

Options for Resolving Sectional Title Disputes

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Introduction

There are many types of sectional title disputes. This guide is written primarily from an owner's perspective. But the information may also be of use to parties other than an owner or the body corporate, such as trustees or managing agents and others who become involved in sectional title disputes.

A sectional title dispute, from the owner's perspective, is any situation in which a significant difference of opinion has arisen between owners of units or between an owner and the body corporate. The dispute can be in regard to any aspect of the management and control of the scheme or from actions of trustees, owners or residents in the scheme. A typical sectional title dispute may involve one or more owners, tenants, the trustees and the managing agent. If the dispute is in regard to building construction, maintenance, improvements, alterations or repairs it may also involve the municipality, architects, land surveyors, engineers, developers, contractors and subcontractors. The large number of parties typically involved in and affected by sectional title disputes can make them quite complex.

Because of this complexity, resolving sectional title disputes through the traditional method of going to court (litigation) is an extremely lengthy and expensive process.

This guide is an introduction to dispute resolution options for people involved in sectional title disputes. It includes:

- general information on negotiation, mediation, arbitration and litigation, and
- information on prescribed Management Rule 71, *Determination of disputes by arbitration*.

DISPUTE RESOLUTION OPTIONS

Disputes can be resolved in many different ways. Some are more formal than others. It helps to think of dispute resolution options as existing on a scale from less to more formal.



The least formal way of resolving a dispute is through **negotiation** directly between the parties involved. A more formal version of this process is to have each party represented by an attorney who negotiates on their behalf.

When people are unable to resolve a dispute through negotiation, they may decide to involve an impartial third party. **Mediation** is an increasingly popular dispute resolution process in which the parties agree to meet with a mediator who can help them settle the matter. A mediator helps the parties to reach a settlement, but does not have any decision-making power.

A more formal option is **arbitration**. In arbitration, the impartial third party is a decision-maker appointed by contract or statute, or chosen by the parties. The arbitrator makes a final and binding

decision—that is, a decision that can be enforced legally and cannot easily be appealed.

The most formal dispute resolution option is **litigation**, in which the matter is decided for the parties by the court system.

Each of these dispute resolution options has advantages and disadvantages (see table 1). When choosing the most appropriate option for resolving a dispute, you will need to consider the advantages and disadvantages of each option, as well as the details of the dispute. However, a general guideline is to start with the least formal option (negotiation), and use increasingly formal options only if the less formal options are unsuccessful.

TABLE 1

OPTION	ADVANTAGES	DISADVANTAGES
Less formal • Negotiation • Mediation	<ul style="list-style-type: none"> • Can be faster and simpler • Can be less expensive • Parties have control over the process and the outcome • Occurs in private • Results are confidential • Parties can make settlements that might not be possible in a court 	<ul style="list-style-type: none"> • Dependent on the cooperation of all parties • Agreements are not binding unless parties take steps to make them so
More formal • Arbitration	<ul style="list-style-type: none"> • Can be faster and simpler • Can be less expensive • Parties have more control over the process than in litigation • Occurs in private • Results are usually confidential • Not dependent on the cooperation of the parties • Decisions are usually binding 	<ul style="list-style-type: none"> • Decisions usually cannot be appealed
Most formal • Litigation	<ul style="list-style-type: none"> • Not dependent on the cooperation of the parties • Will inevitably result in a final decision • Provides a process that increases the likelihood of full disclosure of all the relevant information and tests the honesty of the parties or the accuracy of the evidence 	<ul style="list-style-type: none"> • Can be more costly, time-consuming and complex • Occurs in public • Results are not confidential • Parties have limited control over the process or the outcome

ACKNOWLEDGEMENT

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What is Negotiation?

The first and least formal way to resolve a dispute is to negotiate. This means sitting down with the other party or parties and trying to come to an agreement that satisfies everyone's needs, or at least satisfies them in a way that is preferable to what they could achieve without negotiating.

FOCUS ON INTERESTS

One of the most important principles of any kind of negotiation is to focus on **interests** rather than **positions**. Each party in a dispute has needs, desires and concerns. These are **interests**. A **position** is something a party has decided on as a way to satisfy its interests. Behind the opposed positions in a dispute lie a range of both shared and conflicting interests.

Preparing for Negotiation

Before entering into negotiations with the other party or parties, ask yourself:

- What are your own interests (needs, desires, concerns)?
- Which of these interests are most important to you?
- What do you think the interests of the other party or parties might be?
- What is the best solution you could achieve **without** negotiating?

Once you have answered these questions for yourself, try to come up with some solutions that would satisfy as many of your own interests and those of the other party or parties as possible.

Before the negotiation begins, discuss the process itself with the other party or parties. Decide ahead of time where and when to meet, who can attend, and so on. It is useful to put the details in writing.

During the Negotiation

Another important principle of negotiating is to **separate the people from the problem**. Deal with the people problems—the emotions and behaviours of people on all sides—directly. Don't try to solve them by making concessions in the substance of the dispute.

Clear communication is essential. Make your points as clearly as you can. Listen actively to the other party or parties, and make sure you understand their points— repeat them in your own terms, so that your understanding can be confirmed and any misunderstandings cleared up right away.

