OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3962/2014
CASE NO: 1118/2014
CASE NO: 4375/2014

In the matters between:

Niemesh Singh	First Applicant
Munshurai Madhanlal Ramandh	Second Applicant

And

Mount Edgecombe Country Club Estate Management Association 2 (RF) NPC	First Respondent
Minister of Transport	Second Respondent
MEC for the Department of Transport: KZN	Third Respondent
eThekwini Municipality	Fourth Respondent

JUDGMENT

Delivered on 4 February 2016

TOPPING AJ

Introduction

[1] I have before me three applications. A theme running common to all three applications is a challenge to the Conduct Rules for Residents ("the conduct rules") of the Mount Edgecombe Country Club Estate Management Association 2 (RF) (NPC), which is cited as the First Respondent in the first application and as the Respondent in the second and third. Mr Niemesh Singh is the First Applicant in the first application and the Applicant in the second and third applications. For ease of reference, I shall refer to Mr Singh as the "Applicant" and to the Mount Edgecombe Country Club Estate Management Association 2 (RF) (NPC) as the "Respondent". I shall refer to the remaining parties as cited in the application papers concerned.

[2] In the first application, which I shall refer to as "the rules application", the Applicant, along with the Second Applicant, seek an order declaring certain specified rules of the conduct rules to be declared unlawful and to be regarded as *pro non scripto*. The Respondent has also instituted a counter application in which it seeks an order declaring that it is entitled to suspend the use of the access cards issued to the Applicant, his invitees and members of his family, together with the biometric access for such persons, for so long as certain fines issued to him pursuant to the conduct rules have not been paid. In the second application, which I shall refer to as "the spoliation application", the Applicant seeks confirmation of a *rule nisi* issued by this court on the 1st of February 2014 directing the Respondent to re-activate his access cards and the biometric access of his family to the Mount Edgecombe Country Club Estate 2 ("the estate"). Lastly, in the third application, which I shall refer to as "the trespass application", the Applicant seeks an order directing the Respondent to allow certain contractors engaged by him access to the estate and a further order restraining the Respondent, or any person acting through or

with its instructions, from entering upon various specified immovable properties within the estate.

[3] By agreement between the parties all three applications were placed before me and argued simultaneously. Although it is agreed that I should deal with all three applications in one judgment, I was requested to deal with the merits of each application separately. Save for matters that are common to all three applications, I shall structure this judgment accordingly. I shall also ensure that each application is considered in isolation and anything that might be stated in one application will not be considered in the determination of any other.

Background

[4] The estate is described in the founding affidavit in the rules applications as consisting of in excess of 890 freehold and sectional title residential developments. Besides the freehold and sectional title properties, the estate also comprises of extensive common property, consisting of open areas, dams, ponds, rivulets, water features, community facilities, roads and other infrastructure. The common facilities on the estate include the Mount Edgecombe Country Club Golf Course 2, the clubhouse and a function venue which is utilised for conferences, corporate events, board meetings and weddings. The estate also provides facilities for various sporting activities, including squash, tennis, fishing and bowling. The entire estate is enclosed by a 2m high palisade fence, topped with electrified security wiring. The estate has gated access points which are controlled by guards. Some access points are manned on a 24-hour basis, 365 days a year. The estate is serviced by a network of roads which are situated upon *erven* registered in the name of the Respondent. This much is confirmed by the Respondent.

[5] The Respondent, which is a non-profit company duly registered in accordance with the provisions of the Companies Act, No. 71 of 2008, is an association of all the homeowners on the estate and is the management association which regulates the affairs of the estate.

[6] In terms of the standard contract concluded for the purchase of immovable property within the estate, the purchaser, or his nominee, is obliged to become a member of the Respondent and be subject to the conditions set out in the Respondent's memorandum of incorporation.[1] In terms of the Respondent's memorandum of incorporation, in the event of a unit being owned by a close corporation, company or trust, such entity shall nominate one natural person to be a member of the Respondent.[2] Although there was an initial challenge to the Applicants' *locus standi*, it is now common cause that both the Applicant and the Second Applicant are the persons nominated to be members of the Respondent by the legal entities owning the properties listed in the application papers. It is therefore common cause that both the Applicant and the Second Applicant are residents and property owners (through various companies, close corporations and trusts) within the estate.

The Rules Application: Case Number 3962/2014

[7] As already mentioned above, the rules application was instituted by the Applicant and the Second Applicant against the Respondent. The Minister of Transport, MEC for the Department of Transport: KZN and the eThekwini Municipality, are cited as the Second, Third and Forth Respondents, respectively. No relief is however sought against the Second to Fourth Respondents and they are alleged to have been cited

[1] A copy of the contract of sale concluded for the purchase of 3 Harvard Hill, which is one of the properties forming the subject of the rules application, is put up by the Respondent as annexure "TK 5". Such condition is evident from a perusal of clause 15 thereof.
[2] A copy of the Respondent's memorandum of incorporation has been put up as annexure "A" to the rules application. Such provision is contained in clause 7.4.

merely to give them notice of the application itself. They have, in any event, played no part therein.

[8] The relief sought by the Applicants is that certain specified rules of the conduct rules be declared unlawful and be regarded as *pro non scripto*. There was some initial confusion as to the nature of the relief sought by the Applicants as the notice of motion referred to "*all*" the conduct rules, but then made specific reference to certain identified rules. This issue was however resolved by the exchange of affidavits between the parties, wherein the Applicant clarified in his replying affidavit that only the rules identified in the notice of motion were being challenged. These rules are identified as being rules 7.1.2 and 7.3.2, rules 2.1, 4.7 and 4.8.1 and rules 9.3.2, 9.4.1 and 9.4.3.

[9] A good starting point would be to analyse the relationship between the Applicants and the Respondent. There is no dispute on the papers that the properties listed in the application were purchased in terms of a standard sale agreement referred to above. As already stated, in terms of such agreement, the purchaser is obliged to become a member of the Respondent and undertakes to be subject to the conditions set out in the Respondent's memorandum of incorporation. This much is common cause between the parties. The purchaser also acknowledges that the directors of the Respondent are entitled to lay down rules regarding the administration and governance of the estate which the Respondent considers appropriate.[3] The Respondent's memorandum of incorporation

[3] This is set out in clause 8 of the Contract of Sale put up as annexure "TK 5" to the answering affidavit. The purchaser acknowledges that the directors of the Respondent shall be entitled to lay down rules with regard to, *inter-alia*, the preservation of the natural environment, vegetation, flora and fauna in the estate, the use and allocation of private parking areas, the right to keep animals, the use of the recreation and entertainment areas, amenities and facilities, the placing of movable objects upon or outside the buildings, the conduct of persons within the estate and the prevention of a nuisance of any nature, the use of the land within the estate, the use of the residential houses/apartments and accompanying garages, carport and parking bays erected upon the estate, the use of

and the rules laid down by its directors accordingly form part of the agreement entered into between it and its members.

[10] It is evident therefore that an agreement exists between the entities through which the Applicants claim to have *locus standi* in these proceedings and the Respondent. In terms of that agreement the Respondent is entitled to impose rules relevant to the governance and administration of the estate and such entities, and the Applicants as their nominees, have agreed to be bound thereby. The relationship between the Applicants and the Respondent accordingly has its foundation in contract and I am of the view that it is this contractual nature of the relationship between the parties that should provide the framework in which this application ought to be decided.

[11] This view is reinforced by the recent judgment in **Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC**[4], a case dealing with the Respondent's conduct rules and a challenge to the Respondent's decision to refuse permission for a resident of the estate to keep a St Bernard dog. The court upheld the argument that the contractual nature of the relationship between the Respondent and its members, and its members' voluntary choice of purchasing property, residing within the estate and subjecting themselves to its rules, provided the framework in which the matter should be decided. Olsen J stated:[5]

"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

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the roads, pathways and open spaces, the imposition of fines and other penalties to be paid by members of the Association and generally in regard to any other matter.

[4] [2014] ZAKZDHC 36 (17 September 2004).

[5] At paragraph 23.

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 which the estate offers by reason of the controls imposed on it by contract. In my view PAJA[6] finds no application in this case. "

[12] Any consideration of whether the rules complained of by the Applicants are unlawful and ought therefore to be regarded as *pro non scripto* must entail an application of the principles laid down in various leading judgments of the Supreme Court of Appeal. In **Sasfin (Pty) Ltd v Beukes**[7] it was stated that "[*our*] *common law does not recognise agreements that are contrary to public policy*". In discussing the concept, it was stated that public policy "*is an expression of 'vague import'… and what the requirements of public policy are must need often be a difficult and contentious matter*". With reference to the various definitions that have been applied to the concept, it was stated that "*an act which is contrary to the interests of the community is said to be an act contrary to public policy"* and that *"such acts may also be regarded as contrary to the common law, and in some cases contrary to the moral sense of the community*". A contract against public policy has also been defined as "*one stipulating performance which is not per se illegal or immoral but one which the Courts, on grounds of experience, will not enforce, because performance will detrimentally affect the interests of the community*". It was then stated that "[*the*] *interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are*

[6] A reference to the Promotion of Administrative Justice Act, No. 3 of 2000.
[7] 1989 1 SA 1 (A) at 7I – 8E.

contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced". The court then went on to say that, although writers generally tend to do so, it serves no useful purpose to classify contracts into those contrary to the common law, those against public policy and those *contra bonos mores*, since the three expressions are interchangeable.

[13] Accepting what was stated in **Eastward v Shepstone**[8] the court[9] then went on to say that:

"[*no*] *court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness*", and that

"[*in*] *grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom*".

[14] These principles were adopted and amplified in **Botha (now Griessel) v Finanscredit (Pty) Ltd**[10] and **Jaglal v Shoprite Checkers (Pty) Ltd**[11] where it was further stated that in any investigation into

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[8] 1902 TS 294 at 302:
"*Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result*.'
[9] In **Sasfin (Pty) Ltd v Beukes** supra at 9 B–C and E
[10] 1989 (3) SA 773 (A).
[11] 2004 (5) SA 248 (SCA).

whether a contract, or the provisions thereof, were unenforceable on the grounds of public policy:

"*there must be borne in mind: (a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest*"[12] and

"[b*ecause*] *the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect … it follows that the tendency of a proposed transaction towards such a conflict … can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand.*"[13]

[15] It is in the light of these principles that I must undertake my consideration of whether the rules complained of by the Applicants are unlawful.

[16] The objects of the Respondent (referred to as the "company") are set out in clause 3 of its memorandum of incorporation. They are stated to be the following:

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[12] **Botha (now Griessel)** at 782I – 783B.
[13] **Jaglal** at paragraph 12.

"*3.1 to promote, advance and protect the interests of the Members generally and to co-operate with the Local Authority, the KwaZulu-Natal Provincial Government and all other appropriate authorities for the benefit of the Company and its Members;*

3.2 to represent the interests of the Members and to provide a united voice by which such interest may be expressed;

3.3 to collect levies and other contributions towards funds of the Company for the attainment of the objectives of the Company or any other of them;

3.4 to accept the conservation areas, communal facilities and open spaces on the Estate and to make and enforce regulations governing the use thereof by the Members;

3.5 to preserve the natural environment, vegetation and fauna within the conservation area;

3.6 to impose penalties upon Members disobeying the Memorandum or the Rules made in terms thereof;

3.7 to maintain public road verges, focal points and street furnishings within the Estate;

3.8 to provide security within the Estate and make and enforce regulations in this regard;

3.9 to enforce adherence to the Design and Development Rules and Landscaping Philosophy for the Estate;

3.10 in particular and in no way detracting from the generality of the aforesaid to ensure that all buildings and other structures erected within the Estate, as well as any external fixtures and fittings thereto, comply with the

aforesaid and generally to ensure that the external appearance of all buildings and other structures and all gardens and other areas in the Estate comply with standards set in the aforesaid documentation."

[17] The provision in the sale agreement that all owners of properties within the estate shall become members of the Respondent is reinforced in clause 6 of the memorandum of incorporation, which states that such membership is "*obligatory*". Clause 7 of the memorandum of incorporation, in essence, makes provision that every owner of property within the estate, if a natural person, is a member of the Respondent, and if the owner is a corporate entity, that a natural person is nominated by that entity as being a member of the Respondent. Provision is also made that no owner may transfer a unit unless it is a condition of such transfer that the transferee agrees to become a member of the Respondent.

[18] The authority of the directors of the Respondent to make rules is provided for in clause 20 of the memorandum of incorporation.

(a) The powers of the directors are described in clause 20.1 as follows:

"*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 this Memorandum or the rules*."

(b) The matters in respect of which the directors may make rules are prescribed in clause 20.2 of the memorandum of incorporation, which reads as follows:

"*Subject to any restrictions imposed or directions given at a general meeting of the Company, the Directors may from time to time make rules, applicable within the Estate in regard to:*

20.2.1 the preservation of the natural environment;

20.2.2 the conduct of Members and persons within the Estate and the prevention of nuisance of any nature to any Owner in the Estate;

20.2.3 the use and maintenance of land, common open spaces, recreational areas, roads, etc.;

20.2.4 the design and development rules for the erection of all buildings and other structures;

20.2.5 the design and development rules and the conduct rules for the establishment, installation and maintenance of gardens, both public and private;

20.2.6 the use, upkeep, aesthetics and maintenance of residences and public buildings;

20.2.7 the right to keep and control of pets;

20.2.8 the maximum number of residents allowed to reside in any Dwelling;

20.2.9 the use by co-owners or corporate members, of a residence;

20.2.10 any other matter as may in the opinion of the Directors require to be regulated."

[19] Clauses 21.4 and 21.5 of the memorandum of incorporation, although situated under the heading "*Enforcement of Rules*", provide the following:

"*21.4 Any rules made by the Board shall be reasonable and shall be in the interest of the Company and, where applicable, shall apply equally to all Members*

21.5 The rules made by the Board from time to time in terms of the powers granted to them shall be binding on Members."

[20] The enforcement of the rules is provided for in clause 21 of the memorandum of incorporation.

(a) Any breach of the Respondent's rules is deemed to be a breach committed by the member. This is provided for in clause 21.2, which reads as follows:

"*In the event of any breach of the conduct rules for residents by any Lessee 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."*

(b) In terms of clause 21.1:

"*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 Member 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."

(c) Clauses 21.3 and 21.6 provide as follows:

"*21.3 Notwithstanding the aforegoing, the Directors may in the name of the Company enforce the provisions of any rules by an application to a Court of competent jurisdiction and for this purpose may appoint such Attorneys and Counsels they may deem fit.*

21.6 In no way detracting from the generality of any other provision of this Memorandum, in the event of the Company incurring any legal costs as a result of any breach of this Memorandum by any Member, the Company shall be entitled to recover all such legal costs from such member on an attorney and own client scale in full whether or not legal action is actually instituted."

[21] In their founding affidavit, the Applicants put up a copy of the "*Revised Rules-March 2011*" of the conduct rules.[14] In its answering affidavit, the Respondent contended that such was "an old version of the Rules" and annexed a copy of the "*Revised Rules-August 2013*" as being the pertinent version.[15] There was an initial challenge regarding whether such rules had been properly promulgated or whether the Applicants had been given proper notice thereof, but such was not pursued by the Applicants in argument before me. It was agreed between counsel that I should refer to the "*Revised Rules-August 2013*" for the purposes of this application.

[22] The relief sought in the notice of motion has been styled in such a way so as to categorise the rules complained of in accordance with what the Applicants contend is their alleged purpose.

[14] Annexure "D" to the founding papers.

(a) Rules 7.1.2 and 7.3.2 are categorised as those which "*authorise and empower the First Respondent to police the road works 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*". The rules read as follows:

"*7.1.2 The speed limit throughout 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." [16]

(b) Rules 2.1, 4.7 and 4.8.1 are categorised as those which "*restrict the free choice of the owners and residents of 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*". The rules read as follows:

[15] Annexure "TK 7" to the answering affidavit.
[16] Rule 7.3.2 of the March 2011 version of the conduct rules, which is the rule referred to by the Applicants in their founding papers, is now repeated as Rule 7.3.1 in the August 2013 version of the conduct rules.

"*2.1* ***Design Procedures***

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[17] *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.

4.7 ***Landscapers***

4.7.1 All landscapers working on MECCEMA TWO must be SALI approved and on the Estate's approved contractor's panel.

[17] A reference to the Respondent.

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.

4.8.1 All garden maintenance contractors must be accredited by MECCEMA TWO."

(c) Rules 9.3.2, 9.4.1 and 9.4.3 are categorised as those which "*restrict the hours of employment of domestic employees of owners and residents on the Mount Edgecombe Country Club Estate Two and/or restrict the rights of such domestic employees to traverse the public road network over the estate by walking around or otherwise*". The rules read as follows:

"*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 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."

[23] In their founding affidavit, the Applicants contend that there are four challenges to the rules, which they state to be as follows:

(a) "*The first challenge is that of the Association purporting to carry out the functions of traffic officers or peace officers (as defined in the NRTA[18]) on the roads, which are public roads under the NRTA, within the estate and that of the Association purporting to enforce the provisions of the NRTA*."

(b) "*The second challenge is against the Association restricting which contractors owners and residents, who are subject to the rules of the Association, may utilise in effecting building alterations, additions and repairs to their unit, the landscaping of their gardens and the ordinary garden maintenance thereof*."

