

Managing property properly

Short-term letting: May the body corporate's rules prohibit it?

Ané de KlerkPaddocks Press Newsletter

In the past 8 years, few topics have sparked as much debate as that of short-term letting. Since becoming the first African country to be represented on the popular Airbnb short-term letting platform in 2010, South Africa has added more than 40,000 active listings on the site, with more hosts signing up every day. As Airbnb is only one example of short-term letting, one should refrain from using the name of this popular site as a synonym for this form of letting or from using the concepts interchangeably.

With that being said, the increasing popularity of the site and the great potential financial benefit it offers hosts has certainly probed more and more property owners to consider the possibility of short-term letting as a way to boost their income. We have found, however, that not everyone is equally enthused by the idea and many bodies corporate have expressed their wishes to prohibit such letting for various reasons. As a result, we are often asked for legal advice regarding whether bodies corporate are allowed to include such restriction in its rules. Therefore, we were most excited when we were notified that a Community Schemes Ombud Service (“CSOS”) adjudication, on just this matter, was scheduled for the 26 July 2018. We would finally be in possession of an order providing clarity on the permissibility of prohibiting short-term letting... but were we holding our breath in vain?

The adjudication order issued on 14 August 2018, following the adjudication held in July 2018, relates to a dispute between the body corporate and 3 members thereof regarding the amendment of the body corporate's conduct rules to prohibit letting units in the scheme for a period of less than 3 months. The 3 owners, who had been making use of the popular Airbnb website to let their units for less than three months at a time, contended that this rule was unfair and unreasonable.

After confirming that due process had been followed in the adoption of the prohibiting rule and that said amended rule was subsequently approved by the CSOS, the adjudicator shifted her focus to the following questions:

- 1.
1. Is the rule prohibiting short-term rentals in compliance with the Sectional Titles Schemes Management Act (“the STSMA”)?

2. And, if so, is the rule applicable and enforceable against the 3 owners letting their units on Airbnb?

1. Is the rule prohibiting short-term rentals in compliance with the STSMA?

The adjudicator held that, when considering the above questions, one should remain mindful of section 10(3) of the STSMA, which requires that a scheme's management or conduct rules be reasonable and apply equally to all owners of units within the scheme.

In this regard, the adjudicator emphasised that, when considering whether a rule is reasonable, one has to:

1.
1. Weigh up the individual owners' interest against that of the body corporate as a whole; and

2. Consider the rule against the backdrop of South Africa's laws as well as the intention of the legislature in drafting the STSMA.

She expressed her opinion that:

"bodies corporate, as far as reasonably possible and as far as the law allows them to, should be granted freedom to regulate themselves in a democratic way", but also that "whether or not short-term letting can be regarded as an inherent proprietary right (which is thus by implication untouchable by decision of owners in the scheme) is not clear and in my view it will depend on the particular circumstances of each case. Owners in sectional title schemes buy into these schemes knowing that there are rules and knowing that rules may be changed with the requisite majority".

The adjudicator finally concluded that she does not find a rule restricting short-term letting to a period of no less than 3 months unreasonable as it does not prohibit short-term letting, but rather restricts it to what she deems to be a reasonable amount of time. She further emphasised that the ombud had approved the rule and held that one should respect the rights of the owners who overwhelmingly voted in favour of the rule restricting short-term letting.

2. Is the new rule applicable and enforceable against the owners already letting their units on Airbnb?

The adjudicator advised that, while no formal restriction on short-term letting existed when the 3 owners purchased their units, different rules could not apply to different owners in the scheme and further that she is of the view that all owners should abide by the restriction "provided that the rule only becomes enforceable after a fair and reasonable notice period (probably one year). This will allow owners the opportunity to sell their units (should they so choose) and take care of existing reservations".

This is particularly interesting in light of the fact that it is in conflict with section 10(5)(d) of the STSMA, which reads as follows:

“A substitution, addition, amendment or repeal of rules contemplated in paragraph (a) comes into operation on the date of the issuing of a certificate contemplated in paragraph (c) (referring to the certificate issued by the chief ombud following his/her approval of the substitution, addition, amendment or repeal of rules) or the opening of the sectional title register for the scheme, whichever is the latest.”

In summary, the adjudicator’s findings were as follows:

- The rule prohibiting short-term rentals of less than 3 months at a time is reasonable and fair in the circumstances.
- Different rules cannot apply to different owners and the owners who previously let their units via the Airbnb platform have to abide by the new rule.
- However, the rule should only become enforceable after a fair and reasonable notice period.

Why then, were we not relieved to finally have some clarity upon receiving the adjudication order? Well, quite simply because we (and our clients) cannot use it. You see, despite sharing her thoughts on the matter, the adjudicator finally found that the CSOS Act, 9 of 2011 “does not confer any jurisdiction on an adjudicator to make an order whereby a party can be instructed to cease his/her/their behaviour in contravention of a rule” and further that the act “does not confer the jurisdiction on an adjudicator to declare a rule reasonable and enforceable.” As the CSOS has confirmed that it does not have the required jurisdiction, we find ourselves back at square one, once again trying to navigate our way through our clients’ opposing needs and echoing the adjudicator’s view that “given the uncertainty in schemes insofar as short term letting is concerned, a High Court ruling would be highly beneficial”... and so we await the High Court ruling to end this almost-decade-long debate, once and for all.