



DYKES VAN HEERDEN GROUP OF COMPANIES
professionals striving for excellence

CERTAIN COMMON ESTATE RULES WHICH FALL WITHIN THE AMBIT OF PUBLIC LAW MAY BE UNENFORCEABLE

We previously published an article in respect of the case of Singh and another v Mount Edgecombe Country Club Estate Management Association 2 (RF) NPC and others [2016] JOL 35169 (KZD) (the “First Case”) discussing amongst others the legality and enforceability of certain estate rules.

While the general principle remains in respect of estate rules remains that “restrictions imposed by the rules are private ones, entered into voluntarily when electing to buy in the estate”, such rules are governed by the principles of contract and if contrary to public policy such rules will be unenforceable.

However, in terms of the High Court appeal case of Singh and another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and others [2017] JOL 39258 (KZP) as heard in August 2017 (the “Appeal Case”) the Court ruled certain rules of the estate as illegal and unenforceable. The appeal dealt in detail with two portions of the estate rules, one portion governing so called “road rules” and one portion governing “domestic rules”.

Can estates set and enforce their own speed limits?

The roads within the estate were public roads and as such are governed by the provisions of the National Road Traffic Act 93 of 1996 and the Regulations thereto (the “NRTA”) and the NRTA is a law of general application which governs all public roads within South Africa. While in the First Case the Court ruled that there was nothing prohibiting estates from imposing additional rules as regards to more restrictive speed limits and the imposition of penalties for contraventions thereof between members and the estate based on their agreed contractual relationship the Appeal Case disagreed with this principle. The Appeal Case noted that the NRTA governs road traffic matters including aspects relating to signs and speed limits and that in “terms of section 56(2) it is only the Minister who may, subject to such conditions as he or she may deem expedient, “authorise any person or body to display on a public road any sign, signal, marking or other device for the purposes of ascertaining the suitability of such sign, signal or device as a road traffic sign.” In the Appeal Case it is further noted that the enforcement of the NRTA vests in the Municipality (in whose area of jurisdiction public roads fall within) as the executive authority empowered to administer the matters set out in the relevant schedule to the Constitution, one of them being ‘road traffic’. In the Appeal Case it was noted that the arguments made and upheld in the First Case ignore the inherent dangers in such a dual system, one contractual and one according to public law. The result of which contractual arrangement is that it requires a court to recognise and promote a regime of rules which have not been sanctioned by the authorities concerned. In summary unless the relevant Homeowners Association and estate has obtained the necessary consents and approvals from the MEC or the relevant Municipality to impose reduced speed limits, or erect road traffic signs, or to impose speed traps or fines it may not do so as it has no authority to do so and furthermore they may not seek to circumvent such legislation through any conduct or estate rules based on principles of contract.

Please note that to the extent that roads within an estate do not constitute public roads the abovementioned applicable public law considerations will not apply.

Legality of certain “domestic rules”

The Mount Edgecombe Country Club had in place a number of extremely restrictive and oppressive rules governing domestic employees which read as follows:

“Domestic Employees

- 9.3.2 All domestic employees must comply with instructions from Security while boarding and travelling on official MECCEMA TWO busses. Domestic Employees must make use of designated bus stop points throughout the Estate. When the bus service is unavailable, domestic employees may walk on the estate between the residence where working that day and their gate of exit.
- 9.4.1 All domestic employees must be registered on an annual basis from the date of their first registration and are to obtain an access card for entry to Estate 2. Access cards will be validated only for recognized normal business hours unless authorise differently for MECCEMA TWO.
- 9.4.3 Domestic Employees may have access to Estate 2 from Monday’s to Sunday’s but only during the hours 06h00 and 18h00, they must personally swipe access cards/scan their finger on the biometric reader for ingress and egress. Any variation from this must be authorise by MECCEMA TWO in writing.”

In the Appeal Case the Judge stated that “the rules physically deny access to domestic employees working in the estate save in accordance with the first respondent’s system of ingress and egress and use of the public roads. Domestic employees are simply not free to traverse the public roads in the estate save in the limited manner provided by the Rules. From a constitutional point of view their rights in this regard are severely restricted... The restrictive nature of these rules also affect other basic rights of domestic employees such as their rights to human dignity, equality, freedom of association, freedom of movement, freedom of occupation and fair labour practices.”

The rules to the extent that they restricted the right of domestic employees from freely traversing public roads in the estate was held to be unreasonable and unlawful.

It should be noted that the estate rules did contain registration, card and finger print access and egress rules for domestic workers which rules the Court did not rule to be unreasonable or unlawful.

Conclusion

Estates should evaluate their rules in order to measure them in accordance with the rights afforded to all individuals in terms of our Constitution to ensure that they are not unreasonable, overly burdensome or oppressive. Furthermore, in matters governed by legislation and within the public law framework estates should be cautious not to attempt to circumvent or usurp such frameworks by means of imposing contractual arrangements, but should rather ensure compliance therewith in the first instance.

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.

COMPANIES WITHIN THE DYKES VAN HEERDEN GROUP

DYKES VAN HEERDEN INC

Tel : (011) 279-5000
Fax : (011) 955-4799
E-mail info@dvh.net.za
19 Ontdekkers Road
Roodepoort 1724, South Africa

Docex 24, Roodepoort
Web-site: <http://www.dvh.law.za>

DYKES VAN HEERDEN (CAPE) INC

Tel : 0861 110 210
Fax : (021) 910-4911
E-mail admin@dvh.law.za
Unit E4/2, Edward IV
120 – 122 Edward Street
Bellville 7530, South Africa
Docex 42, Tygerberg
Web-site: <http://www.dvh.law.za>

DYKES VAN HEERDEN (KZN) INC

Tel : (031) 903- 1851
Fax : (031) 903-1101
E-mail thomas@kzndvh.za.net
Nr. 18 Ridge Road
Amanzimtoti
Durban 4120, South Africa
Docex 7, Amanzimtoti
Web-site: <http://www.dvh.law.za>

DYKES VAN HEERDEN SLABBERT

HOPKINS INC
Tel : 0861 110 210
Fax : (021) 910-4911
E-mail admin@dvh.law.za
Unit E4/2, Edward IV
120 – 122 Edward Street
Bellville 7530, South Africa
Docex 42, Tygerberg
Web-site: <http://www.dvh.law.za>

DYKES VAN HEERDEN GROUP OF COMPANIES
professionals striving for excellence