

INFORMATION AND KNOWLEDGE BASE

LEGAL AND GENERAL

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"If you can tell the difference between good and bad advice, you do not need advice."

- Lawrence J Peter

LEGAL IN GENERAL

2.1 Types of Legal Entities, their Registration and Reporting

Retirement facilities are accommodated in one or more of the following structures:

2.1.1 A Private Company classified as a Non-profit Company (NPC)

The NPC is registered with the *Companies and Intellectual Property Commission* (CIPC). The company consists of members, and they appoint the governing body which is granted executive powers in accordance with the company's founding documents. The fact that the company is established for non-profit purposes must be stipulated in all its official documents.

2.1.2 A Trust

Trusts are less common but are used to accommodate a governing body. The Trust Deed is filed with the Master of the High Court, who issues a letter of authority approving the governing body. The trust is managed by the appointed members of the governing body to the advantage of the beneficiaries and to achieve the goals as described in the trust deed.

2.1.3 A Sectional Title Scheme

A sectional title scheme consists of a body corporate which is made up of all the owners of units within the facility. The owners are represented by the elected members of the governing body. This structure is governed by the *Sectional Title Act* (STA) and the *Sectional Title Scheme Management Act* (STSMA). The body corporate is registered with the Deeds Office. The founding document of the body corporate consists of the standard rules and found in the Acts and referred to above. These may be added to by the members of the governing body but must be submitted and registered at the Deeds Office.

2.1.4 Share Block Scheme

A share block scheme with shares of the company linked to a right to use immovable property or any part of immovable property. In this case the sale agreements must comply with the provisions of the Act. The name of the company must include the words "share block".

2.1.5 A Common Law Association

An association or foundation is established for a special purpose by a group of people to achieve a shared goal. The association is based on the partnership principle and is suitable for small to medium-sized community governing bodies. No registration is required. The association's founding document is called a constitution and sets out the governing rules for the governing body and provides for the appointment of an executive to manage the affairs of the association on behalf of its members.

2.2 Models that can be followed

The following models can be used to house a retirement facility with the various rights of owners accommodated:

2.2.1 Non-Profit Companies (NPC) or Body Corporate (BC) or Share Block Schemes (SBS)

- Residents are co-owners and can be life right, owners or shareholders.
- Most models can be compared with a sectional title housing scheme.
- Health care services are funded by way of ordinary levies or through entry or exit levies based on % of purchase price.
- Residents/owners annually elect directors/trustees/committee members.
- Management may also be delegated as part of the sales agreement to either the owner in the case of life right or a managing agent or managed internally.

2.2.2 Traditional Welfare Organizations – Associations and Trusts

- Management associations are used in the organization.
- Members may be life right holders or others, like residents in frail care or the community.
- Some of the services are government subsidized.
- Management and financial responsibilities lie with the elected board, elected annually, or delegated.
- All persons residing in the facility fund the services assisted by fundraising efforts and government subsidies. Also, there may be an agreement in place that the owner may be a trust or non-profit company who takes responsibility for management.

2.2.3 Profit-driven Companies

- The owner is the registered owner of the property and has a lifelong moral and financial

interest and responsibility in the maintenance and management of the facility.

- A management agreement defines the relationship between the management association and the owner.
- In some cases, the facility may be jointly managed by the owner and the management association.
- In some facilities, the owner may make a financial contribution, but in most facilities the residents fund the health care program.
- Funding methods used include general levies to recover operating costs, care availability levies, and direct payment for services rendered.

2.3 Founding Documents and Statutes

2.3.1 Introduction

The memorandum of incorporation (MOI), the content of Sectional Title Schemes Management Act (STSMA) as a baseline and the Constitution are all defined as founding documents. The founding document is the sole governing document of the governing body and covers the rules and regulations which must be followed by the members, the governing body, and the management of the governing body.

The founding document fulfils an extremely important function where disputes arise among members and/or between members and the governing body. It is the “bible” of the governing body and should be respected as such by all parties. Be aware that the founding document cannot contradict any statute law as statute law always overrules the founding document. The Constitution of South Africa provides specifically that no discrimination against any person may take place. It also provides for the fact that no person may be deprived of property and the right thereto.

In most instances the founding document can only be changed by members having a 75% majority at a special general meeting (SGM).

