IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

CASE NO. 7124/12

In the matter between:

PATHMASOLAHANI ABRAHAM First Applicant
EDWARD CHRISTOPHER ABRAHAM Second Applicant

And

THE MOUNT EDGECOMBE COUNTRY CLUB
ESTATE MANAGEMENT ASSOCIATION TWO
(RF) (NPC) Respondent

JUDGMENT

OLSEN J

[1] This case has gained a measure of local notoriety upon the basis that it concerns a rather striking Saint Bernard dog named Theodore. But it should be stated at the outset that the case is not about the dog. It is about human conduct, the consequences of voluntary submission to special rules and regulation, and the duties of those who are elected to be the arbiters when the enforcement of such rules is the issue. The major players are the applicants, a mother and son who are the owners of the dog; and the respondent which is a not for profit company which functions as the manager of the golf estate development known as Mount Edgecombe Country Club Estate Two (the "estate") on which the applicants

reside. In the background are the owners of in excess of 890 freehold residences and sectional title residential developments who enjoy and are burdened with the same rights and obligations as the applicants, arising from the same contractual relationships as those to which the applicants are party.

[2] The respondent is called an "association" presumably because all owners of property on the estate are members of it. Its members elect the directors and, subject to any directives of its members in general meeting, the board of directors of the respondent is in charge of directing the business of the respondent. The business of the respondent is the management and running of the estate.

[3] The estate is a residential golf club estate. The freehold residences and the sectional title residential developments are all situated around or in close proximity to the golf course. As Mr Schreiber, the respondent's estate manager (who deposed to the principal answering affidavit) says, the estate "is served by extensive common property, which consists of open areas, dams, ponds, rivulets, water features, community facilities, roads and infrastructural services." The estate is enclosed by a two metre high electrified palisade fence with controlled access points. It is also a "registered conservancy area", which means that loss of or damage to fauna and flora on the estate must be prevented. According to Mr Schreiber it is generally accepted that the estate is "one of the finest residential golf club estates in South Africa".

[4] The respondent is constituted and governed by a memorandum of incorporation introduced in May 2011, which apparently follows, in its material respects, the memorandum and articles of association which existed before. This document empowers the directors to make rules. It is not disputed that the "Conduct Rules for Residents" (the "rules") are such rules. Neither is it disputed

that rules for the purpose of controlling pets on the estate are within the mandate of the directors.

[5] The applicants have resided on the estate since 2002. Every prospective homeowner, upon purchasing property within the estate, enters into a contract whereby the owner (or prospective owner) agrees to become a member of the respondent, and to be bound by the rules made and decisions taken by the respondent. The applicants, like the other residents and the respondent itself, are bound by the rules which have contractual force.

[6] Rule 5 is headed "Pet Control". Rule 5.1 deals with dogs. The provisions of the rule which are material to the present dispute are as follows.

> "5.1.1 Written permission must first be obtained from [the respondent] before a dog may be brought onto Estate 2. This permission will not be unreasonably withheld provided compliance with the following rules is observed.
>
> 5.1.2 …
>
> 5.1.3 Dogs must be small and not be of a known aggressive breed. In regard to the size of dogs, they should be of a breed which will not exceed 20 kg when fully grown."

The applicants applied for permission to keep the dog Theodore on the estate. It was refused. They now ask this court to review and set aside the refusal.

[7] The first applicant (the second applicant's mother) says that when her family first moved onto the estate in 2002 they owned what she calls a "small" mixed breed dog which they kept with them on the estate until the dog died in 2007. It appears that in the language of the estate, when written permission is

given to bring a dog onto the estate, the dog is said to have been "registered". It is not disputed that the small dog which died in 2007 was not registered. Why that was so is not clear.

[8] During December 2011 the second applicant bought Theodore as a puppy. It appears that Theodore was only brought onto the estate on 28 January 2012. On 8 March 2012 the first applicant received a letter from Mr Charles Kingma who is employed as the respondent's rules warden. In that letter Mr Kingma advised the first applicant that it had come to the attention of his office that there was a dog on the first applicant's premises, and that on investigation it had been discovered that there was no record of any dog having been registered to the first applicant on the estate. He drew attention to rule 5.1.1 and enclosed the form used for applications for permission to keep a dog, and asked that it be returned "with supporting documentation" to his office by 23 March 2012. The first applicant filled in and submitted the form.

