

Traffic Rules in Gated Communities in South Africa: A Reflections on *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v. Singh* Case

Senior lecturer **Moffat Maitele NDOU**¹

Abstract

In a recent Supreme Court of Appeal judgment in *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v. Singh* 2019 (4) SA 471 (SCA) (*Mount Edgecombe v. Singh*), the court found that a homeowner's association has the power to regulate traffic on the roads within a gated estate. The SCA found that, since the roads were private roads, and the National Road Traffic did not apply; the owners of the properties within the estate were contractually bound to comply with the rules of the homeowner's association. The homeowner's association was entitled to make traffic rules and to police such rules in the roads within the estate. The SCA found also, in passing, that even if the roads were public roads, the owner of property in the estate would still be contractually bound by the rules. Such rules would not be against public policy. This submission argues that the SCA is correct that the roads are private roads, and the property owners are contractually bound by the rules. However, the position would be different in respect of public roads. The homeowner's association may only enforce the rules by displaying road signs and they can only do so if they are authorised in terms of section 57 of the National Road Traffic Act. Displaying road signs on a public road without authorisation is an offence and if the roads in *Mount Edgecombe v. Singh* were public roads, it would be against public policy to enforce the rules. The homeowner's association would need to seek authorisation before enforcing such rules.

Keywords: public road; private road, traffic offences, gated community; public policy; domestic employee; contractual relationship; road traffic signs; speeding; authorisation.

JEL Classification: K25

1. Introduction

In a recent Supreme Court of Appeal judgment in *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v. Singh* (*Mount Edgecombe v. Singh*),² the court found that a homeowner's association has the power to regulate traffic on the roads within a gated estate. The decision was based on the fact that the owners of property within the gated community had contractually bound themselves when they bought the property.

This submission will evaluate that decision of the SCA, in *Mount Edgecombe v. Singh*. This will be done in the context of the decisions of the court below.

2. The facts

Mount Edgecombe Country Club Estate Management Association II (RF) NPC (management association) is an association of homeowners. According to the management association's memorandum of incorporation, all the owners of the residential property situated within the Mount Edgecombe Country Estate Two (the estate) must be members of the management association. Where the property is owned by a close corporation, a company or a trust, a natural person must be nominated to be a member of the management association. Mr Singh (the first respondent) and Mr Ramnandh (the second respondent) are residents and owners of a property, through a juristic person, in the estate.

The estate comprises of 890 freehold and sectional title residential units. It consists of extensive common property, which includes, sporting facilities, golf course, dams, community facilities, roads, function venues, and a clubhouse. The estate is surrounded by a two-meter-high palisade fence with electricity security wing. The gated access points in the estate are controlled by security guards. Some of the access points are guarded on a 24-hour basis every day of the year. The estate is also home to several species of small animals protected within the estate. It is serviced by a

¹ Moffat Maitele Ndou - LLB, LLM, Faculty of Law, North West University, South Africa, 25807919@nwu.ac.za.

² (323/2018) [2019] ZASCA 30 (28 March 2019).

network of roads and pathways registered in the name of the management association. The roads and pathways are used by motorised vehicles, pedestrians and golf carts.

Clauses 20 and 21 of the memoranda of incorporation gives the directors of the management association, the power to make reasonable rules for specific purposes and this includes the right of the management association to impose reasonable financial penalties on members who fail to comply with such rules. The memorandum of incorporation further gives the directors powers to enforce the rules; take steps necessary to remedy the breach of the rules; and debit the costs of doing so to the member concerned. The rules are binding to all members of the management association, and they apply equally to the members provided they are reasonable and to the interest of the management association. The rules formed part of the agreement to sell and purchase the property.

In terms of the rules, the speed limit on the roads within the estate was 40km/h. During October 2013, the daughter of the first respondent was issued with three contravention notices for exceeding that speed limit. The first notice for driving at a speed of 69. The second and third notice was for driving at the speed of 67 and 65 respectively. In each of the three instances a penalty of R1500 was imposed. On appeal to the estate management, the first respondent challenged two of the offences, but not the third. The first respondent successfully challenged one of the offences.

According to the management association rule of ‘pay first and argue later’, the first respondent had to pay R3000, and he could then lodge an appeal, of the decision of the estate management, within seven days. After the first respondent failed to pay R3000, the management association deactivated his access cards and biometric access.

In 2014, the first respondent launched an application challenging three categories of the rules.³ These rules were challenged on the following grounds:⁴

a) Rules 7.1.2 and 7.3.2.⁵ These are rules authorising the management association to police the roads within the estate. This includes the issuing of speeding fines and/fines for contravening any law governing the control of traffic on roads. By policing the roads, the first respondent argues, the management association purported to carry the functions of traffic officers or peace officers. The first respondent further argued that this was the position because the roads which the management association policed were public roads in terms of the National Road Traffic Act.⁶ As a result of the deactivation of the access card and biometric access, the first respondent challenged the power of the management association to restrict or limit the right of access the estate by owners and residents.

b) Rules 2.1, 4.7 and 4.81.⁷ These are rules that restrict the free choice of owners and residents with regards to contractors and service providers they may utilise or employ within the bounds of the

³ See *Singh v. Mount Edgecombe Country Club Estate Management Association II (RF) NPC* (unreported) case number 3962/2014 (delivered 4 February 2014) par. 22 (*Singh v. Mount Edgecombe* (unreported)).

