

Life Right Estate Management and the Rights of Life Right Residents

Life Rights are a very popular form of retirement housing and well-established in South Africa in both non-profit and commercial organisations. One aspect which is often not adequately dealt with by the sellers of Life Rights is that of management and the inherent rights of those who choose this form of occupation within a retirement estate.

There are many forms of life right contracts, but when it comes to **management**, the estates can best be considered within three main categories, namely:

1. Those in which estate management activities remain the responsibility of the Life Right Holders (LRHs). This is often enacted through a Management Association. *These are normally estates established during the first few years following the promulgation of the Housing Development Schemes for Retired persons Act No. 65 of 1988 (HDSRP Act).*
2. Those in which all management activities are the responsibility of the Life Right Grantor (LRG). *These estates are normally those established once it became clear that the HDSRP Act included certain fundamental flaws, such as the disenfranchisement of the rights of the owners of the property over which Life Rights were granted.*
3. Those in which there is a form of shared or mixed management responsibility, or management by the LRG under the terms of some form of Memorandum of Understanding between itself and the LRHs.

In these last two categories of Life Right estates, LRHs are no less entitled to the observation of their rights than those in the first category – both their inherent rights as older persons in South Africa under the terms of the South African Constitution and various Acts, but also of course any rights afforded them in their Life Right agreements.

The question is therefore how those rights are to be entrenched and enacted in a meaningful way, if the LRHs do not have management control, and what are those rights exactly?

The intent of the HDSRP Act

Many learned people have made it clear that it was never the intent of the HDSRP Act to establish a management regime or system. This Act was based (at least in part) on what can only be described as a rushed cut-and-paste from the older Sectional Titles Act 95 of 1986 (which after approximately 14 amendments was replaced in October of 2016 by the Sectional Title Schemes Management Act 8 of 2011 and the interrelated Community Schemes Ombud Service Act 9 of 2011 – both subsequently supplemented by regulations).

The Act never went through a thorough research program or process through which the areas that need to be addressed could be properly considered, in light of a totally new South African Constitution, the Older Person's Act, The Consumer Protection Act and other legislation. The Department of Trade and Industry (legal custodian of the Act) has today all but closed its section dealing with the Act. Presently, the Community Schemes Ombudsman Service (CSOS) is inundated with conflict issues concerning the Act.



The HDSRP Act was always intended to provide social protection measures to older people contracting for housing in estates that were established using a range of different ownership and occupation models (Freehold, Sectional Title, Life Right (right of occupation), Share Block, etc.).

Unfortunately, the Act inadvertently afforded LRHs with management rights over property that they do not own, being lifelong *tenants*. This has led to much heartache and tension in several excellent estates, with the inevitable tussle between LRHs and LRGs playing itself out. Things often only come to a head when one of the following become evident:

- Residents reach an average age of over 85 and fewer and fewer have an interest in management. In many cases the skills (including but not limited to financial acumen) required to run a modern estate are simply no longer present within the body of residents, sometimes leading to poorly negotiated service contracts that can disadvantage residents.
- The Management of the estates find it difficult to keep up with the pace of change in law and modern business practices, sometimes leading to questionable legal and good-governance compliance by the estates.
- Property is not being maintained and falls into serious disrepair, which in turn impacts on resales – the life blood of any life right scheme.
- Dispute after dispute arises between LRHs and the LRG, because even though they may be contractually obligated to carry out repairs to buildings and other assets in terms of their Life Right Agreement, levies often have not included reserve fund contributions and so there is always an open hand asking the LRG to pay for capital works. The LRG in turn feels aggrieved because the estate has been allowed to fall into disrepair and he has not been allowed to manage the process. LRHs who pay for a right of occupation do not have access to that initial capital as collateral for loans (one of the principal reasons that special levies are not permitted in such schemes), so expecting LRHs to take responsibility for capital upkeep of buildings and other major estate infrastructure in the long term is naïve and ultimately senseless.

Many LRGs have sought relief from this troublesome situation by applying for exemption from the clauses of concern in the HDSRP Act. Where this is granted, LRGs are free to manage the estates, but must of course comply with all other terms of the Act and observe the rights of residents as Older Persons, protected in various ways as explained in part in this article.

Where exemption from the Act has not been sought, LRGs have either established a cession of rights agreement in Life Right Agreements from the outset, or have proposed changes to the Management regime which have been accepted by the vast majority of LRHs.

