



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no: 29534/18

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~ / NO
- (2) OF INTEREST TO OTHER JUDGES: YES / NO
- (3) REVISED.

02 October 2019

DATE

SIGNATURE

In the matter between:-

THE BODY CORPORATE OF THE PADDOCK
SECTIONAL TITLE SCHEME NO. 249/1984

APPLICANT

And

SALLY CATHERINE NICHOLL

RESPONDENT

JUDGMENT

MATSEMELA AJ:

1. In This application the Applicant seeks relief in the form of a final interdict against the Respondent, on the following terms:
 - 1.1 The Respondent be directed to immediately cease from leasing Section 11 (Door number 11) The Paddock, Stella Street, Sandown ("the unit") for a period of shorter than 6 months.
 - 1.2 The Respondent be directed to immediately cease from utilizing the unit and/or leasing the unit for commercial use and/or as a resort facility and/or a bed and breakfast.
 - 1.3 The Respondent be directed to provide copies of the lease agreements entered into between herself and future tenants of the units.
 - 1.4 The Respondent be ordered to pay the cost of the application on the attorney and client scale.
2. The Respondent has instituted a counter application. The Respondent seeks the following relief.
 - 2.1 Conduct Rules 14(f) and 20(b) be declared unconstitutional and/or void and/or invalid unenforceable.
 - 2.2 It be declared that the Respondent may rent out here unit through Airbnb.

- 2.3 The Applicant is to notify the Community Schemes Ombud Service of the order.
- 2.4 The Applicant be directed to amend the Conduct Rules by removing Rules 14(e) and 14(f) from its Conduct Rules within 60 days of the date of the order.
- 2.5 The Applicant is to pay the costs of the application on the attorney and client scale.

BACKGROUND

3. The applicant is a Body Corporate governed by both the Sectional Titles Act 95 of 1986 and the new Sectional Title Schemes Management Act 8 of 2011 ("the STSMA") and the Regulations thereto.
4. The Respondent is an owner of the unit within the Body Corporate known as The Paddock. Accordingly, the relationship between the Applicant and the Respondent is governed by the STSMA and the Regulations thereto.
5. It is common cause that the Respondent utilizes here unit as an Airbnb.
6. During November 2016 the Applicant received complaints from certain owners objecting to the short term renting of units in the Sectional Title Scheme in so far as the Respondent was utilizing her unit as an Airbnb.
7. The complaints relate to the concerns raised in that short term leasing of units.
 - 7.1 Creates a real security risk to the residents of the Applicant.

- 7.2 Could result in a short term tenant utilizing a unit in the scheme of the Applicant for nefarious conduct.

LEGAL ARGUMENTS

8. The applicant contends that the security concerns raised by the owners of their units are very serious and are very real in so far as:
- 8.1 The Applicant is not aware at any given time who is in the Respondent's unit.
- 8.2 The Applicant cannot validate the identity of all of the tenants entering and exiting the complex. The Respondent's verification method through social media is not a reliable method of verification and increases the security risk. It is telling that the Respondent, by not disclosing her own identity on the Airbnb website also has her own security concerns when renting her unit on the open market.
- 8.3 By having access to the complex, the Respondent's tenants also have full access to the common property including the gardens and the swimming pool.
- 8.4 The Applicant contends that the importance of validating the Respondent's tenants/guests is amplified in so far as complete strangers to the Applicant's and the residents of the complex are allowed to enter and exit the complex at any given time. This is a concern to both the residents of the complex and the Applicant in so far as unauthorized persons entering the complex masquerading as short-term tenants could cause injury to persons or damage to property within the complex. This is not an

unreasonable threat to have to guard against given the prevalence of crime in South Africa.