⁴ See *Singh v. Mount Edgecombe* (unreported) par 23.

⁵ The rule provides for the following “7.1.2 The speed limit throughout [the] Estate 2 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 Estate 2 is prohibited.”

⁶ 93 of 1993.

⁷ Rule 2.1 provides for the following: “2.1.1 The design and construction of all new buildings, extensions, alterations to buildings, swimming pools, fences and all gardens must be approved by Meccema Two prior to any work being commenced. In addition, the required local authority approvals must also be obtained for all new buildings, alterations, glass enclosures, extensions, gazebo’s etc. All buildings, fences and gardens must adhere strictly to the comprehensive “Design and Development Rules” and “Town Planning Controls” for the particular village concerned. A copy of the relevant documents may be obtained from the Meccema Two office. 2.1.2 In order to maintain building standards and design requirements, every alteration to a building, installation of a glass enclosure, attachment to a building (plaques, awnings, air conditioning units, satellites, etc) erection of or alteration to fencing/garden walls, etc., on Estate 2 must have prior written permission from Meccema Two. No owner building is permitted on the Estate. A list of accredited building contractors is available from Meccema Two.” Rule 4.7 provides for the following: “4.7.1 All landscapers working on Meccema Two must be SALI approved and on the Estate’s approved contractor’s panel. 4.7.2 If a resident wants to landscape the verge, permission must be granted by Meccema Two. A landscape plan must be submitted by a landscaper and also approved by Meccema Two. The owner is responsible for the maintenance of the landscaped area. 4.7.3 If a landscaper is approached by a resident to revamp the whole or a large portion of the garden, a new plan must be submitted to Meccema Two for approval before work commences. 4.7.4 When the landscaper hands the maintenance contract over to the garden maintenance contractor, Meccema Two will continue to hold the landscaper responsible for the maintenance of the garden for 6 months, in terms of rule 4.1.5. 4.7.5 The garden will be inspected by the Meccema Two Landscaping & Environmental Manager after 6 months to be signed off as being in good order and no longer the responsibility of the landscaper.” Rule 4.8.1 provides that: “All garden maintenance contractors must be accredited by Meccema Two.”

estate. The first respondent challenged the power of the management association to decide which contractors may be appointed, by the owners and residents, to effect building alterations, additions and repairs to their units, the landscaping of their gardens and the ordinary garden maintenance thereof.

c) Rules 9.3.2, 9.4.1 and 9.4.3.⁸ These are rules which restrict the hours of employment of domestic employees of owners and residents on the estate and restricts the rights of such domestic employees to traverse the road network over the estate by walking or otherwise. The first respondent challenged the management association's power to restrict working hours of domestic employees and the restriction imposed to the effect that domestic employees may not walk freely on or over the roads within the estate.

3. The judgment

In the High Court Topping AJ found that, although the rules may irk one's sense of proprietary and fairness, the rules were not unlawful as contended by the first respondent.⁹ Topping AJ dismissed the application and the counter application brought by the management association. The first respondent appealed the decision of the High Court. The full bench of the High Court found that the rules were invalid. The order of invalidity was suspended for 12 months, to allow the management association to obtain authorisation from the Minister of Transport in terms of the National Road Traffic Act. On further appeal, by the management association at the Supreme Court of Appeal, the court granted the appeal.

3.1. Decision of the High Court

The court dismissed the application and the counter application. Regarding the application the court found that the rules were not unlawful and/or invalid. The rules were there to regulate conduct between neighbours, and it was acceptable that they are restrictive in nature. The court rejected that there existed unconscionable, immoral or illegal conduct which would result from the implementation of the rules. However, the court accepted that if there was evidence that the rules are implemented in such a manner, it would refuse to give effect to such rules.¹⁰ The court gave the following reasons for its decision.

3.1.1. Road rules

The court agreed with the management association's contention that it is not endeavouring to control the conduct of all persons entering the estate or to impose provisions of the National Road Traffic Act upon any persons. The court recognised that the rules themselves identifies the roads within the estate as public roads falling within the provisions of the National Road Traffic Act and there was nothing in the rules prohibiting the enforcement, by the relevant authorities, of the provisions of the National Road Traffic Act.¹¹

Relying on the decision of Olsen J in *Abraham v. Mount Edgecombe Country Club Estate Management Association Two (RF) NPC*,¹² the court concluded that these rules are private rules

⁸ The rules provide the following: "9.3.2 All domestic employees must comply with instructions from Security while boarding and travelling on the official Meccema Two buses. 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 they were 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 recognised normal business hours unless authorised differently by Meccema Two. 9.4.3 Domestic Employees may have access to Estate 2 from Mondays to Sundays but only during the hours of 06h00 and 18h00, they must personally swipe their access cards/scan their finger on the biometric reader for ingress and egress. Any variation from this must be authorised by Meccema Two in writing".