Express negative emotions by referring to the impact something has had on you, rather than by referring to what you think the other party or parties intended by their action. By doing this you are focusing on something you know, rather than on something you don't know and can therefore be challenged on.

Always look for ways to satisfy interests on all sides. When a solution is proposed, assess it in terms of how well it serves your interests. Compare it to the best solution you could achieve without negotiating, to make sure that the proposed solution is actually better.

Completing the Negotiation

Before finalizing an agreement, carefully assess it against:

- all of your interests, to ensure that your interests are being served; and
- the best solution you could achieve without negotiating, to ensure that the agreement is not actually harmful to you in some way.

Make sure that the agreement can actually be implemented by all parties. If one party requires the approval or cooperation of someone else, for example, don't finalize the agreement until this

condition has been met.

Put all details of the agreement in writing, make copies for all parties, and have all parties sign each copy.

Negotiation Step-by-Step

- 1** Prepare for negotiation by identifying your interests, the interests of the other parties, the best solution you could achieve without negotiating, and some solutions that will satisfy as many of your needs and those of other party or parties as possible.
- 2** Discuss with the other parties the details of the negotiation process, including where and when you will meet, who will attend, and a time frame. Put these details in writing.
- 3** During the negotiation, separate the people from the problem itself, communicate clearly, listen actively, and always be looking for ways to satisfy the interests of all parties.
- 4** Assess each proposed solution—especially the one that could become a final agreement—carefully against your interests and the best solution you could achieve without negotiating.
- 5** Make sure that a final agreement can actually be implemented by all parties. If one party requires the approval of someone else, for example, don't finalize the agreement until approval has been given.
- 6** Put the agreement in writing and have all parties sign it.

What is Mediation?

Traditionally, people have relied on the courts to resolve their disagreements. Mediation is an alternative to going to court. In mediation, all parties involved in a dispute meet and try to settle the matter with the help of an impartial mediator. The mediator is trained to help people settle conflicts collaboratively and has no decision-making power.

The mediation takes place in a private, informal setting with a non-confrontational atmosphere. The parties participate in the negotiation and design of a settlement. The dispute is settled only if all of the parties agree to the settlement.

Mediation focuses on interests, which means it is concerned more with the needs, desires and concerns of the parties than with their specific legal rights. (However, the legal rights of the parties can serve as a reference point for the mediation process.)

Advantages of Mediation

Speed	A mediation can be arranged in a relatively short period of time and gets settlement negotiations underway quickly.
Cost	By resolving a dispute quickly, people can save time and money and reduce emotional stress.
Privacy	Mediation takes place in private. Details of the dispute and resolution need not be publicly disclosed.
Control	The parties involved in a dispute control the resolution by designing the settlement and agreeing to live by it only if it is acceptable to them.
Informal atmosphere	The informal setting and atmosphere of mediation can improve communication between the parties. Many of the tensions and stresses of an adversarial process are avoided.
Separating the people from the problem	In disputes, personal feelings or emotions often become confused with the legal issues. The mediator helps to separate the personal dimension from the issues in dispute, reducing tension and making settlement more likely.
Preserving relationships	Often, people involved in a dispute must continue to deal with one another, either in business or otherwise, after the dispute is resolved. Because mediators try to avoid polarizing the parties, mediation can help to preserve working relationships.

Costs of Mediation

The cost of mediating a sectional title dispute will depend on the mediator and how long the mediation takes.

Experienced, legally trained mediators typically charge from R400 to R900 an hour. These rates are sometimes negotiable. Private mediation service providers will offer a full range of services, including setting up, planning and carrying out mediations. Other costs of mediation may include pre-mediation sessions, facility rental, travel and food.

Depending upon the complexity of the dispute, mediations may be completed in a single session or in several sessions over a period of weeks.

The cost of mediation is typically shared equally by the parties participating in the mediation, but the agreement to mediate can provide for any other arrangement. Sometimes other arrangements are negotiable as part of the final settlement.

If attorneys attend the mediation, they will usually charge for preparation time as well as any time

spent at the mediation. The precise amount of the attorney's fee will depend on the hourly rate.

When to Mediate

Mediation cannot solve all disputes, but it can be helpful in many cases.

There are no set rules about what can or cannot be mediated. However, mediation is more appropriate in some situations than others.

Consider mediation for a sectional title dispute when:

- the parties want a flexible and informal process
- none of the parties can get away with simply ignoring the problem
- other options for resolving the dispute are unacceptable or problematic
- each party needs something from the other
- the dispute involves more than two people or businesses
- the case is complex and requires a creative solution
- the parties would prefer to settle the dispute in private.

Mediation is probably not appropriate for a sectional title dispute if:

- a party is challenging the validity of a rule or a decision of the trustees or owners
- an issue of law needs to be settled to serve as a legal precedent
- people not directly involved in the dispute may be unreasonably affected by the outcome.

You need not be confident that a dispute will be settled in order to go to mediation. Settlement rates are quite high in mediation. Disputes are often settled even when parties are far apart and feel pessimistic about resolving the dispute outside of court.

If you are considering mediation as a way to resolve a sectional title dispute, you should first make sure that:

- you understand the differences between mediation and other kinds of dispute resolution
- the dispute is appropriate for mediation.

