Beware, Corporate Body Bullies!

In recent times, there has been a development in policies of residential complexes and retirement homes that has had a significant effect on many people's relationships with their companion animals. In many cases the tactics employed by Corporate Body Bullies are underhanded, illogical and prejudicial.

This document will give people a clear understanding of the variables involved and some strategies for dealing with these dubious tactics.

The Law.

Firstly one needs to establish whether the scheme within which one resides is a sectional title scheme, a homeowners association or possibly even, the now outdated, shareblock scheme, as each of these have specific laws, rules and regulations.

In most cases, residential complexes are bound by the Sectional Titles Act. In addition, Municipal By-Laws will apply, and it's a good idea to have an understanding of both before deciding to buy or rent in a given complex.

Sectional title schemes are established under the Sectional Titles Act of 1986, as amended, and within this Act are prescribed management and conduct rules, the latter of which [annexure 9 of the Act] deals with pets.

The Sectional Titles Act (ST) includes the following clauses relevant to this discussion:

35 (3) Any management or conduct rule made by a developer or a body corporate shall be reasonable, and shall apply equally to all owners of units put to substantially the same purpose.

35 (5) (a) If the rules… …are substituted, added to, amended or repealed, the body corporate shall lodge with the registrar a notification in the prescribed form of such substitution, addition to, amendment or repeal.

35 (5) (c) A substitution, addition, amendment or repeal contemplated in paragraph (a) shall come into operation on the date of filing of the notification referred to in that paragraph.

Conduct Rules

1. Animals, reptiles and birds

(1) An owner or occupier of a section shall not, without the consent in writing of the trustees, which approval may not unreasonably be withheld, keep any animal, reptile or bird in a section or on the common property.

(2) When granting such approval, the trustees may prescribe any reasonable condition.

(3) The trustees may withdraw such approval in the event of any breach of any condition prescribed in terms of sub-rule (2).

Such Conduct Rules may be changed, but only if a resolution is passed by a BC quorum that will be stipulated in the Rules themselves.

These rules are not made on a whim and once clarified, have to be registered at the CSOS. The rules may not be amended or changed without a special resolution and any changes also have to be registered with CSOS (Community Schemes Ombud Service, https://csos.org.za). This essentially means that bodies corporate may not change the rules governing the complex indiscriminately to suit certain owners or individuals.

Interpretation

The very first of the prescribed conduct rules for ST schemes states that no owner or occupier of a section is allowed to keep an animal, bird or reptile without the written consent of the trustees.. In other words, the 'no pets' rule is actually the default position for ST schemes.

However, conduct rule number one also says that the trustees may not unreasonably withhold their approval if an owner or tenant applies to them for permission to keep a pet - although they can impose conditions under which that pet must be kept, and can change their minds if these are not met.

On the other hand, the conduct rules pertaining to a particular ST scheme can be altered from the standard rules, either by the developer before establishment of the scheme, or more usually by the body corporate of the scheme after establishment.

Provided these new rules are filed with CSOS, they are the ones that all owners and tenants in that ST scheme have to follow - which is how it is possible for some schemes to have an absolute 'no pets' policy. It is therefore very important for prospective buyers who would like to keep a pet to find out what the situation is before they commit to a purchase in any particular scheme.

But if the sectional title complex they like has an amended rule that bans all or certain types of pets, or imposes a limit on the number of pets that an owner may keep, the trustees will have no choice but to follow that rule - no matter what they might privately think of a pet-lover's pleas to bend it.

In simple terms the onus is on the owner or occupier to apply for written consent from the trustees to keep a pet, prior to bringing the pet onto the property.

Yes, it is true, that the trustees cannot unreasonably withhold permission, but reasonable is relative and pets are an emotive issue!

Often pets are brought on to the property illegally, i.e. without the trustees' prior written consent, and then prospective purchasers or tenants and/or their agents, see these pets and assume that

the scheme is pet friendly, which is not the case.

You can argue the 'reasonableness' should consent be withheld, but once you move in with the pet, you already, in most cases, in breach of the rules and place yourself in a more difficult position.