2.3.2 Topics covered by the Founding Document

Typical areas covered, *inter alia*, by the founding documents are:

- Nature of the governing body, its objectives, and identities of members.
- Rights and obligations of members.
- Rules to be adhered to at members’ meetings.
- Appointment of members of the governing body, their responsibilities, their terms of office, and various other governing body related matters.
- Rules and regulations applicable to members.

- Disciplinary procedures.
- Resolution of disputes.
- Amending the founding documents.

New members of the governing body and the residents must find the time to study the founding document to obtain a sound knowledge of what is required of its members, its governing body and management. A well-prepared summary of the more pertinent rules and regulations of the document can be an extremely useful reference tool for members of the governing body and residents.

2.3.3 Amendments to the Founding Documents

Each type of governing body's amendment requirements is now discussed:

2.3.3.1 Companies

Company information is regulated by the *Companies' and Intellectual Property Commission* (CIPC). Its function is to register all companies, co-operatives, and intellectual property rights and to maintain these. CIPC discloses all the information on its business registers and business entities are obliged to maintain and update continuously the information required by CIPC. The CIPC website can be found on www.cipc.co.za. The following information needs to be submitted from time to time:

- Resignations and new appointments of members of the governing body.
- Change of auditors.
- Changes in the founding document.
- Annual return.
- Annual financial statements.

The most convenient way of ensuring that all records are up to date always is to outsource the work to an auditor or accountant.

2.3.3.2 Trusts

Changes to the trust deed and the composition of the governing body of members of the governing body must be made through the Master of the High Court.

2.3.3.3 Body Corporates

For body corporates the changes made to its rules and regulations are much easier. The changes, with the appropriate resolutions by members, are submitted to the deed's office.

2.3.3.4 Common Law Associations

No submissions are required.

2.4 Rules, Requirements and Standards

To enable potential residents to make an informed decision on permanent residency, the governing body must provide the potential residents with its founding document, organization structure, marketing material, past financials, past chairman/director reports, all rules and regulations and any agreements with third parties that may influence the prospective resident's decision. Potential residents may want to meet the board of the governing body.

Here follows information on the type of specific rules and regulations that should be in place.

2.4.1 Conduct Rules

The purpose of the conduct rules is to ensure orderly, peaceful but enjoyable living and to nurture a mutual feeling of contentment, ensuring that common interests are protected. The rules are designed to ensure good neighborliness and to encourage compliance thereof in the best interest of the community as a whole.

The rules must not conflict with any Act or Regulation, the founding documents, be reasonable and apply equally to all persons residing in or entering the property.

The conduct rules for a body corporate can be found in the *Sectional Title Schemes Management Act* or its own rules established by way of a separate document approved by members. Various rules apply to exclusive areas and communal areas. As mentioned before, these rules may be amended according to specific needs and, in the case of sectional title schemes, registered with the deed's office.

Typical areas that are covered, *inter alia*, in the conduct rules include:

- Responsibility of members regarding maintenance of streets, sidewalks, and boundary walls, etc.
- Maintenance of common areas.

- Relationships with staff and co-residents.
- Management of open spaces and shared amenities.
- Environmental rules.
- Security related matters.
- Maintenance and watering of gardens.
- Responsibilities regarding visitors and their conduct.
- Storage rules for inflammable materials.
- Cooperation between the body corporates, management association and/or the homeowners' association, should these constitute part of the same complex.
- Keeping of pets.
- Wash drying, washing lines and the use of portable drying stands.
- Rules regarding road usage and parking restrictions.
- Refuse removal and littering.
- Personal and general image of the property, and housekeeping.
- Laundry instructions.
- Rules regarding domestic workers and gardeners.
- Extermination of pests.
- Enforceable noise levels and fines for trespassing.
- Permissible hobbies, games, and the behaviour of children.
- Running of private businesses from home.
- Building contractors' access and applicable rules whilst on site.
- Any special title deed conditions.
- Parking for residents and visitors.
- Use of amenities such as hall, pool, restaurant, etc.
- Levies and fines.
- Rules for letting and selling of property, where permissible.
- Residents' responsibilities towards maintaining independence.
- Care services and the rules around each service that is provided.
- Security rules for both perimeter and access to the facility.
- Communications and grievance resolution.

