

HOA RULE RESTRICTS ACCESS TO LAND WHEN OWNER IN BREACH: IS THE RULE UNLAWFUL?

Nuwekloof Private Game Reserve Farm Owners' Association v Hanekom N.O and Others (A163/2022) [2023] ZAWCHC 10 (30 January 2023)

The constitutions of homeowners' associations all have some provisions that address what happens when owners default on payments and other obligations. The rule in issue here provided that, upon default, the owner's access to a game reserve area forming part of the association will be suspended. Does the exercise of such a rule result in spoliation, and does that make the rule unlawful? The judgment described why the answer was in the negative and what one must consider when making a call in such cases.

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

FACTS

The Nuwekloof Private Game Reserve Farm Owners' Association ("the Association") was established in respect of the Nuwekloof Private Game Reserve ("the Game Reserve") which comprises of six properties owned by different owners. All of the owners are members of the Association.

The Association's constitution deals with governance issues, including the acquisition and loss of membership, as well as with the rights, responsibilities and privileges of the members.

During 2017, the members of the Association passed a special resolution (as prescribed in the constitution) to amend the constitution. This brought about the introduction of a new provision, clause 5.13, which provided that when a member is in default of a payment or other obligation, the defaulting member shall not be entitled to any of the privileges of membership, including access to the Game Reserve, until such time as the member has paid the full amount due and/or rectified the breach.

Subsequently the WTH Trust ('the Trust'), an owner, fell into arrears. This resulted in the Association instituting proceedings for the recovery of the monies owed and putting into effect the provisions of clause 5.13 by denying the Trust access to the Game Reserve.

Unhappy with the denial of access to the Game Reserve, the Trust applied to the Community Schemes Ombud for an order declaring that the provisions of clause 5.13 of the constitution are invalid. This was successful. The adjudicator's finding was that the Association could not "use denial of access to property as a means of collection" and that there were other "lawful means" to use to collect arrear levies. It found further that as much as the parties' freedom of contract must be respected and honoured, the terms of the contract were not in harmony with public policy. To "agree to be locked out of your own property as a collection means cannot be in harmony with public policy and laws" if there are other lawful means of collecting arrear levies.

The Association appealed to the High Court.

HELD

Background

- Section 57(1) of the Community Schemes Ombud Services Act provides that an appeal against an order of an

adjudicator is only available in respect of “a question of law.” The question of law in this sense occurs where an issue is decided using an incorrect legal standard.

- The question to determine was therefore whether the adjudicator committed an error of law when he made the order declaring the provisions of clause 5.13 of the constitution to be invalid as well as finding that the denial of access was unlawful.
- Note, in this context, that there is a difference in the legal position regarding the challenge to the governing provision in clause 5.13 (which is competent for the Ombud Service to pronounce on) and the decision taken by an owners association to give effect to the provisions of clause 5.13 (a consideration where the court has the necessary jurisdiction) in that the legal principles applicable in the case of the former do not apply in the case of the latter and vice-versa.

The constitution is based on contract

- Constitutions of voluntary associations constitute contracts between members of the associations. In this regard, our law provides that contractual provision will not be invalid for the mere fact that it interferes, restricts or limits the right of an owner of immovable property to the full enjoyment of his or her property. Courts will only conclude that contractual provisions are contrary to public policy only when that is their clear effect.

Did the adjudicator commit an error of law?

- If one looks at the reasons furnished by the adjudicator, it is apparent that they did not apply the legal principles applicable to the determination of the validity of a contractual provision, but applied the provisions relating to spoliation (i.e. the remedy to restore the *status quo* after someone was dispossessed of something, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent).

Is clause 5.13 unlawful? Will it reasonably result to a degree of self-help that is contrary to public policy?

- In this regard our courts have held 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.” Further, should a contractual provision “be 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 will stand.”
- Whilst the provisions of clause 5.13 are capable of implementation in a manner that is unconscionable, illegal or immoral, the tenor of the provisions themselves are neutral in that they do not exclude, for example, an owner/member from approaching the courts in order to give effect thereto. There is thus merit in the Association’s submission that the provisions of clause 5.13 are not contrary to public policy.
- The adjudicator’s finding was incorrect as it failed to make the distinction between the contract on the one hand, and its implementation, on the other. It made an unjustified assumption that, because the terms of clause 5.13 was capable of implementation in an illegal or oppressive way, it was, as a necessary consequence, against public policy.

CONCLUSION

It follows from the above that the appeal succeeded.