FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, POR ELIZABETH JUDGMENT

PARTIES**:**

WILMA EMMERENTIA VAN RENSBURG *NO* **FIRST APPLICANT**

PHILIPPUS STEPHANUS VAN RENSBURG *NO* **SECOND APPLICANT**

and

MEC FOR HOUSING, LOCAL GOVERNMENT

AND TRADITIONAL AFFAIRS, EASTERN

CAPE PROVINCE AND SEVEN OTHER **RESPONDENTS**

12 Registrar: **CASE NO: 687/2008**

5 Magistrate:

6 High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABTH**

DATE HEARD: 1 December 2008

DATE DELIVERED: 2 June 2009

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES –

Appearances:

13 for the Plaintiff(s)/Applicant(s)/ Appellant(s): Adv J W Eksteen SC
Adv T M G Euigen

14 for the Defendant(s)/1st Respondent(s): Adv S M Mbenenge SC
Adv N Gqamana

15 for 2nd to 6th Respondent: Adv H J Van der Linde SC
Adv J D Huisamen

Instructing attorneys:

[1] Plaintiff(s)/ Applicant(s)/Appellant(s): De Villiers & Partners

[2] Defendant(s)/1st Respondent(s): State Attorney

16 2nd to 6th Respondent's Attorneys: Greyvensteins Nortier Inc.

17 7th Respondent's Attorneys: Rushmere & Noach Inc

CASE INFORMATION -

(a) *Nature of proceedings* :

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH) **CASE NO: 687/2008**

Date delivered: 2 June 2009

In the matter between:

WILMA EMMERENTIA VAN RENSBURG *NO*	**FIRST APPLICANT**
PHILIPPUS STEPHANUS VAN RENSBURG *NO*	**SECOND APPLICANT**

and

MEC FOR HOUSING, LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE PROVINCE	**FIRST RESPONDENT**
PERAPANJAKAM NAIDOO *NO*	**SECOND RESPONDENT**
PURSOTHAM NAIDOO *NO*	**THIRD RESPONDENT**
SHASHI NAIDOO *NO*	**FOURTH RESPONDENT**
SESHAMMAN MOODLEY *NO*	**FIFTH RESPONDENT**
ANTHOSH NAIDOO *NO*	**SIXTH RESPONDENT**
NELSON MANDELA METROPOLITAN MUNICIPALITY	**SEVENTH RESPONDENT**
REGISTRAR OF DEEDS	**EIGHTH RESPONDENT**

JUDGMENT

DAMBUZA J:

[3] In this application the two applicants seek an order reviewing and setting aside a decision of the first respondent, purporting to remove certain restrictive conditions applicable to Erf 105 (No 3 Seventh Avenue Summerstrand), Port Elizabeth. This property is owned by the Shan Trust of which the second to the sixth respondents are trustees.

[4] The applicants further seek that the decision sought to be reviewed should be substituted with a decision that the application by the Shan Trust dated 27 June 2007 for amendment or removal of the conditions referred to above is refused and that the eighth respondent give effect to the order reinstating the conditions to Title Deed No.T26430/1996 in respect of Erf 105 Summerstrand as they were prior to the decision referred to above being taken by the first respondent.

[5] There is also an application in which the applicants seek an order that certain portions in the answering affidavits of the first respondent and the Shan Trust be struck out.

[6] An application by the Shan Trust for condonation of the late filing of an affidavit by Cindy Jonker, an attorney and a director of the seventh respondent's firm of attorneys be condoned, is also before me;

[7] The applicants are the trustees of the Hobie Property Trust which owns Erf 104 (No 4 Sixth Avenue) Summerstrand. Erven 104 and 105 Summerstrand are adjoining properties.

[8] The first respondent is the Provincial Member of the Executive Council (MEC) responsible for the Department of Housing, Local Government and Traditional Affairs in the Eastern Cape.

[9] The second to sixth respondents who are the trustees for the time being of the Shan Trust shall, for the sake of convenience, be referred to in this judgment as the Shan Trust. The second respondent Perapanjakam Naidoo has deposed to the main answering affidavit on behalf of the Shan Trust.

[10]The seventh respondent is the Nelson Mandela Bay Municipality (the Municipality). It does not oppose these proceedings and has filed a Notice to Abide by the decision of the Court.

[11]The eighth respondent is the Registrar of Deeds in Cape Town.

[12]The Hobie Trust acquired Erf 104 Summerstrand Extension 1 (erf 104) in 1989. The Shan Trust acquired Erf 105 in 1996. When the Shan Trust acquired Erf 105 there was one main building and a double garage on the property. Soon after acquiring Erf 105, the Shan Trust started effecting improvements and erecting additional buildings on the property. At the

time of the launch of this application there were three separate double storey buildings on the property. It is common cause that a business of a guest house is conducted on erf 105. The buildings on the property, or some of them, have been the subject of other court cases between the two Trusts. Of relevance in these proceedings is Case No. 1668/06 wherein the Hobie Trust sought and obtained an order for, *inter alia*, demolition of some offending buildings on erf 105.