⁹ See *Singh v. Mount Edgecombe* (unreported) para 82.

¹⁰ See *Singh v. Mount Edgecombe* (unreported) para 82.

¹¹ See *Singh v. Mount Edgecombe* (unreported) para 58.

¹² (7124/12) [2014] ZAKZDHC 36 (17 September 2014).

entered into voluntarily when electing to buy property and their superimposed on any national or municipal legislation and do not usurp these national and municipal legislations. Since it was clear, to the court, that they were private rules based on a contract, it could not be accepted that the management association was usurping the powers of the relevant authorities in terms of the National Road Traffic Act.¹³ The court rejected that these rules were unlawful.

3.1.2. Domestic employees' rules

The court found that the arguments of the respondents were vague. The court recognised that the application was occasioned by two incidences where the respondents were given warning letters because the domestic employees were discovered walking on the estate by the security personnel in the estate.¹⁴

The court was called to decide whether the implications of the rules was that domestic employees may not walk on the roads within the estate and whether they were allowed to walk on the roads when the bus service provided for them was not available.¹⁵ Taking into account that there were 890 residential developments in the estate, the court accepted that there were a large number of domestic employees in the estate and it made sense that the domestic employees either walked or the employer would provide a bus service which has been provided by the management association. The court further noted that the use of the bus services and the security personnel would ensure order. The court rejected that these rules violated the right to free movement.¹⁶

Regarding the requirement for registration of domestic employees and the fact that they only have access to the estate between 6 am and 6pm, the court found no reason to conclude that such rules could be unlawful and invalid. The court pointed out that the purpose of such rules is to make sure that every person accessing the estate was identified. The court found that given the literal meaning, these rules merely prescribed a set of procedures to ensure that domestic employee went in and out of the estate in an orderly manner.¹⁷ The court rejected the contention that the Promotion of Administrative Justice Act¹⁸ (PAJA) applied in this case.

3.1.3. Contractors and service providers rules

The court noted that the owners of property and residents in the estate had contractually bound themselves to live within a controlled environment. They agreed also that the directors have the powers to make reasonable rules for the management, control, administration, use and enjoyment of the estate. This included ensuring that the buildings and gardens on the estate are aesthetically harmonious and that any alteration or new construction are to the required standard.¹⁹ The court was not satisfied that the respondents have made a case as to why the management association could not have a list of accredited service providers.²⁰ The court noted also that, the rules do not provide for a closed list of service providers.²¹ Considering that there was a procedure for owners to request for accreditation of their preferred service provider, the court accepted that the respondents had not applied for their preferred service provider to be accredited. The argument that the rules fell afoul of the Consumer Protection Act²² and the Competition Act²³ was rejected because the rules did not provide for a closed list of contractors and service providers. It followed that the argument regarding

¹³ See *Singh v. Mount Edgecombe* (unreported) para 59.

¹⁴ See *Singh v. Mount Edgecombe* (unreported) para 73.

¹⁵ See *Singh v. Mount Edgecombe* (unreported) para 74.

¹⁶ See *Singh v. Mount Edgecombe* (unreported) para 77.

¹⁷ See *Singh v. Mount Edgecombe* (unreported) para 80.

¹⁸ 3 of 2000.

¹⁹ See *Singh v. Mount Edgecombe* (unreported) para 66.

²⁰ See *Singh v. Mount Edgecombe* (unreported) para 67.

²¹ See *Singh v. Mount Edgecombe* (unreported) para 68.

²² 68 of 2008.

²³ 89 of 1998.

the limitation on right to free choice was also rejected.²⁴

3.1.4. The counter claims

The management association asked the court to give an order declaring it entitled to suspend the use of access card issued to the first respondent and his family for as long as the two fines totalling R3000 are paid. The court found that there was no indication as to how it was determined that the daughter of the first respondent was travelling at a speed higher than 40 km/h. This meant that the management association had failed to prove that the rules were breached.²⁵ The counterapplication was dismissed.

3.2. Decision of the full bench

The first respondent appealed the decision in respect of the road rules and the domestic employees' rules. However, he abandoned the challenge in respect of the contractors and service providers' rules. The court declared the rules to be unlawful but suspended the order of invalidity for 12 months to allow the management association to obtain the necessary authorisations in terms of the National Road Traffic Act.²⁶ The court gave the following reasons for the decision.

