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DISPUTE RESOLUTION ALERT

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PUBLIC ROADS IN A PRIVATE ESTATE: WHO MAKES THE RULES?

With one out of every ten South Africans residing in a private estate, or gated community as they have become known colloquially, it is worthwhile to spend some time familiarising oneself with the legality of the management association's rules and regulations. While the relationship between the management associations and the residents is based in contract, the contents of such a contract is subject to the principle of legality as to what may be contractually regulated in the face of statutory provisions to the contrary.

PAYMENT OF LEGAL COSTS: STATE OFFICIALS TO FEEL THE PINCH

There has been, over the last two years, a number of high profile cases before the Courts involving various Government departments and state-owned entities. The bulk of these cases involved State officials who were often found wanting in exercising, among other things, public power of performing a public function in terms of their Constitutional obligations.

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PUBLIC ROADS IN A PRIVATE ESTATE: WHO MAKES THE RULES?

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These offences are considered minor, however, only "peace officers" are authorised to issue written fines to offenders.

The recent case of *Singh and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and Others* [2018] 1 All SA 279 (KZP) saw Mr Singh, a resident of the Mount Edgecombe Country Club Estate (Estate), challenge the rules of the management association to which he was purportedly bound.

Mr Singh's troubles began when his daughter was issued with speeding fines by officials of the Management Association (Association) for allegedly speeding on the roads of the Estate. Such fines were levied against Mr Singh's account with the Association.

The Association has a "pay first, argue later" policy which meant that when Mr Singh did not pay the speeding fines, the Association suspended the Singh family's access along the roads to their home. This prevented the family, or indeed anyone visiting the Singh's property, from passing through the security boom at the entrance to the Estate. Mr Singh then instituted an urgent spoliation application to restore his family's access to the roads. This application was coupled with another application challenging the legality of the Association's rules in respect of the roads, with regard to, *inter alia*, the Association's authority to issue fines and erect road signs, and the restricted access of domestic workers to the roads contained in the Estate.

The crux of the matter lay in whether or not the roads confined in the Estate were public roads. It was accepted by the Association in court that the roads were public roads in terms of the definition set out in the National Road Traffic Act, No 93 of 1996 (NRTA).

The NRTA at s57(6) provides that the Member of the Executive Council (MEC) concerned may authorise any association or club to display road traffic signs as they may deem expedient, subject to any conditions which the MEC may determine. Section 56(10) states that no person shall display any road traffic signs on a public road without having been previously authorised to do so by the MEC. Furthermore, the offence of driving a vehicle at speeds exceeding a prescribed limit falls within Schedule 3 of the Criminal

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PUBLIC ROADS IN A PRIVATE ESTATE: WHO MAKES THE RULES?

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Procedure Act, No 51 of 1977. These offences are considered minor, however, only "peace officers" are authorised to issue written fines to offenders.

The Association had placed signs along the roads advising of a speed restriction of 40km per hour, installed speed bumps, and erected barricades to shepherd traffic through their security boom in order to regulate the ingress and egress of traffic.

The court found that inherent to the concept of a public road is that the public has access to it and its regulatory regime is statutory and not contractual. However, the court did recognise the need for associations to enact such regulations with regard to roads and traffic, and pointed out the contents of s57(6) of the NRTA which provides specifically for associations to enact such regulations, albeit with the authorisation of the MEC. Private bodies, such as the Association, are obliged in terms of the NRTA to seek the necessary permission from the MEC, and it was common cause before the court that such authorisation had not been sought by the Association.

Accordingly, the court found the rules and the contractual arrangements with the respective members, to be illegal insofar as the public roads contained in such an estate are concerned. The Association would need to obtain the consent of the MEC should it continue to want to restrict the speed at which residents drive or the access of domestic workers to public roads to only certain hours of the day and only upon the presentation of an Association-issued entry permit.

Whereas previously associations have felt comfortable enacting what may appear to be fairly oppressive rules and regulations, and justifying their existence on the basis that by moving into and residing within such a community run by such an association, that the resident consents thereto. Now however, at least with respect to the use of public roads and the policing thereof within the community, the MEC's authorisation will encourage the enactment of rules and regulations which are in line with general public policy as any rules found to be too suffocating would of course not be authorised.

Management associations should, therefore, confirm that they have obtained the requisite consents from the relevant MEC to ensure that the rules are enforceable upon their estate. For residents, it may be worthwhile raising a query with their respective management association as to whether or not they have received the aforesaid consents. To the extent that they have not, the rules as they stand, insofar as they relate to the roads in the estate, are unenforceable if challenged legally. There is nothing to prevent residents from complying with the rules willingly, however, this does not affect the legality of the rules.