Next, see if the other parties are interested. Don't be surprised or discouraged if the other people involved in the dispute aren't enthusiastic about the idea of mediation at first. Mediation is a relatively new process and it is not always well understood.

If everyone involved in the dispute agrees to try mediation, the next step is to agree on the selection of a mediator. The mediator will then work with everyone to reach an agreement on how the process will happen. Everyone will need to agree on the ground rules and payment of the mediator's fees.

The Mediator

Mediators are trained to help people work together to resolve a dispute in a way that is acceptable to everyone involved. Mediators come from many different backgrounds.

Mediators are impartial and unbiased. They do not have the power to make decisions about the case or impose a resolution. Instead, their role is to ensure that the discussion remains focused, organized and respectful. They are experts in making negotiations work.

A mediator:

- establishes ground rules for respectful conduct
- structures and manages the mediation process
- helps clarify the facts and issues
- helps the parties determine what they need out of a resolution and helps them to generate options for resolving their dispute
- keeps lines of communication open and discussions on track
- is a sounding board, innovator and reality-tester.

Finding a Mediator

If you are considering mediation as a way to resolve a sectional title dispute, you can find a suitably qualified and experienced mediator through a variety of means. You can also get the names of mediators through:

- a private mediation service provider (most advertise in the Yellow Pages)
- a local Law Society—for attorneys who practise sectional title mediation
- personal referrals
- your attorney.

Mediators should be able to provide you with information about their training and experience. Feel free to ask for résumés and references and to contact more than one mediator in order to make an informed choice.

The mediator must not have any personal or business involvement with any of the parties involved in the dispute. It is very helpful if the mediator has expertise in the subject matter of the dispute.

Questions to ask a prospective Mediator

- What training have you received?
- How long have you been doing sectional title mediation? How many cases and what types of cases have you mediated?
- What standards of conduct do you abide by?
- What do you charge and what is included in your fee? How is travel, administrative and clerical time handled? Do you charge for an initial consultation?

Preparing for Mediation

It is important to be well prepared for mediation. Gather together any documents you need to help resolve the dispute, including statements, invoices or photographs. Make copies to give to the mediator and each of the parties. Take the copies and the original documents to the mediation.

The mediator may arrange to exchange information before the first mediation session so that everyone has a chance to become familiar with it. This will make the mediation more efficient.

Sometimes you will be asked to provide the mediator with a short summary report before the first session. It would include:

- the facts or circumstances that led to the dispute
- what you think needs to be resolved
- what you and the other parties agree about and what you disagree about
- what has already been done to try to settle the dispute (e.g., any court proceedings, negotiations or settlement proposals)
- what you are seeking as a favourable outcome.

Who can participate in the Mediation?

The mediator and all of the parties involved in the dispute must attend the mediation. It is important to ensure that each party has the authority to reach an agreement. For example, if any of the parties involved in the dispute is a trust, close corporation, company, or other 'artificial person', then the person attending the mediation on the party's behalf must have the authority to settle the dispute on its behalf. (A person has the authority to settle if that person can agree to a proposed resolution without first getting approval from someone else.)

All parties should agree about who else can attend before beginning the mediation. For example, some parties may wish to have an expert make a presentation on a technical issue. They may also want to have their attorneys involved.

Attorneys and Mediation

You do not need to have an attorney to mediate. However, it can be helpful to consult with an attorney before, during and after the mediation. Or you may choose to have your attorney attend the mediation, particularly when:

- a Court action has been commenced
- you feel the other parties have more power or experience than you have
- the other parties involved in the dispute will have their attorneys attend
- the financial or other stakes are high.

Agreement to Mediate

Once the people involved in a dispute agree to mediate, a written agreement is usually made between the mediator and the parties, setting out the rules and procedures to be followed in the mediation. The mediator and the parties usually sign the agreement to mediate before or at the first mediation session.

Individual mediators often have their own form of agreement, but most agreements include:

- the names of everyone involved in the dispute
- a very general statement of the issues
- a statement about what the parties are trying to accomplish in mediation
- confirmation of the role of the mediator as neutral and impartial
- a statement about confidentiality
- provisions for disclosure of relevant information in the mediation

- an agreement about how much the mediator will be paid, what other costs will be, and who will pay.

The Mediation

Most mediations are conducted informally in an office setting. Sessions may be scheduled for a few hours or for several days at a time. Everyone involved in the dispute sits around a table with the mediator.

The process often includes these steps:

- The mediator makes a short opening statement explaining the process, reviewing ground rules and the agreement to mediate, and describing his or her own role.
- The mediator gives each party an opportunity to describe what they think needs to be resolved.
- The mediator works with the parties to clearly identify the issues that are in dispute.
- The mediator helps the parties to develop goals for the mediation, incorporating the needs and interests of the parties.
- The parties discuss the issues one at a time and identify options for resolving them. The mediator helps to assess and analyze the options, but does not take sides.
- At some points during the mediation, the mediator may want to meet separately with individual parties for a private “caucus.” Parties can take a break at any time to talk to their attorneys or someone else.

You are never forced to agree to anything in mediation. To give the mediation process a fair chance of success, you should continue as long as the mediator thinks it is worthwhile. If you are unable to reach agreement, the mediator will end the mediation. The dispute must then be resolved some other way, usually through arbitration or the court system.