3.2.1. Road rules

The full bench noted that it was common cause that the roads in the estate were public roads. The court pointed out that the rules recognised such roads a public road. After considering various sections of the National Road Traffic Act, the court acknowledged that the first respondent's case was that, because the roads were public roads, the power to regulate traffic does not vest in the management association. The management association did not dispute that the roads were public roads but argued that the relationship between it and the first respondent was a contractual relationship and the source of its powers was a contractual one. The management association further argued that its rules apply in parallel to the National Road Traffic Act and do not replace this legislation.

The full bench found the reasoning of the court below, to be deeply flawed. It recognised that the reasoning of the court below may indeed serve to protect individual interest by virtue of the parties' rights to contract freely with each other, but it ignored the public interest concerned with the National Road Traffic Act.²⁷ The court below failed to enquire into whether the rules infringe upon the *National Road Traffic Act*, the *Criminal Procedure Act*²⁸ (CPA) and the *Constitution of the Republic of South Africa*, 1996 (the Constitution).²⁹ The full bench further noted that the court below misapplied the judgment in *Abraham v. Mount Edgecombe Country Club Estate Management Association Two (RF) NPC* where the court found that the management association rules, in that case, were valid and superimposed on municipal law and had no public law content and do not involve the exercise of public law and the performance of a public function.³⁰ The position in *Abraham v. Mount Edgecombe Country Club Estate Management Association Two (RF) NPC* was different to the position that the court below was faced with, because the rules in *Singh v. Mount Edgecombe* had public law function.

It appeared that the reasons for the failure to consider the provisions of the stated legislations and the Constitution was because the court below considered them trumped by contractual relationship between the management association and the first respondent. The full bench noted that,

²⁴ See *Singh v. Mount Edgecombe* (unreported) para 71.

²⁵ See *Singh v. Mount Edgecombe* (unreported) para 103-104.

²⁶ 93 of 1996.

²⁷ See *Singh v. Mount Edgecombe Country Club Estate Management Association II (RF) NPC* 2018 1 SA 615 (KZP) (*Singh v. Mount Edgecombe*) para 29.

²⁸ 51 of 1977.

²⁹ 1996.

³⁰ See *Singh v. Mount Edgecombe* para 30.

as decided in *Juglal NO v. Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*,³¹ an agreement would be 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”. The full bench found that the rules were against public policy because they were contrary to the provisions of the National Road Traffic Act, the CPA and the Constitution. Since the roads were public roads, only the Minister of Transport or someone authorised by the minister has the power to regulate such roads. No contractual arrangement could remedy the situation.³²

3.2.2. Domestic employees’ rules

The full bench pointed out that the finding of the court below that the rules were neither restrictive nor unlawful, because in their literal meaning and context, they provided set of procedure to maintain order, ignored that the rules deny access to the estate and roads to domestic employees working in the estate. The full bench noted that the management association seem to have categorised these domestic employees as posing security risk, and this was like how they were categorised during apartheid. The restrictive nature of the rules violated the constitutional rights of the domestic employees. The court rejected the management association’s contention that the rules benefitted the employees in terms of their safety, and because they could return to their homes timeously at the end of the working day. The rules were declared unreasonable and unlawful.³³

3.3. Decision of the Supreme Court of Appeal

In the SCA, the management association abandoned their challenge to the domestic employees’ rules. The appeal was limited only to the road rules. In the courts below, the management association had conceded that the roads in the estates were public roads for the purpose of the National Road Traffic Act. In the SCA, the management association contended that the concession was erroneously made, and they withdrew it.³⁴

With reference to the decisions in *Alexkor Ltd. v. Richtersveld Community*³⁵ and *Matatiele Municipality v. President of the RSA*,³⁶ the SCA pointed out that it was trite that the court is not bound by legal concession if it considers such a concession to be wrong in law. It was open to the management association to raise the legal issue which was conceded in the court below. This withdrawal could not cause the respondents any prejudice, because the issue was raised in the affidavits and the concession was only made after all the affidavits were filed.³⁷

In deciding whether, the roads in the estates were public roads or not, the court looked at the definition of public road in terms of section 1 of the National Road Traffic Act. Relying on *S. v. Coetzee*³⁸ and *S. v. Rabe*,³⁹ the SCA noted that the test to be applied was whether the road was at least commonly used by the public or the public had a right of access.⁴⁰

The SCA noted that at the inception of the estate, the roads were private roads because the estate was a private township. The SCA relied on the township approval which provided that the owner must construct the roads to the satisfaction of the local authority and the homeowner association has a power to enact rules, conditions and restrictions for the use of these roads. The roads remained private roads and never acquired the character of a public road. The fact that the estate is enclosed by a two-meter fence topped by electric security wiring; the flow in and out of the estate

³¹ 2004 5 SA 248 (SCA) para 12.

³² *Singh v. Mount Edgecombe* para 34-36.

³³ *Singh v. Mount Edgecombe* para 42-43.

³⁴ *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh* (323/2018) [2019] ZASCA 30 (28 March 2019) (*Mount Edgecombe v. Singh*) para 9.

³⁵ 2004 5 SA 460 (CC).

