IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 3399/2010
3498/2010

In the matter between

WILMA EMMERENTIA VAN RENSBURG N.O.	First Applicant
PHILIPPUS STEPHANUS VAN RENSBURG N.O.	Second Applicant
and	
MEC FOR HOUSING, LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE PROVINCE	First Respondent
EQUUS TRAINING AND CONSULTING CC	Second Respondent
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	Third Respondent
REGISTRAR OF DEEDS	Fourth Respondent

JUDGMENT

REVELAS J

[1] This is an application for review in terms of section 8 of the Promotion of Access to Justice Act, No. 3 of 2000 PAJA. The applicants seek to set aside a decision of the first respondent (or 'the MEC'), consenting to the removal of four restrictive conditions, or praedial servitudes. These are contained in the deed of transfer (the title deed)

pertaining to a residential property, Erf 102, Summerstrand Extention 1 ('the property'). The second respondent (Equus) is the owner of the property and was the applicant at whose behest the MEC consented to the removal of the aforesaid four conditions. Equus brought its application in terms of section 2(1)(a) of the Removal of restriction Act, 84 of 1967 ('the Removal Act') and it was its fourth such application. The decision made in its favour and now sought to be set aside, is dated 21 May 2010 and was published in Notice No 185, Provincial Gazette No 2372. Apart from the substantive relief sought in this application, the applicants also seek further orders, namely the substitution of the decision consenting to the removal of the conditions by a decision that Equus' application for removal of the restrictive conditions be refused. An order directing the fourth respondent (the Registrar of Deeds) to give effect to the substantive relief by reinstating the restrictive conditions in the title deed, is also sought. Only the MEC and Equus (the first and second respondents) oppose the application for review.

[2] The applicants bring this application for review in their capacities as trustees of the Hobie Trust (the trust) which owns erf 104, Summerstrand Extention 1, which abuts the property in question to its west. The applicants have been living there since 1994. Equus acquired the property in September 2006 and ever since, the applicants and their neighbour have been embattled in a legal war over the use of property.

The present application will also not be the last application brought for determination in this ongoing dispute.

[3] The decision sought be reviewed was taken in terms of section 2(1)(a) of the Removal Act which provides for *inter alia,* the removal of restrictions in title deeds in respect of land where the "*Administrator*", (now the first respondent or other responsible representative of the government in the Eastern Cape Province) is satisfied that it is "*desirable to do so in the interest of the establishment, or the development of any township or in the interest of any area, whether it is situate in an urban area or not, or in the public interest; . . .*"

[4] The four restrictive conditions under consideration were first set out and referred to as "special conditions" pertaining to the property in Deed of Transfer No 6315 of 1937. They read as follows:

"C . . .

(i)(a) That this erf be used for residential purposes only.

(b) That only one house designed for the use of one family, together with such outbuildings which are ordinarily required to be used therewith, be erected on this erf.

(c) That no more than half the area of this erf built upon.

(d) That no building or structure or any portion thereof except boundary walls and fences shall be erected nearer to the street lines which form a boundary of the erf, than the building line indicated on the diagram of this erf".

[5] It was common cause that the street building line or setback referred to in condition C(i)(d), is 30 Cape feet in length which is commonly accepted as equal to 9.45 metres. This latter restriction has, according to Equus, been ignored or breached by several owners in the area although the extent and to which degree remains in dispute. This fourth restrictive condition was, according to the applicants, of assistance in preserving a view of the sea.

[6] It was common cause between the parties that the above restrictive conditions applied also to certain other erven in Summerstrand Extention 1, namely Erven 32 to 54, 58 to 68, 77 to 99 and 102 to 118. The applicants are also the trustees of another trust which owns Erf 85 in the same street, from where they conduct a guesthouse.

[7] The relevant part of Summerstrand Extention 1, consists of those erven situated between Marine and Brighton Drives on the one hand, and Fourth and Seventh Avenues on the other.

Factual Background

[8] In September 2006, Mr CM Ellis, on behalf of Equus, approached his neighbours, including the applicants, to advise that he intended to build a second dwelling on the property. The applicants, together with some of the neighbours (abutting land owners) lodged written objections with the third respondent (the municipality) against the construction of a second dwelling on the property, but received no response.

[9] Equus then purportedly abandoned its plan to build a second (separate), dwelling on its property, and during the first half of November 2006, commenced with construction operations to renovate and effect alterations to the main dwelling. These alterations included converting the single storey house on the northern half of the property into a double storey house. This house has eleven bedrooms and eleven parking bays. The plans for these alterations were approved by the municipality on 23 February2007.

[10] On 27 November 2006, in a letter, the trust's attorneys demanded that the building operations on the property be ceased as it transgressed the 9.45 meter street building line. The building operations were continued with. On 5 December 2006 the trust brought an urgent application for an interdict against Equus to demolish all structures which encroached the 9.45 meter street building line on the property.

[11] The result of the application was that the parties came to an agreement, which was made an order of court by Nepgen J on 14 December 2006. In terms thereof Equus was to cease all building operations which encroached the 9.45 meter street building line as set out in the title deed condition C(i)(d), pending the finalisation of an application to be brought by Equus for the removal of conditions C(i)(a) and C(i)(d), which Equus was obliged to bring within sixty days. The main application for final relief (a demolition order) was postponed *sine die*.

