

SUMMARY OF THE JUDGMENT

SPEED LIMITATIONS IN HOMEOWNERS' ESTATES: IT'S A CONTRACT AND ENFORCEABLE

Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others (323/2018) [2019] ZASCA 30 (28 March 2019)

The thorny issue whether a homeowners' association may validly impose speed restrictions in respect of roads in the estate has finally been laid to rest, the Supreme Court of Appeal finding that an association may indeed do so. And, where the rules of the association lay down a penalty for contravention, owners who contractually bound themselves to the rules when purchasing in the estate are liable. The reasoning and context is contained in the summary.

The Judgment can be viewed [here](#).

FACTS

The Mount Edgecombe Country Club Estate Management Association II (RF) NPC (the Association), a non-profit company, is an association of homeowners. In terms of the Association's Memorandum of Incorporation (MoI), membership of the Association is obligatory for all owners of residential property situated within the Mount Edgecombe Country Club Estate Two (the Estate).

The Estate, which is situated in and around a golf course, comprises some 890 freehold and sectional title residential units. It consists of extensive common property, including open areas, dams, ponds and rivulets, as also facilities for various sporting activities, such as squash, bowling, tennis and fishing. It is serviced by a network of roads and pathways for the use of vehicles, pedestrians and golf carts. The common facilities on the Estate include a club house and a venue for conferences, corporate events and weddings. It is also home to several species of small animals, which are protected within the confines of the Estate.

In accordance with clause 20.1 of the MoI, the directors of the Association determined that the speed limit on the roads within the Estate shall be 40 km/h. During October 2013, Mr Singh's daughter was issued with three contravention notices for exceeding that limit and in each instance a penalty of R1,500 was imposed. The amounts, which were deemed by the conduct rules to be part of the levy due by the owner, were debited to Mr Singh's account. Mr Singh appealed against two of the penalties. The appeal succeeded in relation to one of the two contraventions. Mr Singh refused to pay the remaining fine and the Association then deactivated the access cards and biometric access of Mr Singh and the members of his household.

In February 2014, Mr Singh approached the High Court, Kwazulu-Natal for urgent spoliatory relief. A rule *nisi* was issued directing the Association 'to re-activate Mr Singh's access cards and the biometric access of his family. Whilst finalisation of that application was still pending, in March 2014, Messrs Singh and Ramadh launched a challenge to three categories of the Association's conduct rules - loosely described as the 'road rules', 'contractor rules' and 'domestic worker rules'. It was asked, amongst other things, that "rules 7.1.2 and 7.3.2 [the road rules], which authorise or empower the [Association] to police the road network within the Mount Edgecombe Country Club Estate Two, including the issuing of speeding fines and/or fines for otherwise contravening any law governing the control of traffic on public roads" be declared unlawful. This was dismissed.

Mr Singh then successfully appealed, the Court holding that the road rules and domestic worker rules were invalid. Regarding the road rules, the invalidity was suspended for a period of twelve (12) months to afford the Association an opportunity to obtain the necessary authorisations and/or consents under the Traffic Act, 93 of 1996 (the NRTA).

The Association appealed against the order insofar as it related to the road rules, which provide that "7.1.2 The speed limit throughout [the Estate] is 40 km/h. Any person found driving in excess of 40 km/h, will be subject to a penalty. The presence of children and pedestrians as well as many undomesticated animals such as buck, monkeys, mongoose, leguans and wild birds means that drivers need to exercise additional caution when using the roads. 7.3.2 Operating any vehicle in contravention of the NRTA within [the Estate] is prohibited." In the appeal, the Association argued that its concession that the roads in the Estate were public roads was erroneous.

HELD:

- Section 1 of the NRTA defines a 'public road' as 'any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access' The test to be applied in terms of the definition 'is whether a section of the public at least commonly (i.e. generally or universally – cf. Shorter Oxford English Dictionary) uses the area or has a right of access (as opposed to access by invitation direct or implied) thereto'.
- Applying the definition of 'public road', thus interpreted, to the present case, it was apparent that the roads within the Estate are not public roads. The Estate is a private township. In terms of the township approval: '[t]he owner shall construct all the roads in the township to the satisfaction of the local authority'. The approval further provided:

'The owner of the erf, any further subdivision, or any unit thereon shall have a general right of access over Erven 2888-2891 subject to whatever rules, conditions and restrictions as are laid down from time to time by the "Home Owners' Association" for the purpose of ensuring proper control and administration of the use and enjoyment thereof.'