³⁶ 2006 5 SA 47 (CC).

³⁷ *Mount Edgecombe v. Singh* para 10-11.

³⁸ 1970 2 SA 445 (E) at 447H.

³⁹ [1973] 2 All SA 640 (C) at 642-643.

⁴⁰ *Mount Edgecombe v. Singh* para 12.

was controlled; gated access points are controlled by security guards; and visitors are required to provide guards with access code to gain entry to the estate were factors that pointed to the private character of the roads.⁴¹

Relying on the decision in *R. v. Papenfus*,⁴² the SCA acknowledged that the word ‘public’ does not include persons who are there with the permission of the owners of the property within the estate. It must be the general public, not 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 road must be more than mere casual or isolated use. The court also relied on three English judgments, *Hallett v. DPP*,⁴³ *Harriot v. DPP*,⁴⁴ *Harrison v. Hill*⁴⁵ to come to this conclusion.⁴⁶

The SCA accepted that the same approach taken in respect of determining the ‘public’ in the context of a servitude in *Ethekwini Municipality v. Brooks*,⁴⁷ must be taken in the case. In *Ethekwini Municipality v. Brooks*, the court was clear that it had to be proved that the public had acquired the right to use the road. Since the non-owners were permitted to use the road, they were there with the authority and permission of the owners, they were not to be regarded as forming part of the public for the purpose of the definition of public road.⁴⁸

The SCA noted that even if the court below was correct that the roads were public roads, the decision of the full bench could not be supported. When the first respondent bought the property, he became a member of the association and was contractually bound by the rules of the association. The rules imposed were private ones and they were voluntarily entered into when the owner elected to buy the property. Third parties are not bound by the rules, hence the responsibility for any breach lies on the owner who has given access to such third party. No sanction may be imposed on the third party. That meant the rules were enforceable only against the contracting parties. Once it accepted that the rules were private rules in terms of a contract, the court rejected that the rules excluded the functioning of the National Road Traffic Act.⁴⁹

The fact that the estate prescribed a lower speed limit than the National Road Traffic Act did not mean that the rules were unreasonable. This was reasonable considering the presence of children, pedestrians and animals in the immediate vicinity of the roads. The court accepted the approach taken in *Abraham v. Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC)* and *Bushwillow Park Homeowners v. Paulode Olioviera Fernandes*⁵⁰ and concluded that the mere fact that the rules provide additional contractual requirements for the operation of vehicles on the roads does not mean that the rules themselves have a public law content. The enforcement of those contractual obligations did not involve the usurpation of public power. The court further stated that the 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.

The SCA was of the opinion that the court below ought to have found that the approval under the National Road Traffic Act was not required for purpose of contractual self-regulation.

4. Analysis and comment

4.1. Public road or private road

Section 1 of the National Road Traffic Act defines a public road as: any road, street or

⁴¹ *Mount Edgecombe v. Singh* para 13-14.

⁴² 1970 1 SA 371 (R).

⁴³ [2011] EWHC 488.

⁴⁴ [2005] EWHC 965.

⁴⁵ [1932] JC 13.

⁴⁶ See *Mount Edgecombe v. Singh* para 15.

⁴⁷ 2010 4 SA 586 (SCA).

⁴⁸ *Mount Edgecombe v. Singh* para 16-17.

⁴⁹ *Mount Edgecombe v. Singh* para 18-21.

⁵⁰ [2015] ZAGPJHC 250.

thoroughfare or any other place (whether a thoroughfare or not) which is commonly⁵¹ used by the public or any section thereof or to which the public or any section thereof has a right of access, and includes:

- a) the verge of any such road, street or thoroughfare.
- b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and
- c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare.

Cooper points out that the addition of the word in brackets “whether a thoroughfare or not” after the words “any other place” indicates that any place of whatever nature may qualify as a public road.⁵²

Cooper further points out that there were two views regarding the interpretation of a similar worded definition in previous legislation. One view was that a road would be a public road if a section of the road is commonly used by the public and the public has a right of access.⁵³ This definition would exclude any private road commonly used by the public but to which the public do not have right to access. This interpretation was seen to be inconsistent with the intention of the legislature.⁵⁴ However, this view has been accepted by our courts in *S. v. Christodoulou*,⁵⁵ where the court found that a parking area adjacent to a public road and commonly used by the public was not a public road because the public did not have a right of access to the road; and in *S. v. Van Heerden*,⁵⁶ where the court found that the school ground commonly used by the public was not a public road because the public had no right of access.

The second view was accepted by the Supreme Court of Appeal and the test to be applied in terms of the definition is whether a section of the public at least commonly uses the road or has a right of access.⁵⁷ The mere fact that the property is private a property does not preclude it being a public road. The public may not have right of access but if the road is commonly used by the public, such a road would be a public road. This approach was taken in several judgments. First in *S. v. Kriel*,⁵⁸ where the court made it clear that there were no grounds for changing the words in the definition as was done in *S. v. Christodoulou* and *S. v. Van Heerden*. In *S. v. Rabe* the court found that a privately owned area which the public had no right of access was a public road because the general public would, for recreational purposes, habitually drive and park motor vehicle in the area.

