IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

REPORTABLE
CASE NO: AR575/2016

In the matter between:

NIEMESH SINGH	First Appellant
MUNSHURAI MADHANLAL RAMANDH	Second Appellant

and

MOUNT EDGECOMBE COUNTRY CLUB ESTATE MANAGEMENT ASSOCIATION TWO (RF) (NPC)	First Respondent
MINISTER OF TRANSPORT	Second Respondent
MEC FOR THE DEPARTMENT OF TRANSPORT: KWAZULU NATAL	Third Respondent
ETHEKWINI MUNICIPALITY	Fourth Respondent

Coram : Seegobin J, Chetty J et Bezuidenhout J
Heard : 07 August 2017
Delivered : 17 November 2017

ORDER

On appeal from the High Court, KwaZulu-Natal Division, Durban (Topping AJ sitting as a court of first instance):

(a) The appeal is upheld to the extent set out herebelow.

(b) The order of the court *a quo* dismissing the appellants' application is set aside and replaced with the following:

1. It is declared that the first respondent's Conduct Rules 7.1.2, 7.1.3, 9.3.2, 9.4.1 and 9.4.3 are invalid but that such invalidity is suspended for a period of twelve (12) months to afford the first respondent an opportunity to obtain the necessary authorisations and/or consents under the National Road Traffic Act, 93 of 1996.

2. The first respondent is directed to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel.

(c) The first respondent is directed to pay the costs of the appeal including the costs of the application for leave to appeal, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

SEEGOBIN J (Chetty J and Bezuidenhout J concurring)

INTRODUCTION

[1] The issues that arise in this appeal, although having their origins in rather mundane events which took place in a gated estate, have somewhat evolved into a battle of principle between the appellants on the one hand and the first respondent on the other. The issues also bring into play the demarcation of public and private law and their impact, if any, on the regime of certain conduct rules that exist in the estate in question.

[2] The first appellant, *Mr Niemesh Singh* and the second appellant, *Mr Munshurai Madhanlal Ramnandh*, live together with their families on Mount Edgecombe Estate Two ('the estate'). The first respondent is the Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) ('the association') which is one of two management associations established for

the purpose of governing, managing and regulating the affairs of distinct portions of the Mount Edgecombe Country Club Estate which includes the estate on which the appellants and their families reside. By virtue of the appellants' ownership of properties on the estate, they are obliged to be members of the first respondent. Apart from being joined as interested parties in this matter, the second, third and fourth respondents played no role in these proceedings.

[3] During or about October 2013 the first appellant's daughter was issued with three speeding fines by officials of the association for speeding on the roads in the estate. These fines were levied against the first appellant's account as a representative member of the family home. Despite representations by the first appellant to the association regarding the fines, the association simply dismissed such representations and insisted that the fines be paid in terms of its 'pay first, argue later' rules. When the first appellant failed to pay the fines, the family's access along the roads to their home was suspended. The effect of this was that the first appellant's family was barred from passing through the association's boom control which was located on the entry road to the estate.

[4] This denial of access by the association and the simmering resentment on the part of both appellants regarding the manner in which the association was implementing and applying certain aspects of its conduct rules, resulted *firstly*,

in the first appellant instituting an urgent application for spoliatory relief and *secondly*, in the first and second appellants instituting a separate application in which they challenged certain aspects of some of the association's rules ('the rules application'). To this application the association filed a counter-application in which it sought an order entitling it to suspend the use of access cards to the first appellant, his invitees and members of his family, together with the biometric access for such persons, for as long as certain fines issued in terms of it's conduct rules were not paid. In the third application ('the trespass application') the first appellant sought an order directing the association to allow certain contractors engaged by him access to the estate and for a further order restraining the association or any person acting through or on it's instructions, from entering upon various specified immovable properties within the estate.

[5] All three applications were argued simultaneously before Topping AJ in the High Court, Durban. The rules application by the appellants and the counter-application by the association was dismissed. While the spoliation application by the first appellant succeeded, his trespass application failed. The present appeal, with leave of Topping AJ, is only against his judgment and orders in the rules application. At the appeal hearing on 7 August 2017, the appellants were represented by *Mr Kemp SC* assisted by *Mr Ganie* while the association was represented by *Mr Du Plessis* assisted by *Ms*

Pudifin-Jones. The court is indebted to counsel on both sides for their helpful heads of argument and oral submissions herein.

