

Board committees in property associations - the legal side of social, ethics committees

 By [Francois Schoeman](#)

7 Dec 2020

The duties of directors of property development-related associations have at times been an uncertain area of law - one could argue that many associations have seen themselves as somewhat "special" and "separate" from the Companies Act. In many instances believing that only the Memorandum of Incorporation (MOI) is applicable, often forgetting that contract law, being the contractual agreement between owner and association by means of the MOI, cannot overrule the legislative requirements of the Companies Act or other overarching legislation and court precedent.



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The law in terms of sectional titles has made great strides forward with the roles and responsibilities being well defined in the Sectional Title Management Act (STMA). In most home owners associations (HOA), property owners associations or the like, this has, however, remained an area of self-imposed governance. In particular the forming, role and legislative requirements of board sub-committees.

Board committees

The most important consideration, before reading further, is that the 2008 Act expressly spells out the management role and authority of directors in that it stipulates in s66(1) that, "The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's memorandum of incorporation provides otherwise."

The effect of s66(1) is that where a board does not directly manage the business of the company (i.e., is not an operational board), and has delegated the day-to-day management to full-time directors and other officers, the board is nevertheless still ultimately liable for the conduct of the business of the company. No amount of sub-committees can indemnify the elected board - they remain ultimately responsible, and also responsible for keeping the various sub-committees on target, in line and, importantly, prevent them from going "rogue".

I have on many occasions encountered sub-committees that believe they are a law unto themselves, forgetting that they also fall under the ambit of the duties and liabilities of any applicable prescribed officers and members of board. This is irrespective of whether or not they are members of the board of the company, and would therefore include (non-director) officers co-opted to such committees.

In this article I will primarily focus on one specific committee, one often forgotten by large property developments.

The social and ethics committee

Sub-committees are defined through legislation. They may, however, be formed voluntarily should it not be statutory. Many large HOAs and POAs do not realise that they are required to have a social and ethics committee, or apply for exemption.

The regulations to the Act prescribe that every state-owned company, every listed public company, and any other company that has, in any two of the previous five years, scored above 500 points in terms of the public interest (PI) score, must appoint a social and ethics committee.

The public interest score is calculated at the end of each financial year as the sum of the following:

- A number of points equal to the average number of employees of the company during the financial year;
- One point for every R1m (or portion thereof) in third party liability of the company, at the financial year-end;
- One point for every R1m (or portion thereof) in turnover during the financial year; and
- One point for every individual who, at the end of the financial year, is known by the company - in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company.

Reading the above, any person will identify that membership alone may contribute enough PI points, in developments with more than 500 members, to compel the association to have a social and ethics committee. There are many large residential estates - HOAs that tend to avoid the fact that having a membership of 800+ in their HOA will force consideration of the related legislation.

Having a social and ethics committee is a legal requirement for many. However, with the existence of other board committees, directors may very well ask whether there is indeed a need for yet another committee. Seeing that it has become a reality, whether we agree with it or not, the discussion needs to advance towards how the social and ethics committee could potentially be used to add value to business. My view is that if the committee is set up simply to comply with legislation, it may be an opportunity missed.

I wish to further then add that in terms of section 75 (5) (b) of the Act, an exemption will be granted by the Companies Tribunal if it is satisfied that "... it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company".

So why now suddenly have a social and ethics committee, other than being "forced by law"?

If we must, what will it achieve?

It's all about making sure that the association considers and be held accountable for its impact on the marketplace, area and micro economy in which it operates. This implies that it should ensure that it does not, for example, undermine local small businesses and only work with major corporations. It should consider its social impact on the area surrounding and internally understand that, among others, that it should take care of the health, safety and development of its staff as they will inevitably form a significant representation of the local community.

Partaking in the community surrounding the association is not only becoming important due to legislation, but in the long-term relationships in which these developments find themselves it is critical to foster good relationships, for obvious reasons. Finally, let's consider how the development impacts on the natural environment. This brings factors such as pollution, the use and conservation of local resources, and environmental sustainability into play.

Let's summarise it using the International Standards Organization, namely the ISO 26000 standard. Corporate responsibility is defined as: "The commitment of an organisation to incorporate social and environmental considerations in its decision-making and be accountable for the impacts of its decisions and activities on society and the environment." (ISO 26000)

We can't, wont or don't have to...

Many associations won't need to comply, they may, however, voluntarily adopt the principles and choose to form a committee that holds to the principles of a fully fledged social and ethics committee. And, if possible, this would be advised.

For the larger association that is compelled to comply, it can be argued that the intention of the Act was in all probability not to overburden what is in effect a non-profit formed for and by members for a restricted benefit and result.

The following must be noted:

- This is not a listed company.
- The NPC has members and not shareholders.
- Membership is bound to title deeds.
- The business of the NPC is to manage an association.
- The “business” of the association is to manage common association facilities.
- It’s a public benefit advantage, defined to only its membership.
- The association holds no business interest or mandate outside of this ambit.
- It has a limited service mandate, as determined by its members.
- Income is derived from its members.
- Expenses defined to its members or related facilities.

The Companies Act allows application for exemption from the requirement of having a social and ethics committee under certain conditions. The two conditions stated in the Act are:

- If the company is already required by another law to have an existing structure in place that actually performs the functions prescribed by the Companies Act to the social and ethics committee; or
- If the nature and extent of the company's activities are such that it does not have any significant impact on the public interest.

These two conditions are stated in section 72(5) of the Companies Act. The regulations add one further instance in which a company is not required to have a social and ethics committee, namely when a company is “a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company”.

Should the PI score bind the NPC to comply, the application for the exemption, if required and successful, is valid for five years in normal instances:

“An exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of subsection (7).”

It is in most cases I will advise an application for exemption. The reality is that the fusion of the legislative and executive functions that the average members of the board on an NPC have may overburden the members of the board with double functions and some members may not cope well. I recently had to advise a residential development NPC wherein one board member sought to have all possible committees formed, resulting in the resignation of the majority of the board, citing, “We do this in our free time, for free, and in the interest of our fellow members. We don’t need the red tape, and the risks, I’m out!”

In summary

Any sector may have specific regulated committees, including finance committees, procurement committees and municipal public accounts committees. Other industries may have the need for specialised committees, for example, in the financial services industry, a credit committee may be considered necessary.

In essence, a board can set up any number of committees that it considers necessary to effectively discharge its duties, staying within its legislative universe.

Unless legislated otherwise, smaller associations need not establish formal committees, but should ensure that all the relevant functions are appropriately addressed by the board. In the majority of property development-related associations formed, the balance must be sought in the interest of the members they represent.

Compliance comes first, but if you can't or do not see the need, apply for exemption and abide by the ruling.

Should committees be formed, be warned that formal terms of references should be drafted that include, at a minimum composition, the objectives, purpose and functions, clearly outlined delegated authorities, including the extent of powers to make decisions or recommendations or both. It is also useful to cover when and how the committee will be evaluated. The tenure and reporting mechanism to the board being often overlooked in many instances.

It is recommended that unless legislated otherwise, the board should appoint committees of the board based on the members direction and needs, with a strong emphasis on the capabilities and time available to the elected board.

ABOUT FRANCOIS SCHOEMAN

Francois Schoeman's professional experience lies in driving business growth through strategic marketing and business company initiatives, including core competencies in governance, management, planning and directing launches for diverse sectors, and is known as a turnaround strategist. Currently, he is the COO of GEVS Property, consulting to more than 65 companies in diverse sectors.

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