2.4.2 Management Rules

The management rules form the “constitution” of the governing body and relate to the governance and management of the governing body and are important as they also outline the responsibilities and rights of members. The management rules for a body corporate are covered in the *Sectional Title Schemes Management Act*.

These management rules cover *inter alia*:

- Appointments, responsibilities, and requirements of the governing body governors.
- Powers and duties of the governing body.
- Meetings by owners/members/shareholders, conduct thereof, quorums and voting rights.
- Financial powers, controls, and responsibilities.
- Preparation and proper management of planned maintenance and the maintenance reserves.
- Governance matter and record keeping.
- Physical management of the premises.
- Complaints and dispute resolution.
- Access to management and financial information.
- Indemnity for governors of governing bodies when performing their duties, except in cases of negligence.

2.4.3 Aesthetic Rules

The founding document also includes the aesthetics rules that must be adhered to by residents when constructing a new building or when renovating their existing property. In the case of life right schemes, the owner is responsible for capital projects, but where alterations or improvements are undertaken, consultation and cooperation between the governing body and the owner is sound practice. Rules and regulations should be transparent, positive, effective, flexible, and enforceable. Effective communication of the rules with the residents is essential.

The aesthetic rules will cover *inter alia*:

- The submission of plans and approval process.
- The building construction process.
- The maximum coverage of the stands and the maximum height of buildings.
- Building lines, boundaries, and servitudes.
- External building design such as walls, windows, doors, balustrades, pergolas, carports, awnings, roofs and chimneys, paint colour, security gates, etc.
- Boundary rules such as gates, fences, walls, and screens.
- Staff accommodation facilities.
- Gardens.
- Swimming pool rules.
- Paving and paving materials used.
- TV aerials and satellite dishes.
- Refuse bins, pet kennels and washing lines.

- Air-conditioners.
- Solar energy and water heating installations.
- Building restraints such as maximum land occupation, height of the building, number of buildings allowed, and the adherence to building requirements and servitudes.
- Exterior design rules for items such as walls, roofs, windows, doors and shutters, parking areas, garages, carports, swimming pools, paving, gardens, chimneys, colour of paint, etc.
- Additional items such as aerials, TV dishes, solar heating equipment, air-conditioners, washing lines and refuse bins.
- Contract related rules for both contractor and owner.
- Building processes, procedures and the payment of deposits and fees.

Although all the rules are integrated into the founding document, they should be updated regularly in order to address shortcomings that are identified from time to time. The changing environment and opportunities to improve the aesthetic look of the estate will also necessitate updating the rules.

2.4.4 Admission Rules

Two separate sets of admission rules should be in place, namely for the retirement facility as such, and the frail care unit.

2.4.4.1 Admission to the Frail Care Unit

Although not prescribed by law, it is advisable that the following rules, *inter alia*, should be seriously considered:

- Minimum and maximum admission age.
- Specific diseases or age-related ailments that will prevent admission to the facility.
- The fact that the potential resident will be subject to regular health evaluations and that he/she is bound by these.
- Acknowledgement that the resident may be asked to find other accommodation if the facility cannot handle or treat the resident any longer.
- Declaration of income with supportive documents for the admission committee to take an informed decision.
- The separate contract for admission to the frail care unit and the cost of the room and all other service costs.
- Guarantees by the children or any other person to stand in for any future levy shortages.
- A medical declaration by a general practitioner on the standard form supplied by the governing body.

- The fact that the residents may and can be moved within the facility as and when required.
- Copy of the current will or a declaration that the resident has a valid will.
- The “living will” of the resident.
- Organ donor certificate is applicable.
- Names and contact numbers of two relatives and persons that will assist the resident in need.

2.4.4.2 Admission to the Retirement Facility

The following rules, *inter alia*, should be considered:

- Minimum and maximum admission age.
- Specific diseases or age-related ailments that will prevent admission to the facility.
- The presentation of a doctor’s health certificate to confirm his/her ability for independent living.
- A declaration of indemnity in cases where anything happens to or is experienced by the resident, and it is not due to negligence on the part of any of the members of the facility’s staff.
- The fact that the potential resident will be subject to regular health evaluations and that he/she is bound by these.
- The policy document of the facility including the rules and regulations that apply to residents of the facility.
- The contract for admission, the levies, and the cost of all other services.
- Compulsory meals and other services.
- Guarantees by the children or any other person to stand in for any future levy shortages.
- Copy of the current will or a declaration that the resident has a valid will.
- The “living will” of the resident.
- Organ donor certificate is applicable.
- Names and contact numbers of two relatives and persons that will assist the resident in need.

