

THE CONDOMINIUM PROPERTY (AMENDMENT) BILL, 2013

MEMORANDUM

1. **Object of the Bill**

The object of this Bill is to amend the Condominium Property Act, 2001 to provide model rules to be adopted by corporations; to require corporations to register the rules relating to management of the units; to require every corporation to maintain a sinking fund for infrastructural development and structural repairs; to establish a condominium property tribunal to provide an efficient, less formal but effective mechanism for resolving disputes between corporations, developers and owners; to permit unit owners to take out mortgage insurance; and to provide for related matters.

2. **Defects in the Existing law**

The Condominium Property Act, 2001(Act No 4 of 2001) requires a corporation to make rules under section 30 for the management of the units and common property. However, the Act does not give any guidance regarding the content of these rules. The Ministry of Lands, Housing and Urban Development has developed model rules to guide corporations, but these model rules do not have the force of law. The Act also creates confusion by referring to “rules” and “byelaws” interchangeably, yet only the “rules” are defined in the Act.

Section 20 (1) (c) of Act No 4 of 2001 requires every corporation to maintain a fund, but this fund is limited to the recurrent expenditure of the corporation. It does not include future expenditure of substantial proportions, such as structural repairs or substantial repainting.

Section 20(1)(f) of the Act requires the corporation to insure against “fire”. However, other jurisdictions with comparable legislation require insurance against a wider range of risks. In addition, the Act does not permit an owner to take out a policy of insurance, separate from the one taken out by the corporation, to cover the amount secured by a mortgage over the owner’s unit. It would be advantageous for an owner to be able to take out “mortgage insurance” for the amount secured by a mortgage, so that if the unit is damaged or destroyed, the owner could claim under that policy, allowing the mortgagee then to pursue any claim the owner might have under the corporation’s policy of insurance.

Section 19(4) gives a corporation power to sue and be sued. However, this power can only be exercised by a corporation to sue in respect of common property. The Act is silent as to whether a corporation can sue a builder or developer for building defects that come to light after completion of the building, or whether a corporation can represent unit owners in any action that affects more than one unit owner but is not in respect of common property.

Disputes often arise in condominium properties between unit owners and a corporation, a corporation and developers in the case of phased condominiums, and between unit owners themselves. Under the Act, the only arbiter of these disputes is a court. The Act does not provide for an alternative, effective but less costly mechanism of dealing with disputes.

3. Remedies proposed to deal with the defects

The Bill seeks to amend the Act to provide a Schedule containing model rules that can be modified and adopted by a corporation to suit the particular circumstances of the condominium.

In order to cater for expenses related to the infrastructural development and structural repairs of the condominium, the Bill proposes that every corporation should maintain a sinking fund to cater for these substantial expenses that are not part of the administrative expenses already catered for by section 20 of the Act.

The Bill seeks to permit an owner of a unit to take out mortgage insurance. This will stimulate mortgage lending on condominium properties, by guaranteeing repayment to the mortgagee if the building is damaged or destroyed.

The Bill proposes to clarify the uncertainty as to whether a corporation can sue on behalf of unit owners by expressly permitting unit owners to authorise a corporation to sue on their behalf in certain cases.

Finally, the Bill proposes to establish a Condominium Property Tribunal to provide an efficient, cost effective and faster dispute resolution mechanism as an alternative to court proceedings. The tribunal would promote mediation instead of the adversarial system in the courts, would not be bound by the formal rules of procedure and evidence.

