THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 323/2018

In the matter between:

MOUNT EDGECOMBE COUNTRY CLUB ESTATE MANAGEMENT ASSOCIATION II (RF) NPC **APPELLANT**

and

NIEMESH SINGH **FIRST RESPONDENT**

MUNSHURAI MADHANLAL RAMANDH **SECOND RESPONDENT**

MEC FOR THE DEPARTMENT OF TRANSPORT, KWAZULU-NATAL **THIRD RESPONDENT**

ETHEKWINI MUNICIPALITY **FOURTH RESPONDENT**

MINISTER OF TRANSPORT **FIFTH RESPONDENT**

Neutral citation: *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh & others* (323/2018) [2019] ZASCA 30 (28 March 2019)

Bench: Ponnan, Salduker, Swain and Schippers JJA and Rogers AJA

Heard: 5 March 2019

Delivered: 28 March 2019

Summary: Whether roads within a private housing estate public roads as defined in the National Road Traffic Act 93 of 1996 – whether conduct rules ordaining a speed limit of 40 km/h within the estate unlawful.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Seegobin J (Chetty and Bezuidenhout JJ concurring) sitting as a full court:

1. The appeal is upheld with costs, including those consequent upon the employment of two counsel, to be paid by the respondents jointly and severally.
2. The order of the full court is set aside and in its stead is substituted the following:

'(a) Save for declaring Conduct Rules 9.3.2, 9.4.1 and 9.4.3 of the Mount Edgecombe Country Club Estate Two unlawful, the appeal is otherwise dismissed.

(b) The appellants shall, jointly and severally, pay 80% of the respondent's costs, including those of two counsel.'

JUDGMENT

Ponnan JA (Salduker, Swain and Schippers JJA and Rogers AJA concurring):

[1] The appellant, the Mount Edgecombe Country Club Estate Management Association II (RF) NPC (the Association), a non-profit company, is an association of homeowners. In terms of the Association's Memorandum of Incorporation (MOI), membership of the Association is obligatory for all owners of residential property situated within the Mount Edgecombe Country Club Estate Two (the estate). The MOI provides that in the event of any residential unit being owned by a close corporation, company or trust, such juristic person shall nominate one natural person to be a member of the Association. The first respondent, Mr Niemesh Singh, and the second respondent, Mr Munshurai Madhanlal Ramandh, are residents and property owners (through juristic entities) within the estate.

[2] The estate, which is situated in and around a golf course, comprises some 890 freehold and sectional title residential units. It consists of extensive common property, including open areas, dams, ponds and rivulets, as also facilities for various sporting activities, such as squash, bowling, tennis and fishing. It is serviced by a network of roads and pathways for the use of motorised vehicles, pedestrians and golf carts. The common facilities on the estate include a club house and a venue for conferences, corporate events and weddings. It is also home to several species of small animals, which are protected within the confines of the estate.

[3] In accordance with clause 20.1 of the MOI, the directors of the Association determined that the speed limit on the roads within the estate shall be 40 km/h.[1] During October 2013, the daughter of the first respondent was issued with three contravention notices for exceeding that limit. The first two were issued on the 19th when she allegedly drove at 69 and 65 km/h respectively. The third was issued on the 29th, when she was clocked travelling at 67 km/h. In each of the three instances a penalty of R1 500 was imposed. The amounts, which were deemed by the conduct rules to be part of the levy due by the owner, were debited to the first respondent's account.[2] The first respondent appealed against the first two penalties, but not the third. It was asserted in the appeal that his son had been involved in a motor vehicle collision outside the precinct of the estate and that his daughter had to urgently render assistance. The appeal succeeded in relation to one of the two contraventions. The first respondent was thus required to pay R3 000 in penalties in accordance with the Association's 'pay first argue later' regime.[3] The first respondent refused to pay, consequently the Association deactivated the access cards and biometric access of the first respondent and members of his household.

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[1] Clause 20.1 provides: 'The Directors shall have the power to make rules from time to time as well as the power to substitute, add to, amend or repeal same, for the management, control, administration, use and enjoyment of the Estate, for the purpose of giving proper effect to the provisions of the Memorandum and for any other purpose which powers shall include the right to impose reasonable financial penalties to be paid by those Members who fail to comply with the provisions of the Memorandum or the rules.'

