

Somerset West

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HOA GOVERNANCE, ILLEGALITY AND FIDUCIARY ACCOUNTABILITY IN SOUTH AFRICA

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Homeowners' Associations (HOAs) in South Africa are often viewed as informal governance structures focused on estate management, aesthetics, and community rules. However, in law, most HOAs operate as juristic persons governed by constitutions, fiduciary principles, and increasingly complex regulatory exposure.

Given these circumstances, this raises a difficult but largely under-examined question regarding governing bodies (trustees) when they become aware of *unlawful conduct within the HOA* and choose to do nothing? Moreover, what happens when those aware of the conduct include both ordinary members and members serving in a trustee capacity?

Internal rule breaches vs breaches of National Law

A foundational distinction must be made between *internal* HOA rule breaches and breaches of national law. Internal HOA rule breaches may include contraventions of an HOA's conduct rules, architectural guidelines, or administrative procedures. These matters are governed internally through the HOA's constitution and enforced by trustees.



Breaches of *national law*, which may include contraventions of immigration law, municipal by-laws, labour legislation, environmental regulations, and criminal law generally, fall *outside the jurisdiction of the HOA*. Importantly, the HOA is not an enforcement authority of the state. Once a breach of national law is reasonably suspected or known, the issue is no longer purely internal. It becomes a question of **legal exposure** and **governance responsibility**.

The fiduciary duty of trustees: Knowledge triggers responsibility

Trustees of an HOA, like directors of a company, are fiduciaries. Their duty is *not limited to passive administration* of rules. It includes the *active protection of the organisation* from foreseeable harm.

Once trustees become aware of conduct that may expose the HOA to legal risk, regulatory enforcement, reputational damage, or insurance implications, they are required to act reasonably in the interests of the HOA. This does not necessarily mean trustees acting as investigators or enforcement agents of the state. It means ensuring that appropriate governance steps are taken, which may include:

- obtaining legal advice;
- recording the issue formally;
- implementing risk controls;
- communicating legal obligations to members; and
- escalating known and/or suspected illegal activities, where appropriate, to legal advisers, regulatory authorities, municipalities, law-enforcement agencies, or other competent bodies.

Silence, in governance terms, is rarely a defensible position where the knowledge of suspected or known unlawful conduct exists.

Illegal employment of *foreign nationals: A governance risk example**

A frequently overlooked issue in many HOAs relates to the employment of foreign nationals without valid documentation permitting them to work in South Africa. Under South African immigration and labour law, the employment of individuals *without valid work authorisation* may expose employers to significant penalties, including substantial administrative fines and, in more serious or repeated cases, criminal sanctions such as fines and imprisonment. Proposed regulatory changes under the Employment Services Amendment framework may further increase the consequences for non-compliance, including significantly higher penalties for repeat offenders.

While enforcement depends on the facts and due process, the legal risk profile for employers is material and cannot be ignored. However, in the HOA context, the trustees are not typically the direct employers. The primary legal responsibility lies with individual homeowners (the members).

The governance question pertaining to trustees is therefore not one of direct liability, but rather one of *oversight and risk management* associated with protecting the HOA itself. For many residents, the issue may appear to be solely a matter between the homeowner (the member) and the state. However, where trustees become aware of widespread non-compliance and take no steps to assess or manage the associated risks, questions may arise regarding the HOA's governance response, consistency of rule enforcement, and overall risk management culture.

This becomes particularly relevant where HOAs actively enforce municipal by-laws, architectural rules, traffic regulations, or other legal obligations, yet adopt a markedly different approach when faced with potentially unlawful employment practices.

For ordinary members, effective governance is not an abstract concept. It underpins property values, community stability, legal compliance, insurance protection, and the reputation of the HOA itself. Members rely upon trustees to identify and manage material risks before those risks become costly disputes, regulatory interventions, or enforcement actions.

The premium often associated with gated estates is built largely upon perceptions of safety, order, compliance, and effective governance. When governance fails, those attributes may be undermined, potentially affecting the value proposition of the HOA itself.

The escalation question: What must trustees do when they know?

