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Can You Airbnb Your House or Apartment in a Residential Complex?

"Landlords grow rich in their sleep." (John Stuart Mill, economist)

If you are thinking of buying (or already own) a house or apartment in a residential complex with the idea of renting it out as an Airbnb (whether permanently or on an "I can make a fortune this Christmas" basis), tread carefully.

A recent High Court decision has signalled confirmation that your body corporate or homeowners' association (HOA) can, within limits, regulate your right to do so.

Residents vs. Renters

The setting for this dispute is a large residential scheme in the Silver Lakes area of Pretoria, envisioned by its developers as "a family orientated lifestyle estate where families enjoy the various amenities which include the outdoors, beach and water activities in a safe and secure environment."

However, many of the owners don't reside in the complex permanently but rather let their units out on a short-term letting ("STL") basis as holiday accommodation, usually for one to three days at a time.

That, says the Homeowners' Association (HOA), has become a major problem for residents, because holidaymakers renting the units don't always adhere to the rules and family ethos which it tries to maintain and preserve. The short-term tenants are, it says, there only to party and have a good time, which predictably has led to endless complaints from residents relating to noise, overcrowding, traffic congestion, raucous behaviour, security risks and so on.

As its original conduct rules proved inadequate in addressing these concerns, the HOA adopted new, stricter short-term letting rules. Among other restrictions, owners were now prohibited from letting out their units for periods shorter than three months without the HOA's prior consent. Contraventions of this rule attracted a penalty of 90% of the monthly levy.

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These rules were originally approved by the Community Schemes Ombud Service (CSOS) but were later challenged by a group of owners who wanted to keep the short-term-letting party going. The CSOS adjudicator set the rules aside as invalid and unreasonable, characterising the estate as "a leisure holiday resort lifestyle estate in which the presence of non-permanent residence is the norm".

The HOA appealed this order to the High Court, which has issued an interim order suspending the part of the CSOS order setting aside the rules. Effectively, the Court has allowed the stricter rules to remain in force until the appeal is finalised.

What this means in practice for HOAs, bodies corporate, and unit owners

The Court's order is only an interim one pending the final outcome of the appeal – but the fact that it didn't set aside the rules at this stage does suggest at least a provisional confirmation of the right of HOAs and bodies corporate to regulate short-term letting in this way.

We'll have to wait for the final outcome of the appeal for more clarity, and it is likely that every case will be decided on its own facts and merits. But our courts have previously upheld similar conduct rules and it seems logical that they will continue to do so in appropriate cases.

Here are some thoughts on how you should address this thorny issue in the meantime. To be on the safe side:

- **Short-term landlords:** The fact that the Court allowed the HOA's stricter STL rules to remain in place for now is a clear signal to tread carefully before letting out your unit on a short-term basis. At the very least, check your complex's conduct and letting rules and remember that even if STL is not specifically restricted or prohibited, you remain responsible for any breach of the rules by your guests – so make sure your letting agreement obliges them to obey all conduct and other rules. Last but not least, check whether your local authority's zoning or other regulations restrict your rights in this regard.

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- **HOAs and bodies corporate:** On the general principle that you have both the power and the duty to consider the rights of all owners, think of addressing the risks created by constant guest turnover by adopting or tightening rules to regulate or prohibit short-term stays. The term "short-term rental" is not formally defined anywhere, but existing case law relates mostly to conduct rules prohibiting letting for less than three or six months at a time. Make sure rules are properly adopted (via special resolution if required) and that they are defensible as valid and reasonable. I.e. they should balance the competing rights of landlords and permanent residents to use and enjoy their properties as they please. If you have to enforce the rules, do so fairly and reasonably.

This ruling isn't the last word, but it's a strong signal

The High Court's ruling is interim, with the final outcome of the HOA's appeal still to come. But it does signal a strong likelihood that our courts will continue to uphold restrictions on STL that are fair, reasonable, and correctly instituted and enforced. Regardless, transparency and communication will always help to avoid dispute and conflict.

Could this dispute have gone direct to the High Court?

A recent Supreme Court of Appeal (SCA) ruling has confirmed that, despite previous court rulings suggesting that community scheme disputes must always be referred firstly to the CSOS in the absence of "exceptional circumstances", you do in fact have a choice – either the CSOS or the High Court can hear your matter direct.

Going direct to court would certainly save you from having to fight your way through two sets of proceedings (as the parties in this case have had to do, with no final resolution yet in sight) but be careful. Not only is the CSOS's dispute resolution service likely to be a lot quicker, more affordable, and less formal than going to court, if a court feels that you weren't justified in approaching it direct, it could well punish you with some form of punitive costs order. Choose wisely!

Bottom line: there are plenty of grey areas and difficult decisions here, so don't hesitate to ask us for advice specific to your situation.