- 8.5 The Respondent's guests have not entered into lease agreements with a copy of the Conduct Rules and the Applicant is not provided with a copy of these lease agreements. The Respondent does not allege that she provides her guests/tenants with a copy of the Conduct Rules and thus they not aware of same. Without being aware of the Rules, the guests/tenants are more likely to contravene same. The Conduct Rules apply to all residents/owners of the complex and should they not all be aware of and conform to the said rules then the Applicant's ability to enforce same is compromised.
- 8.6 The high number of people coming and going not only poses a security risk but also jeopardizes the reputation of the scheme, as these short-term tenants do not always adhere to the Conduct Rules.
9. A tenant is not a member of the Body Corporate however the tenant is still a member of the community and the Applicant is to ensure that the Conduct Rules are adhered to by all those who reside within the complex.
10. Another problem arises in that there is a threat in so far as guests/tenants could abuse the common property facilities and the owners pay the price via increased levies for the additional repairs/maintenance to the common property. This is understandable, given the associated risks, and further the disturbance caused from the constant coming and going of people to aspects such as noise, visitors and parking and security access which is generally quite guarded. In the case of

long-term rentals however it is easy to integrate the tenants into the complex and its rules including security and access, whereas short-term rentals pose an unusual challenge.

11. It was submitted further that one of the Respondent's guests' remotes for the complex was stolen which created a security threat for all of those who reside at the complex, and as a result the remotes had to be changed. This is evidence of the increased security risk created by the operation of an Airbnb within the complex.
12. The Respondent provides each tenant with a remote to the complex to come and go as they please. This naturally causes unease with the residents of the complex in so far as random persons enter and exit the complex without being aware of the Conduct Rules, and without being held accountable.
13. The Applicant contends that when it comes to Airbnb rentals, the tenants tend to stay for short periods. This also increases disruption within the complex, which effects the residents of such schemes tend to live in close proximity to one another. If the Respondent were to comply with the Conduct Rules and not rent its unit out for purposes of short-term rentals, the Applicant would be in a position to deal with contraventions of the Conduct Rules by the Respondent's tenants.
14. It was further argued on behalf of the Applicant that the Respondent does not reside in her unit and thus cannot accept that the risks she has created by operating her unit as an Airbnb are real.

THE LAW

15. The conduct Rules which find relevance in this application are as follows:

- 15.1 Conduct Rule 3 which states inter alia that the registered owner of a section shall be responsible for the conduct of all occupants of the section, their family, employees, guests, and service providers. The registered owner shall provide occupants with the rules of the scheme and shall ensure compliance with the rules at all times.
- 15.2 Conduct Rule 14(e) which states that owners are not permitted to utilize their units and/or lease their units for commercial use without the written consent of the trustees of the Applicant. Units may not be used as a resort facility bed and/or breakfast or for any similar purpose.
- 15.3 Conduct Rule 14(f) states that owners are prohibited from leasing out their units or permitting their units to be leased shorter than six months due to the security risk to the residents of the Applicant. The owners shall ensure that copies of any lease agreement entered into are provided to the managing agent.
- 15.4 Conduct Rule 16(b) states that if the trustees instruct a firm of attorneys in connection with or arising out of the infringement by an occupant, the owner shall be liable to reimburse the Applicant on demand for all legal costs incurred in respect thereof.

- 15.5 Conduct Rule 20(a) states that owners who let their units to tenants must ensure that their tenants are introduced to an appointed trustee and they sign a copy of the rules.
- 15.6 Conduct Rule 20(b) states that owners who let their units to tenants must ensure that their tenants are introduced to an appointed trustee and they sign a copy of the rules.
- 15.7 Conduct Rule 21(a) states that the trustees shall have the right to take any action deemed fit to prevent any infringement of the rules.
- 15.8 Conduct Rule 21(e) states that an owner shall not do or permit to be done in his unit or on common property anything which will or may increase the rate of premiums payable by the Applicant on any insurance policy.
16. I agree with counsel for the Applicant that the Respondent continues to contravene the Conduct Rules, the STSMA and the Regulations thereto by operating an Airbnb from her unit is so far as she has:
- 16.1 failed to provide occupants with the rules of the Scheme;
- 16.2 failed to ensure compliance with the rules at all times;
- 16.3 utilised her unit and/or leased it for commercial use without the written consent of the trustees of the Applicant;
- 16.4 utilised her unit as a resort facility, or bed and breakfast;
- 16.5 leased out her unit or permitting her unit to be leased shorter than 6 months;

- 16.6 failed to ensure that copies of any lease agreement entered into are provided to the managing agent;
- 16.7 failed to advise the managing agent of the Applicant of the name and contact number of the tenants leasing her unit. This is in contravention of Section 13(f) of the STSMA in so far as the Respondent does not have to inform the Applicant of any change in occupancy;
- 16.8 failed to ensure that her tenants are introduced to an appointed trustee and that they sign a copy of the Conduct rules; and
- 16.9 permitted her unit to be utilized as an Airbnb, which would increase the rate of premiums payable by the applicant on any insurance policy.