Where such changes are made, the changes need to ideally be reflected in addendums to the Life Right Agreements between the LRHs and the LRG. Typically, such agreements will state something like the following:

“The management of the estate shall have the powers, duties and obligations provided for in the Act, the Conduct Rules and Regulations to the Act. Where any such powers confer upon the Purchaser, the Purchaser by his signature hereto and as Member of the Management Association is deemed to have irrevocably ceded and assigned such tasks and responsibilities



in terms of Regulation 9(q) (4) of the Act to Management where such powers, duties and obligations relate to the Management of the Estate as described in the Management Agreement between the Seller and the appointed Managing Agent”

Note that the Life Right Agreement between the LRH and LRG is exclusive and binding. A Managing Agent is not a party to the agreement. All such agreements must comply with the National Credit Act No 34 of 2005, amongst other Acts.

The following must comply in all LR Agreements:

- The communication between the LRH and LRG must always be unhindered and open.
- The LRH has the right to ask the LRG questions or seek information with reference to the terms and conditions in the Agreement. This right cannot be shared with a third party, however, the LRH may delegate this right to a person or institution of his/her choice, with the understanding that this delegation must be communicated with the LRG, including disclosing any terms and conditions that may apply.
- Both parties have the right to amend any part of the Agreement or make additions, provided both agree with such amendments or additions.
- Both parties have the right to acquire legal or other assistance towards ensuring full compliance with the terms of the Agreement.

The rights of Life Right residents

This article will not provide an exhaustive list of rights that are or should in the opinion of the writer be afforded to older persons but focuses instead on those rights that sometimes come into question within the above-mentioned scenarios around management of the estate.

The following rights should be observed ***in a meaningful way*** through proactive action on the part of the LRG and/or its Managing Agent. All the information shown below is best conveyed to the LRHs in the form of a monthly report written by the Managing Agent (this can be written specifically for the LRHs or can be an *extract* from the report provided to the LRG monthly by the Managing Agent, which may cover additional matters that are not required by LRHs):

1. **The right to financial information** – While the LRG is a private entity which may or may not operate on a non-profit basis, financial information regarding both the operation of the estate (the balanced budgets and ongoing operations of the estate in terms of services rendered), as well as the *financial health status* of the Life Right Grantor as it pertains to the estate and the ability of the LRG to sustain and maintain the estate, should ideally be proactively provided by the LRG. The provision of this information is for information and consultation purposes – not for management purposes. Two related matters/approaches that are considered best practices in the industry include:
 - a. **A rational Levy increase approach.** Probably the most important information that LRHs can receive is the rationale behind levy increases on an annual basis. This can be easily provided in the form of an inflation formula that references easily obtainable year-on-year inflation statistics per category of expenses of the specific estate.
 - b. **The provision of a Levy Stabilisation Fund (LSF).** Controlled and owned by the LRG but *transparently* accumulated from a percentage of the resale of Life Right Units,



an LSF is an excellent means of reassuring LRHs of the efforts of the LRG to stabilize the levies and lifestyles of the LRHs – which should be a key goal of all estates housing older persons. This fund is intended to be used in years in which inflation of certain expenses results in a greater than normal inflation of the expenses of the estate (for example, times of drought or load-shedding impacting food prices and diesel expenditure respectively). The Levy Stabilisation Fund can be capped by the LRG to a multiple of the annual levies, so that the fund does not become larger than is needed for the intended purpose.

2. **The right to other operational information** regarding the Quality, Cost, Service delivery, health and safety and staffing of all functions that ensure that the lifestyle of LRHs is maintained at the levels promised at time of establishment of the estate (as a minimum) and improved thereon within the constraints of operational budgets.
3. **The right to be consulted** whenever changes are made to services *that impact the lifestyle* of LRHs. A useful approach is to clearly specify in a Service Pact or similar document, what the services are within the estate and what quality measures should be monitored to ensure that the services are maintained at desired and promised levels. Such a document should form part of the annexures to the Life Right Agreement between LRH and LRG and be amended from time to time as services are improved or altered, in a transparent manner.

It must be noted that none of these envisaged rights imply that LRHs have the right to manage any aspect of the estate, to veto any management decisions or even delay implementation of actions taken by the LRG or the Managing Agent.

What should be provided to the LRHs in addition to the above is **the key operational terms of the Management Agreement** between the LRG and the Managing Agent (as a minimum the full scope of work), so that there is transparency regarding the **role** of the managing agent. There should be no doubts in the minds of the LRHs as to how the estate will function and how the services that underpin the promised lifestyles will be delivered and sustained.