THE MOUNT EDGECOMBE ESTATES

[6] The two Mount Edgecombe Country Club Estates which are made up of Mount Edgecombe Country Club Estate 1 and Estate 2 are situate within the Mount Edgecombe area which falls within the geographical area covered by the Ethekwini Municipality. The Mount Edgecombe Country Club Estates are very similar to those found elsewhere in the Republic and other countries around the world. These estates appear to fall within a category of township developments commonly referred to as gated estates. This country has seen a proliferation of such estates in the last 15 to 20 years.

MOUNT EDGECOMBE ESTATE 2

[7] The estate consists of in excess of 890 freehold and sectional title residential developments. The estate is situated in and around a golf course and is traversed by not only roads but also by golf cart paths. These golf cart paths cross the various internal roads at dozens of points. Besides the freehold and sectional title properties, the estate also comprises of extensive common property consisting of open areas, dams, ponds, rivulets, water features, community facilities, roads and other infrastructure. The common facilities on the estate include the Mount Edgecombe Country Club Golf Course 2, the

clubhouse and a function venue which is utilized for conferences, corporate events, board meetings and weddings.

[8] Apart from golf the estate also provides facilities for various other sporting activities such as squash, tennis, fishing and bowling. The entire estate is enclosed by a two metre high palisade fence topped with electrified security wiring. The estate has gated access points which are controlled by guards. Some access points are manned on a 24 hour basis, 365 days of the year. The estate is serviced by a network of roads which are split amongst various erven registered in the name of the association.

[9] The association in question is a non-profit company which as I indicated already manages the Mount Edgecombe Country Club Estate. Clause 3 of its Memorandum of Incorporation (MOI) defines the first respondent's objects which are, *inter alia*, to protect, advance and promote the interests of its members and to co-operate with the local authority, Provincial Government and all other appropriate authorities for the benefit of it's members and the association itself.

[10] The MOI (clauses 20 and 21) empowers the directors of the association to make reasonable rules for certain specified purposes. It expressly empowers the making of rules which include the right to impose 'reasonable financial

penalties' on members who fail to comply with the provisions of the MOI or the rules. The MOI goes further to empower the directors to enforce the rules and, *inter alia*, to "take or cause to be taken such steps as they may consider necessary to remedy the breach of any rules of which a member may be guilty and debit the costs of doing so to the member concerned". The rules are expressly stated in the MOI (clause 21.5) to be binding on all members. Clause 21.4 of the MOI prescribes that any rules made by the board shall be 'reasonable' and shall be in the interests of the association and shall apply 'equally' to all members.

PROCEEDINGS BEFORE THE COURT *A QUO*

[11] Three categories of the conduct rules [1] were challenged by the appellants before Topping AJ. In summary these rules can conveniently be categorised as:

> 11.1 'the road rules' which permit the first respondent to control ('police') the roads within the estate and to impose 'speeding fines'. The essence of the challenge was that the first respondent was purporting to carry out the functions of traffic officers as defined in the National Road Traffic Act, 93 of 1996 (NRTA)) on the roads, which are public roads in

[1] The Conduct rules are contained in a separate document which bears the heading "MECCEMA TWO – CONDUCT RULES FOR RESIDENTS" and which served s Annexure 'TK7 to the first respondent's answering affidavit. While there was initial doubt on the papers whether the 2013 version of the rules were adopted, for present purposes the parties are agreed that that may be accepted.

terms of the NRTA and that the first respondent was purporting to enforce the provisions of the NRTA within the estate.

11.2 'the contract rules' which restrict the right of an owner (such as the first or second appellants) to choose a contractor or service provider of his or her choice to perform work on the owner's property within the estate.

11.3 'the domestic rules' which impose restrictions on the domestic workers employed by owners and residents on the estate relating to their hours of work and their movements into and out of the estate and that they may not walk on or over the public roads within the estate during work hours.