(c) "*The third challenge to the Association's rules is in respect of the restrictions that the Association has imposed on the hours of work that the domestic workers employed by the owners and residents of units within the estate must adhere to as well as to the restrictions imposed by the Association to the effect that the domestic employees may not freely walk on or over the public roads within the estate*."

(d) "*The fourth challenge is in respect of the Association's alleged power to restrict or limit the right of access to the estate by owners and residents*."

[24] The first challenge is clearly a challenge to rules 7.1.2 and 7.3.2, as defined in the notice of motion. In support of their first challenge, the Applicants make reference to the fact that, although they may be laid out on property privately owned by the Respondent, the roads within the estate are deemed to be public roads as defined in terms of the National Road Traffic Act, No. 93 of 1996 ("the National Road Traffic Act"). This much is common cause as rule 7.1.1 of the conduct rules provides that:

"*The roads on Estate 2, in spite of being within the fence and appearing to be 'private', are in fact public roads and therefore within the jurisdiction of the National Road Traffic Act No. 93 of 1996 (as amended)*".

[18] A reference to the National Road Traffic Act, No. 93 of 1996.

Reference is then made to various sections of the National Road Traffic Act. The Applicants contend that a general speed limit in respect of every public road within an urban area is prescribed by the Minister, which it is accepted is 60 km/h.[19] They go on to state that as the roads within the estate are public roads they are subject to that general maximum speed limit. They further state that road traffic signs may only be caused to be displayed on a public road by the Minister or any person authorised by him and that no person may drive a vehicle on a public road at a speed in excess of the general speed limit or as indicated by an appropriate traffic sign.[20] They point out that any person who contravenes of fails to comply with the provisions of the National Road Traffic Act shall be guilty of an offence and liable to pay a fine, if convicted, and that the duty to regulate the control and monitoring of traffic on public roads is vested in traffic officers.[21] They go on to state that the manner in which the contraventions in question are to be policed and enforced is regulated by the Criminal Procedure Act, No. 51 of 1977, read with the National Road Traffic Act, and contend that only peace officers, which include traffic officers, are entitled to police public roads in regard to all questions of speeding.[22] They point out that any person who is not an authorised peace officer is not entitled to act in any way that may create an impression that he or she is such a person.[23] They contend therefore that fines issued for speeding contraventions under the National Road Traffic Act, read with the Criminal Procedure Act, can only be issued by peace officers duly appointed as such and not by persons impersonating such offices.

[19] With reference to section 59 (1) (a) of the National Road Traffic Act.
[20] With reference to sections 57, 59 (1), 59 (2) and 59 (4) of the National Road Traffic Act.
[21] With reference to sections 89 (1), 89 (3) and 31 (g) of the National Road Traffic Act.
[22] With reference to Schedule 3 of the Criminal Procedure Act, No. 51 of 1977, section 3A and Chapter 9 of the National Road Traffic Act and section 1 of the South African Police Services Act, No. 68 of 1995.
[23] With reference to section 3K of the National Road Traffic Act.

[25] The Applicants then go on to submit that the Respondent has not been authorised by the Minister, or by any delegated authority authorised by him, to reduce the speed limit on the public roads within the estate to one lower than the general speed limit as prescribed by him. It is also submitted that the Respondent's alteration of the speed limit would only be valid if an appropriate traffic sign has been erected and that no such traffic signs have been put up on the roads servicing the estate. It is therefore contended by the Applicants that the Respondent, by issuing fines to persons caught travelling at a speed in excess of the prescribed 40 km/h limit within the estate, is unlawfully usurping the functions of traffic and other peace officers within whose exclusive domain the enforcement and prosecution of contraventions of the provisions of the National Road Traffic Act are vested. They further contend that any persons appointed by the Respondent to carry out this function within the estate are impersonating or creating the impression that they are traffic officers and/or peace officers, which constitutes an offence in terms of the National Road Traffic Act.

[26] The Applicants also contend that the Respondent, in keeping the monies paid by residents in respect of speeding fines and not paying same to the relevant municipality, is committing the offence of compounding. In support of this, it is contended that the Respondent is, in essence, unlawfully and intentionally agreeing, for award, not to report or prosecute a crime that is otherwise punishable in law.

[27] The Applicants further contend that the levying of private speeding fines by the Respondent also falls within the ambit of section 3 of the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004. In this regard it is submitted by the Applicants that the Respondent is offering to accept and is accepting money from residents for its benefit in order to act in a manner which is illegal in terms of the National Road Traffic Act. It is

contended that this also mounts to an abuse of the Respondent's position of authority over owners and residents and a violation of the laws set forth in the National Road Traffic Act and the Criminal Procedure Act.

[28] The Applicants further point out that the National Road Traffic Act provides for the suspension of a person's driving licence when a person is convicted of an offence where such person has failed to fulfil his duties in the event of an accident where death or serious injury is caused to any person or where such person is convicted of travelling at a speed in excess of 30 km/h over the prescribed general speed limit in an urban area.[24] It is contended by the Applicants that these provisions of the National Road Traffic Act are clearly not being enforced within the bounds of the estate by the Respondent as it does not convict residents, their guests or contractors for any contraventions of the said Act. It is contended that the Respondent is thus haphazardly applying the law in contravention of every person's right to equality as defined in section 9 of the Constitution of the Republic of South Africa. It is further contended that the enforcement by the Respondent of its rules regarding speeding, by prescribing that fines must be paid before any application for appeal will be considered, offends against the *audi alteram partem* principle and accordingly limits the residents' rights in terms of section 36 of the Constitution by denying them the right to have any disputes that can be resolved by the application of law decided in a fair public hearing before a court or tribunal.

[29] The Applicants then go on to state that they, as law-abiding citizens, are not averse to the policing of the roads, whether they be within the bounds of the estate are otherwise. They are however averse to a private body performing public functions unlawfully and unconstitutionally.

[24] With reference to sections 35, 61 and 59 (4) of the National Road Traffic Act.

They contend that they are not prepared to submit to the unlawful authority of the Respondent.

[30] The Applicants' second challenge is a challenge to rules 2.1, 4.7 and 4.1.8, as defined in the notice of motion. In the founding affidavit it is contended by the Applicants that these rules effectively exclude a resident or owner from choosing his or her service providers as they are not allowed to utilise contractors who do not appear on the Respondent's list of accredited contactors. The Applicants go so far as to state that rule 2.1 in fact provides that no owner building is permitted on the estate and the owners are required to select a builder from a list of accredited building contractors which is available from the Respondent. The Applicants also contend that rule 4.7 similarly applies with regard to landscaping. It is alleged that the rule provides that all landscapers working on the estate are to be approved by the South African Landscapers Institute and are to be listed on the Respondent's approved contractor's panel. The Applicants contend that the effect of the aforegoing rules is that all residents and owners are obliged to only use contractors, whether in relation to building works or in regard to landscaping or garden maintenance, from a list of such contractors approved by the Respondent.

[31] It is further submitted by the Applicants that the Respondent performs a service to each and every owner or resident within the estate within the meaning of section 1 of the Consumer Protection Act, No. 68 of 2008. They contend that the Respondent is accordingly a supplier as defined in terms of the Act as the owners of units, even though they are members of the Respondent, are still consumers *vis-a-vis* the services provided to them by the Respondent. They then make reference to section 13 (1) [25] of the Act and contend that the Respondent, as a supplier, may

[25] Section 13 (1) of the Consumer Protection Act, No. 68 of 2008 reads as follows:
"A supplier must not require, as a condition of offering to supply or supplying any goods or services, or as a condition of entering into an agreement or transaction, that the consumer must-

not require, as a condition of offering to supply any goods or services, or as a condition of entering into an agreement or transaction, require that its members must agree to purchase any particular goods or services from a designated third-party.

[32] The Applicants, in their founding affidavit, state that, as an owner and resident within the estate, they readily accept that they are bound by the rules of conduct that are not unlawful and to which they have effectively agreed to. They therefore have no complaint with the Respondent having mechanisms in place to ensure, for example, that standards are maintained and that agreed consistency within the estate is adhered to. At a practical level, it is submitted by the Applicants, the Respondent can have a team of professionals, or several teams of professionals, who can monitor work done within the estate and who can ensure compliance and adherence as aforesaid. They however contend that this is "*an altogether different proposition*" from the Respondent purporting to dictate which contractor they may or may not use on their private property. They accordingly submit that the Respondent is not permitted to constrain any of the owners or residents of units within the estate from utilising the services of accredited contractors and/or service providers outside of those designated by the Respondent.

[33] They further contend that the conduct of the Respondent "*with regards to the closed list of accredited contractors*" falls foul of the provisions of the Competition Act, No. 89 of 1998 ("the Competition Act"). In support of this submission the Applicants contend that the preamble to

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(a) purchase any other particular goods or services from that supplier;
(b) enter into an additional agreement or transaction with the same supplier or a designated third party; or
(c) agree to purchase any particular goods or services from a designated third party, unless the supplier-
(i) can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer's right to choice;
(ii) can show that the bundling of those goods or services results in economic benefit for consumers; or

the Competition Act clearly states that the Act is to provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire. It is contended that the Respondent's memorandum of incorporation is an agreement in terms of the definition of "*agreement*" in the Competition Act. The relationship between the Respondent and the owners and/or residents within the estate amounts to a vertical relationship as defined in the Act. Reference is then made to section 5 (1) of the Competition Act [26] and it is submitted that, as there is no benefit or gain that the Respondent can show which outweighs the effect of preventing or lessening competition in respect of the services which contractors and/or service providers can provide to the owners and/or residents of the units within the estate, the conduct rules regarding the accredited list of contractors and/or service providers is anti-competitive and therefore unlawful.

[34] The Applicants' third challenge is a challenge to rules 9.3.2, 9.4.1 and 9.4.3 as defined in the notice of motion. It is alleged by the Applicants that the conduct rules provide that domestic employees are only allowed to walk on the roads of the estate when the bus service provided for domestic employees is not available. It is pointed out that this bus service is provided from Monday to Saturday at set times in the morning and afternoon. It is further submitted that, although not expressly provided for in the rules, the Respondent adopts the position that the necessary implication of the aforegoing rules is that domestic employees may not otherwise walk on the public roads within the estate.

(iii) offers bundled goods or services separately and at individual prices."

[26] Section 5 (1) of the Competition Act, No. 89 of 1998 reads as follows:

"*An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect*."

[35] The Applicant puts up an exchange of emails between himself and the Respondent's compliance and human resources manager regarding a request by the Applicant that the "exit time" for his domestic staff be extended to 19h00 every day. Such exchange is common cause. It is evident that, although initially contending that the "system" could not be amended so as to extend the time for domestic employees, the Respondent approved the request for one of the Applicant's employees, the Applicant's driver, but refused it for his remaining two domestic employees.

[36] It is also contended that the Second Applicant has experienced some difficulties with the Respondent regarding the application of the conduct rules in respect of his domestic employees. An incident is referred to where two of his domestic employees were alleged to have been "*discovered*" walking on the estate by one of the Respondent's security personnel. The Second Respondent's wife then received a "*warning letter*" from the Respondent in which it was contended that this was in contravention of rules 9.3.1 and 9.3.2 of the conduct rules. Again this correspondence is admitted by the Respondent. It is pointed out by the Applicants that the letter makes reference to numerous complaints having been received of "*domestics*" walking on the estate and, as the Respondent has no control over non-residents once they have entered the estate, such is "*a safety concern to some residents and management*". It is therefore contended by the Applicants that the Respondent considers the reasoning behind conduct rules 9.3.1 and 9.3.2 to be that "*domestic employees walking on the estate pose a security risk*".

[37] Various instances where domestic employees have been seen walking unhindered on the estate are then referred to. The Second Applicant then addressed his concerns regarding the alleged "*duplicitous application*" of the conduct rules regarding domestic employees to the

Respondent's rules warden in various emails. In response thereto the rules warden pointed out that the Respondent's rules regarding domestic employees walking on the estate was "*vague in that it did not say that if the buses are operational that they may not walk to and from their residence and the gate*". The email goes on to state that the rule only governs walking to and from the gate on arrival and departure from the domestic employee's place of work. Should the employer deem it necessary for the domestic employee to walk dogs or take children for a walk on the estate, such was not prevented. Again this exchange of correspondence is not disputed.

[38] It is then submitted by the Applicants that their aforementioned exchange of emails constitute requests for reasons in terms of section 5 of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). It is contended that the Respondent is a juristic person exercising a public power or performing a public function in terms of an empowering provision, namely its memorandum of incorporation and the conduct rules. It is contended that the Respondent's actions in imposing conditions or restrictions on the residents' domestic employees constitutes a decision of an administrative nature. It is contended that the Respondent has failed to give the Second Applicant adequate reasons in writing for the action taken in respect of his domestic employee. It is further contended that the Respondent's actions in refusing the Applicant permission for his domestic employees to remain on the estate until 19h00 during the week also amounts to administrative action. It is contended that the administrative action was not rationally connected to the purpose for which it was taken as the Respondent allows domestic employees to traverse the road network at all times during the day, whilst in large numbers and whilst walking their employers' dogs or infants, without any compromise of estate security occurring. It is further contended that the same concern arises regarding the request for increased access times for domestic employees as the Applicant's servant's extended access to the estate does not

compromise the security of the state as he is transported to and from his dwelling by the Applicant's driver. It is also submitted that the Respondent has failed to apply the conduct rules equally as it has extended the times for one the Applicant's employees and not the others.

[39] The Applicants then contend that there is no good rational reason for the restriction of the hours of access to the estate afforded to their domestic employees and that the issue of the domestic employees walking on the public roads of the estate is not applied fairly and equally to all residents. They therefore contend that any rules which seemingly authorise either one or both of the aforegoing stand to be struck down by this court.

[40] In support of the fourth challenge, namely in respect of the Respondent's alleged power to restrict or limit the right of access to the estate by owners and residents, the Applicants make reference to the spoliation application and the interim relief and *rule nisi* granted in this regard. It is submitted by the Applicants that, it would be wrong to raise the same complaint in the rules application considering that the challenge on this score has been foursquarely raised in the spoliation papers and common sense dictates that the appropriate way to deal with the fourth challenge is to have that application finally determined at the same time and by the same court dealing with this application. Nothing further is said of the fourth challenge.

[41] It was submitted by counsel representing the Respondent at the commencement of his argument that the Applicants had raised various issues for the first time in their replying affidavit. There were various issues which the Respondent contended were not foreshadowed by the case made out in the founding papers. These relate to: an argument that, as the Respondent is a company, it is subject to the provisions of section 163 of the Companies Act, No. 73 of 2008 and that its directors may only make

reasonable rules: an argument that the Respondent's speeding contravention notices were not issued by the Respondent's Board of Directors, which it was contended was a requirement in terms of the memorandum of incorporation and conduct rules, and were therefore unlawful: an argument that the refusal to allow the Applicant's domestic workers to remain on the estate after the prescribed time of 18h00 was "*irrational*": and a contention that the "*operator*" of the Respondent's "*speed measuring equipment*" was not properly trained to calibrate or handle the equipment itself. It was submitted that these constituted an impermissible and opportunistic attempt by the Applicants to make out a new case in reply. It was therefore submitted that they fall to be ignored for this reason alone.

[42] I am in agreement with the Respondent's counsel that none of the abovementioned issues are raised in the Applicants' founding papers. If one has reference to the Applicants' founding affidavit, the case made out by them, insofar as the challenge to rules 7.1.2 and 7.3.2 is concerned, is that the Respondent has not been authorised by the relevant authority to regulate the speed at which persons may travel on the roads within the estate, is not authorised to police the roads and enforce such speed limit by issuing speeding fines, or otherwise, and is, in any event, contravening every person's right to equality, as defined in section 9 of the Constitution of the Republic of South Africa, by "*haphazardly*" applying the law and is also contravening the *audi alterim partem* principle by requiring residents to pay their fine prior to having a right of appeal. As far as the challenge to rules 2.1, 4.7 and 4.1.8 is concerned, the case made out is that such rules effectively preclude residents or owners from choosing their own service providers and accordingly contravene the provisions of the Consumer Protection Act and the Competition Act. As far as the challenge to rules 9.3.2, 9.4.1 and 9.4.3 is concerned, the case made out in the founding papers is that such rules provide that domestic employees are not allowed

to walk on the roads in the estate when the bus service provided for them is available, that the Respondent adopts a position that the necessary implication of such rules is that domestic employees may not otherwise walk on the roads within the estate, that the Respondent's actions in imposing conditions or restrictions on the residents' domestic employees constitutes a decision of an administrative nature and that there is no good rational reason for the restriction of the hours of access to the estate afforded to their domestic employees.

[43] It is an established principle that an Applicant in motion proceedings must stand and fall on its founding papers and may not introduce new issues or arguments in reply. In this regard I was referred to the case of **Director of Hospital Services v Mystery**[27] and the dictum in the case of **Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa**[28] where the following was stated by Joffe J:[29]

"*It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court, but also to define the issues between the parties. In doing so the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that they must meet and in respect of which they must adduce evidence in the affidavits……..*

An Applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof."

[27] 1979 (1) SA 626 (A) at 635H-636A.
[28] 1999 (2) SA 279 (T).
[29] At 323 F-J and 324A.