[13]In Case No.: 1668/06 the applicants challenged the lawfulness of some of the buildings and building extensions erected on erf 105 by the Shan Trust and the lawfulness of use of these buildings as a guesthouse. The municipality had granted the Shan Trust special consent to operate the guesthouse. The consent was initially granted in respect of four rooms and later in respect of seven more rooms (a total of 11 rooms). The consent was granted subject to certain conditions which included the Shan Trust not occupying more than one bedroom on the property, a site development plan being submitted and, prior to the exercise of the rights flowing from the consent, submissions to the municipality of building plans showing the use of the buildings and the layout of the parking area. At some stage prior to the hearing of the matter (Case No.: 1668/06) the Municipality withdrew the consent granted to the Shan Trust to operate on erf 105 a guesthouse with 11 rooms. The Municipality then demanded that the Shan Trust, amongst others, remove any unlawful dwelling units on the property, demolish a staircase leading to the roof area of the

"western building" and cease all unlawful usage of the property, including the operation of the guesthouse.

[14]On the day the hearing of the application (case no 1668/06) the Shan Trust, which, up to that stage, had not opposed the application, sought to to have the matter postponed. The application for a postponement was refused and the matter proceeded without representation for the Shan Trust. In the judgment Froneman J set aside an approval that had been granted to the Shan Trust by the Municipality for erection of a building that had already been erected (the "northern building"), ordered demolition (within 60 days of the court order), of that entire building, and ordered demolition and removal (within 60 days of the court order) of the top storey and the staircase of a building situated on the north western corner of Erf 105.

[15]Leave to appeal against the judgment in case no 1668/06 having been refused by Froneman J, the Supreme Court of Appeal and the Constitutional Court (the last two Courts on petition), the Shan Trust, through its attorneys, in a letter dated 27 June 2007, applied to the Premier of the Eastern Cape for removal or amendment of the restrictive conditions in the title deed relating to erf 105, which the offending buildings were erected in contravention of. It appears from the papers that two letters of application were forwarded to the Premier in this regard, the first one on 21 June 2007 and the second one on 27 June 2007. The two letters are identical save for an omission in the application dated 27 June 2007 of an alternative prayer contained in the application dated 21 June

2007. The prayer contained in the application dated 27 June 2007 is substantially the amendment which was ultimately effected to the restrictive conditions in question.

[16]Pending a decision on the application made to the Premier, the Shan Trust successfully brought an application before this court (Case No.: 29/08) for suspension of execution of the demolition order. It was common cause, when this matter was heard, that the offending buildings had not been demolished.

[17]The approval of the application made to the Premier came from the first respondent. That decision prompted these proceedings. After the decision was communicated to the relevant parties, the Shan Trust obtained a Court order (Case No.: 2416/07) declaring the Court order granted in Case No.: 1668/06 to be of no force and effect and suspending the demolition order pending consideration of the site development plan and building plans which had been submitted to the Municipality by the Shan Trust on 7 June 2006. An appeal by the Hobie Trust against the judgment in Case No.: 2416/07 is pending to the Full Court of this Division.

[18]The restrictive conditions of title to which the decision by the first respondent relates appear in Deed of Transfer T1678/99 as follows:

> "C. SUBJECT FURTHER to the following conditions contained in Deed of Transfer T999/1944 IMPOSED BY THE MUNICIPALITY OF THE City of Port

Elizabeth in terms of the provisions of Township Ordinance No 13 of 1927 in favour of itself and any erf-holder in the Summerstrand extension township and subject to alteration and amendment by the administrator:

(b) that this erf shall be used for residential purposes only.
(c) that only one house designed for the use as a dwelling for a single family, together with such outbuildings as are ordinarily required to be used therewith, be erected on this erf.
(d) that no more than half the area of this erf shall be built on.
(e) that no building or structure or any portion thereof except boundary walls and fences shall be erected nearer to the street line which forms a boundary of this erf than the building indicated on the diagram of this erf."

[19]The first respondent granted consent for amendment of the restrictive conditions on 11 October 2007. The approval is to the effect that these conditions are to read as follows:

"That this erf shall be used for residential purposes, including for a guesthouse, only subject to the provisions of the municipality's guest house policy and applicable zoning scheme".

[20]In response to a request by the Hobie Trust for reasons for the decision to grant the amendment of the conditions, the first respondent furnished the following reasons:

"(i) The conditions are obsolete to him that they are no longer required for land-use management purposes;
(ii) The relevant town planning scheme is more than adequate to control development of the erf, Such controls include coverage, density, use and building lines;
(iii) A number of title deed conditions have been removed/amended in the past as far as Summerstrand is concerned;
(iv) There are no exceptional or compelling reason(s) for maintaining the current conditions; and

(v) Duplication of controls are therefore unnecessary."