[12] Placing heavy reliance on the recent judgment of Olsen J in the matter of *Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC* [2], Topping AJ concluded that since the relationship between the first respondent and the appellants was located firmly in contract, the conduct rules and the restrictions imposed by them were of a private nature arising out of the appellants' voluntary choice of purchasing property on the

[2] [2014] ZAKZDHC 36 (17 September 2004)

estate. In paragraph [11] of his judgment Topping AJ summarized this finding in *Abraham* as follows:

> " … The court upheld the argument that the contractual nature of the relationship between the respondent and its members, and its members' voluntary choice of purchasing property residing within the estate and subjecting themselves to its rules, provided a framework in which the matter should be decided" (my emphasis)

In para [12] of his judgment Topping AJ went on to state that

> "… Any consideration of whether the rules complained of by the applicant are unlawful and ought therefore to be regarded as *pro non scripto* must entail an application of the principles laid down in various leading judgments of the Supreme Court of Appeal." [3]

BEFORE THIS COURT

[13] While the appellants persisted with their challenge relating to the road rules and the domestic rules before this court, they effectively abandoned their challenge in respect of the contractors' rules. It seems to me that a finding in respect of the roads rules will have an impact on the rules relating to domestic employees and the alleged restrictions placed on them by the first respondent. In

[3] The decisions referred to by Topping AJ were those in the matters of Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 7 I-E, Eastwood v Shepstone 1902 TS 294 at 302. Botha (now Griessel) v Financescrediet (Pty) Ltd 1989 (3) SA 773 (A), and Juglal N O and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division 2004 (5) SA 248 (SCA) [12]. The general principle laid down in these cases is that while public policy generally favours the utmost freedom of contract, it takes into account (a) the necessity of doing simple justice between man and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transactions and the element of public harm are manifest.

light of the above, it is to the roads challenge that I now turn. In the course of the judgment I will deal with the main submissions advanced on behalf of the respective parties in argument.

THE ROADS CHALLENGE

[14] The road rules which are challenged by the appellant are Rules 7.1.2 and 7.3.1. They provide as follows:

> "7.1.2 The speed limit throughout the Estate is 40km/h. Any person found driving in excess of 40km/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 caution when using the roads.
>
> 7.3.1 Operating any vehicle in contravention of the National Road Traffic Act within Estate 2 is prohibited."

[15] While the first respondent initially sought to deny in its answering affidavit that the roads within the estate are public roads, it became common cause both in the court *a quo* and in this court that such roads are public roads. In fact, Rule 7.1.1 of the conduct rules provide that "the roads on Estate 2, in spite of being within the fence and appearing to be 'private', are in fact public roads and therefore within the jurisdiction of the National Road Traffic Act 93 of 1996 (as amended)."

[16] At the heart of the dispute between the parties regarding the policing of the roads within the estate, lies the NRTA which is to be read with the regulations promulgated thereunder. A brief synopsis of the relevant provisions of the NRTA is necessary for a proper determination of the dispute:

16.1 The NRTA is a piece of national legislation which is aimed to provide 'for road traffic matters which shall apply uniformly throught the Republic and matters incidental therewith.' [4] Section 2 deals with the application of the Act and provides as follows:

> "2. Application of Act-
> This Act shall apply throughout the Republic: Provided that any provision thereof shall only apply to those areas of the Republic in respect of which the Road Traffic Act 1989 (Act 29 of 1989), did not apply before its repeal by section 93, as from a date fixed by the Minister by Notice in the Gazette."

16.2 A 'public road' is defined in section 1 as being 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 or to which the public or any section thereof has a right of access …"

[4] Preamble to the NRTA

16.3 Chapter IX of the NRTA deals with matters relating to road traffic signs and general speed limits. Sections 56 to 59 in particular contain various provisions which have a bearing on the impugned provisions of the road rules as formulated and implemented by the first respondent. In terms of section 56(1) it is only the Minister who may prescribe signs, signals, markings or other devices (collectively referred to as road traffic signs) as he or she may deem expedient, as well as their significance and the conditions on and circumstances under which road traffic signs may be displayed on a public road "for the purpose of prohibiting, limiting, relating or controlling traffic in general or any particular class of traffic on a public road …" 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." (my emphasis)

16.4 Section 57(1) prescribes that only the Minister or a person authorised by him may cause or permit to be displayed in the prescribed manner any road traffic signs on any public road.

16.5 In terms of section 57(3)(a), a local authority or any person in its employment authorised thereto, may display or cause to be displayed a road traffic sign in respect of any public road within the area of jurisdiction of that local authority.

16.6 Section 59(1)(a) of the NRTA provides that the general speed limit in respect of every public road or section thereof, other than a freeway, situated within an urban area, shall be as prescribed by the Minister. The Minister in promulgating regulations under the NRTA, has prescribed the general maximum speed limit for a public road situated within an urban area at 60km per hour.[5]

16.7 In terms of section 59(2) of the NRTA an appropriate traffic sign may be displayed on any public road by the Minister or any person authorised by him or her or the Chief Executive Officer of the Road Traffic Management Corporation or the Local Authority, in accordance with section 57, indicating a speed limit other than the general speed limit which applies in respect of that road in terms of section 59(1).