If you were informed of the rules of the complex when you moved in, the BC are acting in their right to say that you should remove a dog (immediately). They do however have to follow protocol in doing so.

If however this is a "new" arrangement i.e. they had an AGM and the trustees decided that instead of 3 animals, all owners are only allowed 2 animals. They have no right to say that you need to get rid of your dog.

They should wait until the dog passes away and then you will not be able to replace it.

The BC are also not allowed to give you an unreasonable ultimatum - you should have received a letter in the lines of "It has come to our attention that your dog (the big one who looks like a boerboel) is posing to be a nuisance as he is barking non-stop. In the BC rules it states that should your dog be a nuisance you will be asked to remove the pet from the premises within 7 days. Please try to ensure that your pets are not a nuisance to other residents."

With them just saying remove a pet, (not being specific) you could be removing the pet who is not causing a nuisance.

1. They are supposed to give you a chance to rectify the problem. (Stop the barking)
2. They should be specific about which dog is being the nuisance
3. The burden of proof is upon the complainant, who must produce evidence that the dog(s) are a nuisance.

If they were following the correct procedures you should have received at least 3 (warning) letters and then a letter stating that your dog will be removed from the premises within 7 days – and this should also then be followed up by lawyers letters.

The point of course is this blanket insistence on "one dog per property". Any blanket view taken by trustees/agents is an improper exercise of discretion. There are any number of studies showing that dogs on their own (i.e. away from the pack, human or canine) are genetically hot-wired to panic and start barking, either out of boredom, or separation anxiety or in an attempt to "summon the pack". Most of these problems can be eliminated by having two or more dogs.

Options

Owners who think the trustees have unreasonably withheld their consent may apply to court for declaratory orders that the trustees' consent has been unreasonably withheld.

This happened in the case Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse 1999 2 SA 512 (D) which dealt with the interpretation and application of PCR 1 (Prescribed Conduct Rule 1). A woman was refused permission to keep her dog in her flat and she challenged the trustees' refusal by taking them to court. The court held that each request for permission to keep an animal had to be considered on its own merits and the decision of the trustees had to be based on the facts and circumstances relevant to the particular case. The restriction on the keeping of animals was designed to avoid the causing of a nuisance to the other occupants in the building and the fact that permission was refused despite the fact that the woman's dog did not bark and was never allowed to roam on the common property meant that the trustees had not adequately applied their minds to the matter. In the end the court substituted the trustees' decision with its own and allowed the woman to keep her pet in her flat.

If the trustees decide to allow a particular owner or occupier to keep a pet, they are entitled to impose reasonable conditions attaching to the consent. Reasonable conditions could include a requirement that the owner must clean up after their pet immediately if it messes on the common property, that the pet may not cause a nuisance to other owners or occupiers, and that the pet is

not to be on the common property unless it is on a lead. If any reasonable condition is breached, the trustees will then be entitled to withdraw their consent and the owner or occupier may be forced to remove the pet from the complex.

Some schemes have amended the prescribed rules and now have a rule that no pets are allowed in the scheme whatsoever. This absolute prohibition on the keeping of pets could be argued to be an unjustifiable infringement on a person's right of ownership. Then again, if the rule was in place and filed at CSOS or the Deeds Registry before the owner bought into the scheme, the legal principle caveat emptor (let the buyer beware) comes into play as the buyer is presumed to have knowledge of the rules applicable to the scheme.

If a scheme has the prescribed rules and wants to adopt a "no pets" rule as an amendment to PCR 1, this could only be done by the body corporate passing a special resolution amending PCR 1 and having this filed at CSOS. But because all rules must be reasonable, the new rule must take into consideration the vested rights of owners who already have pets at the scheme.

The 'grandfathering' principle is appropriate here. This means not taking rights away from those in whom they are already vested. That is, you should not make those who have pets get rid of them, but once those pets die they should not be entitled to replace them.

With regard to a blanket prohibition on the keeping of any pets whatsoever, without provision for asking for consent, the element of "reasonableness" which is required by The STA is not satisfied – the same is true of provision for exceptional circumstances such as the need by an occupant/owner for a blind guide dog, and also leads to the inequitable scenario where for example an owner or occupier may not keep pets such as an iguana, a hamster in a cage, a snake in a cage, or even a bird in a cage, as well as fish in a fish tank or coy pond, none of which are capable of creating any nuisance to other occupiers or owners.

