

# REAL ESTATE ALERT

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In *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and others*, the Supreme Court of Appeal has ruled that private residential estates are indeed legally entitled to enforce the rules of such estate against its residents as members of the estate homeowners' association, including those rules relating to speed limits on the roads within the estate.

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# ONE STEP CLOSER TO E-CONVEYANCING

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**The digital age is deeming more and more legal processes in South Africa archaic and outdated, and the process of transferring property - or any registrations involving property for that matter - is no exception.**

Our legislature introduced the Electronic Deeds Registration Systems Bill in 2017 (Bill), which it intends to be a replacement of the current preparation and lodgement procedures contained in the Deeds Registries Act, No 47 of 1937 and the Sectional Titles Act, No 95 of 1986. In terms of the Bill, the Chief Registrar of Deeds is obliged to “*establish and maintain an electronic deeds registration system using information and communication technologies for the preparation, lodgement, registration and storing of deeds and documents*”, and is empowered to issue directives to aid this process.

The Bill is largely subject to the provisions of the Electronic Communications and Transactions Act, No 25 of 2002 (ECTA), which is currently South Africa’s overarching legislation with regard to electronic information processes. The objects of ECTA include the promotion of (i) provision of universal access to electronic information services in disadvantaged communities, (ii) e-government services and (iii) the stability of electronic transactions.

The development of an electronic deeds registration system (e-DRS) has already commenced and it is anticipated that it will operate in tandem, and in addition to, the pre-existing online Deeds Registration System (which serves the purpose of maintaining the electronic land register).

It is envisioned that the e-DRS will promote (i) security of title, (ii) improved turn-around times, (iii) country-wide access to registration services, (iv) overall availability of information and (v) enhanced accuracy of information.

The imminent and direct problems that the legislature seeks to combat with the Bill and the e-DRS include the increase in volume that deeds offices are faced with due to land reform; the lack of uniformity in registration procedures at deeds offices across the country; the absence of a system which is flexible enough to accommodate new forms of land tenure and the need for decentralisation and mobility when it comes to property transfer and registration procedures.

Interestingly, the Bill provides a new definition for a “deed” and/or “document”, being: data that is electronically generated, submitted, received or stored, including scanned images. The Bill provides that such a deed or document will for all purposes be deemed to be the “only original and valid record”. This provision is also expressly linked to ECTA, which requires that for it to constitute an *original* the deed or document’s integrity must still be intact, ie that it must (to a reasonable extent) remain unaltered and complete. However, ECTA also provides that “[i]nformation is not without legal force and effect merely on the grounds that it is...” in an electronic form.

# ONE STEP CLOSER TO E-CONVEYANCING

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Ultimately the Bill will have the effect that deeds can be electronically executed or registered, and such deeds “shall be deemed to have been executed or registered in the presence of the Registrar by the owner or by a conveyancer authorised by power of attorney to act on behalf of the owner”. The Bill provides that notwithstanding the date of coming-into-force of the Bill, **the preparation and lodgement procedures contained in the Deeds Registries Act and the Sectional Titles Act will continue to be in force and only be discontinued after the e-DRS and related provisions or regulations are fully in place.**

The drafting of the Bill occurred following consultation with various interested boards and societies, and in 2018 the Bill was published for comment. At a meeting on 12 March 2019, the Department of Rural Development and Land Reform delegation (DRDLR) and the Deputy Minister of DRDLR presented responses to comments on the Bill (Meeting). Notably, the Law Society of South Africa and the Banking Association of South Africa (BASA) had submitted comments that largely related to considerations around the new definition of a “deed” or “document” and especially the deeming of such as the “only original and valid record”. One of the considerations put forward by BASA was that should the only way to obtain an “original” be to apply for one, this would result in additional costs for borrowers, to which DRDLR responded that upon a registration taking place, a certificate of registration or ownership (containing a

summary of the transaction and details of rights and/or restrictions), which will be comparable to an original deed as we currently know it, will be issued and such certificate may be used for security or litigation purposes. It was also stated that financial institutions will have permanent access to original registered records through “bi-directional interfacing of systems”, and as such will no longer need to retain an *original title* deed as security. Although the Bill provides that it will not affect the validity of any registrations effected prior to its commencement, there is not much guidance in respect of pre-existing original title deeds held by banks as security. Will these deeds need to be replaced or will they be phased out gradually? It seems that directives from the Registrar will be required in order to address this.