[21]This decision is challenged on the following grounds:

[19.1] that it was taken without notice to the interested and affected persons;

[19.2] that it was not made in terms of and does not accord with the first respondent's powers as contained in the **Removal of Restrictions Act No 84 of 1967**;[1]

[19.3] that the application by the **Shan Trust** to Premier of the Eastern Cape does not comply with the procedural requirements stipulated in **Section 3 of the Removal of Restrictions Act**;

[19.4] that as an administrative action in terms of the **Promotion of Administrative Justice Act no 3 of 2000 (PAJA)** the decision falls to be reviewed and set aside for:

[19.4.1] procedural unfairness as it was taken without affording the applicant a hearing;

[19.4.2] having been taken in bad faith;

[19.4.3] having been taken capriciously;

[19.5] that it is so unreasonable that no reasonable person would have taken it;

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[1] Section 2 of the Removal of Restrictions Act No 84 of 1967 sets out the powers conferred upon the first respondent; section 3 of that Act sets out the procedural requirements for an amendment to conditions of title.

[19.6] that it is unconstitutional (for procedural unfairness) and unlawful (for bad faith);

[19.7] that it has caused the applicants financial prejudice and that it is prejudicial to the interests of other erf-holders in **Summerstrand extension 1** in whose favour the restrictive conditions were imposed; and

[19.8] that it is not rational or justifiable in relation to the reasons given therefore or the information before the first respondent.

[22]For reasons that will become apparent hereunder I deal only with some of these grounds; but first I shall consider the ancillary/related applications before me.

THE APPLICATION TO STRIKE OUT:

[23]The applicants contend that certain portions in the answering affidavits of the first respondent and the Shan Trust fall to be struck out as inadmissible hearsay evidence and irrelevant, scandalous and/or vexatious averments.

[24]The portions complained of in the answering affidavit of the first respondent are paragraphs 7 and 18. In these paragraphs the first respondent states that she has 'since become aware' that the applicants are allegedly conducting guesthouse activities on erven 85 and 104 Summerstrand. Regarding the answering affidavit of the Shan Trust the

second defendant states that if the applicants are correct in their contentions regarding the contraventions by the Shan Trust of the restrictive Conditions of title, then the first applicant herself is in contravention thereof as she conducts a business in a guesthouse on erf 85 Summerstrand. The allegations complained of are made by the respondents in the context of their plea that the applicants should be censured for approaching the court with "unclean" hands.

[25]The applicants contend that the source of the allegations made by the first respondent's is not identified and no basis is made to lay a basis for its reception in terms of section 3 of the General Law Amendment Act.

[26]The second respondent makes the same allegations in respect of erf 85 Summerstrand and adds that the applicants conduct a guesthouse business in contravention of the same restrictive conditions under consideration in this matter. He states that the same restrictive conditions to which the first reapondent's decision pertains are applicable to erf 85 as erf 85 is one of the erven referred to in the Administrator's Proclamation dated 6 June 1942. In this regard the Shan Trust relies on an allegation in the applicant's letter of objection to the application (to the Premier) which states that:

> "In the present instance, it is not correct, as alleged in the Shan application, that the title deed conditions which it seeks removed from its title deed are binding on all erven in Summerstrand Extension 1. These conditions were only made applicable to specified erven in Summerstrand Extension 1. These are erven numbers 32 – 54; 58 – 68; 71 – 99; and 102 – 108 inclusive. This appears from the original

proclamation issued by the then Administrator of the Cape Province dated 6 June 1942, a copy of which is annexed hereto marked "HF"."

[27]It is trite that two requirements must be satisfied before an application to strike out a matter from an affidavit can succeed; first the matter sought to be struck out must be scandalous, vexatious or irrelevant, second the Court must be satisfied that if such matter is not struck out the parties seeking such relief would suffer prejudice. **Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd** [2001] 3 All SA 15 (T). The meaning of scandalous, vexatious and irrelevant matters has been stated as, allegations which may or may not be relevant, but are worded so as to be abusive and defamatory, to convey an intention to harass or annoy and/or allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter. **Vaatz v Law Society of Namibia** 1991 (3) SA 563 (Nm) at 566C-E; **Steyn v Schabort en Andere NNO** 1979 (1) SA 694 (O) at 698A.

[28]Indeed the first respondent merely states in her answering affidavit that she has since become aware of a guesthouse business allegedly conducted by the applicant on erven 85 and 104. She does not state how and when she became aware of the business. I am unable to find evidence on the record on which her conclusions regarding the alleged business are founded. During argument, Mr Van Der Linde who appeared on behalf of the Shan Trust, referred me to a letter dated 1 April 2008 from the General Manager: Special Planning and Development addressed to the applicants. In that letter the General Manager: Special Planning and

Development Administration states that a site inspection carried out on 4 February 2008 and a subsequent search revealed that there is no record of an application for the removal of restrictive conditions pertaining to "the abovementioned erf" (erf 104) and No. 11 – 6th Avenue (erf 85). It is then stated in the letter that use of both the erven as guesthouses is in violation of the title deed conditions which state that the erven may only be used for residential purposes, housing one family. It is further stated in the letter that various buildings were erected over the 9.45m building line stipulated in the title deed.

[29]The applicant's attorneys in a letter responding to these allegations deny that an inspection was conducted on the applicant's properties as alleged. They also state that their clients have always obtained both their neighbours' consent and the consent of the authorities.