17. It was argued on behalf of the Respondent that:

- 17.1 Conduct Rules 14(e) and (f) are unreasonable in so far as they prescribe who may occupy the Respondent's unit and on what terms.
- 17.2 The Conduct Rules have the effect of depriving the Respondent of her property in that she cannot let the property to who she wants and for as long as she deems fit.

18. I agree with the counter argument by the Applicant that the Conduct Rules do not prescribe who may occupy the property but does prescribe the terms in so far as rental shorter than 6 months are prohibited.

19. The minutes of the meeting held on 25 January 2017 reflect the owners' aforesaid concerns regarding the running of an Airbnb. The new Conduct Rules

were unanimously adopted by the Body Corporate on 25 January 2017 by way of special resolution.

20. It is common cause that the Conduct Rules were registered with the Community Schemes Ombud Service ("CSOS"). Despite the amendment to the Conduct Rules, and further written warning by the Managing agents of the Applicant, the Respondent continued to utilize her unit as an Airbnb.
21. The Respondent is fully aware of the Conduct Rules and has admitted to contravening the Conduct Rules. The Respondent seeks to justify her flagrant disregard of the aforesaid Rules conduct in response to the interdict sought and in her counter application. It is important to highlight that the Respondent continued to breach the Conduct Rules and did not challenge the amendment to the Conduct Rules, until such times as this application was instituted against her.
22. The Respondent further denies that operating an Airbnb from her unit is akin to running a commercial business. The Respondents contents that running an Airbnb does not equate to running a business does not correspond with various admissions made by the Respondent which are detailed herein below;
 - 22.1 The Respondent does not reside at the unit and it was never the Respondent's intention to reside at the unit.
 - 22.2 The Respondent purchased the unit for investment purposes.
 - 22.3 The Respondent alleges that she will be severely financially prejudiced in not being able to service her mortgage bond in respect of the unit.

22.4 The Respondent confirms that the very nature of an Airbnb is admitted by the Respondent in so far as it is an online market place which allows people like her to rent out their properties.

22.5 It was submitted further on behalf of the Respondent that:

"The nature of owning the unit forces me to generate some sort of income stream to service the mortgage bond registered over the property. I then came across Airbnb.

"Unit 11 is advertised on the Airbnb website worldwide."

"Unit 11 is advertised on the Airbnb website as a furnished unit."

"Unit 11 is rented out on a short-term basis."

22.6 The Respondent "advertises her unit extensively."

22.7 The Respondent seeks market related rentals for her unit.

23. The Respondent has also stated that "the nature of the unit forces me to generate some sort of income stream to service the mortgage bond registered over the property".

24. I am of the view that the Respondent having purchased her unit only for investment purposes and renting same out for the objective of paying it off, logically, the only conclusion that can be derived at is that the very nature of the Airbnb is commercial and is in contravention of the Conduct Rules.

THE SECTIONAL TITLE SCHEMES MANAGEMENT ACT 8 OF 2011, AS AMENDED

25. Short-term letting is currently not defined in the STSMA.

26. The functions of bodies corporate are set out in Section 3 of the STSMA '3(1)

a body corporate must perform the functions entrusted to it by or under this Act or the rules and such functions include: -

(p) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property.

(t) in general, to control, manage and administer the common property for the benefit of all owners.

