



Dispute Resolution Policy

Version 01 (13 December 2016)

Legal Status: Adopted as a rule according to the MOI by resolution of the board of directors at a regular board meeting on 12 December 2016. Ratified as binding by the members at the General Meeting on 22 February 2017.

I. Preamble

1. While the Bluewater Estate Home Owners Association NPC (BWE HOA NPC) *Memorandum of Incorporation* deals with
 - breaches of the MOI and rules and regulations by members, and
 - claims the HOA might have against members,and reserves the right of the HOA to institute legal proceedings against defaulting members (who are in financial or other breach of their obligation as members), it seems not to cover sufficiently any relief members might seek against other members or the directors, and is silent on external arbitration.
2. While the *Members and Residents Code of Conduct* article 8 regulates procedures in case of non-compliance of members or residents and provides for complaints about non-compliance, it equally stops there.

While the BWE clarifications on *Responsibilities and Procedures in Architectural Matters* (2016) provide for the possibility of an appeal to the BWE board in instances where the member can substantiate that he/she has been unfairly treated or if due process has not been followed by the Architectural Committee, no external arbitration is provided for.
3. While the *Community Schemes Ombuds Service Act, 2011* that came into force on 7 November 2016 offers an Ombuds Service with which members of home owners associations may seek relief, it is a prerequisite that an internal dispute resolution mechanism of a HOA has been unsuccessful before it is possible to lodge an application with the Ombudsman.
4. Therefore, the following *Dispute Resolution Policy* seeks to fill existing gaps by way of additional steps when the stipulations of the MOI and rules and regulations of BWE have been exhausted or where they are silent on a matter.

II. Dispute Resolution

5. Subject to articles 6.13 and 7.7 of the Bluewater Estate HOA NPC *Memorandum of Incorporation*, the provisions in *Responsibilities and Procedures in Architectural Matters*, and the *Community Schemes Ombuds Services Act, 2011*, if any dispute, question or difference (hereafter collectively referred to as 'the Dispute') arises at any time between members or members and directors out of or in regard to –

- 5.1 any matters arising out of the Memorandum of Incorporation; or
- 5.2 their rights, duties or obligations in terms of the Memorandum of Incorporation or the Companies Act; or
- 5.3 the interpretation or the rectification of the Memorandum of Incorporation'; or
- 5.4 any decision by the directors, Committee or General Meeting pertaining to that member,
- then and in any such event, the parties to the Dispute shall use their respective best endeavours to negotiate in good faith with each other and any applicable third party for purposes of reaching a resolution of the Dispute.
6. If the Dispute cannot be resolved by negotiation and agreement within such period of 7 Business Days, then the Dispute (including costs) shall be submitted to mediation under the guidance of The Arbitration Foundation of Southern Africa (AFSA) on notice given by any of the parties to the Dispute to the other of them in terms of this policy.
7. The arbitration shall be held in Cape Town in accordance with the provisions of the Arbitration Act, No 42 of 1965 (as amended or replaced from time to time) save that:
- 7.1 the arbitration shall be informal and the parties shall be entitled to legal representation;
- 7.2 the arbitrator shall have the absolute discretion to determine the procedure to be adopted
- it being the agreed intention that, if possible, the arbitration shall be held and concluded within 10 Business Days after it has been demanded.
8. The arbitrator shall be such person as may be agreed upon in writing between the parties to the Dispute.
9. If agreement cannot be reached in writing upon the arbitrator within 5 Business Days after the arbitration has been demanded, then the president or chairman for the time being of the Cape Bar Council or its successor/s shall nominate the arbitrator.
10. This policy shall constitute irrevocable consent of each Member to the arbitration proceedings, and no Member shall be entitled to withdraw herefrom or to claim at such arbitration proceedings that he, she or it is not bound by this policy.
11. Each Member hereby irrevocably agrees that the decision of the arbitrator in the arbitration proceedings:
- 11.1 shall be final and binding on each of them; and
- 11.2 will be carried into effect and can be made an order of any court to whose jurisdiction the parties are subject.
12. The provisions of this policy shall not preclude any party to the Dispute from instituting any proceedings in any competent court for any urgent, interim or interlocutory relief, pending the determination of the arbitrator.
13. Notwithstanding anything to the contrary contained in this policy, the Board shall be entitled to institute legal proceedings on behalf of the Company in any court of law having jurisdiction in respect of any failure of a member to comply with the BWE Memorandum of Incorporation or Rules and Regulations formulated in terms thereof notwithstanding the fact that the amount (if any) may exceed the jurisdiction of such court.
14. In the event of the Board having to instruct attorneys as a consequence of a Defaulting Member's breach, the Defaulting Member shall be liable to pay BWE HOA NPC's legal costs on a scale between attorney and own client including collection commission.
15. Members declaring a dispute with the BWE HOA NPC, are liable for eventual attorney's costs incurred by BWE HOA NPC on a scale between attorney and own client including collection commission, should the case be decided against the member by the competent authority or external arbitrator.

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