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## Fines and Penalties in Community Schemes

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### Introduction

This article deals with the legal issue of what fines and penalties are in relation to community schemes (such as a sectional title schemes, share blocks and homeowner's associations, also known as private estates ("Estates")). We look at the relevant laws governing the topic and explain the implications thereof.

### What are Fines and Penalties?

In *Kenrock Homeowners Association v Allsop and Another*<sup>1</sup> the court distinguished between fines and penalty levies. The court appears to be saying that a fine is a once off amount levied for a breach, whereas a penalty levy is where the normal monthly levy is doubled or tripled or multiplied in some other manner and charged each month. In this case the Constitution of the Estate permitted the levying of a fine once off, but the court found that this did not entitle the

homeowner's estate in question to levy a "penalty levy" of several times the normal monthly levy on a monthly basis.

In *Walker and Walker v Cilantro Residential Estate Home Owners Association*<sup>2</sup> the issue of 'penalty levies' was discussed further. In this case double the normal levy was raised where the building had not been completed on time. The court in *Walker* referred to the *Kenrock* case and held that penalty levies were indeed recurring in nature, whereas fines were "once off" (at paras 52 and 53).

### Review of Fines/Penalties in terms of PAJA

The imposition of a fine or penalty is a decision made by the governing body of a community scheme, normally based on that schemes's rules/constitution/founding documents. Depending on the type of decision taken in each

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<sup>1</sup> (A224/2011) [2012] ZAWCHC 31 (28 March 2012) (available at <http://www.saflii.org/za/cases/ZAWCHC/2012/31.html>) .

<sup>2</sup> Unreported judgment of the Johannesburg High Court by Keightly J, case no A3067/2016) (available at <http://www.saflii.org/za/cases/ZAGPJHC/2016/299.rtf> .



case, it is possible that a court would find that a decision of a body regulating a community scheme (such as the trustees of a sectional title body corporate, the directors of a share block or the trustees/directors of an Estate) constitutes administrative action as defined in the Promotion of Administration of Justice Act (“PAJA”), inasmuch as they are managing the common property for the benefit of all members of that type of scheme and in doing so are performing a public function or exercising a public power.

Generally speaking, however, decisions of community schemes are not regarded as being administrative for the purposes of PAJA and as such are not subject to review by our courts in terms of this Act. However, they are still subject to review by our courts in terms of our common law, as confirmed by our courts<sup>3</sup> because in principle our law requires that all fines/penalties be reasonable, lawful and procedurally fair.

The procedure that an aggrieved person would adopt in order to review/challenge such a decision, however, depends on the circumstances. It might be that the appropriate challenge to be brought is by way of an application to CSOS, or to court, or by making use of some other dispute resolution mechanisms provided for in the Estate’s rules.

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<sup>3</sup> (7689/2006) [2007] ZAGPHC 137 (14 August 2007).

### **Procedural Fairness**

- In order for a fine or penalty to be enforceable by a body corporate, it must have been lawfully adopted by the body corporate after the appropriate resolution was taken and (if required) an amendment to the rules to adopt that fine or penalty has been registered with CSOS.
- The imposition of the fine must be reasonable, fair and systematic. Trustees are obliged to treat all persons in the scheme equally and the individual fined must be given a fair opportunity to be heard and defend their case in front of the trustees or managing agent.
- The fine cannot continue indefinitely i.e every month. If the owner continues to contravene the rules the owner must be placed on terms to remedy the situation. If he does not the owner must be taken to court or to CSOS.
- The rule that creates the fine must clearly indicate what conduct is prohibited and must clearly state the amount of the fine for each transgression. At a trustees’ meeting, the trustees should determine the amount of the fines. Ideally (but this is not required in every scheme) at a general meeting the members should then approve the amounts that are to be fined.
- A warning notice must be sent out specifying the amount that might be fined and explain why



the fine would be imposed, with reference to the rule that creates the fine for the conduct prohibited. The amount fined should be proportionate to the purpose of the penalty.

- It has been repeatedly held by our courts that prejudicial legal things like fines will be restrictively interpreted – meaning the court will be strict about whether the Estate has complied fully with every requirement when raising the fine.

### **Reasonableness**

The decision taken to levy the fine must be reasonable. It must be a decision that a reasonable man or woman in the place of the decision maker would have arrived at. Adam Civin and Ramon Pereira (who were with Schindlers at the time) wrote a very interesting article some years ago about the decision by a sectional title body corporate that took a decision to refuse to allow a member to have a dog, citing a provision in its rules that provided that consent for all animals (except birds in cages) needed to be obtained by the trustees (who in this case refused to give it). The court found that the trustees had not properly applied their minds when considering the request. They had simply dismissed it, based on their discretion in terms of the rules to exclude all animals other than birds in cages. The court found that this decision was not reasonable, and as such, set it aside and

allowed the dog on certain strict conditions. This is an example of how the decision taken was not reasonable because a reasonable person would not simply have dismissed it based on the mere ability to do so, but would have properly considered the application on its own merits.<sup>4</sup>

### **Lawfulness**

In some cases the governing body of a sectional scheme has no lawful authority to impose certain kinds of rules/prohibitions/restrictions. Lisa Schmidt and Lauren Squier of Schindlers recently wrote about the *Mount Edgecombe* case<sup>5</sup>, in which the appeal court held that a homeowner's association does have the lawful authority to set speed limits on privately owned road within the estate, but not public roads (such public roads being governed by the traffic authorities). It is also a common misconception that trustees have the lawful authority to approve building plans – they do not. Only the local municipality can “approve” building plans. It may be a condition of the relevant rules that the trustees give their approval of the building plans, but this does not mean that the building plans are in accordance with the national building laws, or town planning laws, and it gives no protection to the owner in respect of non-compliance with these laws insofar as the municipality is concerned. Most often the trustees are only lawfully entitled to scrutinize the aesthetic

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<sup>4</sup> <http://www.derebus.org.za/paws-before-signing-on-the-dotted-line/>; accessed 30.04.2019.

<sup>5</sup> *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh & others*



elements of the plans, and not the structural elements. This is because the interests of the trustees in approving the plans are in keeping the aesthetic scheme of the buildings uniform, because this preserves property values. They also have an interest in ensuring that the building is structurally sound, but their interests in this regard are already protected by the municipality, which checks this aspect of the plans when approving them, safeguarding everyone in question.

### **Conclusion**

Taking a decision as a trustee or director of a community scheme can be tricky. If you are uncertain as to whether your decision is lawfully compliant with any of the above requirements, contact an expert for assistance.



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