[9] After 8 March 2012 there was a discussion between Mr Kingma and the second applicant concerning the application for permission to keep the dog Theodore on the estate. There is a dispute on the papers as to whether this exchange preceded or followed the submission of the application form by the applicants. The applicants contend that the application form was filled in and delivered after the discussion with Mr Kingma. Mr Kingma, attesting to a supporting affidavit for the respondent, says that the discussion took place after the application for registration of the dog had been received. The respondent's version must be accepted following the rule in the *Plascon Evans*, and it seems to be supported by the fact that the first applicant dated the application form 8 March 2012, which would presumably be the day she received Mr Kingma's letter advising her that permission to keep the dog on the estate is required.

[10] The form in question makes provision for disclosing the breed of the dog, its weight when mature, its gender and its age. The form submitted by the applicants recorded the breed as a Saint Bernard, the weight when mature as approximately 70 kilograms, the gender as male, and the age of the animal as three months. The text of the form reminds an applicant for permission of the weight limit stipulated in the rules.

[11] By letter dated 22 March 2012 the respondent informed the first applicant that the application in respect of the dog Theodore had been refused. The letter gave the reason for the decision. It was due to the size of the dog which, according to the letter, when fully grown would weigh somewhere between 55 and 80 kilograms. The applicants were requested to remove the dog from the estate by 30 April 2012.

[12] The second applicant responded to the news with a letter of his own addressed to the respondent on 30 March 2012. In that letter the second applicant (who is a practising attorney) stated that he had not personally been aware of the rules relating to dogs on the estate, and that they were required to be registered. (The second applicant would presumably have been aware of the fact that any shortcoming in his knowledge of the rules was something for which he was responsible. There is no case made that the rules were not available to residents.) The letter raised a number of issues which feature in the founding papers as grounds upon which the applicants seek an order reviewing and setting aside the respondent's refusal to allow the applicants' dog to remain on the estate. I will deal with those matters when dealing with the grounds upon which such relief is sought. The second applicant attached to his letter a document said to be a report from a specialist dog behaviourist then assisting with the training of Theodore, recording that he is not of an aggressive breed, would not be a nuisance, and

would not pose a risk to wildlife on the estate. The second applicant requested the respondent to reconsider its decision.

[13] One of the matters mentioned in the letter written by the second applicant was the fact that the respondent's board of directors had sent out an email circular to all its members advising them that the board had received a "qualified representation" from the South African Animal Companion Council regarding the suitability of dogs larger than 20 kilograms in weight to reside on estates, and asking members to vote on a proposed amendment to the rule dealing with the keeping of dogs. The proposed amendment to rule 5.1.3 would render it as follows.

"Dogs should be small and not be of a known aggressive breed."

The amendment would therefore substitute the word "should" for "must" in the first sentence of the existing rule; and would delete the second sentence of the existing rule which deals with the weight threshold of 20 kilograms.

[14] On 19 April 2012 the respondent replied to the second applicant's letter. The letter conveyed that the proposed rule change had not enjoyed the required support from members as a result of which the existing rule remained in force. The respondent again rejected the application saying that it had "been rejected due to him being classed as a giant breed …". The author of the letter (one Dereyer, the respondent's Rules Administrator) went on to record that the respondent was aware that expenses had been incurred in relation to the purchase and training of Theodore, but that the dog nevertheless had to be removed from the estate. However recognising "the emotional aspect of the order", the author conveyed that it had been decided to allow a three month period within which to effect the removal of the dog.

THE RELIEF SOUGHT

[15] In their notice of motion the applicants sought an order reviewing and setting aside the decisions of the respondent to which I have referred above. They also sought an interdict preventing the respondent from taking any steps to remove the applicant's dog from the estate and from imposing a fine or any other penalty in respect of the dogs presence on the estate. Somewhat ambitiously the applicants also sought an order from this court authorising the keeping the dog on the estate.

[16] In argument counsel for the applicants confined the relief sought to an order setting aside the decisions and referring the matter back to the respondent.

A LEGITIMATE EXPECTATION

[17] Quite a lot is said in the applicants' papers about the discussion which took place between the second applicant and Mr Kingma. It was directed at supporting a submission that the so called "assurances" that Mr Kingma gave the second applicant generated a legitimate expectation that the application for registration of the applicants' dog would be granted despite the size of his breed; and that in the circumstances the contrary decision falls to be reviewed and set aside. (In the applicants heads of argument this proposition was elevated further, it being contended that Mr Kingma had authority to make the decision; and that if that was not so, the respondent was estopped from denying it. There was no evidence at all to support this proposition. Without intending any disrespect to Mr Kingma, he was merely an employee of the respondent with no power to make such a decision.)

