

OBEYING HOA RULES: 'WAIVER' DOES NOT ARISE MERELY BECAUSE ENFORCEMENT APPEARS LAX

Kingshaven Homeowners' Association v Botha and Others (6220/2019) [2020] ZAWCHC 92 (4 September 2020)

Residents in HOA schemes are often heard to claim that because the HOA appears not to be enforcing rules, the HOA has waived the right to do so; or that it cannot enforce the rule against owner A as owners B, C, D and others are also flouting the rules. This judgment explains why this is not the case.

The Judgment can be viewed [here](#).

FACTS

This matter deals with a dispute between the Kingshaven Homeowners' Association ('the HOA') and one of its residents, Mr Botha, who regularly parked in visitor parking bays in the estate, contrary to the HOA's Conduct Rules. The HOA had referred this transgression to the Community Schemes Ombud for a decision, the latter however confirming that it did not have the power (under the Community Schemes Ombud Service Act, herein referred to as 'the CSOS Act') to grant the requested relief prohibiting Mr Botha from parking in the visitors' bays. The adjudicator nonetheless made a note aside (obiter) that the HOA did not have jurisdiction over the visitors' parking bays.

The HOA appealed to the Cape Town High Court. The bulk of the judgment deals with technical aspects in respect of appeals allowed in respect of law, as allowed under the CSOS Act. This aspect is not discussed here, as the majority of our readers are non-attorneys. We deal with the issue raised relating to the Botha's defence that the HOA could not enforce the Conduct Rules as it had not required strict compliance with the rule in the estate before. This resulted therein that many owners, in fact, used visitors' parking bays for their personal use. The HOA had thus waived their right to enforce this rule, Botha argued, and that the trustees were applying the rules in a discriminatory manner (targeting him only) and should not be permitted to do so.

On the facts before the Court, it appeared that Botha owned three vehicles, but could only park one car inside his double garage because household equipment took up most of the space. In consequence, one of the vehicles was frequently parked in front of the house so that part of it juts out into the street and the other was parked in one of the parking bays on the estate that are reserved for visitors. This was in breach of the association's conduct rules.

The HOA took the decision of the adjudicator on review to the High Court. The HOA had asked the High Court for an interdict preventing Botha 'from parking his vehicles, caravans, boats or trailers anywhere within the Kingshaven estate other than in his garages, or in front of his garages and wholly within the boundary of his property'.

Botha argued that the association had waived compliance with the relevant parking rules.

HELD

- The rules were not capable of waiver without compliance by the trustees with a number of prescribed requirements. The constitution and rules of the HOA ('the instruments') create a contractual relationship between the Association and its members.

- These instruments are intended to operate not only between the HOA and each subscribing member on a mutual basis, but they also constitute a pact between each subscribing member and the Association for the benefit of all the other subscribing members. That much is clearly evident from their objects and provisions which are directed at the common good of all the homeowners and at regulating their conduct *inter se*.
- By subscribing to the constitution, each member accepts the benefits stipulated in his or her favour by the other subscribing members. One of those benefits is that there shall be rules of conduct to give substance to the objectives and rights promised and conferred by the constitution (clause 6.3) and that the other members will be required to comply with them (clause 8.1) and that any breaches thereof will be called to account (clause 15).
- The HOA's constitution gives the trustees the power to make rules of conduct, but, unsurprisingly, it does not give them the power to waive compliance with them. On the contrary, a proper reading of the constitution puts them under a duty to enforce the rules. They can rescind or vary the rules, but any such decision to rescind or vary them would have to be adopted by a majority of the trustees in meeting or unanimously by round robin. The decision would become effective only upon approval by the members in general meeting. One can waive a right, but not a duty.
- The exercise of the trustees' power to enforce the rules falls to be seen as an exercise by the Association, through its appointed agents, of the Association's contractual rights. It has not been established that such right was waived in this case. Whether one conceives a waiver as a bilateral concept in the nature of a contract, as contended for by some, or as a unilateral manifestation of the waiving party's intention as reasonably deduced by the benefitted party from the former's words or conduct, the Court could not assume that Mr Botha, as a party to contractual framework established by the constitution and rules, could reasonably have perceived in the circumstances that any laxity in enforcement constituted a waiver of the parking rules.
- A reasonable person in his position would have appreciated that an apparent abandonment by the trustees of the Association's right to enforce the rules could not be effective without the support of at least 75% of the members of the Association in general meeting. He put up no evidence to support a finding that it did. There was, on the contrary, evidence that the trustees had in fact been enforcing the parking rules against other homeowners. An acknowledgment by the trustees of the need for them to apply enforcement measures more conscientiously than they had been doing did not on any approach make out a waiver by their principal; it actually contradicted any notion of abandonment.
- The finding in the Gauteng High Court in *Buffelsdrift Game Reserve Owner's Association v Holkom and Others*, in which the court dismissed an application by a homeowners' association for an interdict enforcing a provision in its constitution prohibiting the keeping of pets based on apparent acquiescence by the trustees in the conduct (and one trustee contravening the rule visibly), could be distinguished on the facts; and because in that matter, the interdict prayed for in that matter was refused in the exercise of the judge's discretion with regard to the equities, rather than on the basis of an established waiver of rights by the homeowners' association.
- It therefore remained only to consider Botha's contention that the trustees were applying the rules in a discriminatory manner and could not be permitted to do so.
- The enforcement of the parking rules by the HOA was subject to the principle of reciprocity. An irrationally discriminatory system of enforcement might well in a given case justify a decision by the court in a matter like this to refuse to grant the interdictory relief in the exercise of its equitable discretion, but that is another matter: if due regard is had to the fact that the relationship arising out of the agreement between Botha and the HOA is contractual, a failure to enforce a breach by the HOA against one owner can have no bearing upon the

HOA's election to enforce such a breach against another owner.

CONCLUSION

In the circumstances, the HOA succeeded in the interdictory relief that it sought.