMR sec 19(2)
 - the PQ of sections registered in the name of the body corporate – PMR sec 19(3)

For illustrative purposes, using the previous example:

- Let's imagine a scheme with 10 units
- A owns 5 units (total PQ of all units = 50%), B owns 3 units (total PQ of all units = 30%), and C and D each owns one unit (PQ of 10% for each unit)
- This is a scheme with more than 3 sections, so $\frac{1}{3}$ of the total PQ is required to form a quorum = 33.3%
- Also, at least 2 members must be present to form a quorum
- So, for example, A (50%) acting alone has more than 33.3% of the total PQ, but that is not sufficient. A, together with any other owner, will constitute a quorum.
- Alternatively, B (30%) + C (10%) can also constitute a quorum.

ADJOURNED MEETINGS

- If a quorum is not present within 30 minutes from the appointed time of the meeting, the meeting stands adjourned to the same day in the next week (at the same time and place) – PMR sec 19(4).
- If no quorum is present within 30 minutes from the appointed time of the adjourned meeting, a quorum shall be constituted by the members who are entitled to vote and who are present in person or by proxy at such adjourned meeting.

PASSING OF SPECIAL RESOLUTION

A special resolution must be passed by BOTH

- 75% or more of the members present (votes calculated in number); and
- 75% or more of the PQ present (votes calculated in value).
- PMR sec 20(2) provides that: "Except for special and unanimous resolutions, a member is not entitled to vote if (a) a member fails or refuses to pay the body corporate any amount due by that member after a court or adjudicator has given a judgment or order for payment of that amount; or (b) that member persists in the breach of any of the conduct rules of the scheme referred to in section 10 (2) (b) of the Act after a court or an adjudicator has ordered that member to refrain from breaching such rule."

Our interpretation is that:

- For special and unanimous resolutions, there is no restrictions on which members are entitled to vote for ordinary resolutions, certain members are not entitled to vote (e.g. members with unsatisfied judgments).
- Please note that PMR sec 20(2) does not refer to a member who are merely in arrears; it refers to a member against whom a judgement was obtained and who failed to pay in terms of the judgment.

When calculating the votes:

- the PQ of sections registered in the name of the body corporate is not taken into account / is considered to be abstentions – PMR sec 19(3) and PMR sec 20(3)
- Where a member is a trust, the beneficiaries of the trust is not entitled to vote – PMR sec 20(4)
- Where more than 1 person is entitled to exercise a vote jointly (for example, if a section is owned by A and B jointly, as co-owners), that vote may be exercised by only 1 person (either A, or B, or a proxy jointly appointed by A & B) – PMR sec 20(7)

For illustrative purposes, using the previous example:

- Let's imagine a scheme with 10 units
- A owns 5 units (total PQ of all units = 50%), B owns 3 units (total PQ of all units = 30%), and C and D each owns one unit (PQ of 10% for each unit)
- A, B, C and D are all present at the meeting
- For a special resolution to be passed, there are 2 requirements:
 - 75% or more of the PQ present to approve (votes calculated in value); and
 - 75% or more of the members present to approve (votes calculated in number)

75% of the votes (calculated in value) can for example be made up by:

- A (50%) + B (30%) = 80%
- B (30%) + C (10%) + D (10%) voting in favour will not be sufficient, as their votes are only 50% of the PQ present
- A (50%) + C (10%) + D (10%) voting in favour will also not be sufficient, as their votes are only 70% of the PQ present

75% of the votes (calculated in number) would require 3 out of the 4 members to vote in favour of the resolution (3 out of 4 = 75%).

- 75% calculated in number can therefore be made up by any combination of 3 votes
- For example A + B + C Or B + C + D and so forth

ACTIONS TO BE TAKEN AT MEETING

- The outcome of each vote (including the number of votes for and against the resolution) must be announced by the chairperson and recorded in the minutes of the meeting – PMR sec 20(8) and 27(2)(c)(iv)
- In our opinion, this means that the following must be announced at the meeting: The number of votes in favour of the resolution
 - in terms of PQ; and
 - in terms of number of votes.
- The number of votes against the resolution
 - in terms of PQ; and
 - in terms of number of votes.

MINUTES OF MEETINGS

The minutes must contain at least the following information – PMR sec 27(2)(a)

- Date, place and time of the meeting
- Names and role of the persons present and details of the authorisation of proxies or other representatives
- The text of all resolutions
- The results of the voting on all motions.
- In our opinion, this means that the following must be reflected in the minutes:
 - The outcome of the vote (for/against)
 - The number of votes in favour of the resolution
 - in terms of PQ; and
 - in terms of number of votes.