I was further referred to the case of **Union Finance Holdings Ltd v IS Mark Office Machines II (Pty) Ltd**[30] where it was stated:[31]

"*The respondent is apprised in a founding affidavit of the case it has to meet and is afforded one opportunity only, save in exceptional circumstances, to deal with the applicant's cause of action and evidence in its answering affidavit. The applicant is afforded an opportunity in a replying affidavit to reply only to what the respondent has stated, and may not raise new matter or new issues. Strict adherence to this rule encourages litigating parties to consult properly before launching an application in order to establish fully the facts which in turn give rise to the cause of action. A failure to enforce this principle rigidly results in the papers ultimately becoming voluminous and being in a state of disarray, replete with cross-references. It creates additional work for the Judges who are required to read affidavits dealing with matters which are later simply jettisoned. This imposes an unnecessary further burden on the Motion Court Judges in any particular week who in this Division regularly have an overloaded and crowded Motion Court roll to deal with. It is also wasteful of both costs and productive time. Most important of all, adherence to the principal ensures that disputes between litigants are resolved in terms of a procedure which is just, orderly and well recognised. Only in exceptional circumstances and for sound reasons should the procedure be deviated from."*

[44] I have not been referred to, nor am I aware of, any exceptional circumstances or sound reasons why this principle should be deviated from. I accordingly agree with the Respondent's counsel that the new issues raised for the first time in the Applicants' replying affidavit should not be taken into account in my determination of this application.

[45] It was further submitted on behalf of the Respondent that it was necessary to clarify exactly what was before me for determination and what was not. Counsel for the Respondent submitted that, although the

[30] 2001 (4) SA 842 (W).

relief sought by the Applicants was relatively confined in that they only sought declaratory relief that the impugned rules were unlawful, their papers were replete with arguments, in large directed at the alleged application of the rules and not to the challenge of the rules themselves, none of which were encompassed by the relief actually sought in the notice of motion. It was submitted that the Applicants rather limit their challenge to abstract assertions that the rules could be unlawfully applied, without demonstrating that this has actually been done. It was contended that the appropriate time to challenge laws or rules is when they are breached on the basis of an ulterior purpose and not upon an assumption that they might be breached or may be used for an ulterior purpose. In support of this submission I was referred to the case of **Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)**[32] where the following was stated:[33]

"*Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute*".

It was therefore contended that, even if the argument was before me that the rules were being used for a purpose for which they were not intended, such was premature as this was not the nature of the relief sought by the Applicants in the notice of motion.

[46] I agree that much of what is stated by the Applicants in the papers before me relates to the enforcement by the Respondent of the speed restrictions on the estate and to the Applicants' perception that the

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[31] At 848 A-E.
[32] 2002 (5) SA 246 (CC).
[33] At paragraph 37.

Respondent is applying the rule relating to service providers in such a manner so as to create a "*closed list*" of such service providers and is applying the rule relating to the access to domestic employees to the estate so as to preclude such employees from walking on the public roads laid out within the estate.

[47] The Applicants do not seek any relief aimed at curtailing or prohibiting the manner in which the Respondent is either applying or enforcing the conduct rules. They seek a declaration that the rules complained of are unlawful and should be regarded as *pro non scripto*. I understand what the Applicants are saying is that the rules complained of allow the Respondent to act in the manner in which they contend it is doing. There is no contention that the rules are being applied in an improper manner. The Applicants in fact accept that the conduct rules apply to the owners and residents of the units within the estate but contend that this does not apply in respect of the rules which are challenged as unlawful. It is therefore not the binding force of the conduct rules in general that is being challenged in this application but only the lawfulness of the content of the particular impugned rules. These particular rules therefore need to be analysed in the context of giving them a proper meaning so as to determine whether they are unlawful.

[48] The present state of our law regarding the interpretation of both statutes and contracts has been expressed in **Natal Joint Mutual Pension Fund v Endumeni Municipality**[34] as follows:

"*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its*

[34] 2012 (4) SA 593 (SCA).

coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." [35]

[49] The process to be followed has been expressed as follows:

"*Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'*.[36]

[50] In analysing the challenged rules therefore it is not the Applicants' or the Respondents interpretation or understanding thereof that I am to

[35] At para 18.

[36] **Bothma Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA) at para 12. See also **Firstrand Bank Ltd v Land and Agricultural Development Bank of South Africa** 2015 (1) SA 38 (SCA) at para 27.

have regard to but the language used in the rules themselves. The exercise is an objective one applying the above-mentioned principles.

[51] If one has reference to the objects of the Respondent, as contained in clause 3 of its memorandum of incorporation,[37] they are, *inter-alia*, to "*promote, advance and protect the interests*" of its members, to "*provide a united voice for which such interest may be expressed*", to "*accept the conservation areas, communal facilities and open spaces on the Estate and to make and enforce regulations governing the use thereof*", to "*preserve the natural environment, vegetation and fauna within the conservation area*", to "*provide security within the Estate and make and enforce regulations in this regard*" and to "*enforce adherence to the Design and Development Rules and Landscaping Philosophy for the Estate*". Clause 20 of the memorandum of incorporation[38] gives the directors of the Respondent the power to make rules with the aforementioned objects in mind.

[52] In considering the Respondent's conduct rules[39] Olsen J came to the conclusion that they should not be seen as "unduly" restrictive and punitive because they stand as a framework to safeguard and promote appropriate, sensible and fair interaction amongst residents and the Respondent. He then stated[40] that:

"*In my mind what is conveyed in the introduction to the rules of that, whatever opinions one might have as to whether any rules are too invasive, it should be recognised that they have been agreed upon by the contracting parties to maintain a structure within which residents can feel secure as regards to the environment into which they have bought, and as regards the conduct reasonably*

[37] Set out in paragraph 15 hereof.
[38] Set out in paragraph 18 hereof.
[39] In **Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC** *supra,* at paragraphs 27-34.
[40] At paragraph 34.

to be expected of their neighbours, and of the respondent in its capacity as the enforcement authority with respect to the rules".

[53] The "*circumstances attended upon the coming into existence*" of the conduct rules and the "*apparent purpose*" to which they are "*directed*" is to give effect to the aforementioned provisions of the Respondents memorandum of incorporation and to formulate a structure within which its residents can feel secure as regards to their environment and the conduct that they may reasonably expect from the Respondent and their neighbours. Sight must therefore not be lost of this intended purpose in any interpretation of the rules presently under consideration.

[54] With reference to rules 7.1.2 and 7.3.2[41] it is contended by the Applicants in their founding papers that the Respondent has not been authorised by the relevant authority to regulate the speed at which persons may travel on the roads within the estate. It is also contended that the Respondent is not authorised to police the roads and enforce such speed limit by issuing speeding fines, or otherwise, and is, in any event, contravening the residents' right to equality, as defined in section 9 of the Constitution, by "*haphazardly*" applying the law. If one has reference to the notice of motion, it is stated that rules 7.1.2 and 7.3.2 "*authorise and empower*" the Respondent to police the road network within the estate, including the issuing of speeding fines. Although never succinctly put, it appears that it is the Applicants' contention that the provisions of rules 7.1.2 and 7.3.2 allow the Respondent to usurp the authority of the authorised officials when it comes to policing the road network within the estate.

[55] It is contended by the Respondent in its answering affidavit that it is "*not pretending to enforce laws applicable to the public. It is simply acting in*

[41] Set out in paragraph 22 hereof.

accordance with what members of the Estate have agreed they may do, as between each other as contracting parties. Contravention notices are issued per the MOI and the Conduct Rules and no attempt is made to arrogate to the first respondent the right or power to impose the penalties applicable under the Road Traffic Act".[42]

[56] To read rules 7.1.2 and 7.3.2 in context, they must be read with clauses 34.5.1 and 21.2 of the memorandum of incorporation and rules 6.4, 6.6.1, 6.6.2, 6.7, 6.10.1, 7.1.1, and 13.1.8 of the conduct rules. The provisions referred to read as follows:

(a) "*Members and their invitees shall be entitled to use all open spaces as well as private roads on the Estate subject to such rules as the Directors may lay down from time to time provided that at all times Owners shall have vehicular and pedestrian ingress and egress from their Unit to a public road*." (clause 34.5.1)

(b) "*In the event of any breach of the conduct rules for residents by any Lessee 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 deem fit against the responsible Member*." (clause 21.2)

(c) "***Messenger of Court, Sheriff of the Court and Police Officers:*** *Due to the nature of the above category of persons, and the judicial processes involved, MECCEMA TWO may not obtain confirmation from residents prior to these persons entering Estate 2, nor may we deny these persons access. However security will ensure that valid court orders, warrants, etc., are produced before they are allowed access. Security will escort such persons to the premises and ensure that all relevant laws are obeyed*." (rule 6.4)

[42] At paragraph 41 of the answering affidavit.

(d) "*Access cards identify an individual and his/her authority to freely enter/exit Estate 2….*" (rule 6.6.1)

(e) "*Only persons permanently residing on Estate 2, club members, guests (including Estate 1) or those authorised to work on Estate 2 may use access cards….*" (rule 6.6.2)

(f) "*Every resident shall stop at all security control gates and then proceed by operating his or her access card*." (rule 6.7)

(g) "*Every resident who wishes a visitor to enter the Estate must phone the Control Room to register that visitor, obtain a reference number and confirm that the visitor is listed on the Visitor Log….*" (rule 6.10.1)

(h) "*The roads on Estate 2, in spite of being within the fence and appearing to be 'private', are in fact public roads and therefore within the jurisdiction of the National Road Traffic Act No. 93 of 1996 (as amended)*". (rule 7.1.1)

(i) "*Any contravention of the rules by any person who gains access to Estate 2 on the authorisation of a resident shall be deemed to be a contravention by the resident concerned*." (rule 13.1.8)

[57] It is evident from the provisions referred to above, that all ingress and egress to the estate is strictly controlled. By agreement, the owners of all properties within the estate, who are defined in the conduct rules as "*residents*", acknowledge that they and their invitees are only entitled to use the roads laid out on the estate subject to the conduct rules. It is also evident that any invitee of a resident, whether such be a visitor or a contractor engaged by such person, will only be given access to the estate if prior arrangement has been made with the resident concerned. Upon such invitee having gained access to the estate, responsibility for any

breach of the conduct rules by that invitee is assumed by the resident through which such invitee gained access. Any breach of the conduct rules is therefore an issue strictly between the resident concerned (who is a member of the Respondent) and the Respondent itself. No sanction is imposed on the "*delinquent invitee*". Any third party who gains access to the estate is in truth not bound by the conduct rules. The third party's adherence to the rules is left up to the resident who invited him or her onto the estate. It is the resident who has to ensure that the third-party complies with the conduct rules or bear the consequences of any sanction imposed as a consequence of that third party's non-adherence thereto. There is nothing in the rules which provides for any consequence flowing from a non-compliance with the rules by a third-party who has gained access to the estate in a manner other than through the authority of a resident. The control of the speed limit within the estate therefore falls squarely within the provisions of the contract concluded between the Respondent and the owners of the properties within the estate.

[58] I agree therefore with the Respondent's contention that it is not endeavouring to control the conduct of all persons entering the estate or to impose the provisions of the National Road Traffic Act upon those persons. The rules themselves provide that the roads within the estate in fact fall within the jurisdiction of the National Road Traffic Act. If that is the case, it must follow that the authority of the peace officers, within whose exclusive domain the enforcement and prosecution of any contraventions of that Act is entrusted, is also recognised. There is again nothing in the conduct rules which prohibits the enforcement of the provisions of the National Road Traffic Act by the relevant authorities within the estate. If anything, rule 6.4 recognises that officers of the court and police officers may gain access to the estate other than through the authority of a resident.

[59] Again these sentiments are reinforced by what was stated by Olsen J in **Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC**[43] that the conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when electing to buy property upon the estate. These private rules are "*superimposed*" on any national or municipal legislation and do not usurp them. I see no difference between the rule considered by Olsen J, namely rule 5.1 which, whilst recognising observance of the local authority bylaws, restricted the breeds and sizes of dogs that may be kept on the estate, and rule 7.1. Rule 7.1 also recognises the jurisdiction of the National Road Traffic Act but restricts the speed at which residents and their invitees may drive on the roads laid out in the estate. Once it is accepted that the rules are private ones, the Applicants' argument that the Respondent is usurping the functions of the recognised authorities or contravening the provisions of the various legislation referred to must be rejected.

[60] If one has reference to rule 7.1.2, and one gives the words their ordinary grammatical meaning, it goes no further than to prescribe that "*the speed limit throughout Estate 2 is 40 km/h*" and that "*any person found driving in excess of 40 km/h, will be subject to a penalty*".[44] If one has reference to the Respondent's memorandum of incorporation, its directors are entitled to make rules for the "*use and maintenance*" of the roads (clause 20.2.3) and are also entitled to "*impose a system of penalties*" for a beach of such rules (clause 21.1). If one has reference to the objects of the Respondent[45], it cannot be said that the prescribing of 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

[43] *Supra,* at paragraph 23.
[44] I do not see the Applicants as contending that the recordal that "*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*" is unlawful.
[45] Set out in paragraph 16 hereof.

members or is unreasonable[46]. This is especially so if one considers 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[47] goes no further than to record that the operating of any vehicles in contravention of the National Road Traffic Act within the estate is prohibited. I cannot see how such a statement can be objectionable.

[61] There is a further contention by the Applicants that the Respondent is contravening the *audi alterim partem* principle by requiring residents to pay their fine prior to having a right of appeal. This contention can only be a reference to the provisions contained in clause 13 of the conduct rules. In terms of clause 13, if a resident fails to comply with any provisions of the conduct rules, the Respondent may, *inter-alia*, "*impose a financial penalty which has to be paid within 14 days of issue and shall be deemed to be part of the levy due by the owner*" (clause 13.1.3) and "*suspend access cards for the household concerned*" (clause 13.1.7). In terms of clause 13.1.10, "*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….*". It is not however contended by the Applicants that the provisions of clause 13 are unlawful and no relief is sought in this regard in the notice of motion. Clause 13 is simply not mentioned. In the context of what is before me for consideration in this application, I cannot see how the submission that the Respondent is allegedly breaching the the *audi alterim partem* principle supports the contention that rules 7.1.2 and 7.3.2 are unlawful.

[46] Clause 21.4 of the memorandum of incorporation and the "Introduction" to the conduct rules prescribe that the rules made by the Respondent's Board must be "reasonable".
[47] Now rule 7.3.1 in the August 2013 version of the conduct rules.

[62] As far as rules 2.1, 4.7 and 4.1.8 are concerned, the Applicants crystallise their complaint as follows:[48]

"*The effect of the aforegoing rules is that all residents or owners are obliged to only use contractors, whether in relation to building works, in relation to landscaping or gardening maintenance, from a list of such contractors approved by the Association*".

The Applicants have accordingly placed an interpretation on these rules that they effectively preclude residents or owners in the estate from choosing their own service providers. They accordingly contend that such rules contravene the provisions of the Consumer Protection Act and the Competition Act.

[63] If one has reference to rule 2.1,[49] the only reference to any form of "*accreditation*" is contained in the last sentence of sub- rule 2.1.2, where it is stated that "[*a*] *list of accredited building contractors is available from MECCEMA TWO*". The rest of the rule relates to the prior approval of any building works by the Respondent and compliance with its "*Design and Development Rules*" and "*Town Planning Controls*". As far as rule 4.7 is concerned, the only reference to "*approved contractors*" is contained in sub-rule 4.7.1, which provides that "[*all*] *landscapers working on MECCEMA TWO shall be SALI*[50] *approved and on the Estate's approved contractors panel*". Again the rest of the rule relates to permission having to be obtained prior to any major landscaping being undertaken. In their founding affidavit,[51] the Applicants state that they "*have no complaint with the Association having mechanisms in place to ensure, for example, that standards are maintained and that agreed consistency within the estate is adhered to*". I must assume therefore that the Applicants' complaint is directed at the provisions of the

[48] At paragraph 48 of the founding affidavit.
[49] Set out in paragraph 22 hereof.
[50] A reference to the South African Landscapers Institute.

last sentence of sub-rule 2.1.2 and sub- rule 4.7.1 and that they raise no complaint to the remaining provisions of rules 2.1 and 4.7 as a whole. Rule 4.8.1 provides that that "[*all*] *garden maintenance contractors must be accredited by MECCEMA TWO*".

[64] If one has reference to the design rules not complained of by the Applicants, the design and construction of all new buildings, extensions, alterations to buildings, swimming pools, fences and all gardens must be approved by the Respondent (rule 2.1.1), every alteration to a building, installation of a glass enclosure, attachment to a building, the erection or alteration to fencing or garden walls must be approved by the Respondent (that portion of rule 2.1.2 not complained of by the Applicants), plans, as required in terms of the "*Conditions of Sale*" and the "*Design and Development Rules*", must be submitted to the Respondent along with any request for approval (rule 2.2.1), no objects may be placed on or attached to any unit or any other structure other than in accordance with prior written approval by the Respondent (rule 2.4), a process for the submission and approval of any glass enclosures, which includes a condition that an accredited glass installer approved by the Respondent may be used, is prescribed (rule 2.5), all fencing must comply strictly with the building rules and may not be installed without the Respondent's prior written approval (rule 2.6) and no gazebos, pergolas or any other similar structure may be erected without the Respondent's prior written approval (rule 2.7).