[2] Clause 21.1.1 of the MOI provides: 'The Directors may 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 so doing to the Member concerned which amounts shall be deemed to be a debt owing by the Members to the Company. In addition the Directors may impose a system of penalties. The amounts of such penalties shall be determined by the Board from time to time.'
And rule 13.1.11 provides: 'Penalties imposed for the breach of or non-compliance with the rules shall be deemed to be part of the levy due by the owner.'

[3] Rule 13.1.10 provides: 'Should any resident be aggrieved by any decision made by the Estate Management, he/she may, after having first paid the penalty, lodge an appeal within 7 days of the penalty being paid, to the Board through the Estate Manager. The appeal should contain sufficient facts and/or information relating to the matter which the resident concerned believes would justify a finding by the Board which is different to that imposed by the Estate Management.'

[4] On 1 February 2014, the first respondent moved the High Court, Kwazulu-Natal Local Division, Durban for urgent spoliatory relief. Gyanda J issued a *rule nisi* directing the Association 'to re-activate the [first respondent's] access cards and the biometric access of his family'. Whilst finalisation of that application was still pending, on 31 March 2014 the respondents launched a challenge to three categories of the Association's conduct rules - loosely described as the 'road rules', 'contractor rules' and 'domestic worker rules'. The following relief was sought:

'1. It is declared that all the First Respondent's Rules of Conduct:

1.1 namely, rules 7.1.2 and 7.3.2 [the road rules], which authorise or empower the First Respondent to police the road network within the Mount Edgecombe Country Club Estate Two, including the issuing of speeding fines and/or fines for otherwise contravening any law governing the control of traffic on public roads, and

1.2 namely, rules 2.1, 4.7 and 4.8.1 [the contractor rules], which restrict the free choice of the owners and residents on the Mount Edgecombe Country Club Estate Two with regard to which contractors and/or service providers they may utilise or employ, within the bounds of the Mount Edgecombe Country Club Estate Two, and

1.3 namely, rules 9.3.2, 9.4.1 and 9.4.3 [the domestic worker rules], which restrict the hours of employment of domestic employees of owners and residents on the Mount Edgecombe Country Club Estate Two and/or which restrict the rights of such domestic employees to traverse the public road network over the estate by walking thereon or otherwise,

are unlawful and are to be regarded as *pro non scripto*.

2. The First Respondent is directed to pay the costs of this application, on an attorney-and-client scale, such costs to include those consequent upon the employment of two counsel.

3. The Second, Third and Fourth respondents, or any one or more of them, is/are directed to pay the costs of this application, on an attorney-and-client scale, such costs to include those

consequent upon the employment of two counsel, only in the event of any one or more of them opposing this application.'

[5] The Association, the Minister of Transport, the MEC for the Department of Transport KwaZulu-Natal and the Ethekwini Municipality, were cited as the first to fourth respondents respectively. Only the Association opposed the application. No relief was sought against the other respondents and they elected not to participate in the proceedings. The Association also launched a counter-application, which is not relevant for present purposes. The matter came before Topping AJ, who dismissed both the application and counter-application, but confirmed the *rule nisi* issued by Gyanda J in the spoliation application.

[6] The respondents appealed, with the leave of Topping AJ, to the full court against the dismissal of the application. The respondents effectively abandoned the challenge to the contractor rules before the full court. The appeal succeeded before Seegobin J (Chetty and Bezuidenhout JJ concurring) in respect of the road and domestic worker rules. The full court issued the following order:

'(a) The appeal is upheld to the extent set out here below.

(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.'

[7] With the special leave of this court the Association appeals against the order of the full court insofar as it relates to the road rules, namely rules 7.1.2 and 7.3.2 (erroneously reflected in the order of the full court as 7.1.3). The present appeal is thus only concerned with whether or not rules 7.1.2 and 7.3.2 'are unlawful and are to be regarded as *pro non scripto*'. Those rules provide:

'7.1.2 The speed limit throughout [the estate] is 40 km/h. Any person found driving in excess of 40 km/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 additional caution when using the roads.

7.3.2 Operating any vehicle in contravention of the National Road Traffic Act within [the estate] is prohibited.'

[8] With the leave of the President of this court, the Association of Residential Communities CC, was admitted as an *amicus curiae.* The *amicus*, which was established in 2008, is a consultative and representative industry body. It has a membership of over 300 estates across South Africa and is representative of 58% of the market. The amicus filed heads of argument and was represented by counsel at the hearing of the appeal. It advanced argument in support of the Association that the appeal should succeed.

