

Executive Management Agents

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INTRODUCTION

This article explores the topic of an executive managing agent for the purposes of the Sectional Title Schemes Management Act 8 of 2011 (“the STSMA”), its Regulations and the Prescribed Management Rules (“PMR”). The essential question is whether an executive managing agent may stand and act independently, or must be appointed alongside the trustees of a scheme?

DEFINITION

The STSMA Regulations and PMR define a managing agent as any person who provides scheme management services to a body corporate for reward, whether monetary or otherwise, including any person who is employed to render such services.

THE APPLICABLE LEGISLATION

The STSMA Regulations prescribe that a body corporate may appoint an executive managing agent to perform the functions and exercise the powers that would usually be performed and exercised by the trustees. Alternatively, members holding at least 25% of the total percentage quotas of a section, may apply to the Community Schemes Ombud Service (“CSOS”) for the appointment of an executive managing agent.

The STSMA Regulations further outline that in determining the number of trustees to be appointed to serve at an Annual General Meeting (“AGM”), that this process is not applicable in a scheme that is managed by an executive managing agent.

The STSMA and PMR award body corporates with certain powers, one such power is that to appoint agents and employees as the body corporate may consider fit.

THE LAW IN APPLICATION

In application, the STSMA empowers the body corporate of a scheme to employ agents to act on behalf of the scheme. Of importance is that, it is the body corporate and not the trustees, that are empowered and as such, it can be inferred that the body corporate therefor has the authority to appoint an executive managing agent.

The STSMA Regulations outline two different ways in which an executive managing agent may be appointed, either they are appointed directly by the body corporate by way of special resolution or, members with at least 25% of the percentage quotas of the scheme may apply to CSOS for the appointment.

The wording of the first option specifically advises that the executive managing agent is appointed to perform the functions and exercise the powers that would otherwise be exercised by the trustees. The conclusion that is drawn, is that the executive managing agent acts in place of the trustees.

The STSMA Regulations are silent on the trustees’ involvement / absence with regard to the executive managing agent, however the law does advise that the executive managing agent is subject to all obligations and duties of a trustee under the STSMA and PMR. In addition, the executive managing agent has reporting responsibilities by which, every four months, members of the scheme must be updated as to the administration of the scheme. It is important that the administration is reported to the scheme members and not to the trustees.

Furthermore, none of the STSMA Regulations require that the executive managing agent reports to or operates parallel to trustees (the one exception being in the instance that an executive managing agent is appointed to perform specific secretarial, financial or administrative functions by the trustees).

In support of the notion that an executive managing agent is able to operate in the absence of trustees, is a section in the STSMA Regulations which, in summary outlines that the number of trustees to be appointed to manage a scheme is required as part of the orders of business at the AGM, however that this is not applicable in schemes where an executive managing agent has been appointed. One can therefore see that the executive managing agent negates the decision as to the amount of trustees to be elected due to the fact that it steps into the place of the trustees.

CONCLUSION

Although the STSMA, STSMA Regulations and PMR's do not expressly prescribe that an executive managing agent is appointed in a place of the trustees of a scheme, the wording of the relevant sections outlined above support this notion and create a tacit implication that an executive managing agent is legally able to operate in independence of and without the appointment of trustees. The executive managing agent will be required to be appointed in terms of the law and will thereafter replace the roles of the trustees with regard to the management of the scheme and will require to be appointed annually.

HBSchindlers Attorneys are adept at drafting management agreements, dependant on the scheme requirements.

Kindly contact the authors of this article on 011 568 8500 for more information or email Lauren Squier at squier@hbgschindlers.com.

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