[65] The garden and landscaping rules provide that the installation of initial or new gardens must comply with the procedures and rules laid down by the Respondent (rule 4.1.1), the content of the plant material is prescribed (rules 4.1.2 and 4.5), that an accredited landscaper must submit proposed garden design layouts to the Respondent for approval

[51] At paragraph 125.

prior to the commencement of any garden installation (rule 4.1.3) and that the landscaper concerned is then responsible for the maintenance of the garden for a period of six months after installation (rule 4.1.5). Again the Applicants have no complaint with regard to these rules.

[66] If one has reference to the conduct rules as a whole, it is immediately evident that the owners of units within the estate have contractually bound themselves to live within a controlled environment. This much is echoed in the introduction to the conduct rules themselves, which provides that:

"*Living on Estate 2 means being part of a community of people who share a secure and congenial lifestyle. Conduct Rules for the community protect this lifestyle through an acceptable code of conduct by which the members may live together, reasonably and harmoniously, without interfering with others' lawful use and enjoyment of the environment. Mutual respect and consideration by all residents for each other promotes a contented lifestyle on Estate 2*."

The Respondent's directors are then given the authority to make reasonable rules for the management, control, administration, use and enjoyment of the estate with the above principles in mind. If one has reference to the rules referred to above, it is evident that every aspect of construction or landscaping undertaken on the estate is controlled by, and undertaken with the prior approval of the Respondent. The obvious reason for this is to give effect to the residents' professed desire to "*live together, reasonably and harmoniously, without interfering with others' lawful use and enjoyment of the environment*" within the estate. This control by the Respondent ensures that the buildings and gardens on the estate are aesthetically harmonious and that any alterations or new construction will not run counter to what has gone before.

[67] With this concept in mind I see no reason why the Respondent would not seek to ensure, or in fact ought to ensure, that the standard of construction and landscaping that takes place on the estate conforms to the agreed standard. The only way to ensure that the required standard is met is to ensure that the contractor or landscaper concerned is competent and able to carry out the works approved by the Respondent in a proper manner. The only way to do this is to ensure that the contractor or landscaper is either accredited by a recognised authority or has, through prior conduct, shown that he or she is so competent. If one accepts, as do the Applicants, that it would be proper for the Respondent to have mechanisms in place to ensure that standards are maintained and that agreed consistency within the estate is adhered to, I see no reason why the Respondent ought not have a list of "*accredited*" service providers who are either accredited by a recognised authority or have, through prior conduct, established that they are competent.

[68] The rules that I have to give consideration to read as follows: "*a list of accredited building contractors is available from MECCEMA TWO*" (rule 2.1.2), "all landscapers working on *MECCEMA TWO shall be SALI approved and on the Estate's approved contractors panel"* (rule 4.7.1) and "*all garden maintenance contractors must be accredited by MECCEMA TWO*" (rule 4.8.1). Viewed in context with the rules referred to above, I cannot see, given their literal meaning, how the rules under consideration go any further than to record that the Respondent has a list of "*accredited*" service providers and that all building contractors, landscapers and garden maintenance contractors must be on that list prior to carrying out any works on the estate. I am therefore of the view that the rules, given a proper interpretation, do not provide for a "*closed list*" of service providers, as is contended for by the Applicants.

[69] There is nothing in the rules themselves that prescribes how a contractor is in fact "*accredited*" by the Respondent or how the list is compiled. Some insight as to how contractors are accredited and placed on the list is given by the Respondent in its answering affidavit, where it is stated that: [52]

"*… The list of the accredited contractors and landscapers is not closed….. when an owner or member wishes to use a contractor or landscaper not already appearing on the accredited list, the owner or member may apply to use such contractor or landscaper. Provided that contractor or landscaper meets certain requirements set out by the first respondent to ensure that only reputable contractors and landscapers are used, the contractor will be accredited. Accreditations are applied for and granted on a case by case basis. Factors influencing the first respondent's decision to allow contractors or landscapers not already on the accredited list are whether they are registered with the appropriate body, ….. and that they are not fly by night operators. I must stress that the list of accredited contractors, landscapers and so on is not intended to exclude anyone, but rather to ensure that all reputable contractors and landscapers are permitted to operate on the Estate. The contractors on the list are not the first respondent's choice. They are on the list after meeting the first respondent's requirements pursuant to a request either by an owner or the contractor itself*."

[70] The Applicants cannot gainsay what is stated by the Respondent regarding applications for accreditation and placement of contractors on the list as it appears, from what is stated in their founding affidavit, that neither of them have in fact approached or made application to the Respondent to have their contractor of choice placed on the list. All that is stated by the Applicant that he is a property investor and developer and has, over the years, become acquainted with a number of different building contractors and service providers. He then goes on to state that it would be for his benefit to use the services of the contractors with whom

[52] At paragraph 34.

he has built up a lengthy and trusting relationship, that he is acquainted with the quality of their work and that he can procure an extremely favourable rate from them. Nowhere however is it stated that any application has been made to the Respondent to have such contractors placed on the list, nor is it contended that the Respondent has refused to place such contractors on its list pursuant to any such application. I must therefore accept what the Respondent has stated with regard to the status of the "*accredited contractors list*".

[71] Having accepted that the rules under consideration do not provide for a closed list of contractors, the Applicants' contention that these rules fall foul of the provisions of the Consumer Protection Act, No. 68 of 2008 and the Competition Act, No. 89 of 1998 must be rejected. There can be no violation of the Applicants' "*right of free choice*" if the Respondent has no right to, nor does, prescribe or dictate which contractors the residents may use. All that the Respondent is in fact doing is giving effect to what has been agreed upon by the owners of the units as to the standard of building and landscaping that is required within the estate.

[72] The Applicants' contentions as regards rules 9.3.2, 9.4.1 and 9.4.3[53] are somewhat vague. It is alleged by the Applicants[54] that these rules "*provide that domestic employees are only allowed to walk on the roads of the estate when the bus service provided for domestic employees is not available*". Save for this allegation however, nothing further is said about what the Applicants contend is a proper interpretation of the rules themselves. I assume therefore that this is the interpretation that the Applicants seek to place on the rules in question.

[53] Set out in paragraph 22 hereof.
[54] In paragraph 143 of the founding affidavit.

[73] It is further submitted[55] that, although not expressly provided for in the rules, the Respondent adopts the position that the necessary implication of the aforegoing rules is that domestic employees may not otherwise walk on the public roads within the estate. Most of what is alleged by the Applicants relates to the refusal by the Respondent to acquiesce to the Applicant's request to extend the "*exit time*" for his domestic employees beyond what is prescribed in rule 9.4.3 and to a "*warning letter*" received by the Second Applicant's wife regarding an incident when two of his domestic employees were alleged to have been "*discovered*" walking on the estate by the Respondent's security personnel.

[74] It was submitted by counsel for the Respondent that the Applicants do not appear to take issue with the rules themselves but rather with the Respondent's apparent implementation of them. For the reasons already referred to herein,[56] they contended that such challenge was premature and impermissible as no relief was sought in this application relating to the Respondent's apparent conduct or application of the rules themselves. I agree with this submission. What is required in this application is an analysis of the rules concerned to determine whether, on a proper interpretation, there is any "*necessary implication*" in them that "*domestic employees may not otherwise walk on the public roads within the estate*" and whether they provide that "*domestic employees are only allowed to walk on the roads of the estate when the bus service provided for domestic employees is not available*".

[75] Some insight into the bus service is provided in the Respondent's answering affidavit[57] where it is stated, *inter-alia*, that:

[55] In paragraph 55 of the founding affidavit.
[56] In paragraph 45 hereof.
[57] At paragraph 35.

"*I stress that the bus service dedicated to transporting domestic employees to and from the access gate is provided at a substantial cost to the Association. That service is provided not only to alleviate the burden of domestic workers and owners/members to arrange transport from and to the homes on the estate, it is also to ensure that the normal business hours of the domestic workers are respected and that domestic workers are without delay assisted to return home timeously at the end of their working day*."

If one bears in mind that there are in excess of 890 residential development on the estate, it must follow that there is a large volume of domestic employees that must seek ingress and egress to the estate at the beginning and end of each working day. It must also follow, by virtue of the number of developments thereon, that the estate covers a considerably large area. It therefore makes sense, rather than having a substantial increase in both pedestrian and vehicular traffic on the roads within the estate at the commencement and end of each working day, as domestic employees either walk to their place of employment or are transported thereto by the individual employers, that a bus service be provided for such employees during these peak periods.

[76] Rule 9.3.2 cannot be read in isolation. Rule 9.3 as a whole provides for "*Transport of Domestic Employees*". Rule 9.3.1 states that:

"*Transport for Domestic Employees on Estate 2 is provided on Monday to Saturday at set times in the morning and afternoon. The service is also available on public holidays, excluding Good Friday, Christmas Day and New Year's Day. Only registered access card holders are permitted to utilise the bus service. MECCEMA TWO does not guarantee the service or accept any responsibility for any interruption in the service*".

Rule 9.3.2 must therefore be read in the context of the bus service provided as aforesaid. The words "[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 the designated bus stop points throughout the Estate" cannot mean anything other than what they state. Considering the probability of the large volume of domestic employees at the commencement and end of each working day, it makes perfect sense that the Respondent's security personnel would be utilised to ensure an orderly boarding and exiting of the buses provided. The same logic applies to the provision regarding the use of designated bus stops. This will ensure that the domestic employees are picked up and dropped off in an orderly fashion.

[77] If read in the context that they refer to the bus service provided in terms of rule 9.3.1, the words "[*when*] *the bus service is unavailable, domestic employees may walk on the Estate between the residence where working that day and their gate of exit*" in the last sentence of the rule 9.3.2 can only be a reference to the time periods when the bus service is being provided, namely, at the "*set times in the morning and afternoon*" on Mondays to Saturdays. If any restriction can be implied, from a reading of rule 9.3 as a whole, it is that domestic employees are required to utilise the bus service provided to transport themselves to and from their gate of entrance and the residence at which they are employed, if such bus service is being provided at that time. Other than at the time when the bus service is being provided, and for the specific purpose of walking "*between the residence where working that day and their gate of exit*", I cannot see how any further restriction to the free movement of domestic employees within the estate can be implied from the provisions of the rules concerned. I therefore do not see that there is any "*necessary implication*" in rule 9.3.2, or in fact rule 9.3 as a whole, that "*domestic employees may not otherwise walk on the public roads within the estate*". I also cannot see, if this is in fact what has been contended for by the Applicants, that the rules can be interpreted so as to prescribe that domestic employees are obliged to utilise the bus service

provided to move anywhere on the estate *per se*, or that their free movement is otherwise restricted.

[78] The Applicants raise no complaint as regards rule 9.4.2, which prescribes that no domestic employees may remain on the estate overnight, unless prior authority has been obtained from the Respondent. Their complaint lies against rule 9.4.1, which prescribes that all domestic employees must be registered on an annual basis and that access cards for such employees will only be validated for recognised normal business hours, unless authorised differently by the Respondent, and rule 9.4.3, which prescribes that domestic employees will only have access to the estate between 6 a.m. and 6 p.m., unless otherwise authorised by the Respondent, and that such employees must swipe their access cards, or scan their finger on the biometric reader for ingress and egress. Nothing is stated in the founding papers regarding why the Applicants contend that the provisions that domestic employees must be registered and must be provided with access cards, or have biometric access, is unlawful.

[79] If one has reference to the various provisions of rules 6.6.1 and 6.6.2[58], to which the Applicants raise no complaint, it is evident that access cards, and now biometric fingerprint reading, are used to identify individuals who are entitled to freely enter or exit the estate. The first sentence of rule 9.4.1 prescribes a procedure whereby domestic employees are identified, by way of registration, and are then either provided with access cards, or registered on the biometric fingerprint reader. I cannot see how such a provision can be seen as being unreasonable or unlawful if one has regard to the general scheme of how residents and their authorised invitees gain access to the estate. Also bearing in mind the accepted rule that domestic employees are not permitted to remain on the estate overnight, I cannot see how a rule that

[58] Referred to in paragraph 56 hereof.

provides, save for any authorised variation upon application being made, that domestic employees are only allowed free access to the estate between the hours of 6 a.m. and 6 p.m. and that their access cards or biometric fingerprint reading will be programmed accordingly can be unreasonable or unlawful.

[80] I am therefore of the view that rules 9.3.2, 9.4.1 and 9.4.3, giving them their literal meaning and context, merely prescribe a set of procedures to ensure an orderly ingress and egress of domestic employees onto and off the estate and efficient transportation to and from their places of employment.

[81] There is a further contention by the Applicants that the Respondent's actions in imposing conditions or restrictions on the residents' domestic employees constitutes a decision of an administrative nature and therefore falls to be reviewed in terms of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). It is contended that the Respondent has failed to give the Second Applicant adequate reasons in writing for the action taken in respect of his domestic employee and that its actions in refusing the Applicant permission for his domestic employees to remain on the estate until 7 p.m. during the week also amounts to administrative action. This issue was dealt with by Olsen J when considering that challenge to the Respondent's conduct rules in **Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC**[59] where he came to the conclusion that "*PAJA finds no application in this case*". I am in agreement with him. As I have already stated herein, it is the contractual nature of the relationship between the parties that provides the framework in which this application should be decided and I am accordingly of the view that the Applicants'

[59] *Supra,* at paragraphs 22 and 23.

submissions that the provisions of PAJA apply ought to be rejected. There is, in any event, no relief sought in this regard in the notice of motion.

[82] Given the interpretation that I have placed on the rules under consideration, I cannot see how they can be considered to be unlawful. Although they might irk one's "*individual sense of propriety and fairness*"[60], because of their restrictive and regimented nature, they cannot be said to be contrary to public policy. In this regard I echo the sentiments of Olsen J[61] that the rules cannot be regarded as unduly restrictive or punitive as they "*stand as a framework to 'safeguard' and promote appropriate, sensible and fair interaction amongst residents and the respondent*". They are there to regulate conduct between neighbours and in so doing must, as of necessity, be restrictive in nature so as to always take into account the cumulative rights of use and enjoyment of the estate by all its residents. It cannot be said that the "*probability*" exists "*that unconscionable, immoral or illegal conduct will result from the implementation of the provisions* [of the rules concerned] *according to their tenor*"[62]. Should the Respondent however seek to implement the rules in such a manner, I am confident that a court will refuse to give effect thereto. One also has to recognise that they have been agreed upon by all the residents of the estate in order to "*maintain a structure within which residents can feel secure as regards the environment into which they have bought, and as regards the conduct reasonably to be expected of their neighbours, and of the respondent in its capacity as the enforcement authority with respect to the rules*"[63]. I am therefore of the view that rules 7.1.2 and 7.3.2 (or more correctly rule 7.3.1 as it is currently numbered in the August 2013 edition of the conduct rules), rules 2.1, 4.7 and 4.1.8 and

[60] See **Sasfin (Pty) Ltd v Beakes** supra, at 9 B-C.
[61] In **Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC** *supra,* at paragraph 34.
[62] See **Jaglal v Shoprite Checkers (Pty) Ltd** *supra*, at paragraph 12.
[63] See **Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC** *supra,* at paragraph 34.

rules 9.3.2, 9.4.1 and 9.4.3 of the Respondent's conduct rules are not unlawful and must be given effect to.

The Counter Application

[83] In its Notice of Counter-Application, the Respondent seeks an order that:

"*It is declared that the first respondent is entitled to suspend the use of access cards issued to the first applicant, his invitees and members of his family, and is entitled to suspend biometric access to such persons for so long as the two fines totalling R 3 000.00 as referred to in the first respondent's answering affidavit in relation to the first applicant are paid or are otherwise extinguished*."

[84] It was submitted on behalf of the Respondent that if the Respondent was successful in opposing the rules application, the relief sought in the counter application flows automatically. In support of this submission, the Respondent relied on what was stated in **Abraham v The Mount Edgecombe Country Club Estate Management Association Two (RF) NPC**[64], namely that:

"[*the*] *respondent is the enforcement authority. If its decision to refuse permission for the keeping of the dog Theodore on the estate stands because the application is dismissed, and I see no reason why, given that the applicants have not yet acted in accordance with the decision, the respondent should be denied an order enforcing the decision*."

I am of the view that that logic does not necessarily follow in this instance. In **Abrahams**, the court was dealing with rule 5.1 of the Respondent's conduct rules, which prescribed that written permission must first be

[64] *Supra* at paragraph 55.

obtained from the Respondent before a dog may be brought onto the estate and that any dog being on the estate in contravention of the rules would be removed forthwith. Consideration was therefore given in that case not only to the prescribed procedure that had to be followed to keep a dog on the estate, namely the obtaining of the Respondent's permission upon having complied with the prescribed criteria, but also the sanction that would be imposed if permission had not been obtained. It was common cause that permission to keep the dog in question had not been so obtained.