Once the Bill is passed into law, there will also be a new requirement that before one can attend to any transactions relating to property registrations and the likes on the e-DRS, one will have to be a registered user. The broader public would also be entitled to register as users. At the Meeting there was concern around this particularly from a fraud perspective – how would fraud be avoided if it was possible for those other than conveyancers to attend to registrations, via the e-DRS, and given the fact that conveyancers would not be required to physically appear before a registrar? The DRDLR commented that it contemplates that there will be different categories of users – one of which will be “Public Users” who will be entitled to use

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the e-DRS only for the purposes of obtaining information, and that the usage of advanced electronic signatures (which can currently be issued by only two accredited service providers in the country) by conveyancers and registrars will be compulsory. However, in relation to advanced electronic signatures it must be borne in mind that according to ECTA, such signature is automatically regarded as valid and properly applied unless it is proven otherwise. It was also further commented that in fact the e-DRS will curtail fraud and corruption as there will be an audit trail of all registered property transactions.

The intention is to have the Bill passed into law by the current parliament, before the upcoming elections in May 2019. The practical effects of the Bill, once passed, will be gradual and we anticipate that it may take some time before the e-DRS is in full operation. Notwithstanding this, given the fact that one would still be furnished with a certificate of registration, the e-DRS should not be viewed as a total replacement of the current registration processes, but rather as an enhancement and technological upgrade.

*Janke Strydom and  
JD van der Merwe*

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# SUPREME COURT OF APPEAL RULES SPEED LIMITS IN PRIVATE RESIDENTIAL ESTATES ARE LEGALLY ENFORCEABLE

*This judgment overturns a previous judgment by the High Court in KwaZulu Natal in which it was held that the roads within private estates fell within the definition of "public roads" in terms of the National Road Traffic Act, No 93 of 1996.*

*While some members of the public are permitted to enter the estate, there is no absolute right on the part of the general public or any section thereof to enter into such an estate and use its roads.*



**In *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and others*, the Supreme Court of Appeal has ruled that private residential estates are indeed legally entitled to enforce the rules of such estate against its residents as members of the estate homeowners' association, including those rules relating to speed limits on the roads within the estate.**

This judgment overturns a previous judgment by the High Court in KwaZulu Natal in which it was held that the roads within private estates fell within the definition of "public roads" in terms of the National Road Traffic Act, No 93 of 1996 (NRTA) and the enforcement of speed limits on such roads by the estate in questions' homeowners' association amounted to the appropriation the functions reserved exclusively for the traffic authorities under the NRTA, and that such conduct and rules were therefore unlawful.

The Supreme Court of Appeal took a very different approach to the determination of whether the roads within such private estates are indeed "public roads". The court looked at the definition of "public road" in the NRTA - "any road, street or thoroughfare or any other place ... which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access" - and emphasised that the right of the public to enter and exit the estate in question was strictly controlled by boundary walls, electric fencing, security guards, access codes and biometric scanning.

Therefore, the general public did not have common use or right of access to the private roads within the estate in question or in fact any similar private residential estate. The general public also does not include those persons who have the temporary right of access to such estate and its roads, which is only obtained with the permission of owners within the estate. While some members of the public are permitted to enter the estate, there is no absolute right on the part of the general public or any section thereof to enter into such an estate and use its roads.

When one chooses to purchase property in such a private estate and become a member of its homeowners' association, one voluntarily agrees to be bound by its rules. The relationship between the homeowners' association and its members is therefore a contractual one and the control of the speed limit within the estate falls squarely within the provisions of that contract concluded between the homeowners' association and its members. The rules are also only enforceable between the contracting parties themselves and not against the general public.

# SUPREME COURT OF APPEAL RULES SPEED LIMITS IN PRIVATE RESIDENTIAL ESTATES ARE LEGALLY ENFORCEABLE

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*The court expressly refused to sustain the High Court's ruling that the association was usurping the functions reserved exclusively for the authorities under the NRTA.*



The court therefore expressly refused to sustain the High Court's ruling that the association was usurping the functions reserved exclusively for the authorities under the NRTA.

The court further emphasised that a private estate ordaining a lower speed limit than that which is prescribed by national legislation on public roads does not go beyond promoting, advancing and protecting the interests of the homeowners in the estate, particularly given the presence of children, pedestrians and animals on the roads – the enforcement of such rules could hardly be seen as objectionable in the opinion of the court.

Should you reside in such a private residential estate, as is the case with approximately one out of every ten South Africans, the above supreme court judgment leads us to consider the importance of becoming familiar with the rules and constitutional documents of the homeowners' associations we may belong to, since such homeowners' associations are legally entitled to enforce these rules and financial sanctions against property owners residing in those private estates.

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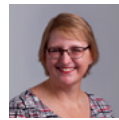
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