[30]The allegations complained of were never established as a fact and the applicants have always registered their denial of the alleged contravention of conditions of title. No counter application based on the alleged contravention on which the matter can be properly determined, has been brought. Consequently the allegations do not contribute in one way or the other to the matter and. I am further of the view that if the portions complained of are not struck out form the record the applicants will suffer prejudice as they will have to defend themselves against the **clean hands** arguments which the respondents strongly rely on. The portions

complained of in the answering affidavits of the first respondent and the Shan Trust fall to be struck out from the record.

<u>THE CLEAN HANDS ARGUMENT</u>:

[31]As I have stated the first respondent and the Shan Trust contend that because the first applicant herself is conducting a guesthouse business on erven 85 and 104 Summerstrand contrary to conditions of title applicable to that property which are similar to the conditions under consideration in this matter, she cannot expect “clean justice” from the court. Having found that the relevant allegations in the respondents’ answering affidavits fall to be struck out, this issue falls away.

<u>APPLICATION FOR CONDONATION OF LATE FILING OF AN AFFIDAVIT BY CINDY JONKER</u>:

[32]In this affidavit Ms Jonker states that attorneys who represent the municipality in these proceedings received instructions from the municipality to launch a wide a wide application for removal of restrictive conditions of title from all erven in Summerstrand Extension 1, including the conditions which are the subject of this application. A related allegation in the papers appears in the second respondent’s answering affidavit; being that the municipality has instructed attorneys to prepare a “blanket” application for the removal of all similar restrictions in Summerstrand. In this context Ms Jonker’s affidavit confirms the allegation

made by the second respondent and does not seek to introduce new matter. And I am satisfied that the applicants stand to suffer no prejudice as a result of the admission of this affidavit.

I now turn to deal with the merits of the application.

WHETHER NOTICE OF THE APPLICATION SHOULD HAVE BEEN GIVEN TO THE APPLICANTS (AND OTHER INTERESTED OR AFFECTED PERSONS):

[33]The applicants' case is that the condition in question is in the nature of a *praedial servitude* registered in their favour and entitles them to enforce compliance therewith without proof of prejudice. It also entiles them, so they contend, to notice or an opportunity of being heard before a decision relating thereto is taken. As no notice of the application made to the Premier was given to the, the decision falls to be set aside. They contend further that in the circumstances the decision constitutes arbitrary deprivation of property contrary to the provisions of section 25 (1) of the **Constitution of Republic of South Africa Act, 108 of 1996** (the Constitution).

[34]It was submitted on behalf of the applicants that the issue of the nature of the rights emanating from the restrictive conditions was determined in the judgment of Froneman J in case no 1668/06. Consequently, so it was submitted, the issue was *res judicata* and it was not open to the

respondents to reopen it; alternatively the respondents were *estopped* from raising the issue as a defence in this application.

[35]It is common cause or not in dispute that a copy of the application was sent to the applicants' attorneys by telefax without the consent of the applicants. Nevertheless, written submissions in support of the applicants' objection to the application were forwarded to the Premier by the applicants' attorneys subsequent to receipt of the faxed application. It is common cause further that no service was effected on other erf-holders in Summerstrand Extension 1 whose title deeds bear similar restrictive conditions. Notice of the application was also not given to the Municipality. Neither was the application published in newspapers circulating within Port Elizabeth or a Government *Gazette*.

[36]The respondents take issue with the characterization of the conditions in question as *praedial servitudes.* They contend that they are entitled to raise this issue as a defence in these proceedings and deny that the issue is *res judicata. Mr Van Der Linde* who appeared on behalf of the Shan Trust submitted that this application is founded on a cause of action entirely different from that in Case No.: 1668/06. The relief sought by the applicants in this application, so it was submitted, being *a review of the decision of the first respondent*, cannot be characterised as the same relief sought in case no 1668/06, which was an application for a relief that an approval granted by the Municipality to the Shan Trust to erect a building

which had already been erected be set aside and that the offending buildings be demolished.

[37]On *res judicata* the South African courts have followed the law as set out by Grotius[2] and Voet[3], that the *exceptio rei iudicatae* lies when a dispute which has been brought to an end (*lis terminata)* is again set in motion between the same persons, about the same thing (*de eadem re)* and on the same "cause for claiming" (*ex eadem petendi causa).*[4] In **Betram v Wood** 1893 10 SC 177 at 180-181 the Court held that in determining whether a defendant was entitled to raise an earlier judgment as *res judicata* it was necessary to establish whether that judgment was given in an action with respect to the *same subject matter*, based on the *same ground* and *between the same parties*. Voet adds that if any of the three requisites, namely the same persons, the same thing and the same cause for claiming, is absent, the *exceptio* does not apply.

[38]In **Boshoff v Union Government** 1932 TPD 345, Greenberg J quoted with approval the judgment in **Mitford's Executor v Ebden's Executors and Others** 1917, AD 682 in which the Court held that for a plea of *res judicata* to succeed it is not necessary that the cause of action, in the narrow *sense* in which the phrase is sometimes used, should be the same in the later case as in the earlier case. If the earlier case necessarily involved a judicial determination of the same some question of law or issue of fact, in the sense that a decision could not have been legitimately

[2] Grotius
[3] Voet Commentaries 42. 1. 47 and 44.2.3
[4] LAWSA at 266-267.

or rationally pronounced without at the same time determining that question or issue, then such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be *res judicata* in any subsequent action between the same parties in respect of the same subject matter.