[85] The issue before me is somewhat different. The rules application encompassed a challenge by the Applicants to certain specified rules of the Respondent's conduct rules. None of the rules under consideration included a provision that would entitle the Respondent to suspend the Applicant's, or the members of his family or invitees, use of access cards or biometric access to the estate, either as a consequence of the fines in question not having been paid, or otherwise. As was pointed out by the Respondent, and which was in fact common cause, the Applicants' challenge was only a challenge to the lawfulness of the content of the rules specified in the notice of motion. Consideration was therefore only given to those specified rules and any finding that I may have made in the rules application relates only to those specific rules. I am of the view therefore that it does not follow that a failure by the Applicants to have those specific rules declared unlawful would automatically entitle the Respondent to relief based on the enforcement of a contractual right that was not contained in the specified rules themselves. What needs to be considered is whether the Respondent has in fact made out a case for the relief sought in the counter application.

[86] As is stated by the Respondent[65], its "*entire affidavit in answer*" stands as its founding affidavit for the purposes of the counter application. One therefore has to "*tease out*" those portions of the Respondent's answering affidavit that relate to the issues pertinent to the counter application.

[87] The only reference made by the Respondent in its answering affidavit to any "*powers to enforce non-compliance with the rules*" is with reference to rule 13 of the conduct rules[66]. It is contended by the Respondent that such rule includes "*the right to 'suspend access cards for the household concerned*'". What the Respondent "*may*" do if a resident fails to comply with the provisions of the rules is contained in rules 13.1.1 to 13.1.7, which read as follows:

"13.1.1 call for an explanation and/or an apology from the resident; and/or

13.1.2 impose a reprimand and require the resident to remedy the breach and/or comply with the relevant rule; and/or

13.1.3 may impose a financial penalty which has to be paid within 14 days of issue and shall be deemed to be part of the levy due by the owner; and/or

13.1.4 withdraw any previously given consent applicable to a particular matter; and/or

13.1.5 order the resident to pay for damages resulting from non-compliance with any rule; and/or

[65] In paragraph 6 of the Respondent's "further affidavit" filed in response to the Applicants' replying affidavit.
[66] Paragraph 31.2 of the Respondent's answering affidavit.

13.1.6 take legal action against the resident for the enforcement of the rule/s; and/or

13.1.7 suspend access cards for the household concerned."

The relief sought by the Respondent in the counter application therefore must be premised on its rights as set out in rules 13.1.3 and 13.1.7, as set out above, read with rule 7.1.2[67], which would entitle it to levy a penalty on any person found driving in excess of 40 km/h on the estate.

[88] The Applicants did not challenge rule 13 in the main application. There is no contention in the papers before me that the provisions of rule 13 are unlawful. It was for this reason that no great consideration was given to them in the main application. If they are however to form the basis upon which the Respondent seeks to rely for the relief sought in the counter application, some consideration now needs to be given to the provisions of rule 13.1.3 and 13.1.7. Rule 13.1.3 is merely a restatement of the powers given to the Respondent's directors in terms of its memorandum of incorporation, with the rider that any financial penalty imposed must be paid within 14 days.[68] Rule 13.1.7, given its ordinary grammatical meaning, says nothing more than the Respondent may suspend the access cards for the household concerned if a resident fails to comply with the provisions of the rules. It is common cause on the papers that any reference to access cards in the conduct rules must also include a reference to the biometric fingerprint reading system that has now been introduced.

[89] Rule 13.1.7 must however be read in context. In order to do so, one has to have reference to rules 6.6.1 and 6.6.2 of the conduct rules. Rule

[67] Set out in paragraph 22 hereof.
[68] See clauses 20 and 21.2 of the memorandum of incorporation referred to in paragraphs 18 to 20 hereof.

6.6.2 states that access cards may only be issued to persons permanently residing on the estate, club members, guests, or persons authorised to work on the estate. The issuing of access cards to club members, guests or persons authorised to work on the estate is further restricted by other provisions of the rules. A non-resident club member may only enter or exit through gate 5 and may only gain access to the Club for the purposes of making use of its facilities[69], a visitor may only be issued with an access card for a period of no longer than one month[70], and persons authorised to work on the estate must be registered with the Respondent[71]. Save for producing original identification upon application for an access card and either being over the age of 18, or possessing of a valid driver's license, no further restriction is imposed on the issuing of access cards to residents. Rule 6.6.1 states that access cards identify both the individual who is the holder thereof and that person's authority to "*freely*" enter and exit the estate. A suspension of a resident's access card, or the biometric fingerprint reading system, would therefore be a suspension of that resident's entitlement to "*freely*" enter and exit the estate. It would therefore be a suspension of a right recognised as being afforded to that person in terms of the rules. In order to succeed in its counter application therefore, the Respondent must make out a case that it is entitled to suspend such right.

[90] By way of "*introduction*" in its answering affidavit, the Respondent makes reference to the spoliation application and points out that it was heard on an urgent basis on the 1st of February 2014. It is further pointed out that the Applicant sought an order that his card and biometric access to the estate be reactivated. It is stated that the Applicant "*dealt at some length with the merits of what he contended were his rights to obtain access to the estate*" but nothing further is said about what such contentions were. It is

[69] Rule 6.3.
[70] Rule 6.10.3.

then stated that an interim order was granted whereby the Respondent was ordered to reactivate the Applicant's access and the *rule nisi* was extended until confirmed or discharged. The Respondent confirms that it has complied with the interim order. The Respondent then goes on to state that it has opposed the spoliation application, contending that the Applicant has refused to pay a number of penalties imposed on him under the conduct rules and that on account of that non-payment the Respondent is entitled to refuse him access to the estate.

[91] The Respondent then deals with its method of controlling ingress and egress to the estate.[72] The Respondent states that there are 3 perimeter gates to the estate, numbered 4 to 6, with each entrance gate having two lanes of entry and exit. In each case one lane is demarcated for visitors and the other lane is demarcated for owners or their authorised family members. Both entrance and exit from the estate is monitored by guards who are on duty 24 hours a day, 7 days per week. It is further pointed out that there are boom gates at all entrances and exits. The deponent then explains that visitors arriving at the boom gate are required to stop and provide the gate guard with a previously furnished access code, obtained by the owner concerned. Once the correct access code is confirmed by the guard, access is permitted to that visitor. A resident who approaches the gate, although also being required to stop, gains access to the estate by swiping his or her access card, or more recently utilising the biometric fingerprint reading system, which then automatically opens the boom gate. It is then stated by the deponent that:

"[*this*] *controlled method of entry to owners/members is a means of entry which each such owner or member is entitled to precisely by virtue of his/her membership. It is method which the first respondent has contractually undertaken*

[71] Rules 6.11.1 and 6.11.2.
[72] In paragraphs 21 to 26 and 64 to 68 of the answering affidavit.

to provide and maintain in order to maximise security within the estate, and it is a method which the first and second applicant's (alongside all other members) have contractually agreed to be bound by, on various conditions"[73], and that:

"[*the*] *wide powers afforded the directors under clause 21.1 of the MOI allows the directors to take steps as they consider necessary to remedy the breach of any rules. This would obviously include taking away a member's automatic right of access by means of swiping a card or biometric access - a sanction which has, when necessary, been enforced consistently by the Estate*"[74].

Reference is then made to an "*illustrative list*" which it is contended reflects members whose automatic right of access has been denied over the past 12 months.[75]

[92] The Respondent then goes on to state that in order to enforce the speed limits imposed in the estate, it has acquired "*speed measuring equipment*", which it contends is duly calibrated, certified and operated by a "*qualified operator*". The relevant "*calibration certificates*" and "*operator's certificate*" are then put up as annexures to the affidavit.[76] It is then contended that, as such methodology has been approved by its directors, it is binding on all owners who are members of the Respondent.

[93] The Respondent then goes on to state that three speeding contravention notices were issued to the Applicant's daughter, two on the 19th of October 2013, where she was allegedly travelling at 69 km/h and 65 km/h, respectively, and one on the 29th of October 2013 where she was allegedly travelling at 67 km/h. It is contended that in each instance, a penalty of R 1,500.00 was imposed by the Respondent's board of directors and that the Applicant was provided with an invoice and

[73] In paragraph 26 of the answering affidavit.
[74] In paragraph 69 of the answering affidavit.
[75] Annexure "TK 10" to the answering affidavit.

statements on a monthly basis reflecting such penalties. The Respondent points out[77] that, should any resident be aggrieved by any decision made by the estate manager, he or she may, having first paid the penalty, lodge an appeal to the Respondent's board within seven days of the fine being paid. It is also pointed out[78] that any fines imposed for a breach of a non-compliance with the rules, shall be deemed to be part of the levy due by the owner. It is then stated that the Applicant appealed against the first two penalties, imposed on the 19th of October 2013, and that one such appeal was successful. No appeal was lodged against the third. It is therefore contended that two penalties remain in place, each for R1,500.00, one for the incident on the 19th of October 2013 and one for the incident on the 29th of October 2013.

[94] It is then contended by the Respondent that the Applicant has himself accepted the method employed by it in measuring speed. In support of this contention it is stated that the Applicant accepted and agreed that his daughter was speeding in the infringement on the 19th of October 2013. The Applicant's email, which the Respondent contends constitutes his "*notice of appeal*", is put up in support of such contention.[79] It is contended by the Respondent that the Applicant "*accepted that she had been speeding, but argued in mitigation that she was faced with a sudden emergency*". It is therefore contended that it is clear that there is no dispute that the speeding actually took place. It is also contended that it is not disputed that the appeal against the second infringement was dismissed,

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[76] Annexures "TK 11", "TK 12" and "TK 13".
[77] With reference to rule 13.1.10, which states:
"*Should any resident be aggrieved by a 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*".
[78] With reference to rule 13.1.12, although the reference should be to rule 13.1.11, which states:
"*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*".
[79] Annexure "TK 14" to the answering affidavit.

and that the Applicant did not appeal against the third infringement. It is therefore contended that the fines imposed by the Respondent on the Applicant remain valid and enforceable and part of the levies due by the Applicant to the Respondent.

[95] It is then stated that, in such circumstances, the Respondent, via its board of directors, decided that the access cards and biometric access of the Applicant, and his household, be suspended. It is stated that this decision was taken before the interim order was granted in the spoliation application. It is then submitted by the Respondent that, as the fines still remain unpaid, there is nothing unlawful or impermissible about the Respondent's rules in this regard and that it would accordingly be entitled to an order authorising the deactivation of the Applicant's access cards and biometric access to the estate.

[96] In his replying affidavit, which serves as an answering affidavit to the counter application, the Applicant does not dispute the institution of the spoliation application or the granting of the relief as alleged by the Respondent. The Applicant however disputes the "*validity of the penalties*" imposed by Respondent. Save for confirming that he is a member of the Respondent, the Applicant raises no further issue regarding the Respondent's allegations as to the operation of the boom gates at the various entrances and their control of ingress and egress to the estate. The Applicant also accepts the existence of the provisions of the memorandum of incorporation referred to. In response to the Respondent's contention that rule 13 affords it the power to "*suspend access cards for the households concerned*", the Applicant makes reference to the fact that the introduction[80] to the conduct rules provides that the

[80] The introduction to the conduct rules provide, *inter-alia*, that:
"*The Board is given the authority to make reasonable rules for the management, control, administration, use and enjoyment of Estate 2. The Board has the power at any time to substitute, add to, amend or repeal any rule. The rule should not however be seen to be either unduly*

board is only given authority to make "*reasonable rules*" and that such should "*not however be seen to be either unduly restrictive or punitive, but rather as a framework to safeguard and promote appropriate, sensible and safe interaction amongst residents*" on the estate and with the Respondent.

[97] It is not disputed by the Applicant that three contravention notices were issued by the Respondent in respect of alleged contraventions of the speeding rule by his daughter on the dates contended for. The Applicant however denies that the "*speeds at which she was recorded as travelling*" are correct and that the contravention notices were issued in accordance with the Respondent's memorandum of incorporation and conduct rules. It is also denied that the person operating the Respondent's "*speed measuring equipment*" is trained to calibrate and/or handle the equipment itself. It is submitted by the Applicant that in any dispute, whether it be contractual or based on a statutory penalty for speeding, he would be entitled to contest the validity of the calibration of the speed measuring equipment in a court. It is contended that the conduct rules prevent such entitlement by requiring him to pay the fine before being allowed to appeal the decision. It is also contended that the person operating the equipment is not "*empowered*" to issue contravention notices as it is contended that, in terms of the memorandum of incorporation, such notices have to be issued by the Respondent's board of directors. The Respondent's contention that the Applicant has accepted the methods employed by it in measuring speed and has accepted and agreed that his daughter was speeding, is denied by the Applicant. It is contended by the Applicant that the Respondent is "*flaunting the audi alteram partem principle*" as the conduct rules make it impossible for him to dispute the correctness of the speeding measuring equipment, by having to pay the fine before lodging an appeal. As regards the allegation by the Respondent that its board of directors has

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restrictive or punitive, but rather as a framework to safeguard and promote appropriate, sensible and fair interaction amongst residents and MECCEMA TWO".

decided that his access cards and biometric access have been suspended, the Applicant points out that such decision has not been disclosed in the papers and he accordingly denies same.

[98] For the purposes of the counter application, there is no dispute between the parties as to the contractual relationship between them and as to the terms of the memorandum of incorporation and the conduct rules relied on. Upon a proper reading of rules 6.6.1 and 6.6.2 of the conduct rules, any resident, for so long as that person is able to produce original identification and is over the age of 18 or is in possession of a valid driver's license, is entitled to be issued with an access card or be registered on the biometric fingerprint reading system. Upon that card being issued to them, or their fingerprints being registered on the system, that person is then entitled, pursuant to the provisions of the conduct rules, to freely enter and exit the estate as of right. The Respondent appears to accept this, otherwise it would not have stated that "*this controlled method of entry to owners/members is a means of entry which each such owner or member is entitled to precisely by virtue of his/her membership*" and that it is a method which it has "*contractually undertaken to provide and maintain*" and which the Applicant has "*contractually agreed to be bound by*"[81]. The Respondent also accepts that it is a right that has to be "*taken away*".[82]

[99] Rule 13 entitles the Respondent to "*suspend access cards for the household concerned*" if the resident concerned fails to comply with the provisions of the conduct rules. I do not see the Respondent as contending that the provisions of rule 13.1.7 entitle it to suspend the Applicant's access cards or biometric access merely upon it forming the opinion that he or she has breached the conduct rules without first having recourse to a court of law in order to seek its sanction to do so. The very

[81] In paragraph 26 the answering affidavit referred to in paragraph 91 hereof.
[82] Refer to paragraph 96 of the answering affidavit, referred to in paragraph 91 hereof.

institution of the counter application must be seen as an acceptance by the Respondent that it is obliged to obtain a direction from this court before it is entitled to suspend the Applicant's access cards and biometric access as a consequence of his alleged breach in the present instance. Should the Respondent however be placing an interpretation on the rules concerned that it is entitled to suspend access cards and biometric access merely upon it forming the opinion that a resident has breached the conduct rules, or is endeavouring to implement them in such a manner, I am of the view that such would be tantamount to self-help as the only reason why the access cards and biometric access would be suspended in such circumstances would be to coerce the resident concerned into paying the penalty imposed by it. The Respondent would, in essence, be imposing a constraint upon the Applicant's right to freely access the estate without having recourse to a court. It is a long established principle that self-help is unlawful and that any provision in a contract providing for such will not be enforced by our courts.[83] I would therefore be loath to come to the Respondent's aid in such circumstances, if this is in fact what it is contending for. As this however appears not to be the case, I am therefore of the opinion that, in order to be entitled to the relief sought by it in the counter application, the Respondent has to establish that there has been a breach of the conduct rules by the Applicant and that it would be entitled, in such circumstances, to an order directing that it may suspend his access cards and biometric access to the estate.

[83] See **Chief Lesapo v North West Agricultural Bank and Another** 2000 (1) SA 409 (CC) at paragraphs 11 and 16; **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at paragraphs 31-34.

[100] As a starting point, the Respondent would have to establish that the Applicant's daughter contravened rule 7.1.2 by travelling on the estate, in the present instance on at least two occasions, at a speed in excess of 40 km/h. Looking at what is before me on the papers, the only direct allegation made by the Respondent regarding the alleged incidents of speeding by the Applicant's daughter is the statement that "*three contravention notices*" were issued to her on the dates alleged. This statement is made by the Respondent's CEO and estate manager. Nothing further is stated regarding the alleged commission of the contravention of the rules by the Applicant's daughter, nor is anything stated as to how it was determined that she was in fact travelling at the alleged speed at the relevant times. There are general statements as to the calibration of the instrument alleged to have been used and the competence of the person alleged to have been operating it, but nothing is said by the person who actually determined that she was travelling at that speed. No affidavit is put up by the operator concerned. The three contravention notices are not even put up by the Respondent. In the light of the aforegoing, the Applicants simple denial that his daughter was travelling at the speed alleged, cannot be criticised. There was nothing alleged by the Respondent as to the actual commission of the transgression of the rules that would have obliged the Applicant to say anything further.

