



## Comply with rules, even if your neighbour doesn't

SEP-21

In the case between *Kingshaven HOA v Botha, CSOS and Another*<sup>1</sup>, we learn, amongst other things, that it is not a valid defence to say that, just because others are infringing the same community scheme rule, and because the executive committee of the community scheme is only attempting to enforce the rule against you and not the others who are alleged to be contravening the same rule, you, therefore, do not have to comply with the rule. It is not a valid defence to state that the community scheme has waived compliance with that rule for those reasons.

In this case, the HOA brought an application to interdict the homeowner from parking his vehicles, caravans, boats, or trailers anywhere within the estate other than in his garages, or in front of his garages and within the boundary of his property. The homeowner was using the visitors parking bays for one or more of his vehicles. It was held that rules are not capable of waiver in general and in this case, there was no power in the HOA's constitution for the trustees of the HOA to waive compliance with the rules.<sup>2</sup> In fact, they had a duty to enforce the rules.<sup>3</sup> A person is entitled to waive a right but cannot waive a duty.<sup>4</sup>

Specific procedures need to be followed to remove, amend, or substitute rules in accordance with the relevant constitutional documentation, the Memorandum of Incorporation and the Companies Act<sup>5</sup> (for HOAs) or with the Sectional Titles Schemes Management Act<sup>6</sup> (STSMA) and its Regulations<sup>7</sup> (for bodies corporate).

The decision to enforce the parking rules by the HOA in *Kingshaven* was an exercise of its contractual right to have all owners comply with the rules.<sup>8</sup> As a party to the contractual framework between HOA and owner, the owner must comply with the rules and the constitution of the HOA.<sup>9</sup> The judge held that the owner could not "reasonably have perceived that any laxity in enforcement constituted a waiver of the parking rules".<sup>10</sup>

The judge did say that an irrationally discriminatory system or rule enforcement might have justified a decision to refuse the interdict but that was not the proven case here as there was no evidence of a discriminatory system of rule enforcement. The HOA was granted the interdict it applied for, and the owner was ordered to pay the costs of the court case.

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<sup>1</sup> (6220/2019) [2020] ZAWCHC 92 (4 September 2020) - <http://www.saflii.org/za/cases/ZAWCHC/2020/92.html>.

<sup>2</sup> Para 47.

<sup>3</sup> Para 47.

<sup>4</sup> Para 47.

<sup>5</sup> Act 71 of 2008.

<sup>6</sup> Act 8 of 2011.

<sup>7</sup> The Sectional Titles Schemes Management Regulations, 2016.

<sup>8</sup> Paras 46 and 48.

<sup>9</sup> Para 46.

<sup>10</sup> Para 48.



Interestingly, this case also dealt with a statutory appeal against a CSOS Adjudicator who refused to entertain the application on the basis that an order prohibiting the owner from parking in the visitor's parking bays is not one of the relief measures available in terms of s 39 of the CSOS Act<sup>11</sup>. Arguably, the CSOS does indeed have the jurisdiction to order an owner to refrain from parking in a way that contravenes a given conduct rule. Section 39(2)(a) of the CSOS Act provides that an adjudicator can give an order that particular behaviour or default constitutes a nuisance and require the relevant person to act, or refrain from acting, in a specified way.

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<sup>11</sup> Act 9 of 2011.