27. In terms of Section 4 of the STSMA, the Powers of bodies corporate are set out as follows:

'4. The body corporate may exercise the powers conferred upon it by or under this Act or the rules and such powers include the power: -

(i) To do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property'

28. In terms of Section 10 of the STSMA prescribes the manner in which bodies corporate are regulated and reads as follows:

'10 (1) A scheme must as from the date of the establishment of the body corporate be regulated and managed subject to the provisions of this Act, by means of rules. (2) The rules must provide for the regulation, management, administration, use and enjoyment of sections and common property, and comprise: -

(a) Management rules, as prescribed, which rules may subject to the approval of the chief ombudsman, be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title

register, to the extent prescribed by regulation and which rules may be substituted added to, amended or repealed by unanimous resolution of the body corporate as prescribed; and

(b) Conduct rules, as prescribed, which rules may, subject to the approval of the chief ombudsman, be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register and which rules may be substituted added to, amended or repealed by special resolution of the body corporate as prescribed, Provided that such conduct rules may not be irreconcilable with any prescribed management rule contemplated in paragraph (a).

(3) The management or conduct rules contemplated in subsection (2) must be reasonable and apply equally to all owners of units.

(4) The management or conduct rules referred to in subsection (2) take effect from the date of establishment of the body corporate in respect of the building, or buildings and land concerned, and bind the body corporate and the owners of the sections and any person occupying a section.

(5) (a) If the management or conduct rules contemplated in subsection (2) are substituted, added to, amended or repealed, the developer or the body corporate must lodge with the chief Ombud, a notification in the prescribed form of such substitution, addition, amendment or repeal. (b) the chief Ombud must examine any proposed substitution, addition, amendment or repeal referred to in paragraph (a) and must not approve it for filing unless he or she is satisfied that

such substitution, addition, amendment or repeal is reasonable and appropriate to the scheme'

29. It is also important to highlight the duties of owners in a body corporate which are set out in Section 13 (d), (e) and (f) of STSMA Act, and states that an owner must:-

use and enjoy the common property in such a manner as not to interfere unreasonably with the use and enjoyment thereof by other owners or other persons lawfully on the premises;

(c) Not use his or her section or exclusive use area, or permit it to be used in a manner or for a purpose which may cause a nuisance to any occupier of a section.

(d) Notify the body corporate forthwith of any change of ownership or occupancy in his or her section and of any mortgage.

30. Regulation 30 of the STSMA is relevant to this application in so far as it places an obligation on bodies corporate to ensure compliance with the said Act and the Regulations thereto and reads as follows:

'30 The body corporate must take all reasonable steps to ensure that a member or any other occupier of a section or exclusive use area does not:-
use the common property so as to unreasonably interfere with other persons lawfully on the premises, in breach of section 13(1)(d) of the Act;

use a section or exclusive use area so as to cause a nuisance, in breach of section 13(1)(e) of the Act;

31. Accordingly, body corporates are required to have a set of rules known as Conduct Rules, in place when they are established. These are binding, by law, on all owners and occupiers in the scheme.
32. In terms of the STSMA, a body of owners in a sectional title scheme is allowed to make its own rules or alter or amend existing rules so long as any amendments are approved by the Community Scheme Ombud Service. Only once approved by the Ombud, will the new rules be valid and binding on all residents.
33. It is therefore, possible for a scheme to decide that it wants to limit or prohibit Airbnb listings by putting it to the vote at a meeting of owners.
34. In the context of continuous or regular short-term letting such as in the case of Airbnb operations, which may go hand in hand with increased activity, noise and use of shared facilities and amenities, the question that must be asked is whether the complaint is objectively reasonable. In other words, is it fair to require the complainant to tolerate the intrusion. This answer will vary from scheme to scheme what is acceptable in a sectional title scheme inhabited by mainly students may not be reasonable in a quiet residential estate such as The Paddock.
35. I agree with counsel for the Applicant that it is not expected of the complainants of the Applicant, being a 10 unit estate, to tolerate the intrusions caused by the operation of an Airbnb.

36. I am of the view that, the amendment to the Conduct Rules prohibiting short-term rentals is in compliance with the STSMA.

37. In the matter of **Goucester Court Body Corporate v Maher and Others** dated **14 August 2018**, which was adjudicated upon by CSOS, the Applicant in that matter sought an order to declare the Applicant's Conduct Rule restricting the use of units in the scheme for short-term letting purposes and adopted by the body corporate lawful and sought to enforce the particular rule. The dispute between the parties related to the amendment of conduct rules to inter alia restrict the use of units for short-term letting purposes of the scheme.

