

## TRUSTEE TROUBLES: PERSONAL COSTS AND INDEMNITY

In sectional title schemes and bodies corporate, trustees occupy a critical role. They have to balance their fiduciary duties with the potential personal risks inherent in their position. These risks include financial risks.

One intriguing scenario involves a trustee who receives an application for a final protection order under the Protection from Harassment Act<sup>1</sup> (“the Harassment Act”) by a member of the body corporate, tenant or other stakeholder within the sectional title scheme. Investigation of the scenario demonstrates principles that are applicable in cases not limited to harassment claims. And it raises the pertinent question: Can a trustee of a body corporate claim legal costs back from the body corporate, which the trustee has expensed to defend themselves? This discussion delves into the complexities of such cases, considering various legal principles and statutory provisions. The facts play a defining role in the analysis too, of course.

While the focus of this article is on the Harassment Act as a point of departure, this article is also relatable to other instances where a trustee of a body corporate has to personally expense legal costs, or other types of costs, for purposes of either defending themselves in court proceedings or in representing themselves in dispute resolution proceedings facilitated by the Community Schemes Ombud Service (CSOS). This article explores these complexities, considering various legal principles and statutory provisions.

### THE FIDUCIARY DUTIES OF TRUSTEES

Trustees of bodies corporate must act in the best interest of the body corporate and its members, and trustees are obliged by law to act with honesty, good faith and diligence, in doing so.<sup>2</sup> Trustees must also not exceed their powers when fulfilling their official duties.<sup>3</sup>

The general duties of trustees are broad and multifaceted, encompassing several critical responsibilities. These include the management and upkeep of the common property to ensure it remains in good condition and serves the community’s needs. Trustees must also ensure compliance with all relevant regulations and body corporate rules, which may involve taking enforcement actions when necessary. This duty extends to the collection of arrear levies, a process that can involve legal proceedings through the courts or the Community Schemes Ombud Service (CSOS), potentially resulting in the execution against a debtor’s movable or immovable property. Furthermore, trustees are tasked with safeguarding the interests of all stakeholders, including members of the body corporate and themselves, to maintain the integrity and smooth operation of the community scheme.

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<sup>1</sup> Act 17 of 2011.

<sup>2</sup> Section 8(1) and (2)(a)(i) of the Sectional Titles Schemes Management Act 8 of 2011 (“the STSMA”).

<sup>3</sup> Section 8(2)(a)(ii) of the STSMA.

Considering the extensive responsibilities entrusted to trustees within a sectional title scheme, and the frequent personal interactions between trustees, members of the body corporate, and other stakeholders, it is inevitable that legal challenges will occasionally arise. Trustees may find themselves facing wrongful legal actions in their personal capacity, which are directly or indirectly related to their official duties. For instance, as mentioned, a member of the body corporate, or resident in the complex, might file a harassment claim seeking a final protection order against a trustee, based on actions or decisions the trustee made while performing their official duties. These scenarios underscore the potential legal vulnerabilities trustees face as they fulfil their roles within the body corporate.

## **DO TRUSTEES HAVE ANY STATUTORY INDEMNIFICATION?**

The Prescribed Management Rules<sup>4</sup> (“PMRs”) in the Sectional Titles Schemes Management Regulations<sup>5</sup> (“the STSM Regulations”) provides for the indemnification of trustees.<sup>6</sup> Specifically, trustees are entitled to be indemnified by the body corporate out of the funds of the body corporate, for all expenses and liabilities incurred by the trustee in the *bona fide* execution of the trustee’s duties.<sup>7</sup>

Professor CG van der Merwe writes that this indemnification should be paid from the administrative fund of the body corporate.<sup>8</sup> The learned author also states that this rule can be somewhat confusing because trustees are reimbursed for all costs and expenses resulting from any official act that does not breach their fiduciary duties.<sup>9</sup> The indemnification should cover losses or damages arising from a trustee’s personal liability for actions taken in their official capacity.<sup>10</sup>

This statutory indemnification serves as a protective measure, ensuring that trustees are not personally liable for costs arising from their official duties, provided they have acted in good faith and within the scope of their authority. Indemnifying trustees is a practical necessity, as failing to protect them from such expenses would significantly deter individuals from accepting nominations to serve as trustees. The prospect of bearing personal costs, losses, or expenses incurred as a result of their official duties would make the role unappealing, further complicating the recruitment of willing candidates (volunteers). The community scheme industry already faces challenges in attracting committed and capable trustees; additional deterrents would exacerbate these difficulties. Ensuring trustees are indemnified against such financial risks not only encourages more individuals to take on these essential roles but also supports the effective governance and management of community schemes.

Sometimes, bodies corporate adopt indemnification insurance policies with insurers for cover for the trustees for such costs, losses and expenses.

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<sup>4</sup> Annexure 1 to the STSM Regulations.