What's remarkable is that the reasonableness/lawfulness/constitutionality has never been tested in a court of law and there is simply no precedent as the closest case law is the Dorse matter where the rule was not a blanket prohibition but had provision for the asking of permission which the court found to have been unreasonably withheld and ruled in favour of the owner/occupier.

The lack of certainty surrounding this issue lays the foundation for unnecessary friction between Trustees and owners/occupiers and there is presently only speculation and conjecture on the part of experts in this field.

Managing Agent 'rules'

The managing agents all copy each other's "bright" ideas in the quest to attract clients. They get away with it in the big developments because a lot of the owners are absentee investor owners, only interested in the rent, and unlikely to want to spend money fighting for something that doesn't affect them. Tenants, who have to rent rather than buy, usually don't have the money to litigate.

If it starts getting known in the industry that the rules are invalid and expose trustees to breach of fiduciary duty claims, and the rules are challenged regularly enough, maybe they will back down and stop using them.

Bottom line: the rules are an unlawful attempt to divert to managing agents the powers/duty of:

1. Trustees to consider each and every pet request, judge it on its merit and impose reasonable conditions, AND

2. Sectional title owners, to the extent that the rules ban pets generally or in respect of certain units (a blanket ban requires the conduct rules to be amended by special resolution).

A special resolution to amend the conduct rules (to exclude pets) can only be passed at the AGM when it rolls around, or at a special meeting of owners called for that purpose. What people forget is that a special meeting can only be called (per Sectional Titles Act) by at least 25% of the owners. So managing agents/trustees cannot get a bright idea and send out a notice for the special

meeting. They need at least 25% of owners to be on board just to call the meeting.

If an owner is faced with such a proposed resolution and is panicking because she/he knows that the rest of the owners (more than 75%) are a bunch of pet-hating psychopaths who will bulldoze through the vote, there is a very obscure section in the Sectional Titles Act that provides that any proposed amendment to conduct or management rules that seeks to impact negatively on proprietary interests of owners must be a UNANIMOUS vote (not just 75%). I would argue that the exclusion of the right to have pets in my unit reduces the pool of potential buyers I could eventually sell to, thus reducing the market value of my unit, so such a vote would have to be unanimous.

Forcing potential tenants to be interviewed by the trustees to see if they are suitable candidates for the complex is an absolute no no. No one except the owner has the right to say who may and who may not occupy a unit.

The owner has the right to have pets with the permission of the trustees and on the written conditions they may impose. However, any "pet application form" is ultra vires, in my view, the powers of the trustees. Firstly, the trustees cannot delegate that power to managing agents and also cannot incorporate "by reference" estate agents' rules (they may change from time to time – I have also never heard of "estate agents' rules – one agent's recommendations are hardly industry wide). Also, in exercising their power to permit or refuse a pet, or the conditions thereto, the trustees have to act reasonably and exercise their discretion properly in each and every case. In my view, the trustees are incorrect (to the extent that they approved the application form as follows:

A blanket refusal to allow pets on the upper floors is not a proper exercise of discretion in each case – for example, what if the pet is old and just sleeps all day without needing to go out?

Similarly, a blanket restriction on one pet is also not a proper exercise of discretion in each and every case – again, what if pets are small or old?

The revoking of permission within 24 hours for reason of "disturbance" is also not reasonable – what is a "disturbance"? One bark, two? 16 barks per hour?

The restriction as to height is also arbitrary. We all know a dog's capacity to be a nuisance is based on energy levels, not size. A beagle is far more likely to cause a disturbance than a laid-back greyhound or Great Dane.

Having said all of this, however, the owner must be the one to refuse to be bound by the "pet application form" – the tenant has no say in law.