[18] In my view there is no merit in the contention that the applicants may succeed in this matter upon the basis that a legitimate expectation of success was induced. There is no need to consider the question as to the viability of such a claim in law. There is no support for it on the facts.

[19] The applicants brought the dog onto the estate before anything was said by Mr Kingma to them concerning the keeping of dogs on the estate. According to the applicants Mr Kingma informed the second applicant that the respondent was not concerned about the weight of the dog, and that it had passed an "internal rule" to the effect that weight was not an issue for so long as the dog was not of an aggressive breed. It is said that Mr Kingma gave an assurance that the application would be approved and that registration was a "mere act of administration". In answer to this the respondent first states the obvious, namely that Mr Kingma had no authority to bind the respondent and especially no authority to relax any of its rules; and that this had to be known to the applicants. It is denied that Mr Kingma told the applicants that their application would be successful. But it is admitted that Mr Kingma told them that as far as he was concerned it was likely that the registration would be approved. This was because, at the time of the discussion, Mr Kingma knew that a proposal had been made to amend the rules (as described earlier), and was under the impression that the rule may already have been changed. The respondent's version must prevail. But in my view, on either version of these exchanges, they would legitimately have done no more than generate optimism, and perhaps even a high degree of optimism, on the part of the applicants as to the outcome of their application for permission to keep the dog on the estate.

A DISCRETION TO GRANT THE APPLICATION

[20] The principal argument advanced on behalf of the applicants is that upon a proper construction of the rule the directors of the respondent had a discretion to grant the application; that they were under the mistaken impression that they had no discretion, and acted on that basis; that they thereby misdirected themselves by not applying their minds to the question as to whether, notwithstanding the size of the dog, the application for registration might be granted; and that on that account their decision should be set aside with a direction that they reconsider it upon the basis that they have a discretion which would enable them to grant the application if they thought that would be the right thing to do.

[21] The respondent's case is that a decision of the kind in question here is not susceptible to judicial review; but that if it is, then there are no grounds upon which to review the decisions made on this occasion. (I find it unnecessary to make any finding as to whether decisions made under the rules are susceptible to judicial review. I make an assumption on this score in favour of the applicants.)

[22] In their heads of argument the applicants made some submissions in support of the proposition that the decisions in question are reviewable under the Promotion of Administrative Justice Act, 2000 ("PAJA"). In argument counsel for the applicants declined to add anything in support of that proposition. Counsel stated that the applicants' case is founded in contract, in the manner exemplified in such cases as *Marlin v Durban Turf Club 1942 AD 112; Jockey Club of South Africa and others v Feldman 1942 AD 340;* and *Turner v Jockey Club of South Africa 1974 (3) SA 633(A).*

[23] In my view the location of this case within the field of contract is correct. By contract concluded between all the residents and the respondent, no dogs are

allowed on the estate unless permission is granted by the respondent. The power of the directors to grant permission is located in the contractual scheme; it has no other origin or foundation. Whilst rule 5.1.9 reiterates that local authority laws relating to the keeping of dogs must be obeyed, the special rules (for example with regard to the breeds and sizes of dogs), which the parties to the contract have agreed to superimpose on municipal law, have no public law content and do not involve the exercise of public power or the performance of a public function. 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. In my view PAJA finds no application in this case.

[24] Some of the arguments advanced on behalf of the applicants could be construed as being to the effect that the rule relating to the sizes and breeds of dogs is unreasonable, and therefore unenforceable. That generated an answer in argument from the respondent's counsel to the effect that no case has been made out in the founding papers that the rule is invalid and no relief in that regard has been sought. That is clearly correct, and I need say no more on the subject of the enforceability of the rule.