Lucinde Rhoodie and Andrew MacPherson

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

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PAYMENT OF LEGAL COSTS: STATE OFFICIALS TO FEEL THE PINCH

Analysing judicial trends with regard to cost orders against State officials who behave in a high-handed manner in exercising their functions.

There has been, over the last two years, a number of high profile cases before the Courts involving various Government departments and state-owned entities. The bulk of these cases involved State officials who were often found wanting in exercising, among other things, public power of performing a public function in terms of their Constitutional obligations.

This alert is a follow up to our previous article titled "Courts to order errant state officials to pay legal costs out of their own pockets" published on 27 July 2016 and aims to analyse judicial trends with regard to cost orders against State officials who behave in a high-handed manner in exercising their functions.

In a recent judgment in the case of *Absa Bank Limited & Others v Public Protector and Others* handed down on 16 February 2018 by the High Court, the Public Protector was ordered, in her personal capacity, to pay 15% of costs of the South African Reserve Bank on a punitive scale, including the costs of counsel, which were estimated to be in the amount of R1million.

In this case, the Public Protector made certain factual findings and came to certain conclusions including, *inter alia*, that:

(a) the South African Government and the South African Reserve Bank (Reserve Bank) had improperly failed to recover R3.2billion from BankCorp Limited/Absa; and

(b) the South African public was prejudiced by the conduct of the South African Government and the Reserve Bank.

This caused the Reserve Bank, the Minister of Finance and Absa respectively, to institute review proceedings challenging the Public Protector's report.

The remedial action

The Public Protector's findings led her to prescribe certain remedial action in her final report, which included the referral of the matter to the Special Investigating Unit to investigate alleged misappropriated public funds given to various institutions with a view to recover the funds given to Absa Bank (Absa) in the amount of R1.125billion. Included in her remedial action was that the Special Investigating Unit, the Reserve Bank and the Chairperson of the Portfolio Committee of Justice and Correctional Services must submit an action plan within 60 days of publication of her report on the initiatives taken in regard to the remedial action. This caused the Reserve Bank, the Minister of Finance and Absa respectively, to institute review proceedings challenging the Public Protector's report.

Grounds for the review

In considering the grounds for the review application, the court established that the Public Protector did not disclose in her report that she had meetings with the Presidency and other State officials pertaining to the Reserve Bank on numerous occasions before the publication of her final report. It was only in her answering affidavit that she admitted to such meetings taking place but gave no explanation for the non-disclosure when she had the opportunity to do so.

PAYMENT OF LEGAL COSTS: STATE OFFICIALS TO FEEL THE PINCH

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The full impact of this judgment and the outcome of the appeal on Government officials exercising their functions recklessly will soon become apparent.

There was no record of these minutes, although it was customary to record all meetings, as she could not supply transcripts of the meetings nor any minutes.

The Public Protector did not engage either Absa or the Reserve Bank after her meetings with the Presidency and State Security and before issuing her final report, and did not give them the opportunity to comment on her final report nor did she inform any of the parties of these meetings, requested their comments, if any, before releasing the final report.

The court's findings

The court stated that a reasonable, objective and informed person, taking into account the facts of the matter, would reasonably have an apprehension that the Public Protector would not have brought an impartial mind to bear on the issues before her and concluded that it had been proven that the Public Protector was reasonably suspected of bias.

In its judgment, the court found that the Public Protector did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector.

Legal costs

As to what order of costs would be appropriate, the court found that this issue fell within its discretion and had to be exercised in a judicial manner. In this matter, the court had found that the Public Protector did not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice.

Section 35(3) of the Public Protector Act, No 22 of 2003 provides for an indemnification of legal costs with regard to conduct performed in good faith. However, the court found that the Public Protector had demonstrated that she exceeded the bounds of this indemnification. In making its findings as to costs, the court showed its displeasure with the unacceptable way in which she conducted her investigation as well as her persistence to oppose all review applications to the end.

Having regard to the above, the court concluded that this was a case that warranted a simple punitive costs order against the Public Protector in her official capacity would not be appropriate. The court found that this was a case where it should go further and order the Public Protector to pay at least a certain percentage of the costs incurred on a punitive scale.

The Public Protector has applied for leave to appeal against the section of the judgment that ordered her to pay part of the Reserve Bank's costs in her personal capacity.

The full impact of this judgment and the outcome of the appeal on Government officials exercising their functions recklessly will soon become apparent.

Mongezi Mpahlwa

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

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OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Grant Ford
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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CLIFFE DEKKER HOFMEYR