

Managing property properly

INFORMAL “DECISIONS” BY HOMEOWNERS’ ASSOCIATIONS

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Many homeowners’ associations have strict requirements concerning the aesthetic appearance of buildings on the estate. These include fences and other smaller additions that are not always considered by the homeowner to be building projects in terms of the rules, the Memorandum of Association (MOA) or the Memorandum of Incorporation (MOI). The owners then fail to submit plans and/or drawings for formal approval by the trustees or directors of the association.

Some homeowners knowingly attempt to avoid the prescribed formal process and merely invite a trustee or director for an informal discussion, explaining with waving arms the envisaged building project, be it a fence or a pergola. The nod of approval by the trustee is then held by the homeowner to be “approval” of the planned project.

The courts have ruled as follows with regard to the “consent” granted by a trustee at an informal meeting with the homeowner, where the MOA or MOI of the homeowners’ association clearly dictates a procedure for approval of any building or improvement:

1. In order for a trustee or director to sign off a plan in his official capacity, a trustee must properly inform himself of the issues which affect the complex as a whole and not simply have regard to his or her inter-personal relationship with the homeowner. In order to be properly informed, a trustee must ordinarily make a decision in committee with the benefit of debate. His decision must consciously have regard to the MOA or the MOI, whichever case it may be, and the long-term interests of the members. Failure by the trustee to do so will imply that the trustee has not applied his mind to all the relevant issues. It may be possible to impute acceptance by a person both in his individual and official capacity.
2. The nature of the relationship established between homeowners under a MOA or MOI to which each subscribes, constitutes an agreement in terms of which each homeowner submits contractually to the decisions of a body of elected trustees to whom they have conferred the right and power to make binding decisions on matters that affect their relationship *inter se*, or which generally affect the estate.
3. It is further important to take note of whether written consent has been granted by the trustee, as such an action by the trustee would be an additional consideration to establish whether a formal decision will be deemed to have been made.

See specifically *Hoosen & Others NNO v Deedat 1999 (4) SA 425 (SCA)* and *Khyber Rock Estate East Home Owners Association v 09 of Erf 823 Woodmead Ext 13 CC*, a judgement by his honorable acting justice Spilg in the Witwatersrand Local Division in case number 7689/2006.

An informal discussion regarding the building plans of the homeowner can thus not be deemed as a formal decision made by the trustees of the homeowners' association, if the homeowner failed to follow the prescribed procedure.

In the event that a homeowner indeed deems the informal consent as a "decision" made by the trustees of the homeowners' association, the courts will not interfere with the decision made by a homeowners' body save under recognised grounds of judicial review as applied to a voluntary association whose members have bound themselves to its rules, which include the conferring of decision-making functions on an elected body of trustees. (*Turner v Jockey Club of South Africa 1974 (3) SA, SA Medical & Dental Council v McLoughlin 1948 (2) SA 355 (AD)* and *Marlin v Durban Turf Club & Others 1942 AD 112*).

Trustees and directors should therefore take care when having informal discussions with homeowners and insist on the due process, in terms of the rules, the MOA or the MOI, to be followed to the letter. Rather avoid commenting or voicing an opinion except at the appropriate forum – the formal meeting of the trustees or directors where the item is noted on the agenda in compliance with the association's prescribed formal requirements.

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