Summary Guidelines

1. A blanket ban on pets is arguably unlawful. if there is a general rule permitting animals, permission to keep pets may not unreasonably be withheld from you.
2. Before renting or buying in a complex, ask to be shown its constitution and bylaws before making your decision. If they are reluctant, reconsider living there.
3. NB: If a complex permitted animals when you moved in, it cannot force you to get rid of your animals, even if the rules are changed by majority vote and animals are no longer permitted.
4. In the circumstances outlined in (3) above, you will not be able to bring in new animals, notwithstanding the fact that you had permission to keep animals when you first moved in.
5. Rules regarding the keeping of animals cannot be changed retrospectively, in other words, they cannot come into effect at some date in the past. Such rules can only be effective from the day on which they are made.
6. If, while you are living in a complex where your animals are permitted or were permitted when you moved in, you are challenged by the body corporate, its chairman, the caretaker or any other individual because your animals are "causing a problem", each case should

be considered on merit. There is no blanket precedent ruling with regard to "nuisance" animals. Determine in advance what "nuisance" means in that particular complex before you commit yourself to moving there.

7. If you are dealing directly with the owner of a unit, make absolutely sure of your position. The owner cannot grant permission conflicting with the complex's rules. If you do obtain such permission, get it in writing.
8. A complex may not discriminate by granting permission to keep only cats, dogs, birds etc. This is regarded as discrimination against you as a person and your constitutional rights.
9. It is absolutely imperative that you know your rights. To this end, ensure that you study a copy of the constitution, the bylaws (normally the house rules), and any other rules, especially if they are relevant to meetings or the powers of the body corporate. You must know specifically who has the right to vote at an annual general meeting, what constitutes a quorum for such a meeting, and whether 2/3 of the voters are required to have a previous decision amended or overturned. This latter point is the normal procedure at most meetings.
10. The body corporate has no powers whatsoever, except those conferred upon it by majority vote at a correctly constituted annual general meeting. "Correctly constituted" means sufficient notice had to have been given, a quorum had to have been present at all times, and a majority had to have voted in favour of or against a proposal. The minutes also need to reflect the exact wording of the matters that were voted on and the outcome of the vote.
11. Some estate agents are not truthful about matters such as pets, because they want the deal done. Verify your facts.
12. Keep emotion out of all negotiations. It has no persuasive power in a court of law.
13. Lastly, but most importantly: Before you sign anything and move in, get the e-mail address of the chairman of the body corporate. Write to this person, confirming your verbal enquiry in regard to your "animal rights" and specifically what "nuisance" is understood to mean in that particular complex. Courts base their decisions on facts, law and evidence. Keep your letter to the chairman short, to the point and absolutely devoid of any emotion. If you do not get a reply, follow up within a reasonable time. If this person runs into you and replies to your query verbally, immediately follow up with an e-mail, confirming your understanding of what was said. (In the court case advocate Nieuwoudt recently won, her case was strengthened by such a complete written record of events. According to her, there may well have been a different outcome without it.)

Addendum: Case Study Summary

In the 10 years since I compiled this document, I have assisted more than 300 people with Body Corporate issues, and this addendum will include lessons learned, recent precedents, and some details regarding certain cases that may be useful to others.

1. Trustees and Managing Agents will often declare that a member is guilty of an offence, based purely on a complaint, without any investigation as to whether the complaint is warranted. This is contrary to common law; one cannot be found to be in contravention of a rule unless there is evidence of that contravention. This is merely the application of a simple concept in our Law: The burden of proof is ALWAYS on the complainant to provide evidence that there has been a breach of the rules.

I have come across cases where fines have been administered on the basis of a complaint that a member's dogs were barking excessively. Ask for proof that this is the case; 'excessively' is a matter of opinion, and the burden of proof is quite substantial, requiring recordings, and a 'noise nuisance' in SA law is something that must occur consistently over time; a one-off event cannot

prove anything.

The evidence prerequisite is the same in respect of any complaint – Trustees or Managing Agents cannot behave like judges and juries.