The number of votes against the resolution

- in terms of PQ; and
- in terms of number of votes.

It is the duty of the trustees to compile minutes of each trustee and general meeting in accordance with PMR 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 – PMR9(e).

SPECIAL RESOLUTIONS TAKEN BY LESS THAN 50% OF TOTAL PQ

PMR sec 20(9) and (10): If a special resolution is passed by members with less than 50% of the total value of all members' votes (i.e. less than 50% of the total PQ of the scheme):

- the body corporate must not take any action to implement the resolution for at least 1 week after the meeting (unless the trustees resolve that immediate action is necessary to ensure safety or prevent significant loss/damage); and
- within 7 days, members holding 25% of the total value of all members' votes (i.e. 25% of total PQ of the Scheme) may deliver a written and signed request requiring the body corporate to hold a special general meeting to reconsider the resolution.
- If a notice for such special general meeting is delivered, the special resolution that was taken cannot be implemented before -
 - it is again passed by special resolution at the subsequent special general meeting called; or
 - a quorum does not arrive for the subsequent special general meeting within 30 minutes of the time set for the meeting.

STEP 3 – PROVIDE PROPELL WITH THE FOLLOWING DOCUMENTS

- A copy of the minutes of the general meeting (whether it is an Annual General Meeting, Special General Meeting or adjourned meeting) where the special resolution was taken

Option 2 – Take a special resolution in writing

STEP 1 – DISTRIBUTE THE RESOLUTION TO ALL MEMBERS

- Apart from the definition in STSMA sec 1, the legislation does not prescribe how the resolution should be distributed to members.

STEP 2 – MEMBERS TO SIGN RESOLUTION

- The special resolution must be agreed to in writing by members of a body corporate holding at least 75%, calculated both in value and in number, of all the votes.
- Put differently, the special resolution must be signed by:
 - 75% or more of all members in the scheme; and
 - Members holding 75% or more of the total PQ in the scheme.
- The STSMA and PMR refer to “votes calculated in value” as well as “votes calculated in number”.
- As per STSMA sec 6(6): “When votes are calculated in value, each member’s vote is calculated either (a) as the total of the quotas allocated to the sections registered in that member’s name; or (b) in accordance with a rule made in terms of section 10(2), whichever is applicable.”
 - In other words: a member’s “total vote in value” equals the total of the PQ of each section owned by that member
 - Alternatively, if a body corporate changed its Prescribed Management Rules and made a new rule which prescribes how votes are to be calculated, votes shall be calculated in accordance with such new rule

As per STSMA sec 6(7): “When votes are calculated in number, each member has one vote.”

- Each member has one vote, regardless of the number of sections that the member owns.

STEP 3 – PROVIDE PROPELL WITH THE FOLLOWING

- A copy of the special resolution by members taken in writing.

PLEASE NOTE THAT:

- Propell must ensure that prospective customers are authorised to enter into loan agreements and therefore requires, as stated above:
 - Minutes of the general meeting (whether it is an Annual General Meeting, Special General Meeting or adjourned meeting) where the special resolution was taken; OR
 - A copy of the special resolution taken in writing
- Propell will check that:
 - The wording of the resolution that was passed, is sufficient; and
 - In the case of a special resolution taken at a general meeting, whether the minutes state that a quorum was present (not applicable to adjourned meetings); and
 - Whether the minutes or resolution state that a sufficient % of votes (calculated both in value and number) passed the special resolution.
- Propell cannot conduct a due diligence in respect of the adequacy of the special resolution process and accepts that bodies corporate and trustees complied with the applicable legislation and prescribed management rules when the members passed a special resolution.
- In addition, Propell cannot express an opinion on or verify facts which fall outside its knowledge. Propell is not in a position to evaluate (and therefore do not ask for copies of and will not consider) any other documents relating to special resolutions, including (but not limited to) notices given for the meeting, attendance registers, participation quota schedules, proxy appointment forms, voting cards or any calculations made or calculation tools used in determining the quorum of a meeting or the results of voting on any special resolution.
- It is and remains the responsibility of the body corporate and its trustees and/or managing agent to ensure that each and every requirement for special resolutions stipulated in the STSMA and the Prescribed Management Rules are complied with and that the minutes or special resolutions submitted to Propell are correct and true.

This document is intended as a summary of the published provisions of the STSMA, Regulations and PMR only (and where an opinion is expressed, it is an in-house opinion of Propell only). This document does not constitute legal advice and Propell accepts no liability whatsoever for any consequences which may arise as a result of reliance on the contents hereof. Bodies corporate, trustees and/or management agents are advised to obtain independent legal advice in respect of aspects of the legislation which is unclear and/or vague.



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