16.8 Section 59(4)(a) of the NRTA further prescribes that no person shall drive a vehicle on a public road at a speed in excess of the general

[5] Regulation 292(a), National Road Traffic Regulations, 17/03/2000

maximum speed limit which applies in respect of that road or, in terms of section 59(4)(b), the speed limit indicated in terms of section 59(2) by an appropriate road traffic sign.

16.9 Section 59(3) of the NRTA provides that the Minister may, in respect of a particular class of vehicle, prescribe a speed limit which is lower or higher than the general speed limit subject to complying with certain formalities.

16.10 Significantly, section 57(6) of the NRTA provides that the MEC concerned may authorise any association or club to display any such road traffic signs as he or she may deem expedient, subject to such conditions as the MEC may determine, on any public road referred to in subsection (2) or (3), and any such association or club may thereupon, in the prescribed manner, display on a badge or other token of the association or club in conjunction with any such road traffic sign.

16.11 Section 57(10) provides that no person shall display any road traffic sign on a public road unless having been authorise thereto by or under this Chapter.

[17] In terms of section 156(5) of the Constitution [6]a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. Schedule 4 of the Constitution provides for functional areas of concurrent national and provincial legislative competence. One of the matters specified in Part A of Schedule 4 concerns 'road traffic regulations'. The enforcement of the NRTA accordingly 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'.

[18] In terms of section 89(1), any person who contravenes or fails to comply with any provision of the NRTA shall be guilty of an offence. Section 89(1) read with the provisions of section 59(4) of the NRTA provides that any person convicted of an offence shall be liable to a fine or imprisonment for a period not exceeding three (3) years in terms of section 89(3). Under the NRTA the duty to regulate, control and monitor traffic on public roads is vested in traffic officers.[7] Interestingly, the NRTA, although making a contravention of the NRTA a criminal offence, and while providing for sanctions as well designating traffic officers as the persons authorise to regulate and control traffic on public roads, makes no provision for the manner in which the contravention in question is to

[6] Constitution of the Republic of South Africa, 1996
[7] Section 31(g) of the NRTA bears reference

be policed or enforced. For this one has to have regard to the provisions of the Criminal Procedure Act 51 of 1977 (the CPA).

[19] The offence of driving a vehicle at a speed exceeding a prescribed limit falls within Schedule 3 to the CPA. The offences detailed in Schedule 3 are considered to be minor offences and for this purpose, peace officers, as defined in the CPA, are permitted to issue written notifications to a person alleging that such person has committed an offence of the sort specified in Schedule 3 of the CPA. The written notification sets out the amount of the fine which a court trying such a person for such offence would in all probability impose upon him or her.

[20] A traffic officer is, in turn, defined in the NRTA as a traffic officer appointed in terms of section 3A of the NRTA and only members of the Municipal Police serve in terms of section 1 of the South African Police Service Act, 68 of 1995. Additionally, for the purpose of Chapter IX of the NRTA, which as pointed out already, includes the sections that deal with speed limits, a traffic officer includes a peace officer. The effect of all this is that the NRTA, read with the relevant provisions of the CPA, provides that only peace officers, who may also be traffic officers, are empowered and entitled to police public roads with regard to all questions of speeding.

CONTEXT OF THE ROADS CHALLENGE

[21] The appellants contend that the first respondent, by virtue of the impugned rules, believes that it can physically control and direct traffic on and access to the public roads in the estate. To this end the first respondent has gone ahead and put up signs along these roads announcing a speed restriction of 40km per hour; it has constructed speed humps aimed at slowing the traffic right down, it barricades the perimeter on these roads as well as entry to the estate and only allows traffic it considers appropriate, to have access to the roads. The appellants maintain that the first respondent, by acting as it does, considers that it has exclusive rights of control of traffic over the roads in the estate.

[22] The appellants further contend that while the NRTA vests the power to regulate and control traffic on public roads in statutory state organs and functionaries as set out above, no such power vests in the first respondent in terms of the NRTA and the regulations promulgated thereunder. Thus, the first respondents' power to control and direct traffic on public roads is governed by it's rules and is not linked to any statutory provision. The appellants' challenge to the road rules is based on the illegality of the system the first respondent seeks to enforce which is at odds with the statutory public law system which governs the rights of the public, including the appellants, to the public roads. In short, the appellants assert that the first respondent's power to control and

conduct traffic on the roads in the estate is done so solely in terms of it's rules and by virtue of the contractual arrangements it has with it's members including the appellants.