2. Conduct Rules must be reasonable; they effectively apply to the members of the complex. (section 35 (3) of the Act provides that “any management or conduct rule made by a developer or a body corporate [i.e. owners in holding a special meeting] shall be reasonable**”)**

So arbitrary rules and vague rules should be challenged. The rule that only 'small' dogs are allowed is too vague, as is a provision that no 'large' dogs are allowed (how large is large?), but so is an arbitrary rule setting the height of dogs to 30 cm, which would disallow a 31 cm tall dog, and the difference of 1 cm between a dog and the rules is not material. It's also unreasonable to assume that the bigger the dog, the more noise they are likely to make; exactly the opposite is generally true. We all know a dog’s capacity to be a nuisance is based on energy levels, not size. A Pekingese is far more likely to cause a disturbance than a laid-back Greyhound or Great Dane. A rule allowing only one dog is arguably cruel; dogs are pack animals and socialisation is critical to their well-being, with few exceptions.

It can be argued that a blanket ban on pets (including existing pets) is unreasonable and an owner could apply to the High Court to set aside the resolution (even if validly granted). The ST Act default Conduct Rules state that: “An owner or occupier of a section shall not, without the consent in writing of the trustees, which approval may not be unreasonably withheld, keep any animal, reptile or bird in a section or on the common property.” The phrase "permission cannot be withheld unreasonably” is key. Permission must be considered for each animal on the merits of each case. The default clause does not exclude animals; it merely qualifies that unless permission is granted, no animals may be kept. But refusal must be on reasonable grounds: a blanket refusal to allow pets on the upper floors is not a proper exercise of discretion in each case – for example, what if the pet is old and just sleeps all day without needing to go out? Similarly, a blanket restriction on one pet is also not a proper exercise of discretion in each and every case – again, what if pets are small or old?

Some schemes have amended the prescribed rules and now have a rule that no pets are allowed in the scheme whatsoever. This absolute prohibition on the keeping of pets could be argued to be an unjustifiable infringement on a person’s right of ownership. Then again, if the rule was in place and filed at the Deeds Registry or CSOS before the owner bought into the scheme, the legal principle caveat emptor (let the buyer beware) comes into play as the buyer is presumed to have knowledge of the rules applicable to the scheme.

In an article in the third 2021 edition of the prestigious Journal of South African Law (pages 456 to 473), Professor C.G. van der Merwe analysed a recent Australian case which is directly applicable to sectional title management in South Africa. He confirmed that all the same principles apply to sectional title rules, considered applicable case law, and came to the conclusion that in a South African sectional title scheme, a “blanket pet prohibition” rule is invalid.

In the article, entitled “Is a scheme rule prohibiting the keeping of animals in a sectional title scheme invalid? Lessons from the landmark decision of the New South Wales court of appeal” Prof. van der Merwe analysed the multi-faceted test applied by the court in the New South Wales case, noted that owners who buy into a scheme are not contractually bound to the rules and, in his concluding paragraph, gave his opinion that:

“A rule containing a blanket prohibition on the keeping of animals is unreasonable and therefore invalid because it: does not provide a mechanism for the body corporate to consider the individual circumstances of each owner or animal; unreasonably and unnecessarily precludes the exercise of the ownership rights of use and enjoyment in accordance with contemporary standards which include the entitlement to keep a pet; and does not permit a balanced consideration of the multiple sides to the issue, but operates only in the interest of sectional owners who oppose pet ownership.”

With regard to ownership, Barend Kruger weighs in:

“The Sectional Title Act stipulates that the owner of a unit in a sectional title scheme acquires separate ownership in his/her unit which entitles him/her to enjoy and use it by exercising the ordinary incidents of ownership to the extent which he/she is constrained in law to do so. The keeping of a pet is a good example of an incident of ownership which entitles an owner to enjoy and use his/her property. This right of an owner will only be limited if the animal causes a nuisance or a hazard to other residents. In normal circumstances there will be conduct rules that will apply to incidents of nuisance and harm to other residents. Less restrictive sanctions can be imposed if there is a contravention of these rules” - Barend Kruger B Iuri, Dep. Legum, LLB, LLM (Family Law)

The revoking of permission within 24 hours for reason of “disturbance” is also not reasonable – what is a “disturbance”? One bark, two? 16 barks per hour? A rule allowing only one dog is also more likely to cause that dog to bark more, due to loneliness or sheer boredom.