38. The new rule adopted in Gloucester provided that no owner was allowed to let the unit for a period shorter than three months without the prior written consent of all the owners in the scheme.

39. The Respondent alleged that the rules of the scheme were unlawfully adopted, were unfair and unreasonable in failing to comply with the Sectional Schemes Management Act, and that the Respondents were not bound by the amended rules. The Respondent also argued that the new rule negatively impacted on his rights as a property owner to maximize his investment. He was also of the view that units are still used for residential purposes and that short-term letting is not the equivalent of running a business.

40. The applicant argued that the rationale for amending the rules was inter alia the issue of security and other problems associated with the presence of short-term tenants. The increase number of people compromised the security systems of

the scheme and further problems were experienced due to the behavior of the cleaning agents entering units to clean for short term tenants. The Applicants viewed the nature of the scheme as changed due to the presence of short-term tenants and it became more like a hotel and impacting on the investment value of units in the scheme. In addition, it was argued that instituting action against short-term tenants is almost impossible as by the time transgression is reported the tenants have already left.

41. The Adjudicator posed a two-fold question. The first question is, are the rules in compliance with the STSMA and if so, are those rules applicable to and enforceable against the Respondents. When considering the above questions, the Adjudicator indicated that one should remain mindful of section 10(3) of the STSMA, which requires that a scheme's management or conduct rules be reasonable and apply equally to all owners of units within the scheme.

42. When considering whether a rule is reasonable one has to:

42.1 Weigh up the individual owners' interest against that of the body corporate as a whole; and

42.2 Consider the rule against the backdrop of South Africa's laws as well as the intention of the legislature in drafting the STSMA.

43. It is important to highlight the freedom of bodies corporate to regulate themselves. Owners in sectional title schemes buy into these schemes knowing that there are rules and knowing that rules may be changed with the requisite majority

44. A body corporate's freedom to regulate itself should not be overlooked. This is the very nature of a scheme which has its own checks and balances in place in order to ensure that the majority are in favour of the Rules which are in the interest of and for the benefit of all of the members, and which rules have to in any event have to obtain the approval of CSOS.

45. The Adjudicatory finally concluded that she did not find a rule restricting short-term letting to a period of no less than 3 months unreasonable as it does not prohibit short-term letting, but rather restricts it to what she deemed to be a reasonable amount of time. She further emphasized that the Ombud had approved the rule and held that one should respect the rights of the owners who overwhelmingly voted in favour of the rule restricting short term letting.

46. In another CSOS adjudication in the matter between **Wianelle Briers and Davit Mawby and White Sands Home Owners Association; Dr Sunny Stout-Rostron case number CD IS 50/WC/17** dated 6 December 2007, the Home Owners Association ("the HOA") introduced a new conduct rule restricting short-term letting in the complex to a minimum of three months and that no B&B or Airbnb type operations would be allowed.

47. The Applicants contested that this restriction unfairly prejudiced them and infringed on their constitutional rights and that the rules contradict the constitution of the HOA. The Applicants argued that their right to earn an income would be

compromised by the rule. They were also of the view that they did not run a business from home as renting out property does not constitute running a business. The Applicant in this matter purchased a townhouse at the White Sands complex in order to generate income from the property with permission from the previous chairperson. The Adjudicator found that the newly adopted conduct rule was reasonable in the circumstances and equally applied to all owners.

48. In dealing with the question as to whether the amendment and adoption of the new rule was unreasonable in this matter, reference was made to the unreported matter of **Wilds Homeowners association and others v Van Eeden and others (2011) ZAGPPHC 101 (25 May 2011)** where Murphy J who ruled that amending of the rules should be guarded and stated further at paragraph 76 that; "A court should hesitate to rewrite a bargain struck between the members with each other, especially where the impetus to do so at the instance of a minority think that the terms of the agreement are unfair and no longer their interests. The Act requires that the articles be changed by a special resolution, which means 75% of the votes at a general meeting with a quorum of 25% of total membership. A court ordinarily should pause before overriding those prescriptions unless there are illegitimate or unfair impediments rendering the achievement of a special resolution impracticable; and even then, it should intervene only to the extent necessary to remove the impediment."

