Marlon Shevelew
and Associates
Attorneys at Law

Marlon Shevelew Partner BA LLB (UCT)
Ismaiel Mohamed Associate LLB (UWC)
Reinette Gouws Candidate Attorney BCOM LLB (UP)

The content of these notes is subject to copyright protection. Reproduction of the content, or any part of it, other than for personal, noncommercial use, is prohibited without prior consent from Marlon Shevelew. The information provided in these notes is for general guidance only. Marlon Shevelew and Associates accepts no responsibility or liability for damages resulting from the use of information contained in these notes especially having regard to the various interpretations of the Consumer Protection Act which remains open to scrutiny by the legislature and our courts and more specifically how the Sectional title Act may be interpreted in relation thereto.

THE APPLICABILITY OF THE CPA TO THE VARIOUS PARTIES INVOLVED IN A SECTIONAL TITLE SCHEME

a) The Body Corporate and the Managing Agent

The relationship between a Body Corporate and its Managing Agent is exempted from all the provisions of the CPA one would think

This is for two reasons.

1. **First,** the relationship is generally accepted to be governed by a type of “employment contract” and no provision of the CPA applies to an “employment contract”.

2. **Second**, the relationship between a Body Corporate and its Managing Agent is exhaustively dealt with by the Sectional Titles Act 95 of 1986 (“the STA”).

"The employment contract"

The CPA excludes services supplied under an “employment contract” from its ambit in totality.

Section 5(2)(e) of the CPA provides:

> *“This Act does not apply to any transaction-*
>
> *…*
>
> *(e) pertaining to services to be supplied under an employment contract …”*

The STA describes the relationship between a Body Corporate and Managing Agent as one of “master and servant”; the analogous phrase used presently being a contract of service between employer and employee.

In this regard, **Annexure 8 of the Sectional Title Regulations, Rule 46(2)(a) – 46(2)(b**), provides:

"The trustees shall ensure that there is included in the contract of appointment of all managing agents a provision to the effect that if he is in breach of any of the provisions of his contract, or if he is guilty of conduct which at common law would justify the termination of a contract between master and servant, the trustees may, without notice, cancel such contract of appointment, and that the managing agent shall have no claim whatsoever against the body corporate or any of the owners as a result of such cancellation.

Any one or more of the owners or mortgagees of sections in the buildings may, if the managing agent is in breach of the provisions of his contract or if he is guilty of any conduct which at common law would justify the termination of a contract between master and servant, require the trustees to cancel the managing agent's contract in terms of paragraph (a). The aforegoing provisions shall in no way detract from the trustees' rights to cancel the managing agent's contract."

This provision probably recognizes the relationship between a Body Corporate and the Managing Agent as being an employment relationship.

One well-respected author on the topic of sectional title schemes, CG Van der Merwe, adopted this view in a recent publication where he stated that "the South African statute allows for the appointment of a managing agent who is regarded as a mere employee of the body corporate."

("Polish Apartment Ownership Compared with South African Sectional Titles", CG Van der Merwe, Stellenbosch Law Review, 2006, pgs 185-186).

This is a departure from one of his earlier publications where he expressed uncertainty on whether a Managing Agent is an employee of the Body Corporate.

In this regard, he stated in a 1994 publication that:

"it is not entirely clear from the provisions of rule 46 whether the contract of appointment is regarded as a contract of employment or a contract for professional services which creates a fiduciary relationship between the body corporate and the managing agent."

("The role of a managing agent in the administration of a sectional title scheme", CG Van der Merwe, Stellenbosch Law Review, Vol. 5, 1994, pg 329).

He explained that "the management rules under the South African Act have created an officially recognized position of 'managing agent' and have to a large extent elevated the traditional employee status of the managing agent to that of a 'delegate' of the body corporate." (Id. pg 315)

He went on to explain:

- "There is a widespread belief amongst managing agents that they are only employees of the trustees or the body corporate and that they do not stand in a fiduciary relationship to either the trustees or the body corporate.

- According to this view the trustees, and not the managing agent, have a fiduciary duty to the body corporate.

- It is therefore the responsibility of the trustees to control the affairs of the body corporate and this responsibility cannot be delegated to anyone.

- Far from assuming the legal responsibilities of the trustees towards the body corporate, the managing agent is only appointed to perform the work of the trustees by rendering assistance and exercising administrative functions.

Although this view is supported by a reference to a contract of master and servant in the rules, there are several arguments that militate against construing the contract of appointment of the managing agent as a contract of service rendering him or an ordinary employee of the trustees.