[9] In the courts below counsel for the appellants accepted that 'the roads in question are public roads for the purposes of the NRTA'. Accordingly, the full court analysed the roads challenge on the basis and assumption that the roads in question were public roads and subject to the National Road Traffic Act 93 of 1996 (the Act). Before this court it was contended that the concession 'appears to have been erroneously made, and the appellant will seek to withdraw it.'

[10] Here, we are concerned with a legal concession. It is trite that this court is not bound by a legal concession if it considers the concession to be wrong in law.[4] In *Alexkor Ltd and another v Richtersveld Community and others*, the Constitutional Court pointed out:

'The applicable rule is that enunciated in *Paddock Motors (Pty) Ltd v Igesund*. In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal. The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong. As the court put it: "If the contention the appellant

[4] See *Matatiele Municipality & others v President of the RSA & others* 2006 (5) SA 47 (CC) para 67. The Constitutional Court added:
'Indeed, in *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others*, this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that "if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it." Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct, in fact, is inconsistent with the Constitution. This would be contrary to the provisions of s 2 of the Constitution which provides that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid."'

now seeks to revive is good, and the other two bad, it means that this Court, by refusing to investigate it, would be upholding a wrong order."'[5]

[11] It is therefore open to the appellant to raise in this court the legal issue that had been conceded below.[6] The withdrawal of the concession can cause the respondents no prejudice. The facts were fully canvassed in the affidavits and the respondents were alive to the need to establish that the roads within the estate were public roads. In its opposing papers the Association disputed the conclusion that the estate roads were 'public roads' for purposes of the Act. The legal concession was made only after all the affidavits were filed. It was for the present respondents to allege facts from which the conclusion could be drawn that the estate roads are 'public roads for purposes of the Act.

[12] Section 1 of the Act defines a 'public road' as '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 has a right of access . . . .' The test to be applied in terms of the definition 'is whether a section of the public at least commonly (i.e. generally or universally – cf. *Shorter Oxford English Dictionary*) uses the area or has a right of access (as opposed to access by invitation direct or implied) thereto'.[7]

As Corbett J observed in *S v Rabe*:

'It is only places which are commonly used by the public (or a section thereof) or to which the public (or a section thereof) have a right of access which fall within the definition. As far as "use"

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[5] *Alexkor Ltd and another v Richtersveld Community and others* 2004 (5) SA 460; 2003 (12) BCLR 1301 (CC) para 43.
[6] See *Saayman v Road Accident Fund* [2010] ZASCA 123; 2011 (1) SA 106 (SCA) at para 12.
[7] *S v Coetzee* 1970 (2) SA 445 (E) at 447H.

by the public is concerned, it is clearly used for driving a vehicle thereon, or thereover, that is intended. Furthermore in this context the word "commonly" (Afrikaans text: 'gewoonweg') should be construed to mean "as a usual circumstance; as a general thing; in ordinary cases; usually, ordinarily, generally" (see meaning No. 5 in *Oxford English Dictionary*).'[8]

[13] Applying the definition of 'public road', thus interpreted, to the present case, it seems to me that the roads within the estate are not public roads. The estate is a private township. In terms of the township approval: '[t]he owner shall construct all the roads in the township to the satisfaction of the local authority'. The approval further provided:

'The owner of the erf, any further subdivision, or any unit thereon shall have a general right of access over Erven 2888-2891 subject to whatever rules, conditions and restrictions as are laid down from time to time by the "Home Owners' Association" for the purpose of ensuring proper control and administration of the use and enjoyment thereof.'

[14] At the inception of the estate, the roads within the estate were private roads. That never changed. The roads did not thereafter acquire the character of public roads. The estate is enclosed by a two metre high palisade fence, which is topped with electrified security wiring. All ingress and egress to the estate is strictly controlled. Gated access points are controlled by security guards. Visitors are required to provide the guards with an access code to gain entry to the estate. In respect of owners, biometric scanning is employed. This de facto situation accords with clause 34.9 of the MOI, which provides that the Association is obliged to provide such security in the estate as it deems appropriate, 'including such security as may be required to control egress and ingress to

[8] *S v Rabe* [1973] 2 All SA 640 (C) at 642-643.

the Estate, so that only Members, Lessees of Units, guests or invitees, authorised representatives, employees of the [Association] and any other duly authorised persons may be admitted'.

