

FOREWARNED IS FOREARMED - ESTATE RULES SHOULD BE READ BEFORE BEING AGREED TO

Estate developments and estate living are on the increase in South Africa as a means of promoting security and peace of mind. As a natural consequence of living within a designated communal area residents agree to live within the framework of the rules of the estate which limits certain freedoms they would otherwise experience in exchange for enjoying the benefits of living within a secure estate.

As evidenced by recent case law, it is crucial that before purchasing a property within an estate that all interested purchasers should obtain a copy of the updated estate rules/rules of conduct and consider whether there is anything of concern in them, such as restrictions to keeping pets (the type, number etc.), approval for any alterations to the property, speed limits imposed within the estate, access and security requirements (or regiments in some estates), levy and penalty regimes in order to ensure that any possible deal breakers are considered by the purchaser and if necessary addressed with the management of the estate upfront.

In this article we seek to discuss certain key outcomes of the recent case of *Singh and another v Mount Edgecombe Country Club Estate Management Association 2 (RF) NPC and others [2016] JOL 35169 (KZD)*, which case is binding throughout South Africa until such time that another High Court (or superior court) overrules the same. In terms of the estate rules of conduct, incorporated and agreed to in the standard sale agreements utilised by the estate, all owners are required to become members of the non-profit company which administers the estate (the “respondent”) upon transfer of the property into their name and were also required to comply with the provisions of the memorandum of incorporation of the company. This is common in most estates, particularly in the larger estates. The issues in this case related to amongst others to disputes regarding:

- a. The relationship between the parties;
- b. Legality and Enforceability of certain rules, in particular as regards:
 - i. Rules which provide the estate management the right to suspend the access cards of a property owner if the member is in breach of the rules; and
 - ii. Rules regarding the establishment and enforce speed limits on the roads within the estate (the roads being public roads).

The relationship between the parties

The court held that the relationship between the parties is contractual in nature and is the framework governing the relationship between the parties and in terms of which the issues in dispute should be decided.

Legality and Enforceability of certain rules

As regards to whether the rules were unenforceable the court cited another judgment which held that the "*restrictions imposed by the rules are private ones, entered into voluntarily when electing to buy in the estate administered by the respondent, rather than elsewhere; presumably motivated inter alia by the particular attractions which the estate offers by reason of the controls imposed on it by contract*". The court whilst acknowledging that certain rules were restrictive, did not find any of the rules to be contrary to public policy and as such unenforceable.

Are rules which allow for access cards to be suspended lawful?

As regards to the rules which granted the respondent the right to suspend the access cards and biometric access to the estate in the event of a member failing to comply with the rules of the estate, the court held that the rules and remedy of suspension in itself was not unlawful. However if the respondent (or any other party in a similar situation) wishes to exercise its remedy of suspending the access cards, such right may only be enforced by approaching a Court, proving that the relevant person is in breach of the rules and proving that the estate management has valid grounds for such remedy in terms of the rules (which powers have been properly exercised). In the *Singh* case the respondent failed to prove that the daughter of the applicant had in fact been speeding and was therefore in contravention of the rules by refusing to pay the fine. The act of unilaterally suspending access to the cards without approaching a court amounts to self-help (spoliation) and the applicant was able to rely on a *mandament van spolie* and their access cards were reinstated (by means of an urgent interdict which was later confirmed) even though at the time of suspension the members could still sign in and access their properties, their rights of freely accessing the premises had been limited.

Can estates set and enforce their own speed limits?

The estate management company had set a lower speed limit (40km p/h as opposed to the statutorily imposed limit of 60km p/h) and had set traffic cameras within the estate. The applicant claimed this was in contravention of the Road Traffic Act and that the respondent had no right to enforce the speed limit against

it. The court held that "*it cannot be said that the prescribing of a lower speed limit within the estate than that prescribed by national legislation goes beyond promoting, advancing and protecting the interests of the respondent's members or is unreasonable*".

In conclusion purchasers should consider what they are signing up to before purchasing properties in an estate, the rules of conduct should not be assumed to be a standard document and vary greatly between estates. These rules will impact on the quality of life of the purchaser and may lead to disputes once the purchaser becomes a property owner if these rules are unacceptable to the purchaser. While we note that rules are capable of change and may be amended in the future, agreeing and being amenable to the rules is something to be considered before making an offer.

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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