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## What is “Public” and What is “Private” in Community Schemes

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### Introduction

This article deals with the legal issue of what “public” and “private” mean in relation to community schemes (such as a sectional title schemes, share blocks and homeowner’s associations, also known as private estates (“Estate”)). We look at the relevant laws governing the topic and explain the implications thereof.

### 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 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. For example, in *Khyber Rock case v 9 of Erf 823 Woodmead Ext 13 CC*<sup>1</sup> however, the court held that trustees of a homeowners’ association were not governed by PAJA.<sup>26</sup> In this case the decision that was being examined was \_\_\_\_\_.

This does not mean, however, that their decisions are beyond scrutiny. The court in *Khyber Rock* went on to explain that trustees of

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<sup>1</sup> (7689/2006) [2007] ZAGPHC 137 (14 August 2007).

<sup>2</sup> *Ibid* at 34.



homeowner’s associations (and we submit by parity, all governing bodies of community schemes) are governed by other common law principles that require fairness in their decision making. Ultimately, the court held, it could find no differences between the PAJA review grounds and the common law review grounds. The court went on to state: “There therefore appears to be no difference in principle for present purposes between common law grounds of review in relation to voluntary associations and the grounds of review provided for in PAJA.”<sup>3</sup>

For this reason decisions of the governing bodies of community schemes are subject to review by our courts either in terms of PAJA (if the body is, when making the decision, exercising a public power or performing a public function) or in terms of our established principles of common law review. All of the grounds of review are ultimately based on the natural justice requirements of legality, procedural fairness and reasonableness; the latter, in the sense of a rational connection existing between the facts presented and the considerations that were applied in reaching the conclusion.<sup>4</sup>

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

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<sup>3</sup> *Ibid* at 35.

<sup>4</sup> *Ibid* at 36..

The main questions brought before the court in this matter was whether roads within a private housing estate constituted “public roads” as defined in the National Road Traffic Act 93 of 1996 (“the Act”) and whether conduct rules prescribing a speed limit of 40 km/h on roads within the estate were unlawful. The argument was that if the roads within the estate are public roads, then only the governmental traffic authorities (and not the Estate) had the power to impose and enforce speed limits.

The case was only concerned with two provisions of the Estate’s Memorandum of Incorporation; those imposing penalties on a person found driving in excess of 40 km/h within the Estate and operating vehicles within the Estate that are in contravention of the Act.

The High Court (which considered the case before it went on appeal) approached the question of the roads based on the assumption that the roads in the Estate were indeed public roads and were accordingly subject to the Act. On appeal, however, it was held that the lower court’s judgment was based on erroneous assumptions and thus was incorrect. The appeal court found the opposite to the High Court, holding that “at the inception of the estate, the roads within the estate were private roads. That never changed. The roads did not thereafter

<sup>5</sup> (323/2018) [2019] ZASCA 30.



acquire the character of public roads.”<sup>6</sup> It was further held that the general public does not have access to the roads within the estate and accordingly, in this context the word ‘public’ would not include persons who are present within the Estate with the permission of the owners of property of the Estate”.<sup>7</sup>

Importantly, the judgment prescribed that non-owners who are permitted to enter the estate are persons who are there with the authority and permission of the owners, and are not to be regarded as forming part of the ‘public’ for the purposes of the definition of ‘public road’.<sup>8</sup>

The appeal court further confirmed that

*“in the instances where the respondents chose to purchase property within the Estate and accordingly become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the owner residing in the Estate is therefore contractual in nature.*

*The conduct rules, and the restrictions imposed by same, are private in nature, having been entered into voluntarily when an owner elects to buy property within the Estate. By agreement, the owners of property within the Estate*

*acknowledge that they and their guests are only entitled to use the roads within the estate subject to the provisions of the conduct rules.*

*Any third-party guest only gains access to the Estate with the prior consent of the owner concerned and upon gaining access to the Estate, responsibility for any breach of the conduct rules by the invitee is that of the owner.”*

Accordingly, any breach of the conduct rules is therefore a matter strictly between the relevant owner and the Association. It is of importance to note that no sanction may be imposed on a third party in this regard.