2.5 Orientation, Induction and Welcoming

Once residents are admitted a welcome and information letter is to be handed to the new resident. A personal orientation and induction program by a group of residents is even better.

This document/orientation program should at least cover the following topics:

- The policies of the facility.
- Financial statements and the budget.
- Office hours and contact details of managers.

- How the resident is represented at management level and who is to be contacted with queries and questions.
- Security arrangements – both the perimeter and gates.
- Emergency procedures, rules, and regulations, including alarms for personal use.
- The employment of domestics and gardeners by the resident or the governing body, if applicable.
- Entertainment- and development clubs, and activities plus who to contact.
- All about the clinic services, sick bay, and the frail centre in general.
- Transport facilities and arrangements.
- Communication methods, notices and how residents are informed of various matters.
- Dining room hours and arrangements for house deliveries.
- Library and the use thereof.
- Social, cultural, and religious functions.
- Municipal services – water, electricity, and rubbish removal.
- Other services that might be offered full or part time, e.g., hair dressing, pedicure sessions, exercise and rehabilitation sessions and guest house use and bookings.
- Laundry services.
- Cleaning services if offered.
- Rubbish and rubble removal – how often and times.
- Parking rules and how to obtain additional parking for cars, bikes and caravans and the cost thereof.
- The operations of the “buddy” system and how to get involved and make use of their assistance.
- Internal garden services.
- The workings of the residents’ committee as his/her representative and how suggestions and complaints are handled.
- The official complaints procedures of the organization.
- Swimming pool use and rules.
- The use of independent registered care services and the facilities rules for the use of these services. The use will also require an indemnity.
- Power disruptions and what to do in such circumstances.

2.6 Resident Rights and Responsibilities

It is for residents to know their basic rights and responsibilities as members of the governing body. These rights must always be respected by the governing body and persons involved in the management of the retirement facility or rendering services to the residents.

Members' Rights cover *inter alia*:

- The attendance of meetings (annual general meetings and special general meetings) and the voting at these meetings.
- To be treated with respect, fairly and not be discriminated against. Privacy and dignity must be respected.
- Not to enter the premises of the resident unless it is an emergency.
- A written pledge by management and staff accepting the resident's rights.
- Have access to a fair and equitable complaints and dispute resolution procedure. A proper dispute resolution policy and procedures document must be in place.
- Have access to all financial reports, the minutes of the annual general meetings as well as all the governing body/management committee meeting minutes.
- Request that any other documents and information be shared.
- Be continuously kept informed on all important matters.
- Personal records and files and accounts are to be treated confidentially by all and in compliance with the *Protection of Personal Information Act*.

Protecting these rights of members will result in a well-run, focused, effective, and competent management of the scheme that guards members' interests at all costs.

Members' Responsibilities towards the Governing Body, *inter alia*, are:

- To respect all the rules that apply to members and all security protocols and any other rules that may have been set up.
- Payment of the levies and other contributions charged by the governing body.
- To participate in regular satisfaction surveys and to suggest actions for improvement of services offered.

2.7 Dispute and Conflict Resolution

The dispute resolution policy must be in place and should contain, *inter alia*, the following elements:

- The fact that the policy is subordinate to the *Community Schemes Services Act* and the terms set out in the founding documents.
- Any dispute must first be addressed in writing to the manager of the retirement facility who will then forward same to the governing body.
- The fact that the governing body will use its best endeavours to resolve the issue.
- A dispute committee consisting of a few elected governing body members will resolve the dispute within pre-determined number of days. If the governing body cannot resolve the issue the committee may:

- Request further submissions.
- Request all information and documents pertaining to the case.
- If the dispute committee can still not resolve the issue within pre-determined number of days, the arbitration process starts.
- The member must once again submit the unresolved issues and the reason for his dissatisfaction in writing to the manager.
- The arbitration process then commences. This can either run via the Ombudsman or the following process can be followed:
 - Be held in terms of the *Arbitration Act*.
 - Appoint an independent arbitrator agreed upon by both parties. If the parties cannot agree, the governing body's auditor will be asked to appoint such arbitrator.
 - Payment or security of payment by the person requesting the arbitration may be requested.
 - The arbitrator determines the manner of the process and will include matters such as representation, information to be submitted, pre-arbitration processes, the venue, and recordings of the proceedings, etc.
- The fact that the decision of the arbitrator is final and binding and may be made an order of the High Court.