In some cases, the Conduct Rules stipulated certain breeds of dog were not allowed, on the basis that some breeds are 'dangerous'. This is unreasonable because there is no such definition by any law or animal body.

3. Many Managing Agents or Trustees threaten body corporate members with the SPCA. This is laughable. The only situation in which a body corporate matter falls within the jurisdiction of the SPCA is if there is neglect or cruelty.

In a couple of cases, the Body Corporate had allowed an animal for which permission had purportedly not been granted, to stay for a reasonably long period of time. In one case it was 2 years and in another 3.5 years. In both cases we appealed to a precedent where this had happened and the court ruled that the Body Corporate had implicitly waived the rules by doing nothing, (Buffelsdrift vs Holkom)

It means that if the Body Corporate does not take action, they imply through such inaction that they have approved the animal.

4. There is a process built into the Sectional Titles Act called 'adjudication' and it provides for the resolution of disputes with regard to interpretation of rules and occurrences in which those rules are claimed to have been broken. The adjudication is conducted by an attorney and the costs are borne by the party found to be at fault. If this is the Trustees, the money comes from the Body Corporate, which effectively is the members. I have used this as leverage in several cases to dissuade Trustees from going ahead once they have decided to register a dispute, since they cannot incur expenses indiscriminately.
5. There is now a Sectional Titles Ombudsman, (https://csos.org.za/) which was “established in terms of the Community Schemes Ombud Service Act to regulate the conduct of parties within community schemes and to ensure their good governance.” They can be contacted to assist in resolving a dispute.
6. The Rental Act actually requires that a copy of the conduct rules of a community housing scheme (including Sectional Title) should be attached to, and form part of, the lease agreement. There is no such provision when purchasing, although we think there should be, since often the first time people hear about Conduct Rules is once they have moved in. If you are a tenant and you were not given a copy of the Rules when signing the lease agreement, they are in contravention of the Rental Act and the contract is null and void.

The Trustees and Body Corporate have no say regarding the relationship between the owner of the ST unit and a tenant – the tenant contracts with the owner, not the Body Corporate. It's up to the owner to attend AGM's or dispute Conduct Rules.

7. We also had several instances where rules were changed via a vote and then the Body Corporate tried to then bring pressure to bear on those not complying because of the new rule even though they had complied under the old rule. This is unlawful in South Africa: One of the principles of the rule of law is that laws should not operate with retrospective effect because such retrospectivity can have an unfairly detrimental impact on the vested rights and obligations of persons who organised their affairs and arranged their transactions in accordance with what the law required at the time of such conduct. The rule of law requires

that persons should be able to know what the law requires, so that they can make their conduct conform to the requirements of the law. So any attempt to make a law (a rule is effectively a law and must conform to the principles of the rule of law) apply retrospectively is unlawful.

8. Where a change in the Rules is envisaged that impacts on the proprietary rights of the owner, the criteria for a quorum change and so do the criteria for voting, which must be unanimous (80% or better) – in addition, the member, in order to be bound by the change, MUST consent in writing.

We had a couple of cases where the Body Corporate tried to push through a change with a 'night shift' vote – this meets with failure if there was not a unanimous vote and any person affected by it did not consent in writing.

Arguably any case in which the pool of buyers is being reduced (by not allowing animals), the proprietary rights of the owner are negatively impacted.

9. We had quite a few cases where the new Conduct Rules, supposedly voted for legitimately, were not registered at CSOS. The ST Act is very clear: changes do not come into force until they are registered, so any change agreed in an AGM or special meeting has no effect whatsoever until it has been registered.
10. In addition, Managing Agents or Trustees often decide, without conducting a proper investigation, to fine members on the basis of a complaint. The burden of proof is always on the complainant to provide evidence; hearsay (someone told me) is not evidence, and unless there are eyewitnesses (reliable ones) or some other substantive evidence, tell the Trustees to go away until they have it.
11. Trustees often use intimidation tactics, claiming that they will get a court order to have animals removed (the courts will refer the matter back to the BC for arbitration), they will have the SPCA remove the animals (no jurisdiction), or have Law Enforcement remove the animals (they would need a court order, refer to the first point).

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