After the Mediation

If some or all of the issues in dispute are settled in the mediation, those issues will be formalized in a written and signed agreement. If a court action has been commenced, the agreement may also be formalized in a consent order. A consent order sets out the terms of the settlement agreement and makes the agreement enforceable by the court.

If some or all of the issues in dispute are not settled through mediation, the issues that have not been settled can go either to arbitration or through the court process. Even if mediation has not settled all the issues in dispute, it may be helpful in making arbitration or a trial shorter and less complicated.

Mediation Step-by-Step

- 1** If you want to resolve a sectional title dispute through mediation, approach the other parties to see if they are interested. You may need to give them some information on mediation before they will agree.
- 2** If everyone agrees to mediate, find a mutually acceptable mediator.
- 3** Prepare for mediation by gathering all relevant documents and making copies for the mediator and each of the other parties. The mediator may want to exchange information before the first mediation session. Sometimes the mediator will also ask for a short summary report about the dispute before the first mediation session.
- 4** Before the mediation begins, all parties and the mediator make and sign an agreement to mediate, which sets out the rules and procedures to be followed during the mediation.
- 5** The mediation process continues until all of the issues are resolved, or until some or no issues are resolved and the mediator feels that it will not be productive to continue.
- 6** If some or all of the issues in dispute are settled, formalise them in either a written and signed agreement or, if an action has been commenced in court, a consent order signed by a judge. If some or all of the issues in dispute are not settled, the parties can try to settle the remaining issues using the more formal dispute resolution options, arbitration or litigation.

What is Arbitration?

Arbitration is a process in which a neutral and independent third party hears evidence and arguments from the parties involved in a dispute, and settles the dispute by making a binding decision.

Arbitration is a more formal dispute resolution process than mediation. While mediators have no decision-making powers and assist parties in negotiating a mutually acceptable settlement of the issues in dispute, arbitrators are adjudicators who make decisions based on the legal rights of the parties. In this sense, arbitration is more like litigation, although it is usually less formal than litigation.

Unlike mediation, which focuses on interests, arbitration focuses on rights—that is, it is concerned with establishing the legal rights of the parties.

When parties agree to arbitrate, they agree to accept the decision (called the “award”) of an arbitrator as final and binding. There are very limited grounds for appealing an arbitrator’s decision.

Prescribed Arbitration proceedings

In terms of the Sectional Titles Act the government has made regulations for arbitration proceedings to resolve sectional title disputes. Prescribed Management Rule 71 provides that when a dispute between the body corporate and an owner or between owners arises out of or in connection with the Act or the rules it must be determined by arbitration, unless an interdict or other form of urgent relief is required.

The rule provides that:

- The aggrieved party must notify the other interested parties in writing and copies of the notification must be served on the trustees and the managing agents, if any.
- If the dispute or complaint is not resolved within 14 days of the notice, either of the parties may demand that the dispute or complaint be referred to arbitration.
- The parties must jointly appoint an independent and suitably experienced and qualified arbitrator within 3 days after arbitration has been demanded.
- If the parties are unable to agree on the selection of an arbitrator, any party may apply to the local Registrar of Deeds who will appoint an arbitrator within 7 days of written application.
- The arbitrator determines the procedure to be used.
- The arbitrator may require that the party who demanded arbitration furnishes security for the costs of the arbitration, failing which the arbitration does not proceed.
- Where possible the arbitration should be concluded within 21 days.
- The arbitrator must make an award within 7 days of completion of the arbitration and may determine how the parties will bear the costs of the arbitration, having regard to the outcome.
- The arbitrator’s award is final and binding on the parties; it may be made an order of the High Court on application by any person affected by the arbitration.

Advantages of Arbitration

Flexibility	Arbitration can accommodate the needs of the parties. Because the details and circumstances of every dispute differ, arbitration allows parties to design their own procedure or agree to use an established set of rules. Parties are consulted on the format that will be used for the hearing. When deciding when and where a hearing will be held, arbitrators can take into consideration the convenience of the parties. If required, an arbitrator may visit the scheme.
Efficiency and economy	Because arbitration is less formal than litigation, the hearing is usually shorter than a court case would be. Also, an arbitration hearing can be scheduled much sooner than a court date. The savings in time can be reflected in lower overall costs to the parties.
Certainty	Arbitration results in a final and binding decision that can be enforced as a court order.
Expertise	Parties have the option of selecting the person who will decide their case. For example, they can select an arbitrator who has technical expertise in a particular field or business area.
Control	Parties provide input on when, where and how the arbitration will proceed. This gives them greater control than in litigation, where court rules are inflexible and time frames depend on the availability of court resources.
Informal atmosphere	Although arbitration is an adversarial process in which each side tries to win its case, the flexibility of the process and the opportunity for the parties to design and participate in the hearing contribute to a less antagonistic atmosphere, which in turn helps reduce stress and encourages cooperation. This can be a particular advantage if the parties continue a business relationship after their dispute is resolved.
Confidentiality	In the arbitration of a sectional title dispute, matters remain between the parties and the arbitrator. Hearings are closed and the arbitrator's decision is not normally a matter of public record.
Structure	Arbitration allows the parties as much control and decision-making as they are prepared to manage. Parties are free to use the rules of any organization or design their own procedure. A number of organizations and service providers administer arbitration programs and have their own arbitration rules (See "Arbitration Rules").