- **Firstly**, there is no limitation in the rules as to the powers and duties that may be entrusted to the managing agent. This implies that any function, including functions in terms of which the agent incurs a fiduciary duty, may be entrusted to the managing agent.

- **Secondly**, rule 48 expressly saddles the managing agent with a fiduciary duty towards the body corporate to keep full records of his or her administration and to notify the body corporate and all holders of registered mortgage bonds of all matters which in his or her opinion detrimentally affect the value or amenity of the common property and any of the sections.

- **Thirdly,** the managing agent is expressly referred to as the holder of an office in rule 47.

- **Finally,** if someone is entrusted to exercise powers and functions on behalf of another at common law, this is construed as a contract of mandate rather than a contract of service.

Since the managing agent is managing the affairs of the body corporate, it is submitted that he or she stands in a fiduciary relationship to the body corporate.

An executive organ of the body corporate, namely the trustees, appoints him or her. The managing agent would thus owe both a duty of trust as well as a duty of care and skill towards the body corporate.

For example, a managing agent entrusted with the function to insure the scheme adequately who fails to renew the insurance of the building would incur liability for the amount that the body corporate could not claim from the insurance company." (Id. pg 324).

It appears that CG Van der Merwe was merely trying to point out that a Managing Agent also has certain responsibilities not usually assigned to most employees, despite the fact that the Managing Agent remains an employee of the Body Corporate.

It is instructive that he again referred to the Body Corporate as the "employer" of the Managing Agent in a 2009 publication which he co-authored, stating that:

"In summary, the powers of the managing agent are derived from the management body or its executive council. Hence, in principle the management body or <u>the body corporate in South African terms exercises all powers since it has the final say as the employer of the managing agent</u>.

In other words, although a management body through its executive council may appoint a managing agent, the ultimate control of the condominium project rests with an executive council under the supervision of a management body.

However, the fact that the body corporate or the trustees may delegate certain of their powers and functions to a managing agent places the managing agent in these instances in a quasi-fiduciary relationship with the body corporate or trustees.

Thus, unless restricted in the management contract, the managing agent may validly exercise all the powers and is obliged to perform all the duties entrusted to him or her in the contract of appointment. This delegation of powers places the managing agent in a quasi-fiduciary relationship with the body corporate or trustees."

("Reflections on the Role of the Managing Agent in SA and Chinese Condominium Legislation", CG Van der Merwe, Journal of South African Law, Vol. 3, Issue 1, March 2009, pgs 25-26).

Notably, in Australia a Managing Agent is regarded as an employee of the Body Corporate despite the fact that he also performs quasi-fiduciary duties.

Australia has a system known as "strata title" or "strata scheme" which is virtually the same as a sectional title is in South Africa. Notably, the duties of the Managing Agent in Australia are the same as those that they hold in South Africa and include quasi-fiduciary aspects.

The mere fact that the Managing Agent has some quasi-fiduciary duties towards the Body Corporate may mean that he performs some functions not ordinarily performed by regular employees, but his appointment is in terms of an employment contract nonetheless.

For this reason, the provisions of the CPA which exclude services performed under an "employment contract" from its ambit, would on its most appropriate reading, also exclude the services rendered by a Managing Agent to a Body Corporate.

Thus, no “consumer agreement” can come into existence between a Managing Agent and a Body Corporate and the CPA can therefore not apply.

<u>The problem however is the following</u>

Whereas the employment agreement logic appears to remain true in cases where a private individual is employed as a Managing Agent; this cannot be the case in relation to juristic persons.

The reason is simple: juristic persons can never be employees!

In this regard, it has been explained in **Workplace Law (Juta Publications, 2009)**, John Grogan, that:

“Juristic persons may be employers. However, they cannot assume the role of employees because juristic persons can act only through their offices and employees; a company cannot therefore offer ‘personal services’ to an employer, which is one of the hallmarks of an employment contract.” (page 37).

<u>How do we deal with this anomaly you might ask?</u>

Section 2(9) of the CPA provides:

“If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8)-

(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision, …..

The provisions of the CPA plainly provide more protection to a Body Corporate than the provisions of the STA.

For this reason, it is clear that the provisions of the CPA and STA will have to apply concurrently to the extent possible and in the extent of an irreconcilable inconsistency; the provisions of the CPA will take preference.

In addition, it appears that in cases where the Managing Agent is a juristic person, the Consumer, Trader and Tenancy Tribunal of New South Wales (Australia) has recognised that the provisions of the relevant consumer protection law apply to this relationship. This is despite the fact that this relationship is provided for in specific legislation in Australia as well.