FIRST RESPONDENT'S CASE

[23] The first respondent, while not disputing that the roads in the estate are public roads as defined in section 1 of the NRTA, nonetheless contends that the relationship between itself (being a private company) and all owners has it's foundation in contract – one that is freely and voluntarily entered into by such owners including the appellants herein. The first respondent asserts that the source of it's power (to control, regulate and police the roads in the estate) is purely contractual in nature – it has no other origin or foundation. In argument Mr du Plessis stressed that the first respondent's position is premised on the understanding that its rules operate as a 'parallel system to the statutory regime prescribed by the provisions of the NRTA. The net result of this is that the first respondent does not purport to utilize, invoke or usurp the powers under the NRTA. This being the case the first respondent does not consider it necessary to seek any authorisation under the NRTA for the enforcement of its private rules. Placing reliance on the judgment of Olsen J in *Abrahams*, *supra*, Mr du Plessis contended that it was perfectly permissible for a parallel system, one regulated by statute and the other by contract, to operate alongside each other.

[24] In the course of his argument Mr du Plessis referred us to the unreported judgment of Sutherland J in the matter of *Bushwillow Park Home Owners v Paulode Olioviera Fernandes & Another*[8]. In that matter the dispute between the parties was whether the applicant, the governing body of the estate in which the respondents owned a home, was vested with authority to approve or disapprove the colour of the paint with which unit holders in the estate could decorate their homes. The respondents had painted lime green stripes on their house without seeking prior authorisation from the applicant to do so. The applicant demanded that the respondents repaint their house in an approved colour. With reference to the applicant's MOI and its rules regarding architectural designs, specifications relating to material and exterior finishes, Sutherland J concluded that the relationship between the applicant and all 591 unit-holders was regulated by contract. Relying on Olsen J's findings in *Abrahams, supra,* Sutherland J too found that the sum of their reciprocal rights and obligations derives solely from contract. In the course of this judgment I intend commenting on the findings made both in *Abrahams and Bushwillows* as relied on by the first respondent herein. I also intend dealing with certain other submissions advanced by Mr du Plessis in the course of his argument.

FINDINGS ON THE ROADS CHALLENGE

[8] Case No. 2014/31526, Gauteng Local Division Johannesburg

[25] While the first respondent believes that it is free to control, regulate and police all roads within the estate by virtue of its Rules and the contracts concluded with it's members (including the appellants), the fundamental difficulty I have with this is that the public road status of the roads within the estate (including all through roads) carry with it certain public law legal consequences. Inherent in the concept of a public road is that the public has access to it and that the regulatory regime is a statutory one viz the NRTA which, as I pointed out already, applies throughout the Republic.

[26] Invoking the *Abraham's* decision, supra, the first respondent's answer to this (which was accepted by the court *a quo*) is that the appellants agreed to \be bound by the first respondent's regime of control and access as provided for in it's Rules. At a contractual level the position adopted by the first respondent simply ignores the principle of legality as to what may be contractually arranged between parties in the face of statutory provisions which govern the very situation contended for: In my view, the first respondent could quite easily have brought itself within the demands of the legality principle. Indeed, the need for private bodies (such as associations and clubs like the first respondent) to regulate traffic on and access to the public roads is recognized by the NRTA (s57 (6), *supra*). Such private bodies are obliged to seek the necessary permission from the MEC and/or the municipality concerned. In granting such permission the MEC and/or municipality concerned would be entitled to impose

such conditions as he/she/it may consider necessary in the circumstances. It is common cause that the first respondent did not apply for such permission at any stage.

[27] I consider that this failure on the part of the first respondent must render such Rules and the contractual arrangement with the members illegal. The first respondent is forced to contend for a parallel system as postulated by Mr du Plessis. However, what this argument ignores is the inherent dangers in such a dual system, one contractual and one according to public law. This contractual arrangement requires a court to recognise and promote a regime of rules which have not been sanctioned by the authorities concerned. The first respondent can hardly police the roads in the estate without putting up its own road signs such as stop signs, yield signs, no parking or passing signs or speed limit signs. Nor can a system which allows some persons to drive at a speed of 60kph and others at 40kph augur well for general law enforcement or one where unlicensed vehicles and drivers are seemingly permitted to drive on public roads or where persons are required to adhere to a system of signs and practices which are at odds with the general public law system recognized in the NRTA and its regulations. The fact that the relevant authorities under the NRTA are silent on the matter, as submitted by Mr du Plessis, does not, in my view, make it legal.

