

Powering Through: Legal Insights on Solar Panels in Sectional Title Schemes

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INTRODUCTION

In the midst of South Africa's looming power crisis, the nation finds itself at a pivotal crossroads, where the urgent need for sustainable energy solutions intersects with the complex legal landscape. According to Mail & Guardian¹ the government has proposed that allocations to Eskom through the debt relief program be cut by R4 billion, citing the power utility's failure to dispose of its finance company. The budget document has pointed to state-owned entity bailouts as a "key driver of South Africa's increasingly constrained fiscal position", noting that Eskom has received more than R240 billion in fiscal support since 2008. According to the budget document, reductions will be in the 2023-24 and 2024-25 debt relief allocations, initially set at R78 billion and R66 billion respectively.

As Eskom grapples with overwhelming debt, the government's attempts to mitigate this financial strain through bailouts and loans have been evident. However, it's increasingly clear that the burden of this crisis is inevitably shifting towards the average consumer, signaling a looming transfer of financial responsibility from the state to the individual. Electricity users will face a heftier bill come 01 April 2024, with the electricity tariff hike predicted to increase by 12.74% for the 2024/2025 financial year.²

A growing number of South Africans, whether in full title properties or sectional title schemes, are recognizing the advantages that alternative energy sources can provide. Whether it's integrating a handful of solar panels, installing rainwater tanks, or embracing upcycling practices, the appeal of living partially off the grid has never been stronger than it is now.

This article delves into the intricate legal landscape surrounding the implementation of solar panels and heating systems within sectional title schemes. Its purpose is to educate owners about the necessary permissions and consents required beforehand, specific to sectional title owners. Additionally, it aims to shed light on the potential ramifications of failing to obtain such permissions or consents.

What is renewable energy?

Renewable energy, green energy, or low-carbon energy is energy from renewable resources that are naturally replenished on a human timescale. Renewable resources include sunlight, wind, the movement of water, and geothermal heat. Despite its very simplistic definition, as appears from the below, the concept of renewable energy presents far-reaching challenges.

Aesthetic differences

While installing solar panels or a solar heating system on the roof of your full title house typically doesn't entail legal implications for you as a property owner, the scenario differs for those in sectional title arrangements. Sectional title schemes operate under distinct governance as compared to freehold properties.

Many sectional title schemes enforce specific rules to maintain uniformity within the scheme, often prohibiting any deviations that might lead to aesthetic discrepancies among unit exteriors, such as varying effects from different types of solar panels. Any unauthorized deviation could result in fines being imposed, and subsequent demands for the removal of the panels and/or equipment from the property. A body corporate would be justified in obtaining an enforcement order from the Community Schemes Ombud Service ("CSOS") or a court, compelling the removal of offending solar panels/equipment, at the cost of the owner.

To steer clear of such challenges, owners should consult with their trustees or managing agents before acquiring any renewable or green energy products necessitating installation to the exterior of their units. Owners should inquire about the appropriate procedure to obtain the necessary consent for installation and familiarize themselves with any existing aesthetic guidelines governing such units or equipment, if applicable. This proactive approach can help ensure compliance and avoid potential conflicts within the sectional title scheme.

Damage to Common Property

The rules governing conduct and management within any sectional title scheme are designed specifically to regulate, administer, and ensure the appropriate use and enjoyment of both individual sections and common property. Of particular significance are the Conduct Rules outlined in Section 10(2)(b) of the Sectional Title Schemes Management Act ("the Act").

According to Provisional Management Rule ("PMR") 4 of the Prescribed Conduct Rules (which are applicable unless modified by the developer or body corporate), no party within the scheme may erect any structure on common property without the written consent of the relevant trustees if such an action would result in damage to the common property.

Sectional title schemes comprise of common property, owners' units and exclusive use areas, and are managed by the trustees on behalf of a body corporate. The outer part of the roof of a section is defined as common property and is regulated by the trustees of the body corporate.

The roof is not part of the section that the owner buys and is not 'private property' in the conventional sense as the roof of a freehold property would be. From a practical perspective, there is no doubt that fixing solar panels or a solar heating system to the roof of a sectional title unit will inevitably cause some damage, even if this is mitigated to only drilling into the roof of the property to fasten the bracket which is going to keep the panels in place. An owner fixing solar panels or a solar heating system to the roof of a sectional title unit without consent from the trustees will thus be in breach of PMR 4. Even if the owner concerned obtains the requisite consent, section 13 of the Act places the onus on him/her to keep the objects in good order and repair.

PMR 5 states further that an owner or occupier should refrain from making any external changes to the common property without the required consent, where such changes would detract from the appearance of the common property. This again, reintegrates the idea of uniformity.

Fines

In some schemes, depending on how the rules have been created, fines can be levied against members for non-compliance. Typical examples include the installation of solar panels and solar water heating systems on the exterior of a section (which is common property) without the prior permission of the trustees. One should bear in mind, however, that the owner in transgression of the conduct rule in question must be warned in writing of the transgression and provided an

opportunity within which to remedy same. Should the owner still fail to remedy their non-compliance, the trustees must apply their mind to the situation and only once this has been done can a fine be imposed.

In schemes where the conduct rules do not provide for fining, the legal standpoint is that fines simply cannot be implemented, and we suggest that if this practice is occurring that the owner refer the matter to CSOS.

The Legal Difficulty in Solar Panels "Acceding to the Property", Especially in Sectional Title Schemes

Determining ownership of solar panels post-installation may appear straightforward at first glance: one would assume that the panels belong to the purchaser, correct? However, the reality is often more complex than meets the eye.