(Arendon Properties P/L v Raine & Horne Marrickville **(General) [2005] NSWCTTT 779 (12 December 2005)**

b) the Body Corporate and the Co- owners

The relationship between the Body Corporate and the co-owners is exempted from all of the provisions of the CPA.

This is because a Body Corporate does not market goods or services in the ordinary course of its business and can thus not be a "supplier".

Section 1 of the CPA provides that a **"supplier means a person who markets any goods or services".**

This definition is narrowed by the definition of "consumer".

The relevant part of section 1 provides:

"consumer, in respect of any particular goods or services, means-

(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5 (3);

Thus, a transaction must be entered into with a "supplier" in the ordinary course of the supplier's business in order for the supplier to be regarded as a "supplier" for purposes of the CPA.

There are several reasons why a Body Corporate cannot be a "supplier" in terms of a "consumer agreement".

The first reason is that a Body Corporate does not render services for consideration.

The CPA defines "business" to "mean the continual marketing of any goods or services".

"Marketing" in turn means "to promote or supply any goods or services".

The crucial definition is "supply", which "means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration".

What is clear is that the Body Corporate performs a statutory mandate for the benefit of the owners of property within the sectional title scheme as opposed to providing services for consideration to such owners.

A case squarely on point with this view is the decision of the Consumer, Trader and Tenancy Tribunal of New South Wales (Australia) in ***Tayco v Clisdell's Real Estate and Owners Corporation Strata Plan No. 53020 (General)*** **[2005] NSWCTTT 708 (17 November 2005).**

The facts in that case were as follows.

- An owner of property within a sectional title scheme brought an action under the Consumer Claims Act against the Body Corporate and the Managing Agent of the sectional title scheme.
- The basis of the claim was that the maintenance of certain amenities was not taken care of.
- The Tribunal held that "the Owners Corporation is not a 'supplier' of services within the meaning of section 3 of the Consumer Claims Act 1998 to its individual lot owners" because "the Owners Corporation is not 'in the course of carrying on or purporting to carry on a business'.
- The Owners Corporation is established by operation of statute for a specific purpose for the lot owners and not for the purpose of a business with the world at large."
- The Tribunal went on to reason as follows:

  "It would appear to me that the Owners Corporation is a highly specific legal entity created by statute for a specific purpose. It is an unusual entity and not subject to all the matters which a corporation may otherwise be subject to. As such and for clarity, it has been expressly included as being capable of being a 'consumer'. It has a mandate to manage the affairs of the Owners Corporation as a specific statutory function. It has no choice in this matter and the way in which it must proceed to carry out this statutory duty is heavily codified in the Act. Whilst it might give the appearance of providing 'services' to the individual lot owners, on a true analysis, I do not believe it is providing services as much as it is carrying out a specific statutory mandate. As such, I am of the view that it is not a service provider to the individual lot owners within the meaning of section 3 of the Consumer Claims Act 1998.In these circumstances, a lot owner cannot bring a consumer claim against the Owners Corporation. In any event, if I am wrong in this conclusion, then, the Strata Schemes Management Act 1996 provides specific remedies and actions by lot owners against the Owners Corporation. Any action by a lot owner should necessarily follow the course and facility given to that lot owner by specific legislation, i.e. the Strata Schemes Management Act 1996. The

applicant did not proceed to take action pursuant to the available legislation. In my view, the existence and purpose of this specific legislation also mitigates against the provisions of the Consumer Claims Act 1998 as applying other than to the extent specifically provided for in the Consumer Claims Act 1998."

The entity which is alleged to be a "supplier" must be fulfilling a "commercial purpose" and desire to make a "profit" before its activities can be "in the ordinary course of business" for purposes of consumer protection laws.

The above reasoning holds true for the Body Corporate of a sectional title scheme in South Africa.

- **First,** the Body Corporate is established for the purpose of assisting owners of property within the sectional title scheme, not for the purpose of carrying on business. It thus does not fulfill a "commercial purpose" and is certainly not designed to make a "profit".
- **Second**, the Body Corporate carries out a statutory function in terms of the STA, something which it must do in terms of the law. To put this differently, it has no choice in the matter. In other words, it is in the ordinary course of carrying out a statutory mandate as opposed to business activity.
- **Third,** the STA heavily codifies the remedies against the Body Corporate which exist for owners of property in the sectional title scheme.

For instance, Rule 71, made in terms of the STA, sets out an intricate procedure for resolving disputes with the Body Corporate. The reasoning of the Tribunal thus holds true: where specific legislation exists to provide for a situation, the general legislation will usually not apply.