[28] Interestingly, in argument before us, Mr du Plessis even went so far as to submit that the first respondent required no authorisation under the NRTA for its private Rules to apply. The basis of Mr du Plessis' argument was that on a reasonable interpretation of the NRTA, it does not either expressly or implicitly say anything about a private arrangement sourced solely in contract. The effect of this submission is that the first respondent and it's members are perfectly entitled to agree contractually on how the roads in the estate are to be policed. This contractual arrangement according to the first respondent is neither in conflict with the provisions of the NRTA nor does the first respondent attempt to arrogate to itself powers under the NRTA. According to the first respondent the traffic signs found on the estate are not really traffic signs which are prescribed under section 56 of the NRTA but rather are signs which have been contractually agreed to between the first respondent and its members.

[29] In my view, this reasoning is deeply flawed. The fundamental difficulty I have with this argument is that while it serves to protect individual interests by virtue of the parties' rights to contract freely with each other, it ignores completely the public interests that are here concerned with by the statute in question – a statute that applies throughout the Republic. It is difficult to conceive that while public policy requires the observance of the statute, the first respondent and its members can simply contract out of the obligations imposed thereunder.

COURT *A QUO'S* REASONING

[30] The basic defect in the judgment of the court *a quo* is that it failed to enquire into whether the first respondent's Rules infringe upon relevant legislation and are in fact contrary to law. The legislation in question are those that I mentioned above, namely the NRTA, the CPA and of course the Constitution. The learned Judge *a quo* confined himself to the common law principles relative to the law of contract viz. the private law contractual aspects to which he referred in the judgment and in doing so he failed, with respect, to consider the public law aspects at all. I believe that in approaching the matter on this restricted basis the learned Judge erred.

[31] This error becomes quite obvious when one has regard to what was actually said by Olsen J in *Abraham, supra,* as quoted above. At paragraph [28] of the judgment Olsen J made the point that the rules in that matter were "… superimposed on municipal law … " but "… have no public law content and do not involve the exercise of public law and the performance of a public function." The position is quite different in the present matter in which the court *a quo* was required to consider the impact of Conduct Rule 7.1.2. As pointed out by Mr Kemp, correctly in my view, this rule clearly has public law content and does in fact involve the exercise of public power and functions of a number of structures and officials such as, for example, the municipality, traffic

officials, the office of the Directorate of Public Prosecutions (DPP) and the courts, in the administration of justice. As I pointed out already there are also executive powers of the local authority vested in it under s151(2) of the Constitution which are directly affected by Conduct Rule 7.1.2. This arises as a matter of law and not as a matter of fact.

[32] At para [11] of his judgment Topping AJ quotes a further dictum of Olsen J in *Abraham* where the learned Judge states "… In my view the location of this case within the field of contract is correct …" and further that "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 rules 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 contrary had agreed to superimpose in municipal laws, have no public law content and … do not involve the exercise of public power for the performance of a public function." (my emphasis). In my view, a careful analysis of the above dicta confirms and supports the contentions advanced by the appellants in this matter.

[33] The findings made by Olsen J in *Abraham, supra*, apply equally to the issue which arose in the *Bushwillow's* matter, *supra*. As in *Abrahams, Bushwillows* had nothing to do with the exercise of a public power grounded in public law. Essentially the issue in that matter had to do with the colour of paint

which was regulated by the association's internal rules and governed by a contractual arrangement between the parties and not by statute.

[34] It seems to me that none of the provisions of the NRTA, its regulations, the Constitution and the CPA were considered by the court *a quo* because they all were considered to be trumped by the contractual model contended for by the first respondent and premised, incorrectly I might add, on the *Abraham* decision. I find myself in agreement with the submissions advanced on behalf of the appellants to the effect that the impugned road rules are against public policy not because such a dispensation is *per se* immoral but rather it is illegal because such a dispensation is in conflict with the dispensation created by the above statutory provisions unless sanctioned in terms thereof. It is well established that contractual provisions are against public policy "… if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to the tenor" [9]

[35] To conclude on this aspect I accordingly hold that since the roads within the estate are public roads it is only the Minister of Transport or someone authorise by him, by virtue of delegated authority, who has the power to regulate any aspect of these roads. In the result and to the extent that the road rules seek to authorise the first respondent to impose a speed limit in respect of

[9] Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division, supra, par [12]

the roads within the estate, it simply has no authority to do so. The situation could have been different if a determination was made in respect of the speed limit for the roads within the estate by a person duly authorised to do so under the NRTA. It is common cause that neither the Minister nor any delegated authority made such a determination.