[25] The explanation for why the "reasonableness" of the rule arises in the course of the applicants' argument lies in the fact that is central to their contention that, properly construed, the rule furnishes the respondent with a discretion to grant an application for permission to keep a dog on the estate despite the fact that the animal may not comply with the requirements laid down in the rule. In essence the argument proceeds as follows.

a) The introduction to the rules records that the respondent's board is given

the authority to make "reasonable rules" for the management, control, administration, use and enjoyment of the estate.

b) Reading rule 5.1.3 literally, to convey that the directors would have no power to permit the keeping of a dog on the estate unless it is of a breed not known as aggressive, and which would not exceed 20 kilograms when fully grown, would render that element of the rules relating to dogs unreasonable.

c) In the circumstances (and within the context of this case, where there is no suggestion that Saint Bernard dogs are aggressive), the rule should be read or interpreted to convey that the respondent has a discretion to grant permission for the keeping of a dog of a breed which, when fully grown, would be expected to exceed the limit of 20 kilograms stated in the rule.

d) Not to so read the rule would brand it unreasonable, and unenforceable because the respondent has no power to make unreasonable rules. No tenet of interpretation supports that outcome where the rule is capable of an alternative construction which saves its validity.

[26] A qualification to the powers of the directors with respect the making of rules, that they should be reasonable, is not stated in the text of the provision in the respondent's memorandum of incorporation (which is quoted in the papers). The text of the provisions of the contract whereby incoming owners bind themselves to the rules and the jurisdiction of the respondent does not appear on the papers. However, as pointed out by counsel for the applicants, the introduction to the rules does indeed state that they are intended to be reasonable rules and I did not understand counsel for the respondent to dispute that they should be construed accordingly.

[27] Some theoretical support for the applicants' contention that the rule should be interpreted to convey that the respondent exercises a discretion when

considering an application for the registration of a dog can be found in the observations of O'Regan J in *Dawood, Shalabi and Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC)* at para [53] and note 73. The learned judge points out that in past times it was thought that discretion was inappropriate in a legal system based on the rule of law, but that is no longer the case. The learned judge points out that it is now recognised that discretion cannot be separated from rules and has an important role to play, but acknowledges the challenge of ensuring that discretion be properly regulated. The following appears in paragraph [53] of the judgment.

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionally powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and so varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionally powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear."

[28] Another statement which appears in the introduction to the rules was stressed in the founding affidavit, and in the second applicant's letter of 30 March 2012 (asking the respondent to reconsider its refusal to register the dog). It was highlighted in argument as well. It reads as follows.

> "The rules should not however be seen as either unduly restrictive or punitive, but rather as a framework to safeguard and promote appropriate, sensible and fair interaction amongst residents and [the respondent]."

The applicants argue that this statement contained in the introduction indicates that the directors have a discretion (and in the case of the proposed registration of the dog Theodore, presumably a substantially broad discretionary power) to make decisions which in effect generate or grant exceptions to the rules. As I understand the argument, it is to the effect that if in a particular case the respondent should conclude that the oversized dog would threaten neither conditions on the estate nor "appropriate, sensible and fair interaction amongst residents", the respondent has a discretion to disregard the express provisions of the rule and register the dog. But it does not seem to me that the construction the applicants put on the introductory statement is perfectly accurate.

[29] In my view it is necessary to consider the nature and extent of the controls imposed upon the estate by the rules, both in order to understand the statement relied upon by the applicants, and to avoid the mistake of interpreting the particular rule relating to dogs out of context. Some examples will do in order to illustrate the extent to which the estate is a controlled environment in which the conduct of residents is subject to regulation, and the extent of the powers and responsibilities of the respondent as the enforcement authority. In doing so it should not be overlooked that these are matters to which the parties have bound themselves contractually.

[30] Rule 2 deals with planning and aesthetic design. The central feature of the rule is that nothing can be built without the prior approval of plans by the respondent. No unit may be occupied in the absence of a completion certificate issued by the respondent. Nothing like an awning or a satellite dish can be attached to a unit without the permission of the respondent. There are specifications for types and colours of permitted awnings and blinds. A resident wanting to use a free standing tool shed or dolls house may only do so with the respondents written permission, and then only upon the basis that the structures

are entirely hidden from view from the roads and the golf course. Even veranda or garden furniture must be in compliance with the respondents view of what is aesthetically acceptable, and when the directors are of the opinion that such furniture does not meet the required standard it "may not be displayed to view in any part of " the estate.

[31] Rule 3 deals with the occupancy of residential units. The maximum number of persons allowed to reside in a unit shall not exceed the number of "legitimate bedrooms" multiplied by two. Only anthracite may be burnt in fireplaces. Washing, when hung up to dry, must not be visible from any roads or from the golf course; indeed it must be 'screened from the direct view of neighbours".