[39]In **Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk** 1995 (1) SA 653 AD it was held that the true significance of Boshoff's case is that the strict common law requirements for the defence of *res judicata* (in particular *eadem res* and *eadem petendi causa*) should not be taken literally and in all cases applied as flexible rules, but that there was, in the light of the underlying requirement of *eadem quaestio* and the ratio of the defence of *res judicata,* room for the adaptation and extension thereof.

[40]In Case No.: 1668/06 the first respondent was the Nelson Mandela Bay Municipality (the seventh respondent in this application), the second to the sixth respondents were the same second to the sixth respondents herein, acting in the same capacity as they do in this matter and the seventh respondent was the first respondent in these proceedings.

[41]*Mr Mbenenge* who appeared on behalf of the first respondent submitted that because Case No.: 1668/06 was essentially a matter between "*private neighbours about buildings in an urban property",* (these being the words used by Froneman J in the opening sentence of the judgment), the first respondent was not "hit" by *res judicata* as it was not a party in Case No.: 1668/06 but was merely cited out of caution. I do not agree with this

submission. In paragraph 6 of the original Notice of Motion (Case No.: 1668/06) the applicants sought, as an alternative, an order setting aside the decision made by the first respondent (then the seventh respondent) on

19 September 2005, dismissing an appeal by the Hobie Trust against the decision of the Executive Mayor of the Municipality approving building plans submitted by the Shan Trust.

[42]I am satisfied therefore that the parties before court in this matter, with the exception of the Registrar of Deeds, are the same parties that were before court in case no 1668/06.

[43]Regarding the cause for acting, at paragraph [6] of the judgment in Case No.: 1668/06 Froneman J held that:

> "The Hobie Tust attacked the unlawfulness of the erection and extension of these buildings, as well as the lawfulness of their subsequent use for leased accommodation. Initially the grounds for the attacks were based on non-compliance with the National Building Regulations and Standards Act 103 of 1997, contraventions of Zoning Scheme and Land Use Planning Regulations, and the irregular granting by the municipality of special consent to use the buildings as part of a guest house. The 'special consent use' was subsequently withdrawn by the municipality, **and in 2006 a more fundamental ground for the alleged unlawfulness came to the fore, namely the existence of registered restrictive conditions in the title deed of erf 105. In the face of these the opposition to the application crumbled,** as mentioned earlier".
>
> (My emphasis)[5]

[5] The condition referred to is the same condition which is under consideration in this judgment.

[44]The learned judge then held further that:

> "It is common cause that this type of a restrictive title takes precedence over the municipality's zoning scheme. **Generally this follows from their characterization in our case law as praedial servitudes in favour of other erf holders (*Ex Parte Rovian Trust (Pty) Ltd* 1983 (3) SA 209 (D) at 212 E-213F, *Malan and another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA (A) at 40 B-1) and in this case also, particularly from the wording of clause 1.6.5 of the Council Zoning Scheme Regulations.** Consequently any possible permission by the municipality to build or use buildings contrary to the conditions cannot be lawful".

[45]It seems to me that in this matter, although the cause of action or relief sought may, on the face thereof, be phrased in terms different from the cause of action in Case No.: 1668/06, this is a difference in the narrow sense as stated in **Boshoff's** case (*supra).* A mere reading of the judgment In case No.: 1668/06 reveals that the court made a finding on of the nature of the rights emanating from the restrictive conditions. The Learned Judge considered the issue pertinently and conclusively. He considered the applicable law including relevant case law and made reasoned findings of fact and law.

[46]Further, as it was submitted by *Mr Eksteen* on behalf of the applicants, the judgment of Froneman J being a judgment in *rem*, settled the issue in question whether one or more of the parties in this matter was not a party in Case No.: 1668/06.[6] Even if I were to accept that the first respondent was not a party before Froneman J as submitted by *Mr Mbenenge*, that would not take the issue any further.

[6] **Le Roux v Le Roux en 'n Andere** 1967 (1) 446

[47]The submissions by *Mr Van der Linde* that because the conditions have been removed, their nature cannot be a subject matter of these proceedings cannot, in my view, be correct when it is the validity of the decision to remove the conditions that is contested in these proceedings.

[48]It bears mention that the cases on which the respondents rely in their submissions that the applicants and other erf owners in Summerstrand derive no rights from the restrictive conditions of title and further submissions considered later on in this judgment, were decided before the Constitution was enacted. The following has been said of that era:

> "The doctrine of parliamentary sovereignty, also inherited from English law, was a fundamental constraint on the powers of the courts in the pre-democratic era — and, what is worse, on their enthusiasm for protecting rights. While the courts had the power to review the legality of administrative conduct, Parliament was free to decide what counted as lawful and what did not. It could simply authorise administrative officials to interfere with people's rights, either in so many words or by conferring such wide discretionary powers on officials that it was difficult for the court to fault the exercise of the discretion — assuming that it had the will to do so. Often that will was absent, and the courts simply 'capitulated to the force of a legislature and executive bent on the abuse of power for racial end. Furthermore, Parliament often ousted the courts' jurisdiction, thus attempting to prevent them from exercising their powers of review in relation to certain statutory provisions." [7]

[49]I consider these remarks relevant in this matter.