[101] The Respondent's contention that the Applicant accepted and agreed that his daughter was speeding in his "*notice of appeal*" is somewhat confusing. It is the Respondent's contention, which is supported by the conduct rules themselves, that an appeal can only be lodged once the fine concerned has already been paid. It is common cause in the present instance that the fines themselves have never been paid by the Applicant. I have difficulty therefore in accepting the Respondent's contention that the email referred to is in fact the Applicant's

notice of appeal. It would appear that no appeal has in fact taken place, certainly not one as prescribed by the conduct rules. Be that as it may, if one has reference to the email itself, it has been addressed by the Applicant to the Respondent's compliance and human resources manager, and appears to be a plea for that person to ask the Respondent's board to cancel the fines. The email itself refers to a telephone conversation between the Applicant and the manager concerned and sets out the circumstances relating to an incident where the Applicant's son was injured and the Applicant's daughter had been requested to assist him and then fetch the son's medical aid card, one assumes from the Applicant's house on the estate. No reference is made in the email to the alleged incidents that gave rise to the contravention notices being issued to the Applicant's daughter and no admission is made in this regard. One simply cannot, in such circumstances, draw the inference that the Respondent seeks to contend for as to the Applicant's acceptance that the fines were properly imposed. Although not denying the issuing of the contravention notices themselves, the Applicant disputes that they were issued in accordance with the Respondent's memorandum of incorporation and conduct rules and denies that the speeds at which the Respondent contends that his daughter was travelling are correct. The Applicant, in essence therefore, puts the commission of the breach of the conduct rules in issue.

[102] Where disputes of fact have arisen in motion proceedings, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred by the Applicant, which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order.[84] In the present instance, it is the facts alleged and admitted by the Applicant that I must consider for the purposes of

determining the counter application. It must also be remembered that a denial of a fact may not be such as to raise a real, genuine or *bona fide* dispute. In such a case, and in the absence of any application for the matter to be referred to the hearing of oral evidence, I am entitled to proceed on the basis of the correctness of the allegation and include this fact among those upon which I determine whether the relief sought may be granted. In order to do this however, I must be satisfied as to the inherent credibility of the factual averment concerned.

[103] As I have already stated, there are no averments in the papers before me as to how it was determined that the Applicant's daughter was travelling on the estate roads at a speed in excess of 40 km/h. All I have is the allegation by the Respondent's CEO and estate manager that "*three contravention notices*" were issued to the Applicant's daughter on the dates alleged and that those contravention notices relate to the alleged speeding incidents. In the absence of any direct evidence in this regard, I am not satisfied as to the inherent credibility of the Respondent's averment that the Applicant's daughter was in fact speeding. Save for the Respondent's say so, I have nothing before me that supports such a contention. I therefore cannot consider it as one of the facts alleged by the Respondent that have been admitted by the Applicant merely because he goes no further than to simply deny it and provides no positive assertion to the contrary. I am therefore of the view that the Respondent has fallen at the first hurdle as it has failed, on the papers before me, to establish that the Applicant's daughter was in fact speeding as alleged. This being the case, it has also failed to establish that the Applicant has breached the conduct rules as alleged.

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[84] See **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at 235 D-G: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)** Ltd 1984 (3) SA 623 (A) at 634 H-I.

[104] The Applicant also challenges whether the Respondent's board of directors has in fact resolved to suspend his access cards and biometric access as no such allegation is made in the application papers. He accordingly denies that such a resolution has been passed. Accepting that the suspension of access cards is one of the remedies that the Respondent "*may*" impose in terms of rule 13, I am of the view that there is some merit in the Applicant's submission. One would expect that, at the very least, an allegation would be made in this regard by the Respondent. It also might be said, having regard to the memorandum of incorporation[85] and accepting that the Respondent's directors only have the right "*to impose reasonable financial penalties*", that some allegation ought also to be made that the penalties imposed in the present instance were reasonable in the circumstances. If they were not, the Applicant cannot be said to be in breach of the conduct rules for not having paid them. In the light of my finding that the Respondent has failed to establish that the Applicant's daughter was in fact speeding and has therefore failed to establish that the Applicant has breached the conduct rules as alleged, I am of the view that I need not consider these issues any further.

[105] I am therefore of the view that the Respondent has failed to establish that it is entitled to the relief sought in the counter application.

The Spoliation Application: Case Number 1118/2014

[106] A *rule nisi* was granted in this matter on the 1st of February 2014 after the application was brought before this court as one of urgency. In the *rule nisi*, the Respondent was called upon to show cause, on the 7th of February 2014, why an order should not be granted directing it "*to re-activate the Applicant's access cards and biometric access of his family to the Mount Edgecombe Country Club Estate II*", together with an order directing it

[85] Clause 20.1 referred to in paragraph 20 hereof.

to pay the Applicant's costs on the attorney and client scale. The order directing the Respondent to re-activate the Applicant's access cards and biometric access to the estate was made an interim order with immediate effect. The *rule nisi*, along with the interim relief, was extended on the 7th of February 2014 until either confirmed or discharged. The Applicant now seeks confirmation of that *rule*.

[107] Although there was initially a dispute over who owned the four properties referred to in the papers, by the time the matter was argued before me such was no longer an issue and it was common cause that the Applicant was a property owner (through various companies, close corporations and trusts) within the estate. There is also no dispute as to the fact that the Applicant, along with his immediate family, consisting of his wife, son and daughter, resided on the estate and were in peaceful and undisturbed possession of the properties occupied by them.

[108] In a founding affidavit deposed to on his behalf by his attorney of record, it is alleged by the Applicant that, on or about the 21st of January 2014, the Respondent deactivated his access cards and his family's biometric access (via a thumb or fingerprint on an electric reader) to the estate. It is stated that the Respondent dispatched an "*SMS message*" to the Applicant communicating its decision to deactivate his access cards and biometric access whilst he was abroad. The Applicant alleges that the Respondent's contention was that it was entitled to do so on the basis that there was an unpaid amount on the Applicant's levy account, arising from 3 speeding contravention notice issued to the Applicant's daughter during or about October 2013. It is further stated that the Respondent contended that the deactivation was the standard procedure followed in all cases where a member's levy account is in arrears.

[109] The contents of a letter addressed to the Respondent on the Applicant's behalf on the 21st of January 2014 is then quoted.[86] The letter confirms that the Applicant has received the notification regarding the deactivation of the access cards and biometric access and contends that the Respondent has "*unlawfully deactivated his access to the estate on the basis that you allege that his account (presumably, his levy account) is in arrears*". The writer points out that the purpose of the communiqué is not to deal with the question of the alleged arrears at that stage, but rather the unlawful and unconstitutional conduct on the part of the Respondent in deactivating the Applicant's access to the estate. It is pointed out that the Respondent is a substantial property owner on the estate and that his "*track record*" over the past 10 years demonstrates that he will honour any and all commitments on his account. It is pointed out that the Applicant "*is however not prepared to and will not pander to your extortive conduct*". The Respondent is then called upon to give an immediate undertaking that the Applicant's access to the estate will be restored.

[110] The response to the aforesaid letter is then put up.[87] This is an email addressed by the Respondent's compliance and HR manager on the 23rd of January 2014 in which reference is made to the three speeding contravention notices issued to the Respondent's daughter in October 2013 and in which it is confirmed that a message was sent to the Applicant on the 21st of January 2014 "*indicating that his access has been deactivated due to his account being in arrears*" and that "[*these*] *are the standard procedures followed in all cases where a member is being advised that his/her account is in arrears*". Reference is then made to the provisions of clause 29.12 of the Respondent's memorandum of incorporation and rule 13.1.7 of the conduct rules.[88] The letter then goes on to state that the

[86] Paragraph 29 of the founding affidavit. The letter itself is annexure "SP 3".
[87] Paragraph 30 of the founding affidavit. The letter itself is annexure "SP 4".
[88] Clause 29.12 of the memorandum of incorporation reads as follows:

Applicant's and his family's access to the estate is not denied. It is pointed out that his "*present access method i.e. access card/biometrics are deactivated, they are still able to access the estate albeit by filling a register*". The writer then contends that the Respondent's actions are in line with the directions given by its memorandum of incorporation and that they are "*neither illegal nor unconstitutional, but in compliance to the governing documents in place*". The writer then concludes by stating "*we would hope that this communiqué would result in him informing "Nico"* [which I think is a reference to the Applicant's son] *to settle the arrears on his account which would result in the family's card/biometrics being reactivated*".

[111] It is submitted in the founding affidavit that "[*the*] *effect of deactivating the Applicant's access cards is that the Applicant will not be able to enter the Estate as a resident. The Applicant and his family will be constrained to enter the Estate using the visitors' access, be required to report to security and to sign a resident's register. Normally, a visitor announces himself to the security gate and the security gate then telephones the resident to obtain permission or consent to allow the visitor onto the Estate. If no-one authorise the entry onto the Estate, the visitor is not permitted to enter. Clearly, when the Applicant and his family members want to access the Estate to get to their residence or residences, it is going to happen that there are times when no-one is at home to authorise access. The Applicant and his family return to South Africa on Saturday, 1 February 2014 and they will proceed directly home. There will clearly be no-one at home to authorise their entry. In the circumstances, the Applicant and his family must rely on the hope and expectation that, given their long residence on the Estate, the security personnel will recognise them and allow them to enter after signing the residents' register. There is no guarantee whatsoever that they will be allowed*

"*Members still in arrears after 14 (fourteen) days may have their overdue account and the full interest thereon, handed over for collection and possible legal action, and/or their access discs suspended. Any costs incurred in these proceedings and all additional interest up to the date of final settlement shall be for the member's account*". Rule 13.1.7 is set out in paragraph 87 hereof.

entry onto the estate and access to their home after having travelled for many hours on an international flight".[89]

[112] Under the heading "*Grounds for Relief*" it is alleged[90] that the Applicant seeks relief under the *mandament van spolie.* It is stated that there is no dispute that the Applicant and his household have been in peaceful and undisturbed possession of their primary residence on the estate for over a decade and in equivalent possession of the other properties on the estate since those properties were first acquired. It is further stated that the Respondent has not obtained any court order for its actions and has accordingly resorted to self-help. The Applicant therefore submits that the Respondent's actions in suspending his access cards and biometric access of his family members amounts to an act of spoliation, even so, it is contended, where the conduct rules authorise such action.

[113] The Respondent puts up two answering affidavits. The first being a very short affidavit dealing only with the salient points prior to the hearing of the matter on the 1st of February 2014 and the second, a more lengthy affidavit dealing fully with the issues raised in the founding papers. In the first affidavit, the Respondent alleges that the Applicant owes it the sum of R 3000.00 in respect of outstanding fines and that it has advised the Applicant that his levy account is in arrears and that payment is expected. The Respondent confirms that the SMS message was sent to the Applicant on the 21st of January 2014 and makes reference to the aforementioned email addressed to the Applicant's attorneys on the 23rd of January 2014. The Respondent then makes reference to clauses 20.2, 21.1, 29.12 of its memorandum of incorporation and rules 7.1.2 and 13.1.7 of the conduct rules.[91] It then contends that, as the Applicant has failed to

[89] Paragraph 23 of the founding affidavit.
[90] In paragraphs 25 to 27 of the founding affidavit.
[91] The provisions of the memorandum of incorporation and conduct rules referred to are set out in paragraphs 16 to 22 hereof.

timeously make payment of the outstanding fines, despite numerous requests and invoices being sent, it has deactivated the Applicant's access cards in accordance with the contractual rights detailed in the aforementioned provisions of its memorandum of incorporation and conduct rules. The Respondent, in any event, disputes that its deactivation of the Applicant's access cards and biometric access constitutes an act of spoliation. It is submitted that there are two lanes of traffic entering the estate, the left-hand lane which is utilised by residents with access cards, who would typically drive through the gate utilising their access cards or placing their finger against a scanner to automatically raise the boom, and the right-hand lane which is utilised by visitors and residents without access cards. It is alleged that, as the Applicant's access cards and biometric access has been deactivated, the Applicant and the members of his family would have to make use of the right-hand lane and would have to fill in the "*residents without access cards register*" prior to gaining entry. It is therefore contended that, as these gates are manned 24 hours a day, the Applicant and his family would still be able to enter the estate. It is on this basis that it is denied that the Respondent has committed any act of spoliation.

[114] In its further answering affidavit, the Respondent confirms that it has complied with the interim order and that the Applicant's access cards and biometric access have been reactivated. With reference to the aforementioned provisions of the memorandum of incorporation and conduct rules, it is stated that the Respondent, via its Board of Directors, decided that the access cards and biometric access of the Applicant and his household be suspended. It is confirmed that this is what took place before the interim order was granted. The Respondent then submits that, as the Applicant's entire application is based on the *mandament van spolie*, he would have to demonstrate that he was dispossessed of something without his consent by the Respondent. It is contended that, as

is apparent from the founding papers, the Applicant's case appears to be that "*his manner of access through the gates per se amounts to possession of something, and when his cards and biometric access was deactivated, that possession was taken away from him*". It is contended that the Applicant has been untruthful, as the only effect of deactivating the cards and biometric access is that the Applicant would have to stop at the boom gate and complete a register before being allowed in. It is alleged that in all cases he and his household, and anyone else previously entitled to access as a resident, would as a matter of course be allowed through.[92] It is then submitted that the properties owned by the Applicant on the estate, whether owned by him or through legal entities, are the only thing that the Applicant can ever claim to have been in possession of and that possession of these properties was never taken away or interfered with. The Respondent then submits that its method of controlling access in and out of the estate can never be something which the Applicant was in possession of. It is stated that the Applicant's entitlement to access the estate by the use of a card or biometric scanning is based on contract, the Respondent having agreed with its members to provide them with that benefit on terms and conditions, one of which is that it can be taken away if levies are unpaid. It is submitted that the relief sought by the Applicant is in effect enforcement of the contractual right to make use of a particular method to gain access to the estate. It is contended that this is a contractual dispute, and on the Applicant's own version, he is in arrears in his levies and the Respondent is entitled to deactivate the card and biometric scanning.

[115] In response to this, it is submitted by the Applicant that the Respondent, in deactivating of the access cards and biometric access, committed an act of spoliation in respect of the peaceful and undisturbed possession by him and his family over access to their property within the

[92] In paragraphs 35 to 37 of the second answering affidavit.

estate, including the common property. It is contended that he has been advised that interference with customary access, is, in law, interference with the right of access of which he was in possession. Such possession was manifest by his family's daily use of such access in an unhindered manner. It is further contended that the Respondent, in instituting the counter application in the rules application, has made a "*blatant concession*" that it is not entitled to unilaterally deactivate the access cards and suspended biometric access for him and his family.

[116] It is contended by the Applicant that he seeks relief under the *mandament van spolie.* "*Spoliation*" is defined by Innes CJ in the case of **Nino Bonino v De Lange**[93] as "*any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a right*". If one has reference to the notice of motion, the relief sought by the Applicant goes no further than to demand the reactivation of his access cards and the biometric access of his family to the estate. Save for costs, no other relief is sought. This form of relief has been described as "*classically spoliatory*".[94] Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation took place, and merely orders that the *status quo* be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict. In order to succeed, an Applicant must satisfy the court on the admitted or undisputed facts by the same balance of probabilities as is required in every civil case, of the facts necessary for his or her success in the application.[95]

[93] 1906 TS 120 at 122.
[94] See **Street Pole Ads Durban (Pty) Ltd and Another v eThekwini Municipality** 2008 (5) SA 290 (SCA) at paragraph 16.
[95] See **Nienaber v Stuckey** 1946 AD 1049 at 1053-1054

[117] In the present instance, it is admitted by the Respondent that the Applicant, and his immediate family, are resident on the estate and were in possession of "*activated*" access cards and biometric access as at the 21st of January 2014, which is the date it is contended that such cards and biometric access were deactivated by the Respondent. It is also admitted by the Respondent that it deactivated both of the access cards and biometric access as alleged by the Applicant. It is also common cause that the Respondent did not have recourse to a court of law before deactivating the cards and biometric access as aforesaid. At face value therefore, the Respondent has admitted all the facts that the Applicant would have to establish in order to obtain relief under the *mandament van spolie*. The enquiry does not however stop there. As a starting point, the Respondent appears to challenge whether its deprivation of the Applicant exercising his right of access is in fact illicit. It appears to contend that, by virtue of the provisions of its memorandum of incorporation and conduct rules[96], it was entitled to suspend the access cards and biometric access upon the Applicant's levy account being in arrears without recourse to a court of law. It also challenges whether the act of deactivating the access cards and biometric access is in fact an act of spoliation, as the Applicant, and his immediate family, have an alternate method of gaining access to the estate by using the "*visitors lane*" and signing the "*residents without access cards register*". It is further contended by the Respondent that the only thing that the Applicant can ever claim to have been in possession of are the properties that he owns on the estate and such possession has never been taken away or interfered with. The Respondent therefore contends that the relief sought by the Applicant is in fact the enforcement of a contractual right to make use of a particular method to gain access to the estate and is not spoliatory in nature. These issues therefore needed to be considered.

[96] With specific reference to clause 29.12 of its memorandum of incorporation and rule 13.1.7 of the conduct rules.