The judgment confirmed that once it is accepted<sup>10</sup> that the rules are private ones, the owners’ argument that the Association is usurping the functions of the recognised authorities or contravening the provisions of the Act cannot be sustained.<sup>11</sup>

*“It cannot be said that ordaining a lower speed limit within the estate than that prescribed by national legislation goes beyond promoting, advancing and protecting the interests of the respondent’s members or is unreasonable. This is especially so given the presence of children, pedestrians and animals (both domesticated and*

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<sup>6</sup> Ibid; paragraph 14

<sup>7</sup> Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh & others (323/2018) [2019] ZASCA 30; paragraph 15

<sup>8</sup> Ibid; paragraph 17

<sup>9</sup> Ibid; paragraph 19

<sup>10</sup> Ibid; paragraph 20

<sup>11</sup> Ibid; paragraph 21

*undomesticated) upon or in the immediate vicinity of the roads themselves”.*<sup>12</sup>

The court places emphasis on the nature of the restrictions imposed by the rules as being private ones, entered into voluntarily when members elected to buy in the estate.<sup>13</sup> In highlighting the above point, the court made reference to the judgment of J in *Bushwillow Park Home Owners v Fernandes & Another* whereby it was stated: “The relationship between the applicant and all the 591 unitholders is regulated by contract. Self-evidently, the sum of their reciprocal rights and obligations derives solely from contract.”<sup>14</sup>

It was explained in the judgment that the mere fact that the rules provide additional contractual requirements for the operation of vehicles on those roads does not mean that the rules themselves have a public law content.

Accordingly, it is necessary to take notice that the above position may have been different if the association in question had sought to appropriate powers under the relevant Act rather than asserting powers it had prescribed for itself in terms of its rules (which are regarded as being contractual in nature). However, with notice to its members and with their agreement, the

Association, for good reason, chose to impose a consensual limit of 40 km/h, that left untouched the limit of 60 km/h, in that, the mischief sought to be addressed by the Act was achieved, inasmuch as 40 is less than 60 km/h.<sup>16</sup>

## Conclusion

From the case law we can discern a few general rules (remembering that in each case you need to check whether the rules of the community scheme are the same as in the case in question – if they are you can apply these principles by parity of reasoning – if they are not you cannot apply these principles):

- Estate rules are contracts. They are private arrangements between the Estate and the members. They cannot be enforced upon third parties (such as guests).
- In certain cases other authorities (and not the Estate) will govern certain acts within the estate (such as where the traffic authority governs speed limits on public roads inside an estate). In these cases the Estate will have no power to regulate that conduct itself because it cannot usurp the power of the regulating entity.
- Speed limits and penalties for failure to abide by speed limits may be imposed by Estates provided they are embodied in the Estate’s conduct rules, subject to the fact that only

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<sup>12</sup> *ibid*; paragraph 22

<sup>13</sup> *Ibid*; paragraph 23

<sup>14</sup> *ibid*; paragraph 24

<sup>15</sup> *Bushwillow Park Home Owners v Fernandes and Others* (2014/31526) [2015] ZAGPJHC 250 (23 October 2015)

<sup>16</sup> *Op cit*; note 1; paragraph 25

members living within the Estate may be fined for failure to abide by speed limits within the Estate and that this cannot be extended to place liability on third parties (because the fine is contractual in nature and only the members, not their guests, contracted with the estate).

- An Estate may permit things to happen on its private roads that are not allowed to happen on public roads – such as allowing golf carts to drive on them.
- Normally decisions of Estates are not regarded as being public in nature, because they are merely regulating the owners in the association area (and not third parties) through private treaty (contract) in the form of the rules.
- Where the decision taken by an Estate is not public in nature, it is still subject to review by our courts under the principles of legality, reasonableness and lawfulness. They are not beyond scrutiny and can be overturned by a court.
- Depending on the nature of the decision, the decision may also (or alternatively) be reviewable in terms of PAJA where the Estate is performing a public power or exercising a public function. In this case the courts would also review it, and could set it aside or amend it.



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