

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

CASE NO: 29534/2018

In the matter between:

SALLY CATHERINE NICHOLL

Applicant

and

**THE BODY CORPORATE OF THE
PADDOCK SECTIONAL TITLE SCHEME**

Respondent

In re:

**THE BODY CORPORATE OF THE
PADDOCK SECTIONAL TITLE SCHEME**

Applicant in the
main application

and

SALLY CATHERINE NICOLL

Respondent in the
main application

**THE APPLICANT'S [SALLY CATHERINE NICHOLL] NOTICE OF
APPLICATION FOR LEAVE TO APPEAL**

BE PLEASED TO TAKE NOTICE that **SALLY CATHERINE NICHOLL**
(hereinafter referred to as "**the Applicant**") intends to make
application for leave to appeal to the Supreme Court of

Appeal, alternatively the Full Bench of this Division, against the judgment of the **Honourable Acting Justice M Matsemela**, dated **2 October 2019**, and handed down on **3 October 2019**, on a date to be arranged with the Registrar of the above Honourable Court.

Such appeal is directed at the findings of fact and/or rulings of law, more specifically, in that, the Honourable Court erred in finding that:

1. The Respondent has satisfied the requirements for final interdictory relief.
2. The Applicant continues to contravene the Conduct Rules, the Sectional Title Schemes Management Act 8 of 2011 ("ST SMA") and Regulations by operating an Airbnb by failing to provide her tenants with the rules of the Scheme, when no such evidence was presented by the Respondent.
3. The Applicant continues to contravene the Conduct Rules, the ST SMA and Regulations by operating an Airbnb by failing to ensure compliance with the rules of the Scheme.

4. The Applicant utilised her unit and/or leased her unit for commercial use.
5. The Applicant utilised her unit as a resort facility or a bed and breakfast, when the uncontroverted evidence was that the Applicant did not provide to her tenants (that rented through Airbnb) any hospitality element (i.e. bed and breakfast).
6. Because the Applicant bought her unit for investment purposes, the only logical conclusion is that the very nature of Airbnb is commercial.
7. The members of a sectional title scheme can limit an owner's right to deal with his/her/its unit, including being prescriptive by changing the conduct rules, preventing a unit owner in a sectional title scheme to rent out his/her/its unit for a period less than the period prescribed in the conduct rules.
8. The Respondent had, and has, a right / entitlement to refuse the Applicant to rent out her unit through Airbnb.
9. The tenants that occupied the Applicant's unit caused intrusions, when no such evidence was presented.

10. The amendment to the conduct rules prohibiting short terms rentals is compliant with the STSMA.
11. Relying on **Goucester Court Body Corporate v Maher & Others** (14 August 2018) and **Wianelle Briers & Davit Mawby and White Sands Homeowners Association; Dr Sunny Stout – Rostron Case Number CB IS 50/WC/17** (6 December 2007), as authority, that, the Respondent's conduct in amending the conduct rules is permitted and/or justified, when that tribunal had no power and/or authority to decide on whether such amendment to the conduct rules infringes an owner's constitutional rights as envisaged by *inter alia* section 25 of the Constitution.
12. The amendment to the conduct rules is consistent with Section 25 of the Constitution.
13. The amendment to the conduct rules is a justifiable limitation of the Applicant's property rights.
14. The interference with the Applicant's property rights is in context of the matter, if any, so limited that it cannot in any manner be considered as a substantial interference.
15. The limitation of the Applicant's use, enjoyment, exploitation of her property is purely to determine the

length of the lease she is permitted to enter into or nothing more.

16. The Respondent does not intend to intrude on the relationship between the Applicant and her tenant/s.
17. Nothing in the conduct rules serves to deprive the Applicant of her right to property and there has been no substantial interference therewith.
18. The Applicant is not entitled to the relief sought in the counter application.
19. The Respondent is entitled to the relief sought in the main application.

The appeal is directed at the finding of fact and/or ruling of law, more specifically, in that, the learned Judge erred in not finding that:

20. The Applicant is entitled to the relief sought in the counter application.
21. The Respondent was not entitled to any of the relief sought in the main application.