[32] Rule 4 deals with garden and garden landscaping. An accredited landscaper must submit garden design layouts at the same time as plans are submitted for a new unit, and there is a time limit placed upon the commencement and completion of gardens once the building is complete. A landscaper's plan must be approved by the respondent. Plant material must consist of indigenous and exotic plants in a ratio of 70/30. Maintenance of gardens is the responsibility of the owner; and when the owners work is not up to scratch the respondent may carry out the necessary work and recover the reasonable cost of it from the owner. If a garden is to be substantially re-vamped, an accredited landscaper must again be employed; and if work starts before the landscaper's plans are approved, it will be stopped immediately.

[33] There are further rules dealing with subjects such as security, the use of roads (the estate has its own speed limit of forty kilometres per hour), sporting facilities and so on, which reflect much the same levels of control as will be

apparent from the few rules selected as examples above. Rule 13.1.14 provides that a breach of the rules will attract fines of between R500 and R10,000.

[34] Against that background it does not seem to me that the applicants' interpretation of the introductory statement they rely on is correct. Where it is said that the rules should not be "seen as either unduly restrictive or punitive", that means that the reader of what follows is being asked to overlook the fact that the rules are in fact restrictive and punitive. They should be regarded as not "unduly" so because they stand as a framework to "safeguard" and promote appropriate, sensible and fair interaction amongst residents and the respondent. Generally speaking tampering with a framework tends to bring the edifice down. In my view what is conveyed in the introduction to the rules is that, whatever opinions one might have as to whether any rules are too invasive, it should be recognised that they have been agreed upon by the contracting parties to maintain a structure within which residents can feel secure as regards the environment into which they have bought, and as regards the conduct reasonably to be expected of their neighbours, and of the respondent in its capacity as the enforcement authority with respect to the rules.

[35] The language of each rule must be considered in context, having regard to its purpose, in order to determine, for instance, the extent to which it may be flexible. (See *Bothma-Batho Transport v S Bothma & Seun Transport 2014 (2) SA 494 (SCA)* at paras [10] to [12]). As to the applicants' efforts to establish just how innocuous a presence their particular dog would be on the estate, the respondent's answer highlights the difficulties which would be experienced in administering the rule relating to the permitted size of dogs if the discretion the applicants contend for existed, and stresses the purpose and advantages of a fixed weight to set the boundary of what may be judged "small".

[36] Turning to the rule which deals with pet control, part of the context is reflected in rule 5.2.2 which explains the decision to ban cats all together. It is explained that it arises from the fact that the estate is a registered conservancy area, and based upon the inevitability of interference with natural bird life if cats are present on the estate. (Rule 12 which deals with general matters records the presence of wild animals on the estate and prohibits interference with them in any way.) These matters presumably also provide some context for the rules relating to dogs.

[37] The applicants point out that as matter of fact there are other large dogs openly kept on the estate, and that this fact also forms part of the context within which especially the rule relating to the size of dogs should be interpreted. However this argument has been pressed without regard to the respondent's evidence on the subject. The respondent points out that at a very much earlier stage, when none of the present directors were involved in the administration of the estate, there appears to have been some laxity in the enforcement of the rule relating to the size of dogs, as a result of which a number of large dogs came to be kept by certain residents. The respondent has taken advice on the question as to whether a court would grant orders for the removal of those dogs and the answer is in the negative. The stance the respondent takes with respect to those dogs is that their presence is not sanctioned by the respondent, but that there is nothing it can do about it. As to dogs thereafter brought onto the estate the respondent states that the rule is being enforced. Court orders have already been obtained for the removal of some such animals. The respondent has named four residents against whom the respondent is presently taking action, or has just taken action. In my view the fact that there are some larger dogs on the estate does not make the size requirement discretionary, in the sense that the respondent is given a discretion to register a dog despite the fact that its directors determine that it will exceed the weight limit.

[38] The first sentence of Rule 5.1.3 states two requirements.

a.) The dog “must” be small.

b.) The dog “must” not be of a known aggressive breed.

It is clear that both of these requirements must be met. If the rule stopped there, then when dealing with an application for registration of a dog, the respondent would have to exercise its own judgment on the available evidence concerning both questions. One supposes that a decision as to the size (and perhaps to lesser extent as to the aggressiveness) of breeds would be difficult to make. How small is a small dog; put otherwise, how large must a dog be before it cannot be called small? What makes a dog small : its weight or its height, or a combination of both? Outcomes would inevitably be matters upon which reasonable people could disagree. A discretion, in the sense of making a decision by the exercise of judgment as to whether the two criteria are met, would exist.