[118] I am of the view that it would be prudent to consider the Respondent's last challenge first, as should the exercising of the right contended for by the Applicant not be one recognised as entitling him to spoliatory relief, that would be the end of the matter. Although the actual mechanism by which the access card or biometric reader operates has not been fully described in the papers, it is apparent that the card is of a magnetic nature and would be swiped through a "*reader*" which would, in turn, generate some electric pulse to cause the boom gate to open. I assume that the same principle would apply once the scanner reads a fingerprint. Although nothing has been said in this regard, I assume that the Applicant and his family are still in possession of the access cards themselves as it is only the "*deactivation*" thereof that has been complained of. It goes without saying that the Applicant and his family must still be in possession of their fingerprints. It is not contended therefore by the Applicant that he has lost possession of any corporeal object. What the Applicant complains of is that the effect of deactivating his access cards and biometric access is that he, and the members of his family, will not be able to enter the estate "*as a resident*". The Applicant is therefore contending for the illicit deprivation by the Respondent of the exercising, or "*quasi-possessio*", of his right to enter the estate in such capacity.

[119] The possession of incorporeal rights is protected against spoliation by the *mandement*. [97] The *mandement van spolie* is not concerned with the protection or restoration of rights, but the restoration of the factual possession of which the *spoliatus* has been unlawfully deprived. What is protected by the remedy is the actual performance of acts, which if lawfully

[97] **Nienaber v Stuckey** 1946 A.D. 1049 at 1056.

performed, would constitute the exercise of the right in question.[98] This much is confirmed in the case of **Telkom SA Ltd v Xsinet (Pty) Ltd**, where the following is stated:[99]

"*Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has 'quasi-possession' of it, when he has exercised such right. Many theoretical and methodological objections can be raised against this construct, inter alia, that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of 'quasi-possession' has passed into our law. This is all firmly established.*"[100]

[120] The remedy has been succinctly stated in **FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz No and Others**[101] as follows:

"*The mandement van spolie is a remedy to restore to another ante omnia property dispossessed 'forcibly or wrongfully and against his consent'. It protects the possession of movable and immovable property as well as some forms of incorporeal property. The mandement van spolie is available for the restoration of quasi-possessio of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the status quo ante and not the determination of the existence of the right. The quasi-possessio consists in the actual exercise of an alleged right …….*

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[98] **Zulu v Minister of Works, KwaZulu, and Others** 1992 (1) SA 181 (D) at 187H – 188E.
[99] 2003 (5) SA 309 (SCA) at paragraph 9.
[100] Reference is then made to the cases of **Nino Bonino v De Lange** 1906 TS 120, **Nienaber v Stuckey** 1946 AD 1049 and **Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi** 1989 (1) SA 508 (A).

The mandement van spolie does not have a 'catch-all function' to protect the quasi-possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandement is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi-possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its quasi-possessio is deserving of protection by the mandement. Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandement. The right held in quasi-possessio must be a 'gebruiksreg' or an incident of the possession or control of the property."

[121] The exercise of the right contended for by the Applicant is not in dispute. There is no dispute that the Applicant, and his immediate family, freely entered and exited the estate through the boom gates utilising either their access cards or the biometric fingerprint scanner. The nature of the professed right contended for by the Applicant needs however to be determined or characterised to establish whether his *quasi-possessio* of it is deserving of protection by the *mandement*. It is evident from what is quoted above that the remedy is confined to the protection of possession, which is a right in property, and is not to be extended to the protection of personal rights. It is not an appropriate remedy where contractual rights are in dispute or specific performance of a contractual obligation is claimed.[102] It is thus only rights to use or occupy property, or incidents of

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[101] 2008 (2) SA 503 (SCA) at paragraphs 12 and 13, together with the authorities referred to therein.

[102] **Firstrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others** supra: see also **Telkom SA Ltd v Xsinet (Pty) Ltd** supra at paragraph 14.

occupation or control of property, that will warrant protection under the *mandement*.

[122] In the case of **Impala Water Users Associations v Lourens N.O. and Others**,[103] the Respondents had successfully obtained an order in the court a quo directing the Appellant, which was a water user association in terms of section 98 (6) (a) of the National Water Act, No. 36 of 1998, to remove locks, chains and welding from certain sluices, which allowed the flow of water onto farms owned by them, and to restore the flow of water through such sluices to reservoirs on the Respondents' respective farms. Relying on the decision in **Telkom SA Ltd v Xsinet (Pty) Ltd**,[104] it was argued on behalf of the Appellant on appeal that the right to receive water upon which the Respondents relied were merely personal rights resulting from the contract that had been concluded between the parties. In terms of that contract, each Respondent had become a member of the Appellant and acquired the privileges of membership, especially the privilege to receive water in exchange for the performance of membership obligations, which included, the payment of the charges raised in respect thereof. In dealing with this argument, it was pointed out by the court that each of the Respondents had been entitled to rights under the previous Water Act, No. 54 of 1956, which rights were registered in terms of that Act and were clearly not merely personal rights arising from contract. It was also pointed out that each of the Respondents had, by virtue of the provisions of the Appellant's constitution, become its founding members. The court was therefore of the opinion that the rights to water which belonged to the individual Respondents under the previous Water Act, insofar as they were replaced or subsumed by the provisions of the current National

[103] 2008 (2) SA 495 (SCA) at paragraph 22.
[104] *Supra*, where it was held that the use of the bandwidth and telephone services supplied by Telkom did not constitute an incident of its use of the premises which Xsinet occupied, with the result that the disconnection by Telkom of the telephone lines did not constitute interference with Xsinet's possession of its equipment.

Water Act, could not be described as mere personal rights resulting from the contract concluded with the Appellant. The court was therefore of the view that the water rights in question were linked to and registered in respect of a portion of each farm used for the cultivation of sugar cane, which was dependent on the supply of the water forming the subject matter of the right. It was therefore held that the use of the water was accordingly "*an incident of possession of each farm*" which was, in the court's view, interfered with by the actions of the Appellant.[105]

[123] The issue of the narrowing of an entrance to a parking lot, so as to preclude the Applicant from effectively gaining access to a parking bay over which it had control, was considered in the case of **Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another**.[106] The Applicant was a supermarket operator who had leased premises in a shopping mall from the First Respondent and operated a supermarket business therefrom. The written lease included a designated loading bay in close proximity to the supermarket's refrigeration rooms, butchery and bakery. Access to this loading bay was gained from the street. The Applicant utilised the designated loading bay to receive bulk deliveries of meat and flour conveyed in 8-ton trucks, and the like. The parking area was also used by other tenants of the building, who occupied office premises. These tenants complained to the First Respondent about inconvenience to them and their clients caused by deliveries made to the designated loading bay. As correspondence and meetings failed to resolve the issue with any success, the First Respondent built walls across each side of the entrance

[105] The Supreme Court of Appeal dealt with similar circumstances in **Firstrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others** *supra*. Whilst accepting that the Respondents' rights, whether they be described as statutory rights to water or rights to a water supply or a *quasi-possessio* of a water supply, may well be incidents of their possession or control of their properties, the court however found, on the facts of that case, that the Respondents were not dispossessed of any of these rights, but an erstwhile contractual right to convey their water entitlements, which had already expired by the effluxion of time.

[106] 2010 (1) SA 506 (ECG).

to the parking area so as to effectively permit only cars or light delivery vehicles being able to gain access to the parking area and the designated loading bay. The Applicant then brought an urgent application for a spoliation order requiring the First Respondent to remove the walls to the entrance to the parking area. In opposition to such application, the First Respondent contended[107] that the Applicant's use of and access to the loading bay was not an incident of its possession of the supermarket, but was an entirely separate contractual right which could not be enforced by a spoliation order. In rejecting this argument, the court found that, on the facts of the case, the Applicant was in possession of the designated loading bay, although it might not have been in possession of the parking bays generally situated within the parking area. The loading bay had been designated for the supermarket, and the supermarket alone. It was then held that access to the loading bay from the entrance was an essential ingredient of the Applicant's possession of the supermarket, as without it, it could not conduct its business. In distinguishing the facts of this case from the case of **De Beer v Zimbali Estate Management Association (Pty) Ltd and Another**,[108] the court held that access to the designated loading bay through the parking lot and the entrance was inextricably and inseparably connected with the possession of the loading bay and the premises of the supermarket beyond it. In drawing a comparison with the facts in **Nienaber v Stuckey**, the court held that access to the parking lot from the street was much the same as access through a gate which was, in effect, regarded as a necessary incident of the possession of the lands beyond.

[107] Relying on **Shoprite Checkers Ltd v Pangbourne Properties Ltd** 1994 (1) SA 616 (W) where it was held that the fact that the Applicant might have had a right, derived from contract, to make use of a parking area, including parking bays to be found in a designated area, such did not amount to possession of the designated parking area for the purposes of establishing an entitlement to the *mandement van spolie*.

[124] In the present instance there is no dispute that the Applicant is the owner of various properties within the estate and that he, and the members of his immediate family, were in free and undisturbed possession of such properties, or at the very least, of the property in which they resided. It is also not disputed that the Applicant, as owner, would be entitled to access to these properties in order to exercise his rights of control and possession thereof. It is also common cause, and I was advised by counsel representing both parties to treat such as same, that the roads laid out on the estate are public roads. All things being equal therefore, the Applicant, and the members of his family, would, as of right, be entitled to utilise such road network to gain access to their property or properties. If one has reference to the Respondent's conduct rules[109] they appeared to be designed to restrict unauthorised access to the estate and not authorised access. Rule 6.6.2 states that access cards may only be issued to persons permanently residing on the estate, club members, guests, or persons authorised to work on the estate. The issuing of access cards to club members, guests or persons authorised to work on the estate is restricted by other provisions of the rules. A non-resident club member may only enter or exit through gate 5 and may only gain access to the Club for the purposes of making use of its facilities,[110] a visitor may only be issued with an access card for a period of no longer than one month,[111] and persons authorised to work on the estate must be registered with the Respondent[112]. Save for producing original identification upon application for an access card and either being over the age of 18, or possessing of a valid driver's license, no restriction is imposed on the issuing of access cards to residents. Rule 6.6.1 in fact

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[108] 2007 (3) SA 254 (N), where it was held that the Applicant was not in possession of the entire housing estate, and where the element of access could be severed from possession.
[109] Put up as annexure "M" to the answering affidavit.
[110] Rule 6.3.
[111] Rule 6.10.3.
[112] Rules 6.11.1 and 6.11.2.

states that access cards identify both the individual who is the holder thereof and that person's "*authority to freely enter/exit*" the estate. The conduct rules themselves therefore acknowledge that a resident, by virtue of his or her ownership or possession and control of a property within the estate, is entitled to unrestricted access to the estate. This is in distinction to the qualified access that is afforded to non-residents, as outlined above. It is the exercising of this right to free and unrestricted access to the estate, "*as a resident*", that the Applicant contends he and his family have been illicitly deprived of by the Respondent as a consequence of the deactivation of their access cards and biometric access. If one accepts that the Applicant and his family are entitled to freely enter and exit the estate so as to gain access to the properties which they own or occupy, one has to accept, based on the authorities referred to above, that the exercise of their right to do so must be an incident of their possession or control of such properties. I am therefore of the view that the illicit deprivation of the *quasi-possessio* of the right contended for by the Applicant is protected by the *mandement van spolie*. I do not agree with the Respondent's submission that the Applicant is merely seeking to enforce a contractual right to make use of a particular method to gain access to the estate. He is entitled to seek relief under the *mandement* in the present instance. I am supported in this view by the decision in **Fisher v Body Corporate Misty Bay**[113] where, in also dealing with an instance where the Applicant was a home-owner in a gated community and had also had his access disk deactivated, it was held that:

"[*access*] *that is intended to retain possession or use of property should be found to be protected under the principle of mandement van spolie. Therefore, any limitation of access that would curtail the Applicant's possession or use of the house ….. should be found to amount to spoliation*".

[113] 2012 (4) SA 215 (GNP) at paragraph 24.

[125] The Respondent's contention that the Applicant and his family have an alternate method of gaining access to the estate by utilising the "*visitors lane*" and by signing the "*residents without access cards register*" appears to be in conflict with the provisions of its conduct rules. If one has reference to rule 6.10.1, it prescribes that:

"[*any*] *resident who wishes a visitor to enter the Estate, must phone the Control Room to register that visitor, obtain a reference number and confirm that the visitor is listed on the Visitor Log. Alternatively, the residents may use the SMS system to perform the above function*".

Rule 6.10.2 then prescribes that the "*reference number may only be used to enter/exit the Estate once*".

Rule 6.7 then prescribes that:

"*Every resident shall stop at all security control gates and then proceed by operating his or her access card. Should the resident not be in possession of his or her access card then the member may only proceed on being allowed to do so by the guard on duty after signing the 'Residents without Access Card' register*".

What is glaringly obvious from the above rules is that no provision is made for a resident who is in fact in possession of his or her access card, but whose card has been deactivated. If one takes heed of the provisions of rule 6.1, which prescribes that "[*all*] *current security procedures must be strictly observed at all times by all persons on Estate 2*", there appears to be some merit in the Applicant's submission that he and his family would not, should the provisions of the conduct rules be adhered to, be able to gain access to the estate on any occasion when no-one was at home in order to obtain a "*visitor's reference number*" as prescribed in rule 6.10.1.

[126] Be that as it may, and accepting that the Applicant could gain access to the estate via the "*residents without access card*" procedure, this does not detract from the fact that having to utilise such a procedure would "*affect or disturb*" the exercising of the right that the Applicant and his family have to free and automatic access to the estate by using their access cards and biometric access. What was stated in **Nienaber v Stuckey**[114] was that what needs to be established is "*anything which touches or affects or disturbs the possession and not ….. complete deprivation*". This was accepted in **Gowrie News Investments CC v Calicom Trading 54 (Pty) Ltd and Others**[115] where it was held that, although the Applicant retained a right of access to the premises possessed by it through an alternate door, the boarding up of the access then utilised "*disturbed the manner of exercising possession of, and access to and from, the premises*". I am therefore of the view that the contention by the Respondent that the Applicant and his family have another means of accessing the estate does not afford it a defence to this application.

[127] I shall now consider the Respondent's contention that it has not unlawfully suspended the Applicants access cards and biometric access to the estate as it has acted in accordance with the provisions of its memorandum of incorporation and conduct rules. I have already expressed my views herein as to whether the Respondent would be entitled to suspend the access cards and biometric access upon the Applicant's levy account being in arrears without recourse to a court of law.[116] It is a long established principle that self-help is unlawful and that any provision in a contract providing for such will not be enforced by our courts. Although dealing with the statutory provisions that allowed for the seizure and sale of a defaulting debtor's property by the North West

[114] *Supra*, at 1059.
[115] 2013 (1) SA 239 (KZN), at paragraph 12.
[116] Paragraph 99 hereof.

Agricultural Bank, the following was stated in the case of **Chief Lesapo v North West Agricultural Bank and Another**: [117]

"A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the State can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by s 1(c) of our Constitution, which provides:

> *'The Republic of South Africa is one, sovereign, democratic State founded on the following values:....*
>
> *(c) Supremacy of the Constitution and the rule of law.'*

Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law."

In **Barkhuizen v Napier**[118] the following was stated by the Constitutional Court:

"*Our common law has always recognised the right of an aggrieved person to seek the assistance of a court of law. Courts have long held that a term in a contract that deprives a party of the right to seek judicial redress is contrary to public policy. The one occasion which comes to mind when this was said is in Schierhout v Minister of Justice [*[119]*]. On that occasion the Appellate Division, as the Supreme Court of Appeal was then known, held that:*

> *'If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.'*

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[117] *Supra*, at paragraph 11.
[118] *Supra*, at paragraph 34.
[119] 1925 AD 417 at 424.

Terms in a contract that deny the right to seek the assistance of a court were considered to be contrary to public policy and thus contrary to the common law."

[128] The provisions of section 59 (3) (b) of the National Water Act[120] were considered by the Supreme Court of Appeal in **Impala Water Users Associations v Lourens N.O. and Others**[121]. The relevant provisions of the said Act read as follows:

"*If a water use charge is not paid-*

(a) interest is payable during the period of default at a rate determined from time to time by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette; and

(b) the supply of water to the water user from a waterwork or the authorisation to use water may be restricted or suspended until the charges, together with interest, have been paid."

Having found that the court a quo had correctly held that a right capable of protection by spoliation proceedings had been interfered with in that case, the court found it necessary to consider whether such interference was to be regarded as lawful, by virtue of the aforesaid provisions of the Act, so that no spoliation can be held to have taken place. In considering whether the court a quo had correctly found that the onus rested on the appellant (the Respondent in the court a quo) to show that its actions were covered by the aforesaid provisions of the Act, the court cited with approval what was said in the case of **George Municipality v Vena and Another**[122] that "[*it*] *is a fundamental principle of our law that a person may not take the law into his own hands and a statute should be so interpreted that it interferes as little as possible with this principle*". The court then agreed with the judge in the court a quo that the aforesaid provisions of the Act can only be invoked

[120] No. 36 of 1998.
[121] *Supra,* at paragraph 22.
[122] 1989 (2) SA 263 (A) at 271E.

when the water use charge, the non-payment of which triggers the power to restrict the supply of water to the user, is legally payable.