Costs of Arbitration

- the arbitrator's fees
- any fees charged by a neutral administrative body to oversee the process
- any fees charged by expert witnesses, if used, and
- any other expenses incurred for such things as meeting room rental, photocopies, faxing, long distance, travel costs, etc.

Most arbitrators charge by the hour. An arbitrator's hourly rate will depend on experience and qualifications. Some arbitrators have a negotiable hourly rate that depends on the complexity of the case, the number of parties involved, and the time estimated to prepare for and hear the dispute,

and prepare the decision.

The arbitrator can decide how costs are divided between the parties, as part of the decision. The successful party may be reimbursed for some or all of their costs associated with the arbitration. Parties are usually required to pay their own legal fees. However, a party can ask the arbitrator for reimbursement by the other parties for this expense as well.

When to Arbitrate

Arbitration should only be used other, less formal dispute resolution options (such as negotiation or mediation) have been considered or attempted.

Unless owners have by unanimous resolution removed prescribed Management Rule 71 they are bound to refer disputes between themselves and between any one of them and the body corporate to arbitration. But the parties involved in a dispute may still try to settle the dispute through negotiation or mediation before going to arbitration, and if they both choose to do so, they can use litigation rather than arbitration to resolve their differences.

Arbitration is appropriate for a sectional title dispute when:

- other, less formal dispute resolution options have been unsuccessful in resolving all of the issues in the dispute
- parties want a flexible process that is less formal than litigation
- parties would prefer to settle the dispute in private
- parties want to settle the dispute with a binding decision.

Arbitration is probably not appropriate when:

- a party is challenging the validity of a law
- an issue of law needs to be settled to govern future legal cases or serve as a legal precedent
- the dispute involves public policy
- people not directly involved in the dispute may be unreasonably affected by the outcome.

It is important to understand that once parties undertake arbitration, they cannot withdraw from the process.

The role of the Arbitrator

While mediators are experts in negotiating and in helping others to negotiate effectively, arbitrators are experts in adjudication. An arbitrator:

- looks at the evidence and listens to the arguments put forward by each of the parties
- assesses the evidence
- makes findings of fact
- applies the law, and
- makes a decision that resolves the dispute.

Appointing an Arbitrator

Technically, any impartial person can act as an arbitrator. But remember—the arbitrator's decision

is final and binding. It is therefore recommended that parties select someone with experience as an arbitrator, as well as expertise in the subject matter of the dispute. (Even where the parties consider the dispute to be “factual,” the arbitrator should be familiar with the applicable law.) Most importantly, the person appointed should be someone in whom all parties have confidence.

You can contact potential arbitrators to request information about them, but you must not discuss the details of a particular dispute with a potential arbitrator. It is a good idea to request information from a potential arbitrator in writing and to provide a copy of the correspondence to the other parties.

What to look for in an Arbitrator

- Experience—how many arbitrations the prospective arbitrator has performed and the types of disputes arbitrated
- Expertise—whether the prospective arbitrator has any training or other background in sectional titles
- Impartiality—there should be nothing about the prospective arbitrator’s background or current activities that could lead one of the parties to conclude that the arbitrator would not be a neutral decision-maker.

During the selection process, ask for the arbitrator’s résumé, fee schedule and availability. If the parties cannot agree among themselves on the selection of an arbitrator, the local Registrar of Deeds will complete the selection process.

Arbitration Rules

One of the first things the parties must do in preparing for arbitration is to choose the rules that will govern the arbitration and agree these with the arbitrator. Arbitration rules include how and when documents should be exchanged, and how the arbitrator will communicate with the parties.

Exchanging documents before the hearing ensures that each party knows the claim the other is making and has an opportunity to prepare a response. Because the arbitrator is a neutral adjudicator, parties cannot discuss details about the issues or evidence directly with the arbitrator unless the other parties to the dispute are present.

Some arbitration organizations have developed their own arbitration rules, which the parties may agree to adopt. All arbitration rules have common procedures that reflect the principles of:

- neutrality—arbitrators must be impartial and have no bias in favour of either a particular party or any specific outcome
- independence—arbitrators are independent decision-makers (i.e., no person or agency can influence his or her decision)
- the right to know the claim—all parties have the right to know the details of the case against them, the right to refute adverse evidence, and the right to present their own evidence.

Arbitrators must follow these principles to ensure that the arbitration process is fair.

Attorneys and Arbitration

You do not have to hire an attorney to represent you in arbitration. However, most parties find the advice and skills of an attorney to be helpful.

Attorneys are trained to research and prepare a case. They advise on legal rights and responsibilities and provide objective opinions. Also, they often know of expert witnesses who can be called upon to support a case.

Sometimes meeting with an attorney for a short consultation will help you to decide whether or not to hire an attorney for your arbitration hearing.

IN DECIDING WHETHER OR NOT TO HIRE AN ATTORNEY, ASK YOURSELF :

- Am I confident that I can prepare my own case?
- Does the value of the dispute warrant the cost of hiring an attorney?
- Will hiring an attorney increase my chances of a successful outcome?
- Are the other parties represented by an attorney?