[15] The general public does not have access to the roads within the estate. In this context the word 'public' does not include persons who are there with the permission of the owners of property within the estate.[9] The public, so it has been held, must be the general public, not the special class of members of the public who have occasion for business or social purposes to go to the estate and the use of the roads by the public must be more than mere casual or isolated use.[10]

[16] In *Ethekwini Municipality v Brooks*[11] this court had occasion to consider whether a servitude of right of way over the land of the first respondent, Ms Brooks, is to be classified as a 'public street' as defined in s 1 of the Local Authorities (Natal) Ordinance 25 of 1974. 'Public street' is there defined as 'any street' which:

'(*a*) has been established by a local authority or other competent authority as a public street;

(*b*) has been taken over by or vested in a local authority as a public street in terms of any law;

(*c*) the public has acquired the right to use; or

(*d*) which is shown on a general plan or diagram of any private township situate in the area of a local authority filed in the Deeds Registry or the Surveyor-General's Office and to which the owners of erven or lots in such township have a common right of use.'

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[9] *R v Papenfus* 1970 (1) SA 371 (R) at 376.
[10] Ibid at 377; see also *Hallett v DPP* [2011] EWHC 488; *Harriot v DPP* [2005] EWHC 965; *Harrison v Hill* [1932] JC 13.
[11] *Ethekwini Municipality v Brooks & another* [2010] ZASCA 74; 2010 (4) SA 586 (SCA); [2010] 4 All SA 164 (SCA).

Ms Brooks contended that 'the only people who may legitimately use it are those in whose favour the right of way servitude was created and this is a finite and limited class of people.' In agreeing with that contention, this court held (para 23):

'I am of the view that the evidence adduced on behalf of the municipality falls far short of establishing a right on the part of the general public to use the road in question. At best for the municipality, the evidence establishes that some members of the public, or persons other than the owners of subdivisions, may, over the years, have used the road from time to time without let or hindrance. However, the evidence fails to establish whether or not those members of the public who used Nyala Drive over the years fell into the extended category of lawful users of the servitude of right of way described by Voet in the passage referred to above. It follows, therefore, that the municipality has failed to prove that the public has acquired a right to use the portion of Nyala Drive that forms part of the property of Mrs Brooks.'[12]

[17] In my view the same considerations apply in respect of the road network within the estate. Whilst it is correct that some members of the public (or persons other than those residing in the estate) are permitted to enter the estate, there is no right on the part of the general public or any section thereof to traverse the roads. This has been the historical position since the estate was first established. The 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'.

[12] See also *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd* 1998 (4) SA 62 (D) at 68G-69B.

[18] However, even on the assumption that the roads within the estate are public roads, the approach of the full court cannot be supported. The full court reasoned that in agreeing, as between members, speed limits, the erection of traffic signs and installation of speed humps, the appellant was purporting to usurp the functions reserved exclusively for the authorities under the Act, and that its conduct in so doing was unlawful.

[19] When the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, 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 invitees are only entitled to use the roads laid out within the estate subject to the conduct rules. Any third party invitee only gains access to the estate with the prior consent of the owner concerned. Upon gaining access to the estate, responsibility for any breach of the conduct rules by the invitee is that of the owner. In that regard clause 21.2 of the MOI provides:

'In the event of any breach of the conduct rules for residents by any Lessees of Units, guests or invitees, authorised representatives or any other duly authorised person such breach shall be deemed to have been committed by the Member and the Directors shall be entitled to take such action as they may deem fit against the responsible Member.'

[20] Any breach of the conduct rules is therefore a matter strictly between the owner concerned and the Association. No sanction is imposed on the third party. The third party's adherence to the rules is thus a matter for the owner who invited him or her onto

the estate. It is the owner who has to ensure that the third-party complies with the conduct rules or bear the consequence of any sanction imposed in consequence of such non-compliance. There is nothing in the rules which provides for any consequence for a third party who fails to comply therewith. The control of the speed limit within the estate therefore falls squarely within the provisions of the contract concluded between the Association and the owners of the properties within the estate. The rules are obviously enforceable only as between the contracting parties, and not against the public at large.

[21] It follows that the Association is not endeavouring to impose the provisions of the Act upon third parties. Neither do the rules purport to exonerate the parties from, or exclude the operation of, the Act. Once it is accepted that the rules are private ones, the respondents' argument that the Association is usurping the functions of the recognised authorities or contravening the provisions of the Act cannot be sustained. The appellant was not, in crafting and applying the rules, purporting to carry out any functions under the Act. Rule 7.1.2 does no more than prescribe that 'the speed limit throughout [the estate] is 40 km/h' and that 'any person found driving in excess of 40 km/h, will be subject to a penalty'. Regard being had to the MOI, the directors of the Association are entitled to make rules for the 'use and maintenance' of the roads (clause 20.2.3) and to 'impose a system of penalties' for a breach of such rules (clause 21.2).