49. The above cases are strikingly similar to the matter at hand and the same principles ought to apply. The respondent was well aware that she purchased a unit which would be subject to conduct rules and future amendments thereto. I am of the view that, the applicant's amendment to the conduct rules is reasonable and should apply to all residents and owners of the sectional title. The majority have voted in favour of the new conduct rules, which rules ought to be respected and preserved.

50. I am of the view that the conduct rules, the STSMA and the regulations thereto, are for the benefit of all of the occupants and residence of a sectional title, who reside within close proximity to one another. It is therefore essential that the rules be complied with so as to ensure that the rights of all occupants and residence are respected and so that they can live in harmony with one another. The respondent cannot and should not be allowed to break these rules.

FINAL INTERDICT

51. The applicant will be entitled to a final interdict if it were able to establish the following;

51.1 A clear right on the part of the applicant;

51.2 An injury actually committed or reasonably apprehended;

51.3 There is no other satisfactory remedy available to the applicant.

See Setlogelo v Setlogelo 1940 AD 221 at 227

A Clear right on the part of the Applicant

52. The applicant has a clear right as well as a duty to ensure that the Conduct Rules and the Regulations thereto as prescribed by the STSMA are complied with.

An injury actually committed or reasonably apprehended

53. An act of interference implies an injury actually committed or reasonably apprehended. A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with certain facts.

54. An applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow; he only has to show that it is reasonable to apprehend that injury will result. The test for apprehension is an objective one. This means that, on the facts presented to the court, it must decide whether there is any basis for the entertainment of a reasonable apprehension by the Applicant.

55. It would be unreasonable to expect the Applicant to suffer actual harm before approaching this Court for the relief sought. One must bear in mind that South Africa is a country where crime is rife and it does not discriminate on race, race or gender. It is not unreasonable for the Applicant to ensure that the measures are put in place to protect the lives and property of its members.

There is no other satisfactory remedy available to the applicant

56. The respondent alleges that there are two alternative remedies available to the applicant those being:

56.1 A dispute resolution mechanism found in the Conduct Rule 23.

56.2 Lodging a complaint with CSOS.

57. In respect of the dispute resolution clause, the mechanism found in the Conduct Rule 23 is not applicable in so far as there is no dispute of fact in respect of the breach. The Respondent admits to be in breach of the Conduct Rules.

58. The lodging of a complaint with CSOS is not peremptory. This court is referred specifically to Conduct Rule 21 (a) which prescribes that the trustees shall have the right to take any action deemed fit to prevent any infringement of these rules.

59. It is common cause that before approaching this Court, the Applicant engaged with the Respondent without success as the Respondent's conduct continued unabated.

60. Accordingly, the Applicant has no other satisfactory remedy available to him but to approach this court for the necessary relief.

61. Given the Respondent's attitude and her refusal to comply with the Conduct Rules, I am of the view that the requirements for a final interdict have been met and, that the Applicant was justified in approaching this Court for the granting of the relief sought.

The Constitution

62. Section 25(1) of the Constitution of the Republic of South Africa, 1996 reads:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property...”

63. The Respondent contends inter alia in her counter-application, that:

63.1 Conduct Rules 14 (f) and 20 (b) have the effect of depriving her from her property in that she cannot execute the rights afforded to her as the owner of the property and let the property to whomever she wants to rent to and for as long as she deems fit.

63.2 The fact that she can only rent out her property in certain circumstances as dictated by the Applicant constitutes a major deprivation and limitation of her right as owner of a sectional title unit; and

63.3 Conduct Rules 14(f) and 20 (b) ought to be declared unconstitutional and/or void and/or invalid and unenforceable.

64. The specific terms of the conduct rules which the Respondent challenges have the effect that she cannot rent out the property unless-

64.1 The lease is no longer 6 months;

64.2 She furnishes the Applicant with a copy of the lease; and

64.3 She introduces her tenants to the Applicant.

65. The Respondent alleges that the aforesaid affects her right as owner of her unit to deal with a property as she sees fit and further that there is no justifiable reason as to why she should comply with these provisions. Accordingly, she seeks orders of unconstitutionality as well as orders directing the Applicant to amend its conduct rules.