Arbitration agreement

Once appointed, an arbitrator may arrange a preliminary meeting to discuss the details of the arbitration process with all of the parties, and document them in a written arbitration agreement, in order to avoid misunderstandings later on. (Even if a preliminary meeting is not held, details of the process should be documented in an arbitration agreement.)

Issues that should be decided at the preliminary meeting and documented in the arbitration agreement, in addition to the arbitration rules that will apply to the process, include:

- dates for the exchange of information
- whether evidence will be presented orally or in writing
- the use of attorneys and experts
- how the fees of the arbitrator and other expenses will be paid.

The Arbitration

The arbitrator notifies each party about when the arbitration hearing will take place. If the issues are complex, more than one session may be required.

The arbitration hearing takes place in a location selected by the parties. The parties may sit at a table with the arbitrator or at separate tables opposite the arbitrator. Each party presents its case to the arbitrator, supporting its arguments with evidence and sometimes with witnesses. The person with the problem usually goes first. The arbitrator controls the process and has the power to decide what evidence will be accepted (it must be relevant to the case), when witnesses can be called, when the other party can ask questions, and so on. The arbitrator may ask questions of the parties or the witnesses to clarify issues.

All parties have an opportunity to summarize their cases at the end of the hearing.

The arbitrator considers the evidence and arguments made by all parties and makes a decision that takes into account the legal rights of the parties. Generally the decision is made in writing, and it may include the arbitrator's reasons for making the decision.

The arbitrator no longer has any jurisdiction in the matter once the decision has been made. In the majority of cases, parties abide by the arbitrator's decision. However, if necessary, a party can apply to to have the arbitrator's decision made an order of court which can then be enforced like any other court order.

Arbitration Step-by-Step

- 1** If you want to resolve a sectional title dispute through arbitration, having already considered or attempted negotiation and mediation, issue a notice of dispute setting out the nature of the dispute and serve it on the other party to the dispute, the trustees and the managing agent, if any.
- 2** If the dispute is not resolved within 14 days of the notice, either party can issue a demand for referral to arbitration
- 3** Independent, suitably qualified and experienced arbitrators can be found through arbitration organizations, a referral from your attorney, the local Law Society (for attorneys who practise arbitration), and personal referrals.
- 4** If the parties are unable to agree on an arbitrator, either of them can apply to the local Registrar of Deeds for the appointment of an arbitrator.
- 5** The arbitrator may call a preliminary meeting to decide on the details of the arbitration process. The parties and the arbitrator should sign an agreement setting out the various details, including the provision of security for costs of the arbitration.
- 6** At the arbitration hearing(s), the arbitrator hears the evidence and arguments of each of the parties.
- 7** The arbitrator issues a final and binding decision, usually in writing.
- 8** Any affected party may apply to the High Court for an order enforcing the decision.

Introduction to Litigation

This section sets out the litigation process in general terms. It refers to litigation in the High Court only. The information contained here is not necessarily complete and is not legal advice. Every sectional title dispute is different, and legal advice should be sought in each case.

What is litigation?

Litigation is a formal process for resolving disputes in court, based on the rights of the parties involved. It is by nature an adversarial process. It is governed by extensive rules that are designed to increase the likelihood that all of the relevant facts are known by all parties.

If you believe your rights have been infringed by someone else, you have a cause of action against that person or group of people. (An action is a lawsuit brought against another person.) As the complaining party (normally called the plaintiff), you have to prove the facts that you say support your cause of action. The other party or parties (normally called the defendant) try to either show that those facts do not exist, or prove other facts that show that you should not be given what you are asking for.

Each party puts its best arguments forward and a judge determines which party is responsible and should pay to remedy the problem. The court recognizes certain rights and will only allow the plaintiff to succeed if one or more of those rights have clearly been infringed by the other parties.

Advantages of Litigation

- | | |
|-------------------|--|
| Mandatory | Litigation does not rely on the cooperation of all parties. Litigation requires all parties to participate, and has strict and extensive rules to govern participants' actions throughout the process. |
| Disclosure | Litigation provides processes that ensure full disclosure of all relevant information, and that test the honesty of the parties and the accuracy of the evidence. |
| Certainty | Litigation inevitably results in a final decision that can be enforced by the court. |

Costs of Litigation

The costs of litigation can be extremely high, and being the successful party does not necessarily mean you will recover those costs. Costs include the attorney's fees—usually called “legal fees”—and various other fees and out-of-pocket expenses, or “disbursements.”

Attorneys normally charge on an hourly basis, with rates varying from as low as R350 for newly qualified attorneys to R1200 or more an hour for senior attorneys. It is also common for more than one lawyer (advocates, attorneys and articled clerks) to work for a party in a sectional title dispute.

While it is difficult to estimate legal fees, you should ask your attorney for a budget of anticipated legal fees.

Disbursements include everything else—for example, any expenses incurred by the attorney while working for you (telephone, fax, couriers), fees for filing and serving court documents, and fees for expert reports, transcripts and so on. Over the course of a lengthy court case, disbursements can be very costly.

The unsuccessful party in a court action is usually required by the trial judge to pay the costs of the successful party. The specific amount to be paid is based on a tariff set by the court rules. The attorneys and advocates employed may charge at rates higher than the tariff. Only very rarely does the successful party recover all of its costs; a more common amount recovered by a successful party would be only 60 percent of legal fees and disbursements.