As to what would amount to the “public”, the National Road Traffic Act does not provide a definition. The court in *S. v. Mnguni* provided direction as to what the word means. The court found that people who use the road must be members of the general public.⁵⁹ In *R. v. Papenfus*, the court went further and stated that the meaning to be given to the word 'public' in the definition cannot include persons who as individuals are there with the express or implied permission of the owner and this includes employees and their dependants, visitors and guests.⁶⁰ These are all persons who as individuals are there with the special consent.⁶¹ The court explained that the word 'public' must be taken to include only those persons, such as casual travellers, tourists and the like, whose use of the road may be said to be tolerated as opposed to be permitted.⁶² In Both *S. v. Kriel* and *S. v. Mnguni*,

⁵¹ Commonly means generally or usually. In *S v. Laubscher* 1973 (4) SA 303 (C), the court found that were the number of people using the private road (used only by permit holders) was minimal and the road was used seldom or intermittently it could not be said to be a commonly used road. In *S. v. Mnguni* 1975 (4) SA 664 (T), the court found that unless there are members of the general public who can be said not to be an inconsiderable number who use a mine road with some degree of regularity for purposes that are quite unconnected with the business of the mine or visiting the mine or its employees, such road cannot be said to have been turned into a public road.

⁵² See Cooper *Alcohol, Drugs and Road traffic* 25.

⁵³ See Cooper *Alcohol, Drugs and Road traffic* 25

⁵⁴ See Cooper *Alcohol, Drugs and Road traffic* 25.

⁵⁵ 1967 3 SA 269 (N).

⁵⁶ 1968 1 SA 65 (GW).

⁵⁷ *Mount Edgecombe v. Singh* para 12-13.

⁵⁸ 1968 3 SA 451 (T).

⁵⁹ *S v. Mnguni* 669.

⁶⁰ *R v. Papenfus* 376E.

⁶¹ *R v. Papenfus* 376E.

⁶² *R v. Papenfus* 376E.

the courts quoted, with approval, an English decision in *Harrison v. Hill*, where the court found that when a statute speaks of the public in respect of road traffic offences, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to use the road.⁶³

In *R. v. Papenfus*, the court concluded that when deciding whether a private road is commonly used by the public or section of the public, the following principles are important:⁶⁴

a) the public must be “the general public” and the use of the road by the public must be more than mere casual or isolated use.

b) a “private road” would not become a “public road” merely because on a few isolated occasions each year one or two members of the general public happen to use it.

c) on the other hand, if several members of the general public use the road every day this would make what was otherwise a “private road” a “public road”.

To prove that the road is not a public road, the party must prove it was not commonly used by the public or a section thereof; and the public or a section had no right of access. Hence, it is necessary to discuss what the phrase right of access means. Cooper argues that the right of access should not be temporary in nature but, it should have a degree of permanence.⁶⁵ It is difficult to decide the extent to which the public must be using the road before they can be said to be having access to it.⁶⁶ This is one of those difficult questions turning on degree, which cannot be answered with any precision; each case must largely be determined on its own merits.⁶⁷ Payment of a fee to access the road does not mean that there is no right of access.⁶⁸ In *S. v. Coetzee*, the court made the following finding regarding the right of access:⁶⁹

The governing consideration in applying the definition in a particular case, seems to me to be the character of the place or area in question. In the present case the area is one to which only customers of the Eskimo Hut have exclusive access. Their right to use the parking area derives from a specific invitation directed to them in their particular capacity as business clients of the concern carrying on business on the premises. The frequency with which customers of the concern may have access to the parking area seems to be irrelevant. What does seem to be crucial is that business customers cannot be equated to the general public or a section of the public. 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. The use and the right of access in the present case is confined to customers, i.e., persons who proceed to business premises for the particular object of transacting business only. Such use or access is no different from the use or access exercised by friends or acquaintances who visit private property at the invitation direct or implied of the owner of that property or with his permission.

In *S. v. Kaffer*, the court found that the mere fact that the public was required to pay a fee to obtain access has no bearing on the question whether the public has a right of access, if the public has a right of access on payment of a prescribed fee it has access in terms of the National Road Traffic Act.

Klopper concludes that the following areas have previously been declared public road:⁷⁰

a) a parking area on a from beach allowing for driving and parking of vehicles with a tarred access road.

b) a grand parade in Cape Town which also does duty as a paid parking area.

c) a road traversing a private property and linking a main road with a filling station.

Klopper further summarises that the following areas were previously found not to be public

⁶³ *Harrison v. Hill* 16.

⁶⁴ *R. v. Papenfus* 377.

⁶⁵ See Cooper *Alcohol, Drugs and Road traffic* 28.

⁶⁶ *S. v. Mnguni* 669.

