

Managing property properly

Governance Documentation in Homeowners' Associations

A homeowners' association (HOA) is a legal body in which the **individual properties are exclusively owned, while the communal infrastructure and facilities are owned by the association.** This communal property can include boundary walls, security entrances, club houses and can also include the roads and bulk infrastructure services for water and electricity supply.

Each owner must be a member of the HOA so that they are **bound by the governance documentation** to ensure that they are **legally liable to make contributions** towards the HOA communal costs and **abide by the other rules** applicable to the estate.

There are **two types of legal structure** that are used to create or establish an HOA:

1. A non-profit company.
2. A common law association.

Where a HOA is incorporated as a common law association, its primary governance documentation is a written **constitution**. The common law also has detailed rules that apply to such associations.

Where a HOA is incorporated as a non-profit company, its primary governance documentation is the **memorandum of incorporation**. The Companies Act 71 of 2008 regulates non-profit companies, and the content of the MOI cannot contradict any provision in the Companies Act.

The **purpose** of these fundamental governance documentation is to detail the purpose and regulate the rights and responsibilities of the HOA including the executives and the members.

In both forms the governance documentation applicable are **considered to be a contract** that binds every member of the HOA. The members are also bound to the provisions in these documents because the **title deed conditions imposed in regard to the individual**



properties in the estate must set out that any registered owner of such a property is a member of the HOA and obliged to comply with its governance documents, and that no registration of any transfer can take place until the HOA has issued a clearance certificate confirming that all amounts due to the HOA by the person transferring the property have been paid. The constitution and MOI will also require that any **sale agreement** must include a reference to these obligations.

It often occurs in practice that these documents make provision for the executives to make **regulations, rules and architectural guidelines** that are binding on the members. The terms of the abovementioned documents cannot contravene or contradict any term in the constitution or MOI. The rules and regulations should be reasonably necessary, apply equally to all members and be within the scope of the executive's rule-making authority as set out in the primary governance documentation. The constitution or MOI can also refer to other documents such as agreements with the local municipality or other service providers, and can **incorporate such external documents** by specific reference.

There is no legislation that specifically governs the operation of HOAs, as there is for sectional title schemes. It is these governance documents that have to be followed in managing HOAs. Get to know yours!

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