[50]In the end I am satisfied that the respondents may not in these proceedings raise as a defence the issue of the nature of the rights flowing

[7] Administrative Law in South Africa, Cora Hoexter 13 – 14.

from the restrictive conditions. It further follows, in my view, from the judgment in Case No.: 1668/06 that the applicants as holders of real rights in relation to erf 105, were entitled to a notice of the application for removal of the restrictive conditions prior to the first respondent's decision on the application.

[51] I do not, however, on the facts of this matter, consider the failure by the Shan Trust to give the applicants notice of the application, on its own, to be fatal to the case of the Shan Trust (or the decision of the first respondent). The fact is that the application was brought to the attention of the applicants and submissions were made by or on behalf of the applicants in support of their objection to the application. Until that stage there is no evidence of real or substantial prejudice suffered by the applicants as a result of the failure by the Shan Trust to give the required notice to the applicants. The matter on this issue, however, does not end there.

[52] The applicants contend that the decision was made without having regard to the submissions made in support of their objection to the application. The basis for the contention is that the Senior Manager: Spatial Planning drew recommendations to the first respondent regarding the application on or before 29 June 2007 whereas the submissions made by the applicants and forwarded to the Premier by registered mail were only collected from the Post Office on 19 July 2007. In this regard a memorandum dated 29 June 2007 prepared by the Senior Manager: Spatial Planning addressed

to the Senior Manager: Municipal Development Administration which is part of the papers reveals that the following comments and recommendation was made by the Senior Manager: Spatial Planning:

> "The application for removal of the restrictive conditions is supported as the title conditions have become obsolete and are no longer required for land use management purposes. Numerous applications have been approved and the relevant Town Planning Scheme provides adequate control of all these provisions. The title conditions are absolutely unnecessary. Furthermore these conditions inhibit development contrary to the Development Facilitation Act…….
> It is recommended that condition C in its entirety be removed from the Deed of Transfer T26430/96."

[53]Another Memorandum from the Senior Manager: Municipal Developmental Administration/Land Use Management to the Deputy Director General Housing, Local Government and Traditional Affairs which is also part of the record reveals that the following comments and recommendations were made regarding the application:

> "the application for amendment of the restrictive conditions is supported as the title conditions have become obsolete and are no longer required for land use management purposes. Numerous applications have been approved and the relevant Town Planning Scheme provides adequate control of all these provisions. The title conditions are thus unnecessary…..
> It is thus recommended that the consent from the MEC be granted for the amendment………to read as follows:
> 'C That this erf shall be used for residential purposes, including for a guesthouse, only, subject to the provisions of the municipality's guesthouse policy and the applicable zoning scheme.' "

[54]I am satisfied the recommendation made by the Senior Manager: Spatial Planning was made without having regard to the submissions made on

behalf of the applicant. The Senior Manager: Municipal Developmental Administration also makes no mention of such submissions. I can only conclude in the circumstances that the recommendations made to the first respondent and on which she must have relied in making the decision, were indeed made without taking into account the submissions made on behalf of the applicants. The decision was, in my view, taken without affording the applicants a hearing.

WHETHER THE DECISION CONSTITUTES AN ADMINISTRATIVE ACTION AS DEFINED IN THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 (PAJA):

[55]The applicants contend that the decision by the first respondent to remove or interfere with the restrictive conditions and the real rights conferred thereby constitutes an "administrative action" as defined in the **Promotion of Administrative Act 3 of 2000 (PAJA).** The decision therefore, so the argument goes, falls to be reviewed and set aside for failure to comply with the requirements of **Administrative Actions**.[8]

[56]The respondents' denial that the decision constitutes an administrative action is founded on their view that the applicants derive no rights from the conditions in question. On the finding I have made regarding the issue of *res judicata* the respondents' contention that the decision does not constitute administrative action must fail.

[8] See Section 6 of PAJA.

[57]In this matter the rights that the applicants had flowing from the restrictive conditions were affected by the decision of the first respondent.

<u>DID THE FIRST RESPONDENT HAVE THE POWER/AUTHORITY TO MAKE THE DECISION</u>?

[58]Flowing from the decision of the first respondent being an administrative action, the applicants contend that the decision is *ultra vires* and that that, on its own, renders the decision unlawful. The basis for this submission is that the power to make the decision is conferred upon the "**Administrator"** in terms of Township Ordinance No 13 of 1927. In this regard Section 3(2)(b)(ii) of Schedule 6 of the Constitution Act 108 of 1996 (the Constitution) provides that any reference in the "*old order legislation*" to the "*Administrator*" of a province is to be construed as referring to "*the Premier*" of such a province. The decision in this matter, so it was submitted, and that much is clear from the record, was not made by the Premier who is the repository of whatever powers the Administrator may have had in terms of the title deed. It was submitted further on behalf of the applicants that the delegation to the first respondent relied upon by the respondents can only be the one that applies in respect of the Removal of the Restrictions Act 84 of 1967.