Please remember that going the CSOS way on dispute resolution could be a far less expensive way for resolving a dispute. Parties must seriously consider using these facilities (csos.org.za) Lodging a dispute with CSOS could be done by the persons affected by the dispute or by mandating a person who has experience in handling disputes with CSOS.

2.8 Sales-, Life Right- and Rental Contracts

Minimum requirements of the four types of contracts are listed below. Please feel free to approach any of your co-members of the ASC for full examples of their agreements.

2.8.1 Full Title Contract

The following clauses, *inter alia*, must be covered in the sales contract:

- Parties to the contract - their addresses, IDs, and other contact information.
- Full description of the property.
- The selling/purchase price.
- How the property is being purchased – deposits, bank guarantees, bonds, etc.
- Suspensive conditions such as non-approval of bond, etc.
- Occupation date of the property by the buyer.

- Fixtures and fittings enclosed or excluded from the purchase.
- Cancellation of existing bonds of the property.
- The payment of levies, municipal accounts and any other property-related cost that is payable by the seller.
- The payment of transfer cost.
- Risk, *voetstoots*, title of condition and defect statement.
- Penalties payable and the conditions present.
- Commissions payable and to whom.
- Retirement facility costs payable, if any.
- Retirement facility cost and condition when property is resold.
- The retirement facility's conditions that must be declared to the buyer and those to be taken up in the title deed.
- Acknowledgement of the rules and regulations of the facility.
- Compliance certificates such as electricity, gas, electric fence, etc.
- Representation, liability, and surety issues.
- Sole agreement, attachments, non-variation, and latitude.
- Domicile and notices.

2.8.2 Life Right Contract

The following clauses must be, *inter alia*, be covered in the life right contract:

- All the above items in paragraph 2.8.1 plus the items below.
- The fact that this agreement is neither a sale nor a rental agreement.
- Financial declarations and submissions by the buyer.
- The establishment of the right of lifelong occupation of the unit by the longest living parties to the contract.
- Rights of and conditions set by the governing body.
- Obligations of the governing body.
- The life right payment terms and repayment terms by the governing body.
- The responsibilities of the occupants.
- Repairs and maintenance, renovations and upgrades of the unit and the immediate surrounding area. Also, the inspections and the payment for replacement of non-wear and tear cost.
- Alterations to the unit.
- Insurance and risk aversion rules.
- The rights and conditions to have access to general health services and how this is paid for.
- The rights and conditions to have access to frail care.
- The rights and conditions to have access to the restaurant, laundry, and any other facilities.

- Minimum number of meals to be enjoyed or the payment of a restaurant levy.
- Municipal services and how these are paid for and recovered from the resident.
- Transfer of residents between units.
- Medical assessment rules and conditions and the right of the governing body to take the necessary steps to look after the best interest of the resident.
- Conditions for the termination of the contract.
- Indemnities required.
- Securities and guarantees by children or other people.

2.8.3 Rental Contract

The following clauses, *inter alia*, must be covered in the rental contract:

- Most of the items listed as per paragraph 2.8.2 above. Replace buyer with tenant and seller with landlord.
- The rental amounts, the payment terms, deposit, yearly increases, and any extras.

2.8.4 Frail Care Contract

The following clauses must, *inter alia*, be covered in the frail care contract:

- Names, ID of service provider and resident.
- Medical history declaration.
- Medical assessment before admission.
- Starting date.
- Monthly cost, when payable, increases.
- Recovery of other costs.
- Transport arrangements.
- Declaration of income and assets.
- Rules and regulations and commitment thereto.
- Cancellation conditions of the agreement by the service provider and the resident.
- Movement between rooms and beds.
- Indemnities.
- Alternative accommodation in case of catastrophes.
- Sureties by children or another sponsor.