22. There is no difference between a landlord renting out his immovable property to a tenant that uses the property for residential purposes and the Applicant renting out her unit to tenants for short periods of time through Airbnb, i.e. on a daily basis, weekly basis or monthly basis.
23. The Applicant does not utilise her unit or rents out her unit for commercial use.
24. The Applicant does not utilise her unit as a resort facility or bed and breakfast.
25. The Applicant as owner is entitled to rent out her unit for as long as she wants, not requiring anyone's consent, and not being prevented in terms of the conduct rules of the Respondent to rent out her unit for periods less than 6 months, to *inter alia* Airbnb tenants.
26. The conduct rules unjustifiably and unreasonably limits the Applicant's (and other unit owners) rights to rent out her/their immovable property.
27. The amended conduct rules offend the privacy of the private contractual relationship between a unit owner such as the Applicant (as landlord) and his/her/its tenant/s.

28. The purpose of conduct rules is not to limit the rights of ownership of an owner but to create harmonious interaction between owners and occupiers of sections and persons making use of the common property, and, in this case, the conduct rules achieved exactly the opposite, by limiting the unit owner's (i.e. the Applicant) right of ownership.
29. Conduct rules 14 (e) and (f) infringes the Applicant's constitutional rights in the following manner, by limiting her right as owner of a unit to deal with the property as she deems fit, namely:
 - 29.1. the property may not be rented out for periods less than 6 months;
 - 29.2. if a unit owner wants to rent out a unit for commercial purposes the approval of the Respondent is necessary;
 - 29.3. leases regulating private contractual relationship must be given to the Respondent.
30. By amending conduct rules 14 (e) and (f) as it did, the Respondent exceeded its powers.

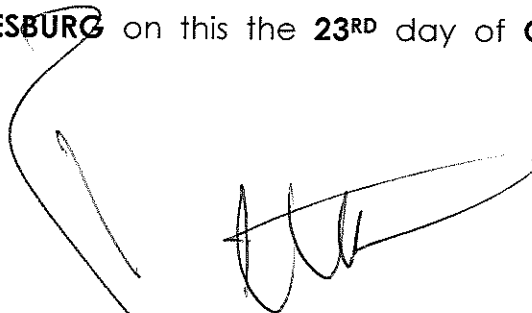
31. The amended conduct rules (14 (e) and (f) does not serve the purpose for which the Respondent is in existence.
32. The amended conduct rules, i.e. 14 (e) and (f), are unreasonable.
33. Conduct rules 14 (e) and (f) constitutes a major deprivation and limitation of the Applicant's rights as owner of a n immovable property.
34. The impugned provisions of the conduct rules (14 (e) and (f)) are both unreasonable within the meaning of the Act and constitute a deprivation and limitation of the Applicant's rights in respect of her property, and, as a result, such provision should have been declared unconstitutional and/or void and/or invalid and unenforceable.
35. The conduct rules 14 (e) and (f) infringes Section 25 of the Constitution and are not justified under Section 36 of the Constitution.
36. As a result of the aforesaid, i.e. conduct rules 14 (e) and (f) infringing section 25 which is not justifiable under section 36 of the Act, as enunciated in **First National**

Bank SA Ltd t/a Wesbank v Commissioner, South African Revenue Services & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC),
conduct rules 14 (e) and (f) are unconstitutional.

37. Conduct rules 14 (e) and (f) constitute a substantial interference or limitation that goes beyond the normal restrictions and property use or enjoyment found in an open and democratic society, which amounts to a major deprivation of right to deal with property.
38. The Respondent has not satisfied the requirements for final interdictory relief.
39. The Respondent did not prove any act of interference to be granted final interdictory relief.
40. Alternative remedies were available to the Respondent in achieving its purpose, including conduct rule 23 and an approach to the Community Schemes Ombud.
41. The main application of the Respondent is dismissed with cost and the relief sought in the counter-application is granted with costs.

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY.

DATED at **JOHANNESBURG** on this the **23RD** day of **OCTOBER**
2019



CR BOTHMA & JOOSTE ATTORNEYS

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TO: **THE REGISTRAR OF THE ABOVE**
HONOURABLE COURT
JOHANNESBURG

AND TO: **KARNAVOS ATTORNEYS & NOTARIES**
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Received a copy on this the
____ day of **OCTOBER 2019**

ATTORNEYS FOR
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