If trustees become aware that members of the HOA are engaging in conduct that may be unlawful, the issue becomes one of governance response. Trustees are not required to act as law enforcement agencies. However, they are required to consider whether:

- the HOA is exposed to legal or regulatory risk;
- the conduct creates systemic risk within the HOA; and
- reasonable governance measures are required to mitigate that exposure.

Reasonable governance responses may include:

- obtaining legal advice;
- issuing member communications regarding legal obligations;
- reviewing access-control procedures;
- updating contractor and worker registration requirements;
- recording risks within trustee meetings;
- implementing appropriate compliance controls; and
- ensuring conflicts of interest are properly disclosed and managed.

Failure by trustees to act may raise questions about whether they have properly fulfilled their fiduciary duties owed to the HOA.

Poor governance rarely remains a theoretical concern. Legal disputes, regulatory investigations, reputational damage, increased insurance costs, declining buyer confidence, and reduced property values can all have direct financial consequences for members.

When the trustee is also involved: Conflict of interest and governance failure

The situation becomes significantly more serious where a trustee is *personally involved* in the conduct in question. For example, a trustee employs an individual without lawful work authorisation and they are aware of the individual's illegal status. Making matters worse, the trustee remains silent in their fiduciary capacity.

This creates an immediate conflict between the trustee's personal interests and their fiduciary duties. In such circumstances, additional governance concerns arise:

- failure by the trustee to disclose their conflict of interest;
- the trustee's compromised board oversight; and
- the trustee's potential failure to act in the best interests of the HOA.

At this point, the issue is no longer simply about the trustee's underlying conduct - it becomes a question of *governance integrity*.

The role of members: Whistleblowing and protected disclosures

A critical but often overlooked dimension is that *governance awareness* is not limited to trustees alone. Members of an HOA may also become aware of conduct that they reasonably believe to be unlawful or improper. South African law, through the *Protected Disclosures Act 26 of 2000* (as amended), provides a framework for individuals to report wrongdoing in a protected manner.

The purpose of the Act is *not to require reporting of every unlawful act*, but rather to:

- encourage disclosure of wrongdoing in good faith;
- protect individuals from occupational detriment or other forms of reprisal; and
- promote accountability within organisations.

Importantly, the protection afforded does not depend on the perceived "severity" of the wrongdoing in abstract terms, but on whether the disclosure is made *in good faith*, through *appropriate channels*, and in *relation to conduct that is reasonably believed to be improper*. This means that members -- like trustees -- are not passive observers in governance systems. They may become legitimate whistleblowers where circumstances justify it.

The governance reality: Silence creates systemic risk

Governance failures seldom originate from a lack of knowledge. More often than not, they arise from a failure to act upon knowledge that already exists. Where both trustees and members are aware of unlawful conduct, yet no structured response is taken, the HOA may face escalating exposure over time.

This is not merely a legal issue. It's a *governance failure mode* comprising:

- having the knowledge but not responding;

- knowing the risk but not mitigating it; and
- having authority but not accepting the accountability.

In such environments, the HOA itself becomes vulnerable, not only to potential external enforcement, but also to the internal breakdown of governance discipline.

Conclusion: When governance replaces assumption with accountability

HOAs are not informal social arrangements. They are juristic bodies with fiduciary leadership structures and legal exposure. Once knowledge of potentially unlawful conduct enters the system -- whether through trustees or members -- the HOA *enters a governance decision cycle*. The question becomes whether that knowledge will be ignored or addressed.

This is followed by the actions taken to escalate the matter appropriately and the controls implemented to strengthen the HOA's governance environment. The legal and governance expectation or actions taken by the HOA is not about achieving perfection by the trustees. Rather, it is about acting with integrity, reasonableness, transparency, and honouring their fiduciary duties once the knowledge of potentially unlawful conduct exists.

In applying one's fiduciary duties, it is important to recognise that HOAs are no different from companies, public bodies, non-profit organisations, or any other fiduciary-controlled structures operating within a rule-of-law environment.

Ultimately, the question is *not whether trustees can prevent every act of wrongdoing*. The real question is far simpler: What did the trustees do *once they knew*?

* Disclaimer: The example used of foreign nationals working in South African HOAs without valid documentation is used as a governance case study and the principles discussed apply equally to municipal by-law breaches, environmental contraventions, health and safety matters, financial misconduct, and other forms of unlawful conduct.

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