- At the inception of the Estate, the roads within the Estate were private roads. That never changed. The roads did not thereafter acquire the character of public roads. The Estate is enclosed by a two metre high palisade fence, which is topped with electrified security wiring. All ingress and egress to the Estate is strictly controlled. Gated access points are controlled by security guards. Visitors are required to provide the guards with an access code to gain entry to the Estate. In respect of owners, biometric scanning is employed. This de facto situation accords with clause 34.9 of the Mol, which provides that the Association is obliged to provide such security in the Estate as it deems appropriate, 'including such security as may be required to control egress and ingress to the Estate, so that only Members, Lessees of Units, guests or invitees, authorised representatives, employees of the [Association] and any other duly authorised persons may be admitted'.
- The general public does not have access to the roads within the Estate. In this context the word 'public' does not include persons who are there with the permission of the owners of property within the Estate. The public, so it has been held, must be the general public, not the special class of members of the public who have occasion for business or social purposes to go to the Estate and the use of the roads by the public must be more than mere casual or isolated use.
- Whilst it is correct that some members of the public (or persons other than those residing in the Estate) are permitted to enter the Estate, there is no right on the part of the general public or any section thereof to traverse the roads. This has been the historical position since the Estate was first established. The non-owners who are permitted to enter the Estate are persons who are there with the authority and permission of the owners, and are not to be regarded as forming part of the 'public' for the purposes of the definition of 'public road'.
- Even assuming that the roads within the Estate are public roads, the approach of the court *a quo* could not be supported where it reasoned that in agreeing, as between members, speed limits, the erection of traffic signs and installation of speed humps, the Association was purporting to usurp the functions reserved exclusively for the authorities under the NRTA, and that its conduct in so doing was unlawful. When Singh and Rampadh chose to purchase property within the Estate and become members of the Association, they agreed to be bound by its rules. The

relationship between the Association and the owners is thus contractual in nature. The conduct rules and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property within the Estate. By agreement, the owners of property within the Estate acknowledge that they and their invitees are only entitled to use the roads laid out within the Estate subject to the conduct rules. Any third party invitee only gains access to the Estate with the prior consent of the owner concerned. Upon gaining access to the Estate, responsibility for any breach of the conduct rules by the invitee is that of the owner. In that regard clause 21.2 of the MOI provides: 'In the event of any breach of the conduct rules for residents by any Lessees of Units, guests or invitees, authorised representatives or any other duly authorised person such breach shall be deemed to have been committed by the Member and the Directors shall be entitled to take such action as they may deem fit against the responsible Member.'

- Any breach of the conduct rules is therefore a matter strictly between the owner concerned and the Association. No sanction is imposed on the third party. The third party's adherence to the rules is thus a matter for the owner who invited him or her onto the Estate. It is the owner who has to ensure that the third-party complies with the conduct rules or bear the consequence of any sanction imposed in consequence of such non-compliance. There is nothing in the rules which provides for any consequence for a third party who fails to comply therewith. The control of the speed limit within the Estate therefore falls squarely within the provisions of the contract concluded between the Association and the owners of the properties within the Estate. The rules are obviously enforceable only as between the contracting parties, and not against the public at large.
- It follows that the Association is not endeavouring to impose the provisions of the NRTA upon third parties. Neither do the rules purport to exonerate the parties from, or exclude the operation of the NRTA. Once it is accepted that the rules are private ones, Singh's argument that the Association is usurping the functions of the recognised authorities or contravening the provisions of the NRTA cannot be sustained. The Association did not, in crafting and applying the rules, purport to carry out any functions under the NRTA. Rule 7.1.2 does no more than prescribe that 'the speed limit throughout [the Estate] is 40 km/h' and that 'any person found driving in excess of 40 km/h, will be subject to a penalty'. Regard being had to the MOI, the directors of the Association are entitled to make rules for the 'use and maintenance' of the roads (clause 20.2.3) and to 'impose a system of penalties' for a breach of such rules (clause 21.2).
- It cannot be said that ordaining a lower speed limit within the Estate than that prescribed by national legislation goes beyond promoting, advancing and protecting the interests of the Association's members or is unreasonable. This is especially so

given the presence of children, pedestrians and animals (both domesticated and undomesticated) upon or in the immediate vicinity of the roads themselves. Rule 7.3.2 goes no further than to record that the operating of any vehicles in contravention of the NRTA within the Estate is prohibited.

It followed that the appeal succeeded.

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