Minister of Lands, Housing and Urban Development

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ARRANGEMENT OF CLAUSES

Clause

1. Amendment of Act No. 4 of 2001
2. Amendment of section 2 of the principal Act
3. Amendment of section 17 of the principal Act
4. Amendment of section 20 of the principal Act
5. Insertion of new section 20A
6. Amendment of section 23 of the principal Act
7. Amendment of section 24 of the principal Act
8. Amendment of section 29 of the principal Act
9. Amendment of section 30 of the principal Act
10. Insertion of new section 34A
11. Insertion of new section 39A
12. Insertion of new section 46A
13. Insertion of new Part VA
14. Insertion of Third Schedule

A Bill for an Act

ENTITLED

THE CONDOMINIUM PROPERTY (AMENDMENT) ACT, 2013

An Act to amend the Condominium Property Act, 2001 to provide model rules to be adopted by corporations; to require corporations to register the rules relating to management of the units; to require every corporation to maintain a sinking fund for infrastructural development and structural repairs; to establish a condominium property tribunal to provide an efficient, less formal but effective mechanism for resolving disputes between corporations, developers and owners; to permit unit owners to take out mortgage insurance; and to provide for related matters.

BE IT ENACTED by Parliament as follows:

1. Amendment of Act No. 4 of 2001

The Condominium Property Act, 2001, in this Act referred to as the principal Act, is amended in section 1 by substituting in the definition of “unit factor”, for “byelaws”, the word “rules”.

2. Amendment of section 2 of the principal Act

Section 2 of the principal Act is amended

(a) by substituting for subsection (5), the following-

“(5) Where a developer deposits a phased condominium plan in accordance with this section, the developer shall provide –

(a) a time table projecting the development of each phase; and

(b) the prescribed information required in respect of a phased condominium plan.”

(b) by inserting immediately after subsection (5), the following-

“(6) Where a developer changes the phased condominium plan, the developer shall submit a modified condominium plan and may vary the time table projecting the development of a phase to cater for the changes.”

3. Amendment of section 17 of the principal Act

Section 17 (1) of the principal Act is amended by substituting for “byelaws” the word “rules”.

4. Amendment of section 20 of the principal Act

Section 20(1) of the principal Act is amended-

(a) by inserting immediately after paragraph (c), the following-

“(ca) to establish and maintain the sinking fund provided for in section 34A;”

(b) by substituting for paragraph (d) the following-

“(d) to determine at least once in each period of twelve months, the amounts to be paid for the purposes of paragraphs (c) and (ca)”;

(c) by substituting for paragraph (e) the following-

“(e) to raise amounts determined under paragraph (d) by levying contributions on the properties, based on the unit entitlement of the respective units, but varied as the

corporation considers reasonable having regard to the value of the units or the extent to which the units or their use contribute to the costs and expenses of the corporation;”

5. Insertion of new section 20A

The principal Act is amended by inserting immediately after section 20, the following new section -

“20A. Mortgage insurance

- (1) Notwithstanding any policy of insurance taken out by the corporation, an owner may insure a unit against fire for a sum equal to the amount secured by one or more mortgages secured over the unit.
- (2) Subject to the terms and conditions of the policy, the insurer shall pay the proceeds of the policy to the mortgagees whose interests are noted on the policy in order of their respective priorities.
- (3) Subject to the terms and conditions of the policy, the insurer shall be liable to pay:
 - (a) the value stated in the policy; or
 - (b) the amount of the loss; or
 - (c) the amount sufficient, at the date of the loss, to discharge mortgages charged upon the unit,whichever is the least amount.
- (4) Where the amount paid by the insurer:
 - (a) equals the amount needed to discharge a mortgage charged upon the unit, the insurer shall be entitled to an assignment of that mortgage;
 - (b) is less than the amount needed to discharge a mortgage charged upon the unit, the insurer shall be entitled to a submortgage of the mortgage to secure the amount paid, on the same terms and conditions as those contained in the mortgage by the owner.”

6. Amendment of section 23 of the principal Act

Section 23(2) of the principal Act is amended by substituting for “byelaws” the word “rules”.

7. Amendment of section 24 of the principal Act

Section 24 (2) of the principal Act is amended by substituting for “byelaws”, the word “rules”.

8. Amendment of section 29 of the principal Act

Section 29 of the principal Act is amended -

- (a) by substituting for subsection (3), the following-

“(3) A rule made under this section or an amendment or revocation of a rule shall not take effect until it is registered by the registrar.”
- (b) by substituting for subsection (5), the following-

“(5) Upon registration by the registrar, the rules shall bind the corporation and the owners or tenants to the same extent as if the rules had been signed and sealed by the corporation with each owner or tenant.”