<sup>5</sup> 2016.

<sup>6</sup> PMR 8(1) and (4) of the STSM Regulations.

<sup>7</sup> PMR 8(4) of the STSM Regulations.

<sup>8</sup> CG van der Merwe *Sectional Titles, Share Blocks and Time-sharing* Volume 1, para 14 5 11.

<sup>9</sup> Van der Merwe *Sectional Titles* para 14 5 11.

<sup>10</sup> Van der Merwe *Sectional Titles* para 14 5 11.

## INDEMNIFICATION INSURANCE COVERAGE

It is highly recommended that bodies corporate maintain indemnification insurance to protect their trustees, and their administrative fund. Although it is not a statutory requirement to obtain such insurance, as it is not a prescribed risk,<sup>11</sup> the members of a body corporate have the option to resolve by special resolution that this risk should be covered by insurance.<sup>12</sup> This proactive measure ensures that both trustees and the body corporate are financially protected against potential legal challenges arising from any of the trustees' official duties.

However, it is crucial to note that the extent to which indemnity insurance covers legal costs, whether for harassment protection orders or other legal matters, depends entirely on the specific wording and coverage details of the policy. Trustees and bodies corporate must carefully review and understand their insurance policies to ensure adequate protection is in place. Consulting with the insurer to clarify coverage details and address any potential gaps in protection is also advisable.

## COSTS IN HARASSMENT AND OTHER CASES

Under the Harassment Act, the courts seldom award costs to the winning party against the losing party. This principle aims to encourage alleged victims to seek protection without the deterrent of potential legal costs. However, this norm poses a significant challenge for trustees who would feel compelled to defend themselves in such actions. The court may only make an order as to costs against any party if it is satisfied that the party in question has acted frivolously, vexatiously, or unreasonably.<sup>13</sup> This is a formidable evidentiary requirement to demonstrate, hence the reason why the court seldom awards costs in harassment applications.

Delaying a decision while waiting for the board of trustees or the body corporate to determine whether to cover legal costs can place trustees at a significant disadvantage. Such delays can allow opponents to gain the upper hand or even result in default judgments against the trustees. Therefore, it is imperative for trustees to act swiftly to protect their reputation and legal standing, often needing to take decisive action before internal discussions and debates within the body corporate can be fully resolved. Quick action is essential to mitigate risks and ensure that trustees can effectively defend themselves against any allegations or legal challenges they may face.

On the other hand, not giving the body corporate an opportunity to choose the legal service provider to assist the trustee in preparing a defence and / or at an agreed cost and / or failing to provide the insurer with a pre-warning notice as may be required by some insurance policies, can introduce complexities into whether the trustee is indemnified for any costs.

Boards of trustees and bodies corporate should consider creating a policy (either in the rules or via directives to trustees from members in general meeting), in line with their insurer's requirements, to guide trustees on what to do when they need to defend themselves and may seek indemnification. This policy would help balance competing

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<sup>11</sup> Regulation 3 and PMR 23(1)(a)(i) of the STSM Regulations, read with s 3(1)(h) of the STSMA.

<sup>12</sup> Section 3(1)(i) of the STSMA, read with PMR 23(1)(a)(ii) of the STSM Regulations.

<sup>13</sup> Section 16 of the Harassment Act.

interests and ensure everyone is informed. By addressing these issues in advance, trustees can act swiftly without leaving the body corporate or insurer out of the loop.

## **REIMBURSEMENT CLAIMS AGAINST THE BODY CORPORATE**

If the body corporate refuses to indemnify a trustee for legal costs incurred in defending a harassment claim, or in defending another type of civil suit or criminal charge brought against the trustee as a result of their official duties, the trustee may have a legal claim against the body corporate for reimbursement. The trustee would need to demonstrate that the costs were incurred as a direct result of performing their official duties and that they acted within the scope of their authority, honestly and in good faith.

Trustees play an indispensable role in managing bodies corporate, often facing legal risks in the course of their duties. When sued under the Harassment Act for a final protection order, or when sued for any other civil or criminal reason, the question of whether they can claim the legal costs that they would personally expense from the body corporate is complex. Trustees are generally entitled to indemnification under the PMRs, but practical issues such as insurance coverage and the specifics of each case can complicate matters. Therefore, it is essential for trustees to understand their rights and for bodies corporate to ensure adequate protections and insurance are in place to mitigate these risks. This highlights the need for clear policies and robust insurance coverage to support trustees, enabling them to perform their duties without undue fear of personal financial loss. As mentioned, it's already quite difficult to persuade a potential trustee to accept a nomination to be one; and the risk of increased personal expense or liability can make it even more unlikely that they individuals will volunteer.

**FAUSTO DI PALMA**

**SECTIONAL TITLE SOLUTIONS (PTY) LTD**

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