

# REGULATION OF ROADS IN SECURE ESTATES



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Over the past couple of decades, the number of secure estates in South Africa, both residential and commercial/industrial, have increased exponentially. This has been largely driven by security concerns because of the escalating crime rate in the country.

Each estate is administered by an owners' association, which is either established as a non-profit company, with a memorandum of incorporation governing the functioning of the association or as a common law association, with a constitution governing the functioning of the association. The association in turn promulgates rules which regulate the conduct of persons who own properties on the estate, occupy properties on the estate or access the estate from time to time. The rules are enforced by the association and are often a source of conflict between the association and the individuals who fall foul of the rules.

This was the case in the recent, yet unreported, decision of the full bench of the KwaZulu-Natal High Court at Pietermaritzburg in the matter of Nimesh Singh and Another v Mount Edgecombe

Country Club Estate Management Association Two (RF) (NPC) and Others, Case Number AR575/2016 handed down on 17th November 2017. This was an appeal of the decision of Topping AJ in the KwaZulu-Natal High Court (the First Judgement). The judgement has proved to be of great interest to the owners associations of the various secured estates around South Africa as it is the first major judgement that questions the freedom of the owners associations to regulate the conduct of persons who own or occupy properties on the estate or access the estate from time to time and the right of owners associations to regulate conduct on privately owned roads that may nevertheless be subject to the National Road Traffic Act, 93 of 1996 (the NRTA).

Three categories of the conduct rules of the Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) (MECCEMA Two) were challenged by Nimesh Singh (Singh), namely the 'Road Rules', which permit MECCEMA Two to control the roads on the Mount Edgecombe Country Club Estate Two (the Estate) and impose 'speeding fines', the 'Contractor Rules' which restrict the right of an owner to choose a contractor or service provider of his or her choice to perform work on the owner's property within the Estate and the 'Domestic Rules' which impose restrictions on the domestic workers employed by owners and residents on the Estate relating to their working hours and their movements into and out of the Estate.

In the First Judgement, Topping AJ upheld the right of the

MECCEMA Two to enforce the rules that were challenged by Singh. Accordingly, Singh appealed the First Judgement which appeal was heard by a full bench of the KwaZulu-Natal High Court (the 'Appeal Court').

The primary focus of the judgment of the Appeal Court centred around the Road Rules. The counsel for Singh argued that the roads on the Estate were public roads. In terms of the NRTA, it is only the national Minister of Transport (the Minister) who may prescribe signs, signals and markings on public roads and who may prescribe speed limits for the various categories of roads. The NRTA provides that the MEC may authorise an association or club to display any road traffic signs, subject to such conditions as the MEC may determine. Accordingly, the counsel for Singh argued that MECCEMA Two had no power to regulate and control traffic on the public roads in the Estate.

The counsel for MECCEMA Two did not dispute that the roads on the Estate were public roads for the purposes of the NRTA but argued that the relationship between MECCEMA Two and all owners on the Estate was based on contract that was freely and voluntarily entered into and that the rules of the Estate operated as a parallel system to the statutory regime prescribed by the NRTA. Accordingly, MECCEMA Two did not "purport to utilise, invoke or usurp the powers under the NRTA" and as such did "not consider it necessary to seek any authorisation in terms of the NRTA for the enforcement of its private rules".

The Appeal Court held that the public road status of the roads within the Estate carry with it legal consequences arising out of public law and the regulatory regime is a statutory one, arising from the NRTA. MECCEMA Two could have sought permission from the MEC, which it did not. The failure of MECCEMA Two to seek permission from the MEC must render the rules and the contractual arrangement with the members illegal. To the extent that the Road Rules seek to authorise MECCEMA Two to impose a speed limit on the roads within the Estate, MECCEMA Two has no authority to do so. The position would be different if a determination were made by a person authorised to do so under the NRTA but neither the Minister nor any delegated authority had done so.

In conclusion, the Appeal Court held that the Road Rules were in direct conflict with the relevant provisions of the NRTA. No authorisation had been sought by MECCEMA Two nor been granted by the Minister. Accordingly, the Appeal Court held that the Road Rules were invalid, but the invalidity was suspended for a period of twelve months to afford MECCEMA Two an opportunity to obtain the necessary authorisations and/or consents under the NRTA.

MECCEMA Two have the right to appeal the judgement and we understand that the Association of Residential Communities (ARC), which represents a number of owners' associations around the country, is considering intervening in the proceedings. ■

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The Property Team consists of Partners Roger Green, Robin Westley, Tina Halstead, Lazelle Paola, Carol McDonald, Thabo Vilakazi and Associate Kim Edwards. If you require assistance or advice regarding property matters, contact us on 031 536 8500 or email rgreen@coxyeats.co.za www.coxyeats.co.za

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