It is of paramount importance that both LRH and LRG understand the importance of the **sybiotic** relationship that they share. A toxic estate will not sell. A happy estate will continue to sell and reap rewards for the LRG. It is thus in the interests of the LRG to maintain the property and to ensure that there is ongoing and continuous engagement with the LRHs.

Some LRGs pay lip service to the abovementioned rights either by making information available in a very high-level and cursory manner at rushed meetings, or by providing overcomplicated, detailed reports that are not easily accessible.

LRGs should ideally provide all information in a clear format ahead of the meetings and be at pains to explain in simple terms how the operations are faring. LRHs are often cautious of asking questions for fear of reprisal or other reasons, and so it is useful to anticipate frequently asked questions and to answer those in writing as part of the report ahead of meetings.

It is poor practice to hold a residents meeting at which information is divulged for the first time, in a hurried manner and then to call for questions while the smell of cake and tea is wafting into the room, beckoning residents to end the meeting as soon as possible. These tactics are commonplace but do not display good governance or observation of rights. Far better to distribute documentation



in understandable format and language and to explain some of the key content in detail at the meeting, inviting and even encouraging questions.

The organisation of Life Right residents

It is essential both in terms of practical interaction as well as to ensure the observation of all rights and obligations of all stakeholders in any Life Right scheme that residents be organised in some fashion that allows for clarity regarding their collective majority views.

In the opening paragraphs of this article, reference is made to Management Associations – a structure also referred to by the HSDSRP Act 65 of 1988. Such a structure within a Life Right Estate context is not considered to be optimal, given the aforementioned points. Such associations are governed by their constitutions, which vary widely from estate to estate. Dependent on what is stated in the Life Right Agreements (which are not standardised in South Africa) and the Constitution, gaining agreement on matters related to management of the estate and maintaining a stable, consistent and well governed estate can be hugely challenging. In many such estates, these structures have been dismantled in favour of allowing the LRG to manage the estate, but with an undertaking to observe the obligations that were made to the LRHs at sale time and to continue engaging with LRHs as proposed by many of the points made in this article.

While there are some estates that do not have any formal structure that residents are all part of, such estates rely heavily on an LRG and Managing Agent that engage proactively with the body of residents. Ways of ensuring such proactivity are often included in the Management Agreement between LRG and the Managing Agent.

Two good options are listed below that are found in many estates today. More complicated scenarios are also evident and possible, however the principles are more important than the details.

1. Residents Committee

This is the simplest approach, adopted by some large organisations.

- Residents elect a committee under a set of written rules or guideline.
- The Committee elect a chairperson, vice chairperson and other functionaries as needed.
- The Committee meet monthly with the estate manager and receive a copy of the managers monthly report, or an abridged version containing only matters relevant to the LRHs.
- The Committee meet regularly with residents to convey information and to seek input from residents.
- The LRG meets with the Committee biannually around a predefined agenda.

2. Residents Association

This is a slightly more complicated and formalised approach.



- A constitution is established, which all residents are automatically members of – this stipulation is conveyed in the Life Right Agreement/Contract between the LRG and LRH. The constitution spells out the rights and obligations of members and how matters of the association are to proceed.
- Residents elect representatives to an executive committee (EXCO) at an AGM.
- The Committee elect a chairperson, vice chairperson and other functionaries as needed.
- The Committee meet monthly with the estate manager and receive a copy of the managers monthly report, or an abridged version containing only matters relevant to the LRHs.
- The Committee meet regularly with residents to convey information and to seek input from residents.
- The LRG meets with the Committee biannually around a predefined agenda.

Because neither of these organisational approaches imply any *management authority*, some residents deem themselves to have been deprived of all rights, but that is not the case. As mentioned above, several sets of rights must be observed in a proactive fashion by the LRG and the Managing Agent.

Regardless of the form of the organisation of residents, it is important to understand that the key relationship in all Life Right estates is that between the LRH and the LRG in terms of the primary Life Right agreement, backed up by the endorsement of the title deed in terms of the HDSRP Act – a significant benefit for Life Right Holders.

The opinions expressed in this article are those of Rob Jones of Shire Retirement Properties (Pty) Ltd. Rob is not a legal practitioner and encourages all readers to consult with a knowledgeable attorney when seeking legal advice regarding any of the points mentioned herein.

Rob Jones
Managing Director
Shire Retirement Properties
5 August 2023