(c) by inserting immediately after subsection (8), the following:

“(9) For the purposes of this section, a corporation may adopt all or any of the model rules provided in the Third Schedule.”

9. Amendment of section 30 of the principal Act

Section 30 (7) of the principal Act is amended by substituting for “Registrar General”, the word “registrar”.

10. Insertion of new section 34A

The principal Act is amended by inserting immediately after section 34, the following new section—

“34A. Sinking Fund

- (1) Every corporation shall establish and maintain a sinking fund.
- (2) The sinking fund shall consist of-
 - (a) the amounts levied under section 20(1)(e);
 - (b) all funds accruing from any investment made by the corporation under section 34;
 - (c) any other funds set aside by the corporation for purposes of infrastructural development or structural repairs on the condominium.
- (3) The sinking fund shall be used to facilitate infrastructural development, structural repairs and any other development of the condominium property.
- (4) For the avoidance of doubt, the sinking fund shall not be used to fund any administrative or recurrent expenditure of the corporation.”

11. Insertion of new section 39A

The principal Act is amended by inserting immediately after section 39, the following new section—

“39A. Developer’s access to property in phased condominium plan

In the case of a phased condominium plan, a developer shall, for the time indicated in the time table projecting the development of each phase, have reasonable access to the completed condominium indicated in that plan for purposes of completing the phases.”

12. Insertion of new section 46A

Part VI of the principal Act is amended by inserting immediately after section 46, the following new section—

“46A. Suits by corporation on behalf of owners

A corporation may institute proceedings on behalf of an owner if the corporation is authorised by the owner in writing.

13. Insertion of new Part VA

The principal Act is amended by inserting immediately after Part V, the following new Part—

“PART VA- CONDOMINIUM PROPERTY TRIBUNAL

43A. Condominium Property Tribunal

- (1) There is established a tribunal known as the Condominium Property Tribunal.

- (2) The tribunal shall consist of a chairperson and two other members appointed by the Minister on the recommendation of the Judicial Service Commission.
- (3) The chairperson shall be a person qualified to be a judge of the High Court.
- (4) A person shall not be appointed a member of the tribunal unless that person has ten years' experience and knowledge in condominium matters.
- (5) The chairperson and members of the tribunal shall hold office for four years and may be eligible for reappointment for one further term.

43B. Jurisdiction of the tribunal

- (1) The tribunal shall have jurisdiction to determine disputes between –
 - (a) corporations;
 - (b) owners;
 - (c) a corporation and owners;
 - (d) developers;
 - (e) a developer and a corporation; and
 - (f) a developer and an owner.
- (2) For the avoidance of doubt, the tribunal shall not hear any matter before a court.

43C. Powers of the tribunal

The tribunal shall have the powers of a court –

- (a) to enforce the attendance of witnesses and examine them on oath;
- (b) to compel the production of documents;
- (c) to make orders, declarations or grant relief in respect of any matter within the jurisdiction of the tribunal.

43D. Procedure of the tribunal

- (1) Proceedings before the tribunal shall be conducted without regard to technical rules of evidence or procedure.
- (2) The tribunal shall, before hearing and determining a dispute, require every dispute to be subjected to mediation.
- (3) Subject to this Act, the tribunal may regulate its own procedure and may make rules regarding submission of disputes to the tribunal, notices, payment of costs and fees, and service of documents.

43E. Representation before the tribunal.

A person may appear in person or may be represented in proceedings before the tribunal.

43F. Appeals

A party to proceeding before the tribunal who is aggrieved by a decision of the tribunal may within thirty days after being notified of the decision, appeal to the High Court.”

14. Insertion of Third Schedule

The principal Act is amended by inserting immediately after the Second Schedule, the following new Schedule.

“Third Schedule

Model Rules for Corporations