[59]The first respondent pleads, however, that the decision was not made in terms of the Removal of Restrictions Act or powers delegated under that Act. It was submitted on behalf of the first respondent that the Removal of

Restrictions Act only applies in respect of restrictive conditions not framed in terms which render them expressly subject to future cancellation or variation. In this case, so it was argued, the powers of the first respondent to consent to the amendment of the conditions, was derived from the title deed itself. It was submitted that the first respondent, "as a repository of powers *duly delegated to her by the Premier,* is the successor in title to the Administrator referred to in the conditions". (my emphasis). But I was not referred to any instrument in terms of which such powers were delegated by the Premier to the first respondent. Instead it was submitted that it is not only powers associated with the Removal of Restrictions Act that were delegated by the Premier to the first respondent, but all powers relating to removal of conditions (including the powers conferred to the Administrator in terms of the Title Deed).

[60] I do not agree that when the Premier delegated certain powers to the first respondent in Proclamation 6, he also delegated to him/her other unspecified powers related to the powers specifically stated in the Proclamation. That, in my view, contradicts the fundamental principles of Administrative Law that public authorities possess only so much power as is lawfully authorized and that every administrative act must be justified by reference to some lawful authority for that act. Delegation of power in as vague a manner as suggested by the first respondent would, in my view result in chaotic public administration.

[61]As it was submitted on behalf of the applicants, since the title deed only empowers the Administrator (read "the Premier") to effect alterations and amendments to the conditions of title, the first respondent could only have undertaken the act or decision complained of in terms of powers delegated to her by the Premier. And the only instrument in which power to alter, suspend or remove restrictions and obligations in respect of land was delegated to the first respondent is Proclamation 6, in which certain of the Premier's powers under the Removal of Restrictions Act were delegated to the first respondent. The application by the Shan Trust, however, did not comply with the provisions of sections 2 and 3 of the Removal of Restrictions Act.

[62]The Shan Trust traces the power of the first respondent as follows:

[60.1] The title conditions were purportedly introduced in terms of the Township Ordinance 13 of 1927 which was repealed by the Townships Ordinance 33 of 1934 (both of these being Ordinances of the Cape Province);

[60.2] But as the original title deed relating to erf 105 is dated 1944 the title conditions in question must have been imposed by the Proclamation of the then Administrator of the Cape Province dated 6 June 1942;

[60.3] The Townships Ordinance, 33 of 1934 was repealed by the Land Use Planning Ordinance, 15 of 1985 the administration of which has been delegated by the Premier to the first respondent (in Proclamation 6 *supra*);

[60.4] Consequently the administration of all legislation relevant to the title conditions in question has been delegated to by the Premier to the first respondent in Proclamation 6.

[63]Firstly, the title deed states that the restrictive conditions were imposed by the Municipality in terms of Township Ordinance 13 of 1927. If there is an error in the title deed a proper procedure to amend the title deed must be followed. And as it was submitted on behalf of the applicants, this submission does not assist the respondents in any way as the applicants would still have to be notified if an amendment is to be effected to the title deed regarding the law in terms of which the restrictive conditions were imposed.

[64]It has been held that notice to all dominant tenement owners is an essential requirement for proper exercise of the discretion of an MEC in terms of the Removal of Restrictions Act. See: **Beck and Others v Premier Western Cape and Others 1998 (3) SA 487 (C**) at 511 E-G.

[65]Further, in **Ronnie's Motors (PTY) LTD v Van Der Walt** 1962 (4) 660 it was held that section 18(3) of Ordinance 33 of 1934 did not empower the

Administrator to alter, suspend or remove a restrictive condition against the title deed of an erf on the application of the owner of that erf and for **his benefit**. In that case the Administrator had under section 35 *bis* of Ordinance 33 of 1934 granted an application for amendment of certain conditions of title which had prohibited use of the three erven in question as a service station and a garage. By granting the application the Administrator enabled the erven concerned to be used as a "garage/filling station". Hoexter JA held that if the Provincial Council had intended to confer such powers to the Administrator, the provisions of section 18(3) would be repugnant to those of sections 1(1), (3) and (4) and 2(1) and (2) of Act 48 of 1946.[9] At 668 the learned Judge of Appeal held:

> "If an application is made in terms of the Act, the applicant must make the deposit and give the undertaking referred to in subsection 2(2), the Administrator must refer the application to the townships board concerned for investigation and report, and the alteration may be made only if the Administrator is satisfied as required by para. (a) of subsec. (3) of sec. 1. And if all these requirements of the Act have been complied with, it is still necessary to secure the approval of the State President (in 1946 it was the Governor General) to issue a Proclamation in the *Government Gazette* . What is more the section empowers the Administrator to alter, amend or delete a restrictive condition even if such alteration, amendment or deletion would be in conflict with a town planning scheme in operation in respect of the township in question…..
> This view is supported by the fact that the Act refers to an application made by an individual owner whereas the Ordinance does not do so and the fact that sec. 18 *bis* of the Ordinance contains the words "with the consent of the owner", words which would be quite inappropriate to an application by an individual owner.
> In my opinion, therefore, sec.18(3) *bis* of the Ordinance does not cover the case of an application made by an individual owner for his own benefit, and the decision of the Administrator, professedly acting in terms of that section, was therefore invalid."