When selecting an attorney and advocate, ask about the fee structure such as hourly rates, retainer requirements and anticipated timing of any payments required. Some attorneys will provide an initial consultation at a nominal fee.

Finding the right Attorney

For sectional title disputes, select an attorney who specializes in or at least has a good working knowledge of the Sectional Titles Act . You may also need a specialist trial lawyer, known as an advocate.

You can get referrals from others who have gone through similar disputes. Find out if they were pleased with the final results. Don't make your selection based on unrelated work an attorney did for you or someone else (like a divorce or will).

Develop a shortlist of the attorneys that appear best qualified to provide the services you require, and with whom you are comfortable. Meet the candidates, ask questions, then make a selection.

SELECTING AN ATTORNEY

It is important to know the experience and qualifications of the attorneys you consider.

Let the candidates know if you are representing the trustees of a sectional title body corporate or yourself.

During your selection process, determine the following:

- What experience does the attorney have working with sectional title issues? How long has the attorney worked in sectional title law?
- Ask if there might be any conflicts of interest.
- If representing a body corporate, would the attorney be willing to attend body corporate and trustee meetings to explain issues and respond to questions from the owners and trustees?

Consulting an Attorney

When consulting an attorney, take the current rules of the scheme and all other relevant documents and information with you, including the names and addresses of the parties you believe have been involved in creating the problem. You should be able to describe the nature of the problem as fully as possible, and explain why you think the parties you have identified may be responsible.

At an initial consultation, or after the attorney has done a preliminary investigation and review, the attorney should be able to advise you on:

- whether the problem you have discovered is likely to give rise to a valid cause of action
- whether the dispute involves complex or simple issues
- which parties, generally, might be responsible for or involved in the solution of the problem
- what further steps need to be taken to determine the best way to proceed.

Collecting and organizing the facts

Once involved, the attorney should guide the investigative process, since one of the primary concerns will be whether there are sufficient facts to establish a valid cause of action against other parties.

A thorough review of the documents you have provided, as well as interviews with people who have been involved in any of the issues giving rise to the dispute, will help the attorney to:

- determine which matters require further investigation, and

- identify the parties against which an action should be commenced.

Expert advice

Obtaining expert advice on matters that others cannot properly give opinions on in court is another key part of the fact-finding process. When the matters are technical or complex, experts are needed to review and assess the facts and physical evidence. Their advice and evidence are used initially in discovering the nature of the problems and eventually in proving the plaintiff's case against the defendants. Expert advice can also be useful in identifying the parties against which an action will likely be successful, as well as the merits of the defence and the expert opinions put forth by other parties.

In sectional title disputes that involve building maintenance or repairs, expert opinions are often required. Where the dispute involves the principles that underly levy calculation and collection a lawyer may be the appropriate expert, whereas in matters of bookkeeping and financial analysis an accountant may be more suitable.

Experts are best retained through a attorney, or at least with the involvement of a attorney.

Assessing the law

While collecting and reviewing the facts, the attorney is also assessing the legal issues required to establish the cause of action. These processes—discovering the relevant facts and identifying the issues and applicable law—progress at the same time. The legal issues help to define which facts are most relevant, and the facts show which legal issues are in play.

The attorney assesses the law by looking at past cases that had similar facts. Reviewing the decisions of the courts helps the attorney to determine the strength of a cause of action and which facts are most important. Assessing the law and the legal issues also helps the attorney to identify the parties against which an action should be commenced.

Before the trial:

Prescription Periods

A court action must be commenced within a certain time period. If you don't commence an action in court before the relevant prescription period expires, you lose the right to sue.

Commencing an Action

Once the attorney understands the relevant facts and knows what law and legal issues apply to the dispute, an action can be commenced. Actions are commenced by issuing a summons and serving it on the defendants.

The Summons informs the defendants that an action has been commenced against them, and that if they fail to respond to it within the specified time period, judgment will be taken against them.

The summons includes Particulars of Claim, in which the plaintiff sets out the facts that establish the cause of action brought against the defendants. The Particulars of Claim are extremely important, because they define which matters are important in the case. This allows the defendants to know how to defend themselves, and informs the court about the case.

In response to the Summons, each defendant files an Appearance to Defend. An Appearance to defend is a simple document that tells the plaintiff and the court that the defendant intends to defend the action, and identifies the attorney acting for that defendant.

In response to the Summons, each defendant files a Plea, which tells the plaintiff, other parties and the court why that defendant says it is not liable, and which sets forth the defendant's defence to

the action.

If a defendant says that other parties are liable for the plaintiff's problem, it can make those parties participate in the litigation by a process known as Joinder. This informs the new party and the court why the defendant says that the new party (the third party) should be held liable to the plaintiff.

Collecting and Exchanging Documents

Each party—the plaintiff, the defendant(s) and any third parties—must collect all documents that have any relevance to the claims and defences, and give them to its respective attorney. Each attorney then prepares a list of the documents which, in the attorney's opinion, should be disclosed, and gives the list to the other parties. The other parties can then ask to see and get copies of all of the documents on the list, or only those which are of particular interest. This way, each party has the opportunity to review the evidence that might be produced by every other party. In sectional title disputes, especially those involving structural issues, building maintenance, the interpretation of the rules or accounting issues there may be hundreds of pages of relevant documents.

