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Vetting of Tenants by Managing Agents: Important Considerations

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INTRODUCTION

Owners, bodies corporate and homeowners' associations have a legitimate interest in knowing who will occupy units or properties within their schemes. Any vetting of prospective tenants by a managing agent must, however, be authorised by the applicable conduct rules, management rules, constitution or other governing documents of the community scheme, and those documents must be consistent with South African law, including the Community Schemes Ombud Service Act 9 of 2011 ("**CSOS Act**").[1]

THE RULES OF A BODY CORPORATE OR HOMEOWNERS' ASSOCIATION

A body corporate or homeowners' association may require a managing agent to vet prospective tenants before occupation only where the applicable scheme rules lawfully require or permit that process. The vetting process should be applied consistently, objectively and only for legitimate scheme-management purposes.

- If the prospective tenant does not satisfy the lawful screening criteria, the application may be refused, provided that the refusal is objectively justified and not unfairly discriminatory.
- If the prospective tenant satisfies the lawful screening criteria, the scheme should not withhold approval on arbitrary or inconsistent grounds.
- If the prospective tenant refuses to provide documentation reasonably required by the applicable scheme rules, the application may be declined, subject to any applicable appeal or dispute-resolution procedure.

The following are key legal and practical considerations for screening a prospective tenant in South Africa.

IMPORTANT CONSIDERATIONS WHEN MANAGING AGENTS VET PROSPECTIVE TENANTS

The following categories of information are commonly considered by bodies corporate and homeowners' associations when verifying and screening prospective tenants:

1. <u>Criminal record checks or police clearances.</u>
   A scheme should require a criminal record check or police clearance certificate only where this is expressly authorised by the applicable rules and is reasonably necessary for a legitimate purpose.

2. <u>Creditworthiness and affordability</u>
   A managing agent may assess a prospective tenant's creditworthiness and ability to meet rental obligations, provided that the tenant has given the necessary consent and the assessment is conducted for a lawful and specific purpose. Where adverse credit information appears, the tenant should be afforded an opportunity to provide relevant context or supporting documentation, such as proof that debts have been settled, payslips, bank statements or references from previous landlords.

3. <u>Identity verification</u>
   Identity documents may be requested and verified to confirm the prospective tenant's identity and to guard against fraud or misrepresentation.

   Where certified copies are required, they should be requested only to the extent necessary and should be handled in accordance with the Protection of Personal Information Act 4 of 2013 ("**POPIA**").

4. <u>Vehicle and access-related information.</u>
   Where a scheme requires information about a prospective tenant's vehicle, driver, licence or insurance, the requirement should be clearly authorised by the scheme rules and limited to what is necessary for access control, security, parking management or risk management within the scheme. Any insurance requirement should be framed carefully and should not create an unreasonable or unlawful barrier to occupation.

5. <u>Income sufficiency</u>
   Managing agents often assess whether a prospective tenant has sufficient income to meet the rental obligations. Any affordability threshold, including a requirement that income be a multiple of the monthly rental, should be treated as a guideline rather than an inflexible rule, unless the

scheme rules or landlord's leasing criteria lawfully provide otherwise. Bank statements, payslips or other financial information should be requested and retained only to the extent necessary for the assessment.

6. FICA and immigration-related documents.
   Where the Financial Intelligence Centre Act 38 of 2001 ("**FICA**") applies to the relevant service provider or transaction, the appropriate customer due-diligence documentation should be obtained.

   For foreign nationals, a valid visa, permit or other lawful basis to reside in South Africa may be requested where relevant to the proposed occupation period. The request should be made in a non-discriminatory manner and should be limited to confirming lawful residence and the ability to occupy the property for the contemplated lease period.

WHAT HAPPENS IF THE TENANT DOES NOT PASS THE VETTING PROCESS?

Where a prospective tenant's application is refused, the managing agent or committee should provide written reasons within a reasonable period, preferably within 7 to 10 days after the decision. The reasons should identify the applicable rule or criterion relied on and should be sufficiently clear to enable the prospective tenant, owner or landlord to understand the basis for the refusal. It is prudent for the rules to provide for an internal appeal to a body or person not involved in the initial decision.

The prospective tenant, owner or landlord should be informed of any available remedies, including the right to approach the Community Schemes Ombud Service where the dispute falls within its jurisdiction and is brought within the applicable time periods.

CONSENT, PERSONAL INFORMATION AND CREDIT CHECKS

POPIA regulates the processing of personal information and gives effect to the constitutional right to privacy in section 14 of the Constitution.[2] In terms of section 11 of POPIA, personal information may be processed only if a lawful basis for processing exists, which may include consent, necessity for the conclusion or performance of a contract, compliance with a legal obligation, or the pursuit of a legitimate interest[3], depending on the facts. In practice, a managing agent should obtain clear, informed and specific consent before conducting credit checks or other screening checks, and should explain what information will be collected, why it is required, who will receive it and how long it will be retained.

A credit check conducted without an appropriate lawful basis, or without the consent required by the applicable credit bureau or service provider process, may constitute unlawful processing of personal information. POPIA affords data subjects rights in relation to their personal information, and an infringement may expose the responsible party to complaints, enforcement action or civil remedies, including damages where the statutory requirements are met.

A prospective tenant may withdraw consent to processing. Processing that occurred lawfully before withdrawal is not invalidated merely because consent is later withdrawn, but the managing agent should not continue processing on the basis of consent after withdrawal unless another lawful basis applies. If the information cannot lawfully or practically be assessed after withdrawal, the application may be treated as incomplete in accordance with the scheme rules and any applicable appeal procedure.

Tenant vetting must also be conducted consistently with South Africa's anti-discrimination framework, including section 9 of the Constitution[4] and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. A scheme should not refuse approval, impose additional requirements or apply screening criteria on grounds such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth, unless a lawful and objectively justifiable basis exists.

The Rental Housing Act 50 of 1999 is also relevant to residential leasing because it regulates the relationship between landlords and tenants and prohibits unfair practices in that context.[5] Vetting criteria should therefore be transparent, rational, consistently applied and capable of being justified by reference to the landlord's or scheme's legitimate interests.

CONCLUSION

The central requirement is that the body corporate or homeowners' association must act within its lawful rules and must apply those rules fairly, consistently and in accordance with South African law.

The rules should expressly authorise any tenant-vetting process, identify the categories of information that may be requested, state the purpose for which the information is required, and provide for appropriate consent, confidentiality, retention and dispute-resolution mechanisms.

The categories of documents discussed above are not exhaustive, but any additional requirements should be necessary, proportionate, non-discriminatory and connected to a legitimate scheme-management or leasing purpose.

[1] Section 4 of the Community Schemes Ombud Service Act 9 of 2011 sets out the functions of the Community Schemes Ombud Service, including regulating, monitoring and controlling the quality of community scheme governance documentation and taking custody of, preserving and providing public access to scheme governance documentation.
[2] The Constitution of the Republic of South Africa, 1996, Section 14.
[3] Protection of Personal Information Act 4 of 2013, Section 11.
[4] *Supra 2*, section 9.
[5] Rental Housing Act 50 of 1999, Section 4(1).

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