[39] However as to the first requirement, that the dogs must be small, the second sentence of clause 5.1.3 confines the discretion of the respondent by stipulating that the requirement as to size should be governed by the rule that the dog should be of a breed which will not exceed twenty kilograms when fully grown. An exercise of judgment is necessary in marginal cases, but otherwise the rule as to size is clarified to a significant extent, thereby limiting debate, argument and in particular discord, to the advantage of all concerned.

[40] On the assumption that I am correct in classifying the decisions discussed immediately above discretionary, it must be observed immediately that the choices to be made are as to whether each criterion has been met. These decisions may determine whether registration will be granted, but have nothing to

do with whether a dog may be registered despite the fact that both criteria are not judged satisfied.

[41] Some of the arguments advanced by the applicants to support the proposition that there is a discretion to register notwithstanding the weight limit are based upon the proposition that keeping a dog in excess of the weight limit would breach the rule. What happens if a pet becomes overweight? Which gender of the breed determines the weight of the breed? It is suggested that questions like these illustrate that the weight limitation cannot be cast in stone. But the rule is not framed on the basis that an owner must put the dog on a scale from time to time to see that its weight remains below twenty kilograms. The duty of the directors is to determine whether a dog of the particular breed will exceed twenty kilograms when fully grown. If permission is granted upon the basis that the expectation of the breed is that the fully grown specimen will weigh 19 kilograms, the rules do not make provision for the removal of the dog because it turns out not to meet the expectation. That cannot in my view mean that there is a discretion to admit breeds which are expected ultimately to exceed the limit.

[42] Counsel for the applicants develop the argument for discretion further by pointing to the example of guide dogs for blind persons. Apparently Labradors are the standard guide dogs and they obviously weigh in excess of twenty kilograms. Blind people require a relatively tall dog for obvious reasons. Surely, counsel argues, there is a discretion given to the directors to admit such a dog to the estate for the benefit of a blind person. Counsel for the respondent did not dispute the proposition that in an exceptional case of that kind a discretion to grant permission for the keeping of an animal clearly in breach of the size requirement would exist. I agree with that proposition, not only because contracts are not easily interpreted to operate in conflict with what is sensible, but also because interpreting the rule to convey that no such discretion would exist is to

regard the contract as one which discriminates at least indirectly, and probably directly, against blind people in breach of s 9(4) of the Constitution; and it is difficult to see how such discrimination in the context of the affairs of the estate could be shown to be fair, and therefore not in breach of s 9 of the Constitution. I see no difficulty in construing the rule as permitting an exception to be made in such an exceptional case. But that does not mean that a discretion must exist in every case.

[43] Counsel for the applicants however referred me to two cases in this Division, contending that they support the analysis advanced on behalf of the applicants. The one is an unreported judgment, *The Body Corporate of Sandown Village Scheme v A Magnus N.O. and others* (D&CLD; Case No. 8556/2000; 16 August 2001). In this case the body corporate of a sectional title scheme sought an order that two cats should be removed from a unit because keeping them there was in breach of a rule which provided that no animals or reptiles "other than a dog of small house breed and not more than thirty centimetres high" may be kept. Resisting the application, the respondent argued that the rule allowed the trustees no discretion, and that this rendered the rule unreasonable and in breach of the provisions of s 35(3) of the Sectional Titles Act 1986 which required such rules to be reasonable; with the result that the rule was invalid. Strangely enough in the light of the fact that the case concerned cats, it appears from the judgment that the attack on the rule was based principally on arguments about the way the rule provided for dogs, with specific reference to blind persons and the potentially unhappy circumstance that a dog anticipated to grow no taller than thirty centimetres might grow to thirty- two centimetres, putting it at that time out of the permitted class. The learned judge referred to the case of *Dawood* (supra) and held that the rule was *ultra vires* the Sectional Titles Act because it did not "allow for some form of discretion however narrowly described, vesting in the board of trustees to allow for a deviation from the rules." Having made that

finding the learned judge cautioned that he should not be understood to be saying that even if the discretion had been available it would have been wrong to refuse to exercise it in favour of the resident concerned. In my view the *Sandown Village* case is distinguishable from the present one. It appears to have been accepted in that case that the rule allowed the trustees no discretion in a case such as would have been presented by a blind resident. In this case the rule is not susceptible to attack upon the basis that a dog may grow unexpectedly beyond the sanctioned limit. And to the extent that a total ban on cats may have played a part in the reasoning in the *Sandown Village* case, it has not been suggested in this case that the ban on cats is susceptible to challenge. In this case the arguments of both the applicants and the respondent support the proposition that the rule must be read to allow for a discretion in the exceptional case presented by the example of a blind person. The dispute here is over whether there is a more general discretion not to enforce the rule despite the absence of the extraordinary circumstances exemplified by the needs of a blind person. The one thing *Sandown Village* did not decide is that the rule being considered there was unreasonable and invalid for want of a discretion as broad as that contended for by the applicants in this case.