⁶⁷ *S. v. Mnguni* 669.

⁶⁸ See Cooper *Alcohol, Drugs and Road traffic* 28.

⁶⁹ *S. v. Coetzee* 447.

⁷⁰ Klopper, *The Law of Collisions in South Africa* 199.

roads.⁷¹

- a) a school playground, and
- b) a road leading to a mine designated as a private road and used only by employees of the mine.

The SCA took the view that in the case, the roads in the estate were private roads. The fact that, with respect to owners, biometric scanning was used for them to access the estate; any other visitors or guest were required to provide access codes; and the enclosure of the estate with a two-meter palisade fence, is a clear indication that the estate was not accessible to the general public. Only special members of the public were able to access the estate. This was not a case of accessing the estate by merely paying a fee or acquiring some form of a permit. To access the estate, one had to be an owner, a resident in the estate, an employee of an owner or a guest who has been given access codes by the owner in the estate. It is submitted that the decision that the roads in the estate were private roads is a correct interpretation of the law. However, this decision is not authority that in every gated estate there could not be a public road. Every case must be judged on its merits and if the general public has access to the roads or commonly uses the roads, such road will be a public road.

4.2. Contractual relationship and public policy.

The full bench found that the road rules were against public policy because they were in conflict with the provisions of the National Road Traffic Act.⁷² The full bench emphasised that a contractual provision is against public policy if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the contract. The full bench further found that the implementation of the rules would be contrary to the law. This reasoning was rejected by the SCA. The SCA emphasised that when the first respondent bought the property, he was bound by the rules and these rules were contractual in nature. The SCA found that this was the case even if the road was found to be a public road.

To understand whether the rules would be against public policy, if the road was found to be a public road, it is important to look at the provisions of the National Road Traffic Act. The purpose of the National Road Traffic Act is to provide for road traffic matters which apply uniformly throughout the Republic.⁷³ The National Road Traffic Act provides for various offences which may be committed only on a public road.

The Minister of Transport has the power to prescribe such signs, signals, markings or other devices for purposes of prohibiting, limiting, regulating or controlling traffic in general.⁷⁴ The minister further has the power to authorise any other person or body to display on a public road any sign, signal, marking or other device for the purpose of ascertaining the suitability of such sign, signal or device as a road traffic sign.⁷⁵ The MEC 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 within the jurisdiction of the local authority and such association or club may display a badge or other token of the association or club in conjunction with any such road traffic sign.⁷⁶ No person shall display any road traffic sign on a public road unless such person is authorised in terms of section 57 of the National Road Traffic Act.⁷⁷

Failure to comply with any direction conveyed by a road traffic sign displayed in the prescribed manner is an offence, unless directed by a traffic officer.⁷⁸ Any authorised person may display an appropriate road traffic sign on any public road, indicating a speed limit other than the general speed limit which applies in respect of that road, provided that such other speed limit shall

⁷¹ Klopper, *The Law of Collisions in South Africa* 199.

⁷² The court made this decision based on the concession that the road was a public road.

⁷³ Long title of the *National Road Traffic Act*.

⁷⁴ Section 56(1) of the *National Road Traffic Act*.

⁷⁵ Section 56(2) of the *National Road Traffic Act*.

⁷⁶ Section 57(6) of the *National Road Traffic Act*.

⁷⁷ Section 57(10) of the *National Road Traffic Act*.

⁷⁸ Section 58(1) of the *National Road Traffic Act*.

not be higher than the speed limit prescribed.⁷⁹

Section 89 of the National Road Traffic Act provides the criminalising and penalty provisions. The section provides that any person who contravenes or fails to comply with any provision of the National Road Traffic Act or with any direction, condition, demand, determination, requirement, term or request thereunder, shall be guilty of an offence.⁸⁰

Two offences are relevant for the purposes of this case. First, the speeding offence in terms of section 59(4) read with section 89(1) and 89(3) of the National Road Traffic Act.⁸¹ In the full bench it was accepted that since speeding on a public road is an offence in terms of the National Road Traffic Act, only the state could enforce compliance and punishment for such an offence. Any enforcement by the management association would be against public policy. It is submitted that this conclusion can be justified. This is even clearer when one considers the second offence.⁸²

Section 57(10) read with section 89(1) and 89(6) of the National Road Traffic Act, it is submitted, clearly provides that displaying any road traffic sign on a public road without authorisation is an offence.⁸³ The full bench conclusion, that in respect of a public road it would be contrary to the law if the management association did not obtain authorisation to display the road traffic signs is justified. Displaying road traffic signs, on a public road, without authorisation is not only contrary to the National Road Traffic Act, it also an offence. The full bench is also correct that, as it relates to a public road, the decision in *Abraham v. Mount Edgecombe Country Club Estate Management Association Two (RF) NPC* is not applicable because in this case the court considered rules which did not involve the exercise of public function and the performance of public function. In respect of a public road, the rules would contravene the provisions of the National Road Traffic Act and they would amount to an offence.