[36] Even more egregious is the fact that the first respondent conducts speed trapping on the public roads within the estate. Not only this but it thereafter goes ahead and imposes fines for speeding violations in the estate. The first appellant's daughter was 'caught' speeding in the estate. By caught I assume that she was trapped by employees of the first respondent who are authorised by the first respondent to perform such function. No doubt many other residents on the estate have suffered a similar fate. Clearly, when the first respondent behaves in this manner it acts outside the powers of the relevant authorities under the NRTA and the CPA. No such power vests in it by virtue of any delegation or permission. Whatever interpretative tool one might use (as contended for by Mr du Plessis) insofar as the NRTA is concerned, I do not believe that any contractual arrangement, however well intended, can remedy such an illegality.

THE DOMESTIC RULES

[37] The specific rules which arise in respect of this challenge 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 MECCMA TWO in writing.

9.6 Temporary Domestic Employees

A temporary permit must be obtained through Security for a Domestic Employee who will be working for no more than 5 days. The Domestic Employee must hand in a valid Identity Document every day on entry to Estate 2. This will be returned when the Domestic Employee leaves. The Resident employing a Domestic Employee working for more than five days, must obtain an access card from MECCEMA TWO. Therefore, temporary domestic workers must be picked up and dropped off at a gatehouse by the employer."

[38] The case made out by the appellants on this aspect is that the system of conduct rules relating to domestic employees in the estate is repressive. The appellants contend that these rules restrict the rights of domestic employees to use the public roads freely. According to the appellants Rule 9.3.2 and Rule 9.6 effectively mean that a domestic employee cannot walk on the roads in the estate despite the fact that these are public roads but may only walk to the bus-stop. The time restriction during which domestic employees may gain access to the estate, namely, between 06h00 and 18h00, restricts their right to work for hours that they may choose (such as for instance, if they wish to work overtime). Domestic employees may only walk on the roads in the estate when the bus service provided for by the first respondent is unavailable. This bus service is ordinarily provided Monday to Saturday at set times.

[39] The appellants further contends that the provision in Rule 9.4.3 that "any variation from this must be authorise by MECCEMA TWO in writing" does not ameliorate the infringement of rights which the entire system of rules presents. The appellants assert that the scheme of the rules and the restrictions they present are unreasonable. They accordingly argue that there is no purpose for registering the first respondent's consent to work extra hours, especially given the strict access controls to the estate. Nor can there be any rationality to

restricting the employees' right to movement, such as by walking from the employer's home to the access gates, since these roads are public roads.

[40] In its heads of argument the first respondent points out that although the appellants had in their notice of motion before the court *a quo* sought an order declaring all of these rules to be invalid, when one has regard to the affidavits however, it is apparent that the vast majority of the content of these Rules is unchallenged. The first respondent contends that the appellants do not challenge (a) the requirement that domestic employees must comply with instructions from security while boarding and travelling on the official estate busses; (b) the requirement that domestic employees must make use of designated bus stops when catching the estate buses, (c) the requirement that domestic employees must be registered on an annual basis and are required to carry an access card; and (d) the requirement that domestic employees must swipe their fingers or access cards for ingress and egress from the estate.

[41] The first respondent further contends that the appellants also accept that the bus service (a) is dedicated to transporting domestic employees to and from the access gate; (b) is provided at substantial cost to the first respondent; (c) is provided to alleviate the burden on domestic workers and owners/members to arrange transport from and to the homes on the estate; (d) is provided to ensure that normal business hours of domestic workers are respected; and (e) ensure

that domestic workers are without delay assisted to return home timeously at the end of the day. In light of these factors, the first respondent contends that the appellants do not appear to take issue with the rules themselves but rather with the first respondent's implementation thereof.

[42] In the court *a quo* Topping AJ took the view that by giving Rules 9.3.2, 9.4.1 and 9.4.3 their literal meaning "and context", they merely prescribe a set of procedures to ensure an orderly ingress and egress of domestic employees onto and off the estate. Thus the rules are neither restrictive nor unlawful.