[44] The second case relied upon by the applicants is *Body Corporate of the Laguna Ridge Scheme N.O. 152/1987 v Dorse* 1999 (2) SA 512 (D). The facts in *Laguna Ridge* could not be more different to those that arise here: the case concerned keeping a miniature Yorkshire Terrier dog in a sectional title unit when permission had been refused. In that case the rules provided simply that no animals or pets could be kept in the building without the express written permission of the trustees. No criteria were laid down. The respondent defended her position by making a counter-application for an order reviewing and setting aside the refusal of the trustees to permit her to keep the dog. The counter-application was successful. The court held that the trustees had been vested with

a discretion to grant or refuse permission, but that they had wrongly adopted a policy that permission should be refused unless special circumstances warranted a departure from that policy. The court held that even accepting the legitimacy of adopting a general policy of refusal, the refusal in the particular case was actually based on the proposition that a precedent should not be set, despite the fact that the little dog (eleven years of age at the time) would not be a nuisance. Relevant considerations were ignored and irrelevant ones motivated the decision. The facts and the enquiry in *Laguna Ridge* were quite different to those which arise in this case. Here there was no policy which motivated the outcome; the rule itself generated the decision. It is worth observing that in the course of a discussion of the rules the learned judge in *Laguna Ridge* made the observation that the rule on animals could have provided that no animals or pets could be kept in the building at all, and reasoned that "in that event the respondent would have had no case". The judgment in *Laguna Ridge* was not considered in *Sandown Village*.

[45] The applicants argue further that a body such as the respondents board of directors either has a discretion or does not; and if it has one it is in effect empowered to grant any application for permission to keep a dog on the estate in the exercise of that discretion. The application of the stated criteria would on that argument be discretionary in all cases.

[46] In my opinion that argument is not correct. The rule not only empowers the directors of the respondent to make decisions as to whether dogs may be registered; it imposes a duty on the directors to do so. The rule stipulates the conditions necessary for the grant of permission. The duty is constrained by the same limitations as govern the power. There is no room, save in the extraordinary case, for a residual discretion to ignore the agreed criteria and grant permission. To claim and exercise such a discretion would breach the duty and exceed the power. In my view the rule in question here is similar to the building

design code which was in issue in the unreported case of *Riverland Resort Shareblock (Pty)Ltd v L J Letschert* (D&CLD; Case No. 3794/2010; 25 April 2012) in which Swain J made the following observation in paragraph 16 of his judgment.

> "On the evidence the building design code was published to give owners and prospective owners, notice of what would be approved. The object was no doubt to ensure consistent and predictable decisions by the building committee, albeit at the expense of individualised discretion in considering the approval of plans placed before it."

[47] Assuming in favour of the applicants (for the reasons stated earlier) that all the rules must be interpreted upon the basis that they are intended to be reasonable, I have difficulty in seeing why a rule which does not allow the directors such a residual discretion would be branded unreasonable. Reverting to the introduction to the rules, one sees that they are designed to safeguard and promote appropriate, sensible and fair interaction amongst the residents and the respondent. If the parties contract upon the basis that these relationships will be best served if the keeping of dogs on the estate is controlled, and that the size restriction imposed by the rules should exist, then it is fair to assume that the contractual provision has been agreed upon for the purpose of maintaining such proper relationships. That is reasonable. In my opinion this conclusion is unaffected by the proposition that one must recognise an implied term that an exception may be allowed to meet the case of blind people, and perhaps also of others in equally exceptional circumstances.