This is plainly a scenario where the maxim *generalia specialibus non derogant* should apply and which will be dealt with later herein.

For these reasons, a Body Corporate is not a "supplier" within the ambit of the CPA. As a consequence, the provisions of the CPA do not apply to the relationship between a Body Corporate and the owners of property within the sectional title scheme.

c) Managing Agents and Co- owners

This relationship is certainly not one between a "supplier" and "consumer" for purposes of the CPA and therefore the CPA does not apply.

In this regard, the reasons **are twofold**.

- **First,** The owners have no direct link to the Managing Agent as the Body Corporate is the representative body of the owners in their dealings with the Managing Agent

- **Second,** because the co-owners of property subject to a sectional title scheme have no right to proceed against the Body Corporate, because the Body Corporate in not a Supplier, nor is the owner a Consumer, they can likewise have no right to proceed against the Managing Agent, who is just an employee of the Body Corporate.

d) The Latin maxim *generalia specialibus non derogant*

In the event that the relationship between a Managing Agent and the Body Corporate is not found to be governed by an "employment contract",, as mentioned earlier, this maxim should decisively place to rest the question of the applicability of the CPA to this unique relationship.

In terms of this maxim, where a subsequent statute deals with a matter in general terms, it should not be construed to alter or derogate from a previous statute which dealt with a matter exhaustively.

This is especially so where the earlier statute was part of a comprehensive scheme designed to govern a particular type of relationship.

The Supreme Court of Appeal explained in ***Transnet Ltd and others v Chirwa* 2007 (2) SA 198 (SCA**):

> "Steyn Die Uitleg C van Wette cites a passage from the speech of Lord Hobhouse in *Barker v Edger* (reproduced in R v Gwantshu):
>
> > 'The general maxim is *generalia specialibus non derogant*. When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.'

Maxwell on Interpretation of Statutes 12 ed by P St J Langan cites a passage from ***Seward v The Owner of the Vera Cruz*** **('The Vera Cruz')** where Lord Selborne said:

'Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.'"(para 28).

These same considerations apply here and indicate that the CPA should not apply to the unique relationship between a Body Corporate and its Managing Agent.

First, it would not fit with the comprehensive scheme for regulation of sectional titles which has been laid out in the STA in order to regulate this "particular type of relationship". This constitutes "adequate remedies" to govern this relationship (as envisaged by the Constitutional Court).

Second, like in the above cases, the CPA is a general statute enacted long after the STA. It regulates in general terms the relationship between all "consumers" and "suppliers", while the STA specifically the relationship between a Body Corporate and its Managing Agent exhaustively.

Third, this "particular type of relationship" between the Body Corporate and its Managing Agent is heavily codified by the STA.

This further indicates that the State wanted this relationship - which is different from most "consumer" and "supplier" relationships - to be comprehensively regulated by that piece of legislation alone.

For instance, the method of the Managing Agent's appointment and termination, the terms of his contract of employment, as well as his powers, duties and functions are provided for in intricate detail in the Rules which accompany the STA.

In the absence of the CPA having explicitly included this relationship within its ambit, it cannot be assumed that this type of relationship could have been intended to fall within the ambit of the CPA.

Thus, the maxim *generalia specialibus non derogant* should prevent the application of the CPA and require the exhaustive rules provided for in the STA to prevail in governing this relationship exclusively.

For ease of reference, and since there may be agents here attending to rental portfolios, **I have concluded that the existence of the Rental Housing Act** does not trigger the application of the maxim because a "clear intention" exists in the CPA to include rental agreements within its ambit.

While no "clear intention" can be found in the CPA that it was intended to apply to the special relationship between a Managing Agent and Body Corporate, such intention is manifest as far as rental agreements are concerned.

For instance, the definition of "supply" includes "sell, rent, exchange and hire in the ordinary course of business for consideration".

The term "service" is defined to include "access to or use of any premises or other property in terms of a rental". Therefore, rental agreements were plainly envisaged to be governed by the terms of the CPA provided they are concluded in the ordinary course of business.

It must also be remembered that the relationship between a Managing Agent and a Body Corporate is a very unique and special relationship, similar to an employment type relationship.

Special legislation was required to give content to the scope of this relationship. This is not so with the relationship between landlord and tenant, which is an ordinary relationship.

Thus, in my view, the maxim does not apply to rental agreements concluded in the ordinary course of business.

From the above analysis one thing is clear: the CPA's impact on sectional title schemes should remain quite limited.