The fact that the contract was voluntarily concluded, would not detract from the fact that, as it relates to a public road, it would be an offence for the management association to enforce the rules. As already accepted that the SCA correctly held that the road was a private road, the decision that the contract was voluntarily concluded and that the court should not interfere with the rules was a correct decision. That the rules provide for a lesser speed than that provided in the National Road Traffic Act, is justifiable and reasonable and is not in conflict with the provisions of the National Road Traffic Act.

5. Conclusion

The SCA correctly found that the roads within the estate were private roads. This means that the first respondent was contractually bound by the rules enacted by the management association. The first respondent could not argue that the rules amounted to usurping the function of traffic officers and/or peace officer in terms of the National Road Traffic Act, since this act did not apply to private roads.

The SCA goes further and state in passing that even if the road was a public road, this would not be contrary to public policy. It is submitted that this conclusion cannot be sustained. Considering that displaying road traffic signs without the required authorisation would amount to an offence in terms of section 57(10) read with section 89 of the National Road Traffic Act; the enforcement of

⁷⁹ Section 59(2) of the *National Road Traffic Act*.

⁸⁰ See also *Pakule v. Minister of Safety and Security; Tafeni v. Minister of Safety and Security* 2011 4 All SA 159 (SCA) and *S v. Permal* 2018 2 SACR 206 (WCC).

⁸¹ Section 89(3) provides that Any person convicted of an offence in terms of subsection (1) read with section 3A (3), 17 (4), 17 (5), 18 (5), 59 (4), 61 (2), 66 (3) or 68 (1), (2), (3), (4) or (6) shall be liable to a fine or to imprisonment for a period not exceeding three years.

⁸² This submission does not suggest that these are the only offences prescribed in terms of the National Road Traffic Act. However, the scope of the submission is limited to these two offences.

⁸³ Section 57(10) provides that “no person shall display any road traffic sign on a public road unless having been authorised thereto by or under this Chapter”. Section 89(1) provides that “any person who contravenes or fails to comply with any provision of this Act or with any direction, condition, demand, determination, requirement, term or request thereunder, shall be guilty of an offence”. Section 89(6) provides that “any person convicted of an offence in terms of subsection (1) read with any other provision of this Act shall be liable to a fine or to imprisonment for a period not exceeding one year”.

these rules would be against public policy. The fact that the only way to implement the rules is through displaying of road traffic signs, is an indication that, in respect of a public road, the enforcement of the rules would amount to an offence and therefore against public policy.

The judgment would be applicable to cases where one is dealing with a private road. However, this judgment would not be applicable where the road is a public road.

Bibliography

1. *Abraham v. Mount Edgecombe Country Club Estate Management Association Two (RF) NPC* (7124/12) [2014] ZAKZDHC 36 (17 September 2014).
2. *Alexkor Ltd v. Richtersveld Community* 2004 5 SA 460 (CC).
3. *Bushwillow Park Homeowners v. Paulode Oliviera Fernandes* [2015] ZAGPJHC 250.
4. *Constitution of the Republic of South Africa*, 1996.
5. *Cooper WE Alcohol, Drugs and Road traffic* (Juta Cape Town 1979).
6. *Criminal Procedure Act* 51 of 1977.
7. *Ethekwini Municipality v. Brooks* 2010 4 SA 586 (SCA).
8. *Hallett v. DPP* [2011] EWHC 488.
9. *Harriot v. DPP* [2005] EWHC 965.
10. *Harrison v. Hill* [1932] JC 13.
11. *Juglal NO v. Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 5 SA 248 (SCA).
12. Klopper HB, *The Law of Collisions in South Africa* 8th ed (Butterworths Durban 2012).
13. *Matatiele Municipality v. President of the RSA* 2006 5 SA 47 (CC).
14. *National Road Traffic Act* 93 of 1996.
15. *Pakule v. Minister of Safety and Security; Tafeni v. Minister of Safety Security* 2011 4 All SA 159 (SCA).
16. *R. v. Papenfus* 1970 1 SA 371 (R).
17. *S. v. Christodoulou* 1967 3 SA 269 (N).
18. *S. v. Coetzee* 1970 2 SA 445 (E).
19. *S. v. Kriel* 1968 3 SA 451 (T).
20. *S. v. Laubscher* 1973 4 SA 303 (C).
21. *S. v. Mnguni* 1975 4 SA 664 (T).
22. *S. v. Permal* 2018 2 SACR 206 (WCC).
23. *S. v. Rabe* 1973 2 All SA 640 (C).
24. *S. v. Van Heerden* 1968 1 SA 65 (GW).
25. *Singh v. Mount Edgecombe Country Club Estate Management Association II (RF) NPC* (unreported) case number 3962/2014(delivered 4 February 2014).
26. *Singh v. Mount Edgecombe Country Club Estate Management Association II (RF) NPC* 2018 1 SA 615 (KZP).