[48] I conclude that the respondent has no discretion to register a dog of a non-aggressive breed which is found to be one which will exceed the twenty kilogram limit when fully grown, save for the truly exceptional case presented by guide

dogs for the blind. (I should mention that no example was furnished in argument of a potential instance which may be regarded as exceptional on a basis comparable to the case of such a guide dog.) On that basis I conclude that there was no misdirection on the part of the respondent in approaching the application for permission to bring the dog Theodore onto the estate upon the basis that, given Theodore's status as a "giant breed", respondent was not empowered by the rules to grant the application. The applicants have not shown that there is anything extraordinary about their case and circumstances which would engage the narrow discretion which would be employed in the case of a guide dog for a blind resident; neither in the letter of 8 March 2012 (making their submissions to the respondent in support of the request for reconsideration of the decision) nor in the papers filed in this application.

OTHER GROUNDS FOR RELIEF

[49] There are alternative grounds for relief advanced by the applicants in their papers and heads of argument which, save for one, were not addressed in argument before me. My impression is that these matters were pleaded in each case simply to raise the issue. That is of course unhelpful. I will deal with these briefly.

[50] The applicants claim that there was procedural unfairness, because when the respondent first formed its intention to refuse permission the applicants should have been offered an opportunity to make representations. This issue was touched upon briefly in argument, as something of an afterthought. The complaint was not supported by any argument to the effect that a proper construction of the rules would reveal an obligation on the part of the directors of the respondent to conduct hearings in connection with applications for permission to bring a dog onto the estate. Be that as it may, on the applicants formulation of

the complaint the only shortcoming in the conduct of the respondent lay in the fact that it first communicated a refusal, rather than an intention to refuse permission for the dog to be brought onto the estate. The letter of 8 March 2012 constituted submissions in support of a reconsideration of that decision. The respondent, thus apprised of the applicants submissions, declined to reconsider its decision to refuse permission, but did reconsider the terms of its refusal, granting more time to make arrangements for the dog to be removed. In my view this complaint made by the applicants would not sustain an order setting aside the decision.

[51] The applicants complained that the presence of other large dogs on the estate means that refusing them permission to keep a large dog on the estate breaches their rights to equality. I have already dealt with the respondent's explanation for the presence of other large dogs on the estate. On the papers before me the applicants' position is equivalent only to that occupied by the residents against whom the rules prohibiting the keeping of large dogs are currently enforced. There is no inequality. Furthermore, I respectfully endorse what was said by the learned judge in the case of *Riverland Resort Shareblock* (*supra*) in dealing with a similar argument raised in that case.

> "In any event, if due regard is had to the fact that the relationship arising out of the agreement between the applicant and the individual shareblock owners is contractual, a failure to enforce a breach by the applicant, against another shareblock owner, can have no bearing upon its election to enforce such a breach against the respondent."

[52] The applicants (who say they are of Indian origin) contend that those who have larger dogs on the estate are white, and that the decision not to afford the applicants permission is the product of racial discrimination. The allegation is

denied by the respondent which points out that each of the persons against whom steps have been taken or are in the process of being taken happens to be white.

[53] I conclude that there is therefore no other basis upon which the applicants may have the relief they seek.

COUNTER APPLICATION

[54] The respondents answering affidavit was also delivered in support of a notice of counter-application in which the respondent sought an order for the removal of the dog Theodore from the estate within fourteen days. Dealing with this in argument counsel for the applicant suggested that as the rule in *Plascon Evans* works in reverse for the purposes of the counter-application, the relief sought by the respondent should be refused.

[55] In my view that is not the correct approach. The respondent is the enforcement authority. If its decision to refuse permission for the keeping of the dog Theodore on the estate stands because the application is dismissed, then I see no reason why, given that the applicants have not yet acted in accordance with the decision, the respondent should be denied an order enforcing the decision.

[56] However I believe it to be just in all the circumstances now to allow the applicants the same time to make arrangements for the removal of their dog from the estate as was allowed to them by the respondent after it had considered the representations made in the letter of 8 March 2012.

I accordingly make the following orders.

1. **The application is dismissed.**
2. **The applicants are directed to remove the dog known as Theodore, a Saint Bernard, from the Mount Edgecome Country Club Estate Two within three months of the date of this order.**
3. **The costs of the application and the counter application shall be paid by the applicants, their liability being joint and several, the one paying the other to be absolved.**

DATE OF HEARING:	1 August 2014
DATE OF JUDGMENT:	17 September 2014
FOR THE APPLICANTS:	K J Kemp SC and HS Gani, instructed by Pather & Pather Attorneys
FOR THE RESPONDENT:	A Stokes SC, instructed by Strauss Daly Inc.