Pre-Trial Meeting

Before the trial the parties' legal representatives must meet to try to limit the issues in dispute and obtain agreement where possible so as to limit the length of the trial. A record of the meeting is supplied to the court.

Interlocutory Applications

Before a trial, there can be issues that need to be resolved in order for the parties to prepare for the trial, and on which the attorneys cannot agree. These issues often concern procedure. They are called interlocutory because they arise before a trial.

When this happens, the parties go to court and have a judge determine what should occur. An application to the court for the settling of an issue before trial is called an interlocutory application. The nature and number of interlocutory applications differ in each case.

Expert Reports

During the preparation for a trial, many facts cannot be determined by the parties without expert opinions— especially when matters are technical and beyond the knowledge of an ordinary person.

The rules of court contain specific provisions for expert reports; they must be provided in a specific form and exchanged between the parties in a certain time frame. If these requirements are not met, you may not be able to rely on the expert evidence you have obtained.

Getting a Trial Date

A trial date can be set when the parties have completed their Pleadings. The Plaintiff's attorney usually applies for a trial date and the Registrar of the court allocates a particular date. If the Plaintiff's attorney does not apply for a trial date the Defendant's attorney may do so.

Settlement

The fact that a court action has commenced does not rule out attempting to settle the dispute in other ways. The parties can reach a settlement at any time before or after a judgment is granted. The rules of court include a number of procedures designed to assist the parties in reaching a settlement. Any party can deliver formal offers of settlement to the other parties at any time before the judgment is granted. There may be consequences for parties not accepting settlement offers.

The parties can also arrange and participate in mediation and/or arbitration while preparing for a trial, in an attempt to settle the case. In addition, if a formal settlement offer is made during the trial, the parties may ask the judge for an adjournment while they negotiate the settlement.

The trial

The trial includes several distinct stages. The plaintiff's case is presented first.

The advocates usually:

- make an opening statement outlining their party's case that will be presented and the issues to be decided by the court
- tell the court what witnesses will be called and what their general evidence will be.

Then the plaintiff's advocate calls witnesses and examines them under oath. Each of the other parties has an opportunity to cross-examine each witness, including expert witnesses. Once all of the plaintiff's witnesses have been called and the defendants have cross-examined them, the defendants' cases are presented. The plaintiff's advocate can cross-examine each witness.

When all of the parties have presented their evidence, each is given an opportunity to make closing arguments, which usually include a review of the evidence and a submission concerning the applicable law. The advocates try to convince the court to grant judgment in favour of their client.

The judge then renders a decision, either orally immediately after the closing arguments, or, more commonly, in writing at a later date. Typically, the decision will say:

- who was successful
- what compensation or order the successful party is entitled to, and
- who will pay the costs of the legal action.

Appeals

After the parties receive the judgment, they may ask for leave to appeal. Usually, a party cannot appeal the judge's findings of fact. In other words, when a judge decides that certain facts are true, a party cannot appeal this decision even if it thinks those facts are false. Appeals usually concern the manner in which the law is applied to the facts.

Litigation Step-by-Step

- 1** You start by consulting an attorney, take all relevant documents and the names and addresses of as many of the involved parties as possible. Be prepared to describe the problem as clearly as possible, and to explain why you think the other party or parties are responsible.
- 2** The attorney will advise you on whether there is a valid cause of action against other parties. If there is, the attorney then guides the process of discovering the facts. This process could include reviewing your documents, interviewing the parties involved, and seeking expert advice. While discovering the facts, the attorney also assesses the legal issues.
- 3** When the attorney understands the facts and legal issues, he or she commences the action by filing the Summons including Particulars of Claim with the court and serving them on the defendants. The action must be commenced within the relevant prescription period.
- 4** Each defendant files an Appearance to Defend in response to the Summons, and a Plea in response to the Particulars of Claim. If a defendant believes someone else is responsible for the problem, the defendant may apply to have that party joined as another party to the litigation.
- 5** The attorney for each party makes a list of all relevant documents in that party's possession and which in the attorney's opinion should be disclosed, and gives the list to all other parties. The other parties can then request copies of the documents they wish to see.
- 6** The attorneys arrange a pre-trial conference to limit the duration of the trial.
- 7** The attorneys apply for a trial date.
- 8** Any party can deliver formal offers to settle to other parties any time before the judgment is granted. Parties can also participate in mediation and/or arbitration at any time before the trial. In addition, if a formal settlement offer is made during the trial, the parties may ask the judge for an adjournment while they negotiate the settlement.
- 9** At the trial, the plaintiff's case is presented first, with the plaintiff's advocate introducing the case and examining witnesses, and the defendants' advocate cross-examining the witnesses. The defendants' advocate presents his witnesses, who are then cross-examined by the plaintiff's advocate. The judge is also entitled to question the witnesses to clarify any matter. When all parties have presented their evidence, each makes a closing argument. The judge renders the decision.
- 10** A dissatisfied party may apply for leave to appeal the judge's decision—specifically the judge's application of the law to the facts.