On its most appropriate interpretation, the CPA does not apply to the main role-players in a sectional title scheme in relation to their dealings with one another, such as (1) the Managing Agent, (2) the Body Corporate, (3) the co-owners of property within the sectional title scheme, and (4) most private landlords. Extensive changes for sectional titles are thus unlikely.

In the event that the CPA does have application, arising out of the impossibility of employment of a juristic entity Managing Agent, it is prudent to interpret what the impact of the CPA would be as the entire act would apply except for section 14.

THE PROVISIONS OF SECTION 14 OF THE CPA WILL NOT APPLY TO MOST CONTRACTS WITH MANAGING AGENTS

Section 14(1) of the CPA provides that "This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value."

A Body Corporate is inarguably a juristic person. Section 1 of the CPA defines a "juristic person" to include:

- **a body corporate**;
- a partnership or association;
- a trust as defined in the Trust Property Control Act 57 of 1988.

Consequently, regardless of whether the Managing Agent is a juristic person, or a private individual, the provisions of section 14 of the CPA will have no impact on the Managing Agency contract between them and the Body Corporate.

This is because:

(1) in the case of the Managing Agent being a juristic person, section 14 of the CPA explicitly excludes its application,

and (2) in the case of a Managing Agent who is a private individual, the existence of an employment contract excludes the application of the CPA in its entirety.

In the event that it is found that section 14 of the CPA does apply to the contract between a Body Corporate and a Managing Agent, the provisions of section 14 of the CPA can easily be reconciled with Management Rule 46(1) of the STA. which section serves as one of the most debated sections of the STA as regards the CPA.

Management Rule 46(1)

46. The Appointment, Powers and Duties of a Managing Agent

(1) (a)……………………

(b) A managing agent is appointed for an initial period of one year and thereafter such appointment shall automatically be renewed from year to year unless the body corporate notifies the managing agent to the contrary: provided that notice of termination of the contract may be given by the trustees in accordance with a resolution taken at a trustee meeting or an ordinary resolution taken at a general meeting.

In terms of both statutes, the Managing Agency agreement remains in force until terminated by the Body Corporate. Why?

Where there is an inconsistency between the provisions of the CPA and another law, they apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the other as per Section 2(9) of the CPA.

In the present case, it is easy to apply the provisions of Management Rule 46(1) of the STA without contravening section 14 of the CPA.

Section 14 of the CPA provides that a fixed-term contract which comes to an end will be automatically renewed on a month-to-month basis, provided that the consumer may terminate the fixed-term agreement.

Section 14(2)(d) of the CPA provides:

"On the expiry of the fixed term of the consumer agreement, it will be <u>automatically continued on a month-to-month basis</u>, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (c), unless the consumer expressly-

(i) directs the supplier to terminate the agreement on the expiry date; or

(ii) agrees to a renewal of the agreement for a further fixed term."

Management Rule 46(1)(b) of the STA works in harmony with this provision by providing for the automatic renewal of a fixed-term agreement for a period of one year, subject to the right of the Body Corporate to terminate the agreement. The provisions can be harmonized as follows.

Upon the expiry of the Managing Agency contract, it automatically renews on a month-to-month basis. This applies the provisions of section 14(2)(d) of the CPA which provides the greater protection to the Body Corporate than the provisions of Management Rule 46(1)(b) which provides for a full one-year extension.

The agreement will continue to remain in force from month-to-month until the Body Corporate terminates it. This complies with the provisions of section 14(2)(d) of the CPA and Management Rule 46(1)(b). This is because both provide for the continued operation of the Managing Agency agreement until it is terminated by the Body Corporate in the manner prescribed by Management Rule 46(1)(b).

Thus, even if it is found that the provisions of section 14 of the CPA apply to the relationship between a Body Corporate and the Managing Agent, the automatic renewal of the Managing Agency contract will still take place.

Although section 14 of the CPA grants the Body Corporate the right to terminate the Managing Agency agreement, that right already existed in terms of Management Rule 46(1)(b). Thus, under both statutes an automatic renewal takes place until the Body Corporate terminates the agreement.

Yours sincerely,
MARLON SHEVELEW

MARLON SHEVELEW & ASSOCIATES

9th Floor, Zeeland House
7-9 Heerengracht
Cape Town
8001

PO Box 8254
Roggebaai
Cape Town
8012

Tel +27 21 425 7069
Fax 27 21 418 5488
info@marlonshevelew.co.za
www.marlonshevelew.co.za

VAT No 4850232028
Law Society Reg No 10666