According to our law, when a movable object like a solar panel is permanently affixed to immovable property, such as a building forming part of the land, it becomes an integral component of the building. The "accessory" or "fixture," ceases to exist independently and cannot be owned separately. Consequently, the owner of the building (or rather, the land) automatically assumes ownership of the attached object.³ For individuals purchasing and installing solar panels in their homes or businesses, understanding whether the panels become part of the building is crucial. This question holds significant importance for institutions financing the acquisition of solar panels as well, as it affects the creditor's rights to the panels. If the solar panel remains movable, a creditor can establish a security interest over it (e.g., by registering a notarial bond) or retain ownership until the purchase price is paid in full. However, if the solar panel becomes part of the building, it falls under the same rights applicable to the building itself.⁴

To determine whether or not the solar panel becomes part of the building, one must apply the principles of accession. Our courts consider at least three factors when determining this, i.e.:

1. The nature and purpose of the object. Is it the kind of object that can become a permanent feature of a building? Is it meant to serve the building permanently? Will the ordinary reasonable person (such as a potential buyer) expect the object to form part of the building?
2. The manner of attachment. Does the method of attachment indicate that it should remain indefinitely? How firmly is it attached and how difficult will it be to move it? Will the object or the building be damaged when you remove the object?
3. The intention with which it was attached. Depending on the circumstances, this could be the intention of the person who attached it or of the original owner of the object.⁵

In instances where the physical circumstances (factor 1 and 2 above) are not clear, the courts largely rely on the intentions of the parties involved, however, the parties' intentions will never override the physical facts which are easily ascertainable.⁶ The ruling of any court will depend on the circumstances of each individual case.

A solar panel is typically considered an essential fixture for effective building usage in certain circumstances, especially as their prevalence and necessity continue to grow. While solar panels are not inherently portable items, they can generally be removed without causing significant damage, suggesting they remain separate movable objects. When determining ownership, conflicting factors may arise, necessitating reliance on the parties' intentions as a decisive factor. Looking at the subjective intentions of the parties when the first two factors (as per the above) seem inconclusive is often termed the "traditional approach". Alternatively, the "new approach" prioritizes subjective intention over the other two factors. Despite the approach taken, the practical outcome is likely to be similar, as both approaches tend to lead to the same conclusion.

Other important factors to consider include the following:

1. When a tenant affixes an object to rented property, there is an assumption that the attachment is temporary, as tenants typically occupy the property only for the duration of the lease. Before the lease expires, tenants generally have the right to remove attached items, unless specified otherwise in the lease agreement and provided no damage is incurred.
2. Conversely, when an owner attaches an object to their own building, it is presumed to be for a permanent purpose, given that owners typically do not view their property as temporary occupancy. Hence, in the absence of evidence suggesting otherwise, the attached object is deemed part of the building.
3. In cases where the object is financed by a credit provider who retains ownership until the full purchase price is settled, the presumption leans towards the object remaining movable. It's improbable for the owner, in this instance the credit provider, to relinquish ownership before debt settlement. Courts typically align with the intentions of the credit provider. However, if removing the object causes damage, the owner's intention becomes less significant.⁷

Where does this leave me as a sectional title owner/tenant?

When solar panels are installed in sectional title schemes, it will practically always be on common property. As discussed above, the outside of a roof also

qualifies as common property, even if it is the roof of your unit. Therefore, if a solar panel is permanently attached to the roof (or any other part of the common property) and if all the guidelines discussed above indicate that it becomes part of the property, then the body corporate will automatically become the owner of the solar panels.

But my solar panel is portable and capable of being removed. How can this be part of the building?

At that time, one might not have seen them as an integral part of a home but probably as a movable thing that could be separately owned.

However, consider a geyser, for instance - it technically can be removed without causing any damage to the property. Nowadays, practically every home has a geyser, and it is inconceivable that any reasonable member of society will regard a geyser as a portable object separate from the building.

Relying on the factor of removability to argue that such installations retain their status as movable property simply doesn't hold weight for objects that society unanimously perceives as integral components of a structure. After all, no reasonable person believes that, when they sell their house, they can take the geyser with them.⁸

Solar panels are likely to follow a similar path as geysers and other commonplace fixtures that we inherently consider as integral components of buildings, despite their technical removability with minimal effort. Presently, we find ourselves in a transitional phase regarding the status of solar panels. While solar panels remain relatively novel and luxurious enough to prompt a legitimate difference of opinion among reasonable individuals regarding whether they constitute movables or integral building components, this perspective is subject to change. It is foreseeable that a time will come when no reasonable person would seriously contend that a rooftop solar panel is a detachable object separate from the building. In fact, we may be approaching that juncture sooner than anticipated.

CONCLUSION

As South Africa grapples with an ongoing power crisis, the conversation around renewable energy sources like solar panels and heating systems has never been more relevant.

If owners are contemplating harnessing this alternative energy in a sectional title context, it is imperative for owners to familiarize themselves with the necessary consents required prior to installation, any aesthetic guidelines that may apply, as well as the implications surrounding ownership of the solar panels.

Should there be any uncertainty about the rules governing your sectional title scheme or your rights and obligations as an owner within it – do not wait until you are in the dark - seeking guidance from an attorney or specialist in the field is paramount.



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¹ Smit S, “Budget 2024: Tough line on bailouts could see Eskom debt relief cut by R4 billion” *Mail & Guardian*, 21 February 2024, Budget 2024: Tough line on bailouts could see Eskom debt relief cut by R4 billion – *The Mail & Guardian* (mg.co.za)

² Thorne S, “More electricity price pain coming for South Africa” *BusinessTech*, 15 March 2024, More electricity price pain coming for South Africa – *BusinessTech*

³ Brits R, “Who owns rooftop panels?”, 2024, Stellenbosch University

⁴ *Ibid*

⁵ *Ibid*

⁶ *Ibid*

⁷ *Ibid*

⁸ *Ibid*