[129] I am of the view that the same principle would apply in the present case. In order for the Respondent to show that it was legally entitled to suspend the Applicant's access cards and biometric access to the estate in terms of the provisions of the conduct rules it would have to show that the Applicant has in fact breached such rules. In order to do so, the Respondent would also have to show that the amount it contends is due by the Applicant is legally payable. The only way the Respondent would be able to do so is by having recourse to a court of law to make such a determination. The Respondent has not done so and appears to contend that the suspension of a resident's access card is "*standard procedure*" where a member "*is being advised*" that his or her account is in arrears. The only conclusion one can come to is that the Respondent is employing the provisions of rule 13.1.7. of the conduct rules as a remedy of self-help in order to procure payment of the levies alleged to be outstanding from the residents on the estate without actually having recourse to a court of law to determine that such amounts are in fact due, owing and payable. This is apparent from what is stated in the email addressed to the Applicant on the 23rd of January 2014[123], wherein the Respondent expresses the hope that the communiqué would result in the payment of the arrear levy so as to "*result in the family's card/biometrics being reactivated*". I am therefore of the view that the Respondent's contention that it has legally suspended the Applicant's access cards and biometric access to the estate by operation of the provisions of its memorandum of incorporation and conduct rules is without merit.

[130] I am therefore satisfied that the Applicant is entitled to confirmation of the *rule nisi* granted by this court on the 1st of February 2014.

The Trespass Application: Case Number 4375/2014

[131] This application was brought, as one of urgency, on the 8th of April 2014. The matter was struck off the roll on that occasion for lack of urgency and the Applicant was directed to pay the costs. The Applicant sought a *rule nisi* to be issued calling on the Respondent to show cause why an order should not be granted:

> (a) directing the Respondent and all persons acting through, with or on its instructions to allow access to the estate to certain named employees of Alexander Garuth for the purposes of finalising the replacement of all the windows and window frames in the building and outbuildings situated on the property known as 3 Harvard Hill, MECCE2, Mount Edgecombe, KwaZulu-Natal;
>
> (b) interdicting the Respondent and all persons acting through, with or on its instructions, from preventing, interfering with or otherwise hindering the aforementioned named employees from finalising the replacement of all the windows and window frames in the building and outbuildings situated on the aforementioned property; and
>
> (c) interdicting and restraining the Respondent, and all persons acting through, with or on its instructions, from entering upon four properties within the estate, namely, 48 Columbia Crescent, 50 Columbia Crescent, 3 Harvard Hill and 7 Harvard Hill, without an order of this court authorising the Respondent and such persons to enter upon such properties.

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[123] Referred to in paragraph 110 hereof.

[132] It is evident from the papers, and which was confirmed by counsel before me, that the relief sought in subparagraph (a) and (b) above has become academic, as, after the matter was struck from the roll as aforesaid, access to the estate was allowed to the said employees and the works being carried out on the windows and window frames at the said property was completed. I am asked not to make any finding in this regard, save to make a determination whether the relief sought in those prayers ought to have been granted, but for the matter being struck from the roll, for the purposes of determining costs. The relief sought in subparagraph (c) however remains pertinent and I asked to make a finding in this regard.

[133] It is common cause that the four named properties are those owned by the Applicant, albeit through various legal entities. In support of the relief sought in subparagraph (a) and (b) above, it is alleged by the Applicant in his founding affidavit that the property situated at 3 Harvard Hill ("the property") was in urgent need of maintenance as the doors and windows required stripping and repainting. Pursuant to the provisions of the conduct rules, the Applicant requested, and received, permission from the Respondent to engage the services of a contractor, Alexander Garuth, to attend to the aforesaid maintenance. The works to be carried out was stated as the painting of the exterior of the house, wooden doors and wooden window frames. When the works commence, it was determined that the wooden windows were so badly rotten that the contractor deemed them to be beyond repair and advised that they needed to be replaced. The Applicant then gave the contractor an instruction to replace the wooden windows in the dwelling with aluminium windows of the same design and colour, so as not to offend against the Respondent's conduct rules. It is common cause that on the 27th of March 2014 an email was sent to the Respondent requesting permission for the contractor to add additional labourers to the list of approved contractors, who had already

been given permission to enter the estate, so as to attend to the additional work. It is also common cause that a response was received on the same day advising that the Respondent would acquiesce to such request on condition that such additional labourer "*related to painting only*".

[134] On the 7th of April 2014, and when the works had reached a stage where the aluminium windows had been fitted into the window apertures but where plastering and sealing of the aluminium frames was incomplete, the Applicant received an email from the Respondent contending, *inter-alia*, that upon a "*routine inspection*" of the estate, the Respondent's planning and aesthetics manager had noticed that the windows and doors of the property had been changed without plans or approval from the Respondent or the local authority. It was pointed out by the Respondent that the approved works on the property were solely for the purposes of painting the building, windows and doors. The Respondent then advised that it would not allow the contractors access to the property until such time as plans had been submitted for the work being carried out.

[135] It is alleged by the Applicant that he has, at the very least, a *prima facie* right to attend to the replacement of the wooden windows on his property with aluminium framed windows. He further contends that the conduct rules do not prevent him from attending to the maintenance and upkeep of the property, and that they in fact encourage it. He then submits that he has a *prima facie* right to have the contractors authorised by the Respondent attend to the maintenance of his property. Reference is made, *inter-alia*, to rules 2.1[124], dealing with design and construction procedures, and rule 6.11.2, dealing with the registration of contractors undertaking works on the estate. The Applicant accepts that, by virtue of the provisions of rule 2.1.1, the design and construction of all new buildings, extensions, alterations to existing buildings, swimming pools,

[124] Which is set out in paragraph 22 hereof.

fences and gardens must be approved by the Respondent. He also accepts that rule 2.2.3 provides that no construction or installation shall commence prior to the requisite approval of the Respondent. The Applicant however points out that the provisions of rule 2.10 provide that an owner or resident must properly maintain the exterior of his or her unit and that failure to do so may lead to the Respondent giving that resident notice to carry out the necessary repairs within a specified time. It is however contended by the Applicant that the replacement of rotten wooden window frames with aluminium framed windows is done in the course of maintaining the property and can never be considered as an extension or alteration of the existing building. The Applicant further contends that, in any event, the balance of convenience favours the granting of an interim interdict as the installation of the aluminium windows is near completion and the present state of the construction has a negative effect on the uniform aesthetics of the estate, as it appears that his house is not properly constructed.

[136] In support of the relief sought interdicting the Respondent, and its representatives, from entering upon his properties without a court order, it is alleged by the Applicant in his founding affidavit that the email addressed by the Respondent on the 7th of April 2014, advising him that access would be denied to the contractors, was "*an act of reprisal*" to a publication in a national newspaper where the dispute between the parties forming the subject of the "*rules application*" and the "*spoliation application*" had been highlighted. If one has reference to the email itself[125] it is, *inter-alia*, stated therein by the Respondent's planning and anaesthetics manager that "[*this*] *afternoon I did a routine inspection of the Estate and have noticed that windows and doors have been changed without plans or any approval from either Meccema Two or eThekwini Municipality*". It is submitted by the Applicant that he, as owner, is entitled to determine who

can and who cannot enter upon his property. It is pointed out that the property is freehold and not part of the sectional scheme within the estate. The Applicant goes further to say that the Respondent has shown "*that it will stoop at deplorable lows in seeking retribution for the declaratory publication and its attendant publicity*" and that the Applicant's aforesaid manager "*has already indicated that on a 'routine inspection' he discovered that the windows on the property were being replaced*". The Applicant then alleges that he fears that the next step taken by the Respondent "*will be to snoop around the … properties looking to raise any issue, no matter how weak, that they can attempt to penalise me for*". It is for this reason, so the Applicant submits, that he advised the contractors not to attend the property as he fears that the Respondent "*will continue to victimise me by patrolling the … properties*". He then submits that "[*such*] *conduct must be stopped*".

[137] In response to these allegations, the Respondent, in its answering affidavit, confirms that, by the beginning of June 2014, the substance of the application and the need for the order sought by the Applicant had fallen away and had become academic as the Applicant had made application for, and had received permission to complete the works pertaining to the installation of the aluminium framed windows. The Respondent then makes reference to, and annexes[126], an exchange of correspondence between the parties' legal representatives on the 13th and 23rd of June 2014, respectively. It is suggested in that exchange by Respondent's representatives that the furtherance of proceedings would "*simply run up costs unnecessarily*". The representative then advises that the Respondent would not be delivering an answering affidavit and would oppose any attempt by the Applicant to set the matter down for hearing. In their response, the Applicant's representatives, while accepting that the works had been complete, contended that such had been completed

[125] Which forms annexure "H1" to the founding affidavit.
[126] As annexures "B" and "C" to the answering affidavit.

without prejudice to the Applicant's rights and that he was entitled to proceed with these proceedings. The Respondent was then called upon to file an answering affidavit.

[138] In response to the Applicant's allegations relating to the access interdict, the Respondent points out that any permission granted for the access of construction workers onto the estate was for the purpose of painting. It is pointed out that the Respondent was not informed that the nature of the works to be carried out by the contractors was going to change from that of repainting to that of replacing the windows or altering them from wood to aluminium. It is submitted that the Applicant "*deliberately concealed*" the nature of the additional work to be carried out and that there can be no misunderstanding on his part that the Respondent was under the erroneous impression that it was allowing access to contractors based on a non-disclosure. It is contended that the "*replacement of wooden windows with aluminium windows is an alteration to the property and required the Respondent's prior approval*". It is alleged that, despite the Applicant's contention to the contrary, the new aluminium windows do not look exactly the same as the old wooden windows and that such accordingly constitutes an alteration into the property, which would require its prior approval.

[139] As far as the Applicant's allegations relating to the Respondent's representatives "*snooping around*" his property are concerned, whether in the past or the future, such are denied. The Respondent then goes further to state that, in any event, it is lawfully entitled to access the property by virtue of a memorandum of lease allegedly concluded between the parties. No lease is in fact annexed to the papers, but only a copy of a document which is purported to be a specimen thereof. It is contended by the Respondent that such a document is signed by every purchaser of property on the estate as a condition of sale. The Respondent then goes

on to state that, by virtue of the terms of the lease, it is afforded a lease over all portions of each and every erf on the estate, save for those portions occupied by any building or enclosed by walls.

[140] Although styled in the form of a *rule nisi*, the relief sought by the Applicant in the notice of motion is final in form. Although interim relief would have been granted pending the determination of the *rule*, the effect of such relief, if granted, would be that the contractors would have been allowed access to the estate until such time as the works had been completed and the windows and window frames replaced. The same applies to the trespass interdict, as, if granted, the Respondent and its representatives would not, at all times in the future, be entitled to enter upon the Applicant's property without prior authorisation of a court order. I am therefore of the view that the Applicant would have had to established the requisites of a final interdict in order to be successful in either forms of relief sought.[127]

[141] The Applicant's contention, as I understand it, insofar as the access interdict is concerned, is that he is entitled, as owner, to repair and maintain his property. All things being equal, I am in agreement that he would have had such right to do so. The Applicant however accepts, on his own version, that he is obliged to abide by the provisions of the conduct rules and obtain the Respondent's prior permission to carry out works on his property. The Applicant however submits that he was not obliged, in the present instance, to obtain the Respondent's prior approval for the work actually being carried out in the present instance, by virtue of the fact that such constituted "*maintenance*" and not "*an alteration*" to his property. If one has reference to the provisions of conduct rule 2.1.1, which is the rule pertinent to the present enquiry, it states that "*the design*

[127] The Applicant would have had to establish that he has a clear right, that an injury has actually been committed, or is reasonably apprehended, and the absence of similar protection by any other ordinary remedy.

and construction of all new buildings, extensions, alterations to buildings, swimming pools, fences and all gardens must be approved by MACCEMA TWO prior to any work being commenced". It is clear that the works being carried on at the time would not have constituted the construction of any new buildings or an extension to the existing buildings. Could they then be considered to be "*alterations*" to the buildings? If one looks at the nature of the work of which the Respondent was advised, it consisted of the "*painting of the exterior of the house, wooden doors and wooden window frames*". It follows from this that the work would constitute the painting of the existing elements of the house and would go no further. Obviously, any additional work such as the sanding, scraping and filling of those elements would be included in that definition. What the Applicant has in fact done, and in respect of which he did not advise or seek permission from the Respondent, is to replace the existing wooden windows and window frames with aluminium framed windows. In so doing, the Applicant has altered the nature of the existing windows from wood to aluminium. I cannot see how this can be seen as anything other than "*an alteration*".

[142] If one accepts this, and also accepts that the Applicant would need the Respondent's prior approval for such, the Applicant cannot say that he has a right, *per se*, to demand that the contractors continue with the work then being carried out on his property. He is contractually bound, before exercising such right, to obtain the Respondent's permission to do so. Although I make no finding in this regard, I am therefore of the view that the Applicant would have failed in establishing that he has a right, *prima facie* or otherwise, as would justify the grant of an interdict directing the Respondent to allow the contractors in question access to his property on the estate.

[143] As far as the trespass interdict is concerned, and leaving aside for the moment the Respondent's contention that it has a right to access the

exterior of the Applicant's property by virtue of the alleged lease, I am satisfied that the Applicant would have a right, *per se*, as the owner of the property, to dictate who may enter thereon. The enquiry does not however stop there. In order to be entitled to an interdict, the Applicant would also have to establish that an injury has actually been committed or that one is reasonably apprehended. In dealing with this issue, the following was stated in **National Council of Societies for the Prevention of Cruelty to Animals v Openshaw**:[128]

"*An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated*."

The Supreme Court of Appeal, in dealing with the requirement of a well-grounded apprehension of irreparable harm in an interim interdict, went on to state that:[129]

"*The test …. is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in Minister of Law and Order and Others v Nordien and Another:*[*[130]*]

> *A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result.*

[128] 2008 (5) SA 339 (SCA) at paragraph 20.
[129] Citing with approval what was stated in **Nestor and Others v Minister of Police and Others** 1984 (4) SA 230 (SWA) at 240 4F-I.
[130] 1987 (2) SA 894 (A) at 896G-I.

> *However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant….*

If the infringement complained of is one that prima facie appears to have occurred once and for all, and is finished and done with, then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated".

[144] If one has reference to what is alleged by the Applicant in these proceedings, the Applicant does not in fact contend that the Respondent's manager has entered upon his property. He relies solely on what is alleged in the Respondent's email addressed to him on the 7th of April 2014 that the manager, during a "*routine inspection of the Estate*", had noticed that the windows and doors had been changed on his property. From that statement, he seeks to infer that the manager in fact entered upon his property to make such a finding. There is nothing to support such a contention. The Respondent denies such allegation. Should the manager have in fact entered upon his property, it would appear from the facts of the matter, that any such "*intrusion*" onto the Applicant's property would have been solely for the purposes of an inspection of the repairs that where then being carried out thereon. Nothing is stated by the Applicant to support the notion that any further intrusions would incur in the future. One simply cannot draw the inference that the inspection was carried out as a consequence of the newspaper article that was published around about the same time, as one cannot get away from the fact that works were actually being carried out on the property at the time and an inspection thereof would in all probability have formed part of any "*routine inspection*" of the estate being carried out by the Respondent's manager. I am therefore not satisfied, on the papers before me, that the Applicant has established that there had been an "intrusion" onto his property by the Respondent's manager during the course of his aforesaid inspection or

that there was, or is, any threat of any such further intrusions being carried out in the future. Having formed this view, it is necessary for me to deal with the issue of whether a lease has been concluded as contended for by the Respondent, or the status thereof. The Applicant has therefore not made out a case for the relief sought in the third subparagraph of the notice of motion and I accordingly decline to grant same.

Costs

[145] As far as the issue of costs is concerned, I am of the view that the costs should, in each instance, follow the result of the respective application concerned. Although a punitive attorney and client costs order has been sought in certain instances, I am of the view that such is not warranted. The parties have, through the various applications, sought to enforce the rights for which they contend: which is something they are entitled to do. I am therefore of the view that any costs awarded herein ought to be on the High Court scale.

[146] As far as the hearing before me is concerned, by virtue of the equality of outcomes, with both parties being unsuccessful in the rules application, the Applicant being successful in the spoliation application and the Respondent being successful in the trespass application, I am of the view that it would be appropriate in such circumstances for each party to bear their own costs incurred consequent upon such appearance.

Orders

I therefore make the following orders:

In the rules application: Case number 3962/2014

(a) Both the application and the counter application are dismissed.

(b) The First Applicant, the Second Applicant and the First Respondent are directed to pay their own costs.

In the spoliation application: Case number 1118/2014

(a) Subparagraph 2 (a) of the *rule nisi* granted on the 1st of February 2014 is confirmed.

(b) The Respondent is directed to pay the Applicant's costs of the application, save for those incurred consequent upon the hearing of the matter on the 12th of June 2015, where each party is directed to bear their own costs.

In the trespass application: Case Number 4375/2014

(a) The application is dismissed.

(b) The Applicant is directed to pay the Respondent's costs of the application, save for those incurred consequent upon the hearing of the matter on the 12th of June 2015, where each party is directed to bear their own costs.

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TOPPING AJ

Date of hearing	:	12 June 2015
Date Delivered	:	4 February 2016

Appearances:

For the Applicant	:	Adv. KJ Kemp SC Adv. CB Edy
Instructed by	:	Pather & Pather Attorneys 3rd/4th floor Lincoln House 30 Masonic Grove Durban
For the Respondent:		Adv. SC Stokes SC Adv. M Du Plessis Adv. SF Pudifin-Jones
Instructed by	:	Halstead Paola Unit 5 7 Holwood Park La Lucia Ridge Office Estate La Lucia