[22] 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 undomesticated)

upon or in the immediate vicinity of the roads themselves. Rule 7.3.2 goes no further than to record that the operating of any vehicles in contravention of the Act within the estate is prohibited. I fail to see why that would be objectionable.

[23] In *Abraham & another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC)*,[13] Olsen J had occasion to consider rule 5 of the conduct rules of this very estate.[14] In that matter the applicants sought permission from the Association to keep a Saint Bernard dog on the estate, which was refused. They then applied to court to review and set aside the refusal. Olsen J stated:

'[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

[13] *Abraham & another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC)* JOL 32322 (KZD).

[14] Rule 5 is headed 'Pet Control'. Rule 5.1, which pertained to dogs, provides:

'5.1.1 Written permission must first be obtained from [the Association] before a dog may be brought onto Estate 2. This permission will not be unreasonably withheld provided compliance with the following rules is observed.

. . .

5.1.3 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.'

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] The approach adopted by Olsen J was endorsed by Sutherland J in *Bushwillow Park Home Owners v Paulode Olioviera Fernandes & Another.*[15] There the dispute between the parties concerned the authority of the governing body of an estate to approve or disapprove the colour of paint with which unitholders in the estate may decorate their homes. The unitholder had seen fit to paint lime green stripes on the unit in question. The governing body contended that it did not authorise that colour and demanded that the house be repainted in an approved colour. The application by the governing body succeeded. Sutherland J 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.'

[25] Those principles apply equally in respect of the regulation of the roads within the estate. 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. Nor does the enforcement of those contractual obligations involve the usurpation of public power. Statutory obligations on members of the public generally are obviously enforceable by the relevant authorities. Contractually binding regulations are enforceable by the parties to the contract, and against them only. There is therefore no conflict between the Act and the rules of the Association, agreed to privately. The position may have been different if the Association had sought to appropriate powers under the

[15] *Bushwillow Park Home Owners v Paulode Olioviera Fernandes & Another* [2015] ZAGPJHC 250.

Act. That it did not do. 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. Accordingly, the full court ought to have found that approval under the Act by the relevant authorities for purposes of contractual self-regulation was not required. There was thus no warrant for the finding by the full court that the Association had to first seek and obtain permission from the MEC or the local municipality.

[26] It follows that the appeal must succeed. The order of the full court accordingly falls to be amended by the deletion of the reference therein to Rules 7.1.2 and 7.1.3 (or more accurately 7.3.2).

[27] That leaves costs: The costs in this court present no difficulty; it must follow the result and it was agreed that it should include those consequent upon the employment of two counsel. Topping J directed the parties to pay their own costs. There was no suggestion that any basis exists for interference with that order. Insofar as the costs before the full court are concerned, the respondents succeeded in their challenge to the domestic worker rules. Thus although the Association has had substantial success in the litigation, the costs relating to the domestic worker rules call for particular consideration. The full court approached the enquiry thus: ‘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. . . . In the light of the above, it is to the roads challenge that I now turn to.’ The domestic worker rules challenge occupied less than five of the

approximately 30 pages in the judgment of the full court. What is more, a perusal of the record and both judgments suggests that roughly less than 20% of the costs related to this aspect. The order of costs must take account of this.

[28] In the result:

1. The appeal is upheld with costs, including those consequent upon the employment of two counsel, to be paid by the respondents jointly and severally.

2. The order of the full court is set aside and in its stead is substituted the following:

'(a) Save for declaring Conduct Rules 9.3.2, 9.4.1 and 9.4.3 of the Mount Edgecombe Country Club Estate Two unlawful, the appeal is otherwise dismissed.

(b) The appellants shall, jointly and severally, pay 80% of the respondent's costs, including those of two counsel.'

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V M Ponnan
Judge of Appeal

APPEARANCES:

For Appellant:	A Stokes SC (with him M Du Plessis SC and S Pudifin-Jones) Instructed by: Cox Yeats, Umhlanga Rocks Symington De Kok Attorneys, Bloemfontein
For First and Second Respondent:	KJ Kemp SC (with him HS Gani SC) Instructed by: Pather & Pather Attorneys Inc., Durban Claude Reid Inc., Bloemfontein
For the Amicus Curiae:	LJ De Bruyn Instructed by: Werksmans Attorneys, Sandton Symington & De Kok Attorneys, Bloemfontein