

*A free newsletter to the sectional title community by
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SHORT TERM LETTING AND AIR Bn'B

How to deal with the plague

This article relates to the situation in the City of Cape Town municipal area and to municipal areas with similar regulations.

Many bodies corporate have conduct rules in place which prohibit the use of sections for the purpose of short term rentals, i.e. for periods shorter than two or three months, without the approval of the trustees. The Ombud Service is currently allowing such rules.

It has been argued that a conduct rule prohibiting short term rentals infringes upon the proprietary rights of owners who have purchased their sections for investment purposes and that any prohibition must preferably be contained in the management rules to be binding. To incorporate such prohibition in the management rules of a body corporate requires the approval of all the members by unanimous resolution – not an easy thing to achieve.

But consider that a conduct rule which provides for compliance with strict requirements to enable an owner to let his section on short term will serve to protect the rights and interests of long term owners and residents. How must these opposing interests be weighed up against each other?

Problems experienced as a result of short term letting and transient residents include:-

1. General non-compliance with rules.
2. Noise and nuisance;
3. Security breaches;

4. Overcrowding of sections and pressure on the services;
5. Overloading of common amenities;
6. Unauthorised parking on common property, preventing access and egress to parking bays and garages;
7. Damage to common property and equipment;
8. Increased risks affecting the body corporate's insurance.

Owners who are letting their sections (irrespective of the duration of the lease) are obliged in terms of Section 13(1)(f) of the Management Act, to notify the body corporate of a change in occupancy of their section, and the trustees are obliged in terms of prescribed Management Rule 27(2) to keep record of the personal details and contact details of the tenants of all the sections in a scheme. I doubt whether this happens in practice, particularly in respect of short term tenants.

Owners of sections zoned with a residential zoning and situated within the jurisdiction of the City of Cape Town who are using their sections for the purpose of short term rentals on AirBnB or otherwise, must note that it is likely that they must first submit an application to the City of Cape Town for approval of a temporary land use departure in terms of the Municipal Planning By-law, 2015 to authorise such usage. Owners who are using their sections for short term rentals without the necessary approval of the City of Cape Town may be found guilty of a land use contravention. To ascertain your primary use rights relating to your section, a zoning scheme extract and map may be obtained from the City of Cape Town and one would be able to consult with one of their professional officers.

It is also prudent for trustees to obtain the necessary zoning certificate and information from the City of Cape Town or from the other local municipality concerned.

There can be no doubt that the recent increase of short-term letting is causing major problems for management and it is hoped that when the issue is considered in our courts, as it inevitably will, outcomes will favour the majority of owners and residents.

Ibse Kotze

UNCLEAR INTENTIONS; UNWANTED OUTCOMES

Why must bodies corporate rectify defective drafting?

The least that trustees and managing agents expect from legislation is reasonable clarity and consistency in the language of statutory provisions. Consider the wording of MR 17(9):-

- (9) *The body corporate does not have to hold a special general meeting to consider a resolution if all members waive the right to a meeting and consent to the resolution in writing; provided that if two or more persons are jointly entitled to exercise a vote, all of them must waive the right to a meeting and consent to the resolution in writing.*

The waiver and consent referred to may and should of course be combined in one document in order to avoid having to exercise two parallel procedures.

But how does this provision mesh with the definition of 'special resolution' in S 1 of the Act which allows a 'round robin' special resolution to be taken if agreed to in writing by members holding at least 75% of the votes, calculated in number and value?

Does MR 17(9) add an additional condition in respect of special resolutions that all members must waive the right to a meeting? Such condition would add an unnecessary and unreasonable complication for trustees. But surely it cannot be required that all members, that is 100%, must agree for the purposes of a special resolution which normally requires only 75% support?

Or does MR 17(9) only apply in respect of ordinary resolutions? But if so, how does it make sense that all members must waive and consent whereas in respect of a special resolution only 75% is required?

The only sensible alternative left for the purposes of MR 17(9) is a unanimous resolution. If so, why is this not clearly stated in the rule? And why was it found necessary to require waiver of a right to a meeting? If an owner wants to enforce a meeting he only needs to vote against the

resolution, which would oblige the trustees to call a meeting if they want to proceed with the motion.

I suspect that the legislator's intention had been to provide a mechanism to adopt ordinary resolutions without the necessity of a meeting, but the attempt fails miserably. I am afraid the drafting of this sub-rule is absolutely inadequate and should be revised urgently by the Advisory Council. It cannot be expected from individual bodies corporate to have to amend their Management Rules for this purpose.

While we are on the subject, the remainder of the rule under discussion also needs consideration. The term *'two or more persons are jointly entitled to exercise a vote'* includes couples married in community of property. Both must then waive and consent. How does this mesh with S 1(2)(b) of the Act which provides that *'either one or both of the spouses are considered to be the owner'*? I am at a loss to understand how voting should be conducted.

And why must a partner in marriage who cannot agree with his or her spouse be able to hold the entire body corporate to ransom? This is another example of the excessive protection given to minorities by the new Management Rules. A much tougher approach is justified, such as that the dissenting spouse's vote should be counted as a vote in line with the majority. The same should apply in respect of joint owners who are not married to each other.

And what is the situation in respect of the number of proxies which may be held by joint owners who are married to each other? The proxy restriction is excessively stringent and authoritarian, but to return to my question, it seems from the wording of subsection 6(5) that joint owners are each allowed to hold two proxies. But may each of the spouses issue a proxy to different persons? From the wording of Section 1(2)(b) it seems that they may not. This applies only to couples married in community of property. If married out of community of property only the registered owner has a vote and may issue a proxy. The other spouse may vote and issue a proxy only if he/she is also a registered owner of a different unit.

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ANOTHER POSTSCRIPT

I continue to be reprimanded by some about my undue criticism of the prescribed Management Rules which some regard as quite adequate. Let me dispel this view with one extract from Management Rule 5:-

- (2) *Subject to rules 6(4) and 28(1), if a body corporate consists of less than 4 members who are owners of primary sections, each member or his or her representative recognised by law is considered to be a trustee without election to office.*
- (3) *If a body corporate consists of more than 4 members who are owners of primary sections, they must from time to time determine the number of trustees to be elected in terms of these rules.*

I have an issue with the reference to 'primary sections.' I am involved with some schemes without any primary sections. But the little snag which I want to point out today is: *What about schemes with four owners?*

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