[9] The relevant sections of Act 48 of 1946 provide that :
"1. (1) Upon the written application of any owner of land in a township…

[66] In this matter the application for removal of the restrictive conditions was made by or on behalf of the Shan Trust for the benefit of the Trust. [10]

[67] Even further, the powers conferred upon the Administrator in terms of Township Ordinance No 13 of 1927 (which was repealed by Ordinance 33 of 1934) only empowered the Administrator to amend or alter the conditions of title prior to approval of the Township plan. The writers Donges & van Winsen in Municipal Law; 2nd ed at 616 state that:

> "Section 18 (3) of the Townships Ordinance provides that notwithstanding anything to the contrary in that section the *Administrator*, after the granting of the application may, with the consent of the owner, alter or amend any of the conditions under which the application has been granted or add further conditions, provided that the *Administrator* shall consult the board before making any such alteration, amendment or addition.
>
> It seems clear that this provision, unlike the equivalent provision in Ordinance no 13 of 1927, purports to confer on the administrator the power to alter or amend conditions or to add further conditions at any time even after a township or sub-divided estate has been notified as an approved township or sub-divided estate."[11]

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[10] Compare with the provisions of sections 2 of the Removal of Restrictions Act which provides that the Administrator may alter, suspend or remove conditions if he/she is satisfied that it is desirable to do so in the interests of the establishment or development of a township or if the land is required for ecclesiastical or public purposes or for use or erection of a building by the state or local authority or for purposes incidental thereto. Section 3 of the Removal of Restrictions Act prescribes the procedure to be followed for making such application.

[11] Section 15(b) of Ordinance No 13 of 1927 provided that:

> "Notwithstanding anything to the contrary in this section the Administrator, after the granting of the application and before the owner has complied with all the provisions of the next succeeding section, may, with the consent of the owner, alter or amend any of the conditions under which the application has been granted or add further conditions, provided that the Administrator shall consult the Board before making any such alteration, amendment or addition."

[68]*Mr Van der Linde* submitted to the contrary,[12] relying on the decision in **Garden Cities v Registrar of Deeds**[13] wherein Steyn J held that :

> "Section 18(3) (which is worded in the same terms as section 15(b) of Ordinance No 13 of 1927) is in general terms and there is nothing in the Ordinance which expressly or by implication limits its application to an extent that the alteration or amendment of the conditions must be made or sought prior to the approval of the township plan and diagram by the Surveyor General under sec.19 of the Ordinance…"

[69]I do not consider myself bound by this decision. In my view a mere reading of the two relevant provisions reveals the difference referred to by Donges and Van Winsen. I can only conclude therefore that the intention of the wording in Section 15(b) of Ordinance 13 of 1927 was that the powers of the Administrator to alter conditions of title in terms of the title deed, be limited to prior to approval of the township plan.

[70]Section 33 read with item 23(2)(b) of Schedule 6 of the Constitution requires that administrative action be lawful, procedurally fair and justifiable in relation to the reasons given for it.[14] In this case I am satisfied that the decision of the first respondent was not lawful as the first respondent had no power to make the decision in question. I am also satisfied that the decision was not procedurally fair as already reasoned above. The decision therefore falls to be set aside.

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[12] i.e. that the power of the Administrator was not limited in the manner suggested by the applicant.

[13] 1950 CPD 239 at 244 G

[14] **Campsbay Ratepayers Association v Minister of Planning, Western Cape** 2001 (4) SA 294 (C).

[71]There is no evidence on the papers that the restrictive conditions have been amended in the title deed in line with the first respondent's decision. The applicants, however, seek an order that the Registrar of Deeds reinstate the conditions. I shall grant the order as sought as it is a natural consequence of this judgment.

[72]The following order shall therefore issue:

(a) The decision of the first respondent dated 11 October 2007, in which he purported to grant consent for the amendment of Conditions C (a), (b), (c) and (d) from Title Deed No. T26430/1996 in respect of Erf 105 Summerstrand, Port Elizabeth, being the property of the second to sixth respondents inclusive, in their capacities as trustees of the Shan Trust is set aside.

(b) Such decision is substituted by a decision that the Shan Trust's application dated 27 June 2007, purportedly made in terms of the title deed application to erf 105 Summerstrand (annexure "VR 11" to the founding affidavit), is refused.

(c) The eighth respondent is ordered to give effect to the order made above by reinstating the said conditions C (a), (b), (c) and (d) to Title Deed No. T26430/1996 in respect of Erf 105 Summerstrand, Port Elizabeth, as they stood prior to the decision referred to above being taken by the first respondent.

(d) The first to sixth respondents inclusive are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, including those costs consequent upon the employment of two counsel.

N DAMBUZA
JUDGE OF THE HIGH COURT

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Heard on:	1 December 2008
Delivered on:	2 June 2009