66. Under section 172(1)(a) of the Constitution, this court is required to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

67. Section 8(2) of the Constitution too records that the Constitution is binding on the natural and juristic persons if, and to the extent that, it is applicable, considering the nature of the right and the nature of the duty imposed by the right.

68. The Respondent further alleges that the Applicant does not contend that the Respondent's counter-application is incompetent or impermissible in any way. save for noting that it does not appear that the Respondent has published a notice as required by rule 16A. She submits that this court can assume, without deciding, that the Respondent is entitled to exercise her section 25(1) right as against the Applicant.

69. I agree with counsel for the Applicant that the aforesaid position has been adopted by the Applicant because the conduct Rules in question are indeed consistent with section 25 of the Constitution, in that they do not constitute an arbitrary deprivation of the Respondent's right to property, alternatively constitute justifiable limitations of the Respondent's property rights.

70. In **First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC)** at para 46 the Constitutional Court has previously held that in examining whether or not an infringement of a person's property rights has taken place, a court must consider,

70.1 Whether there has been deprivation of property;

70.2 Whether the deprivation is consistent with section 25(1) of the Constitution and not arbitrary;

70.3 If not, whether the deprivation is justified under section 36 of the Constitution.

71. The Applicant submitted that Respondent is not being deprived of her property. But if it is found that a form of deprivation is occasioned by the Conduct Rules, then it is contended that such deprivation is not arbitrary. In the event the court is not with the Applicant in relation to arbitrariness, then the Applicant submits that the deprivation has taken effect by way of law of general application, which is reasonable and justifiable and thus constitutes a permissible limitation of the Respondent's property rights.

72. It was submitted further on behalf of the Respondent that the Conduct Rules not only do not deprive the Respondent of her property but also deprive her of one of the incidents of ownership, being the ability to lease the property for rental income.

73. The issue at hand is merely the requirement that any such lease must be a minimum of a 6-month period in respect of leasing unit, something the Respondent, on her version, would even prefer.

74. The Constitutional Court in **Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC)** determined that a deprivation for purposes of section 25 would be required to constitute something more than just interference with a right incidental to ownership. The Court said the following at paragraph 32

“Whether there has been deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.

75. That a ‘substantial interference’ is required was expanded upon by the Constitutional Court in **Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd 2011 (1) SA 293 (CC)** where the test for the presence of a substantial interference was confirmed as being context-specific.

76. The interference with the Respondent’s property rights is in the context of this matter, if any, is submitted to be so limited that it cannot, in any manner, be considered as a substantial interference.

77. The limitation, of the Respondent's use, enjoyment, exploitation of her property is purely to determining the length of the lease she is permitted to enter into or nothing more. The Applicant does not seek to dictate any other terms of the lease at all and, importantly, does not intend to intrude on the relationship between the Respondent and her tenant, as long as the Conduct Rules of the Applicant are adhered to by both such persons.

78. I am of the view that, properly construed nothing in the Conduct Rules serves to deprive the Respondent of her right to property and, that there has been no substantial interference therewith.

I therefore make the following order

1. The Respondent is hereby directed to immediately cease from leasing Section 11 (Door number 11) The Paddock, Stella Street, Sandown ("the unit") for a period of shorter than 6 months.
2. The Respondent be directed to immediately cease from utilizing the unit and/or leasing the unit for commercial use and/or as a resort facility and/or a bed and breakfast.
3. The Respondent be directed to provide copies of the lease agreements entered into between herself and future tenants of the units.
4. The Respondent is ordered to pay the cost of the application.

5. The counter-application is hereby dismissed with costs.



M MATSEMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Applicant : Adv V Vergano

Instructed by :Karnavos Attorneys

For the Respondent :Adv W F Wannenburg

Instructed by :CR Bothma and Jooste Attorneys