[43] What this view ignores completely, in my opinion, is 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 first respondent appears to have categorized them into a class of people who pose a security risk to people living on the estate. Their position within the estate is reminiscent of the position that prevailed in the apartheid era: while they are good enough to perform domestic duties for their employers on the estate, which include the task of pushing perambulators on the roads, they are precluded from exercising any rights derived from public law and the

Constitution. 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. It seems to me that the restrictions placed on domestic employees with regard to their movements on the roads in the estate, flow from a misconceived notion on the part of the first respondent that it is entitled to exercise usurped control over the public roads in the estate through its conduct rules. The first respondent's attempts to give a different, less restrictive meaning to the domestic rules by asserting that the rules actually benefit the employees in terms of their own safety and the fact that they are able to return to their homes timeously at the end of the working day, does not, in my view, detract from the unreasonableness of the rules. To the extent that these rules restrict the rights of domestic employees from freely being on and traversing public roads in the estate, I consider them to be unreasonable and unlawful.

CONCLUDING REMARKS

[44] In the course of his argument Mr Kemp stressed that the appellants do not wish to see the traffic control system by the first respondent fall away or become ineffective. What the appellants want is that the system should be a lawful one subject to such appropriate restraints as the state functionaries referred to under the NRTA may see it fit to include in granting the necessary permissive powers to the first respondent. Some of the suggested restraints may

well include collaboration of trapping devices, prohibition of sanctions such as denying the rights (in terms of access) to one's home as a penalty for not paying a traffic violation (as happened to the first appellant and his family herein), the prohibition of different speed limits, etc. The point was made that the appellants as members of the first respondent are entitled to demand that the first respondent acts lawfully by not presenting Rules as binding when they tend to promote illegality. Inherent in the Rules challenged is the first respondent's assertion that it has the right in law to control traffic and access on public roads in the estate. However, no explanation is provided in the judgment of the court *a quo* or by the first respondent as to the source of this power. As I pointed out above the only answer provided by the first respondent is that it has a contractual arrangement with the appellants 9and with other owners of property on the estate) to deny the public access to public roads and to maintain such right against the public.

[45] I accordingly conclude that the road rules as formulated by the first respondent is in direct conflict with the relevant provisions of the NRTA. No authorisation whatsoever has been sought by the first respondent nor has any been granted by the national Minister and/or his duly authorised delegate or the relevant MEC in charge in the Province or the Municipality concerned. It may well be, as suggested by Mr du Plessis, that there are other gated estates in the country that conduct themselves in a similar manner as the first respondent

herein insofar as the power to regulate, control and police public roads in such estates is concerned. If this is the case Mr du Plessis cautioned that this court should bristle at the idea of interpreting the NRTA as requiring that prior authorization should first be sought from the relevant authorities for a Rule that has little or no impact on the minimum requirements prescribed under the NRTA. I disagree entirely. In my view, courts would be failing in their duties were they to overlook and/or condone flagrant and deliberate contraventions statutory provisions. If in fact there are other associations and/or estates in the country who, like the first respondent herein, either through ignorance or plain arrogance on their part, have seen it fit not to comply with statutory provisions, it's time that they did.

[46] Mr Kemp submitted that in the event of this court finding that the rules are invalid that an appropriate order would be one suspending such declaration for a certain period in order to afford the first respondent the opportunity of obtaining the requisite authorisations and consents required in terms of the NRTA. This will be reflected in the order to be made. It follows that the appeal must succeed.

[47] As far as the issue of costs is concerned, I see no reason why the appellants should not be awarded their costs given their substantial success in the matter.

ORDER

[48] The order I make is the following:

(a) The appeal is upheld to the extent set out herebelow.

(b) The order of the court *a quo* dismissing the appellants' application is set aside and replaced with the following:

3. It is declared that the first respondent's Conduct Rules 7.1.2, 7.1.3, 9.3.2, 9.4.1 and 9.4.3 are invalid but that such invalidity is suspended for a period of twelve (12) months to afford the first respondent an opportunity to obtain the necessary authorisations and/or consents under the National Road Traffic Act, 93 of 1996.

4. The first respondent is directed to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel.

(c) The first respondent is directed to pay the costs of the appeal including the costs of the application for leave to appeal, such costs

to include the costs consequent upon the employment of two counsel.

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SEEGOBIN J

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CHETTY J

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BEZUIDENHOUT J

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COUNSEL FOR THE RESPONDENT:	J du Plessis (Instructed by Cox Yeats)
DATE OF HEARING:	7 August 2017
DATE OF JUDGMENT:	