[12] One month later, in January 2007, Equus applied to the municipality for permission to run a guesthouse from the property. It did so under the Port Elizabeth Zoning Scheme. Equus also applied to the municipality under the National Building Regulations and Building Standards Act, No. 103 of 1977 (the Building Act) for the approval of its amended building plans, which made provision for eleven bedrooms in two main structures, linked on the ground floor. The plans were approved on 23 February 2007. The special consent to run a guest house on the property was granted on 5 September 2007, but subject to certain conditions. These were that a maximum of six guest suites for overnight guests were permitted and restrictive Condition C(i)(a) was to be removed, before any new land rights were to be exercised on the property.

[13] On 23 February 2007 (the same day on which the amended building plans were approved), Equus applied to the provincial government for the removal of condition C(i)(d) (the restrictive condition pertaining to the street line) as well as condition C(i)(a), (the restrictive condition requiring that the property be used for residential purposes only). This was its first application for the removal of restrictive title deed conditions. There were twenty one objections to the application.

[14] A second application for review was brought by the trust, this time to set aside the municipality's approval of the amended building plans, and also to interdict Equus from approving further plans in breach of the restrictive conditions and to direct Equus and the municipality to demolish the buildings, or portions of those buildings on the property which were deemed in conflict with the restrictive conditions in its title deed. The application was brought under case number 1440/2007.

[15] The review was premised on the trust's main objection to the proposed building plans, which was that they conflicted with the remaining title deed conditions and the Municipality's Zoning Regulations and section 7 of the Building Act. Equus argued that it was in the process of applying for the removal of the relevant title deed conditions and that it would be inappropriate to anticipate the outcome of that application by giving final relief as sought by the trust.

[16] Froneman J on 29 March 2008 found that the municipality's approval of the building plans was procedurally unfair insofar as it did not allow for representations made by those property owners in whose favour the title deed constrictions operated, prior to it making a decision on the application for approval of the plans. The procedural unfairness was also held to have stemmed from an error in law on the part of the municipality who considered that the question whether or not the proposed building plans were in conflict with the title deed conditions, could be determined on the same grounds as determining whether the building qualified as a dwelling or not under the zoning regulations. It was held that a different approach in respect of each was required.

[17] The application for review succeeded and the municipality was interdicted from approving any further building plans. The determination of the final (demolition) relief stood over until the outcome of the restrictive title deed conditions was made known to the parties.

[18] On 20 October 2009, under case number 3649/2006 Froneman J ordered that all structures erected on the property that encroach over the building line adjacent to the street frontage of the erf. An order was also made under case number 1440/2007 that Equus and the municipality take all the necessary steps to demolish the buildings which were erected on the property in accordance with the plans. Leave to appeal against these orders was refused by the SCA on 24 June 2010.

[19] On 23 February 2008, Equus applied for a second time to the provincial government for the removal of restrictive conditions C(i)(b) and C(i)(c) in the title deed. These were respectively the condition permitting only one house designed for one family on the property, and the condition requiring that no more than half of the property be built upon. There were sixty eight objections to this application.

[20] Some time during August 2008 Equus abandoned both its first and second applications and submitted its third application for the removal of the restrictive conditions on 17 September 2008. But in the *interim* the MEC had approved Equus' first application on 4 April 2008.

[21] On 24 June 2008 the applicants successfully instituted proceedings to review and set aside the MEC's aforesaid decision dated 4 April 2008 in which the removal was approved. On 13 November 2008, Jansen J set aside the MEC's decision and substituted it with a decision in which Equus' application of 23 February 2007 for the removal of clauses C(i)(a) and (d) was refused. The Registrar of Deeds (fourth respondent) was ordered to reinstate the aforesaid conditions in the title deed. Before the order was made, the MEC withdrew its opposition to the application on 5 November but did not consent to the order granted. Equus contended that because the merits were not considered, it was entitled to bring another application for the removal of conditions C(i)(a) and (d), despite the order of Jansen J. I will return to this aspect later herein.

[22] On 10 December 2008 Equus lodged its fourth application to the first respondent for the removal of all four restrictive conditions of title applicable to the title deed in question. The decision of the MEC to consent to the removal is the subject-matter of the present review application.

The Application brought by Equus

[23] The first submission advanced by Equus in its application was that in bringing the application, Equus was complying with the court order of 14 December 2006. This is incorrect. Nepgen J only set a time period within which Equus could bring the application, if it wanted to. If it did not exercise its rights in this regard, it would not be in contempt of court, but the applicants would then be entitled to their demolition order.

[24] Equus' other reasons were the following:

24.1 The removal of the restrictive conditions in the titled deed would facilitate its guesthouse business which it was entitled to conduct as it received the municipal council's consent thereto, as did several other property owners in the area. Equus asserted that many of these guesthouse owners did not have the required consent. Equus elaborated on this argument of the unlawful use of property of others, by stating that the "vast majority of erven" in the area were in violation of condition C(i)(d) which prohibits building over the 9.45 metre street frontage line.

24.2 The removal of the restrictions would not deprive any of the property owners of their rights, and the guesthouse would not impact negatively on the residential character of the area. Mr Ellis, who drafted the application, added that the structure which presently stands on the property, enhanced the appearance of the street due to its 'aesthetic nature' and thereby enhanced the value of property in the street. Accordingly, Equus argued, it facilitated future development for other property owners.

24.3 It would be in the public interest to remove the restrictive conditions because the "anomaly between the Title Deeds and the Zoning Scheme" could lead to unnecessary claims against the municipality.

24.4 Equus alleged that there was "overwhelming support from most homeowners" in the immediate vicinity for the removal of the restrictive condition an also referred to a "township wide application" for the removal of restrictive conditions in the title deeds of all the erven in the area to be brought by "the Council". Such an application would "regularize the *de facto* situation of the Port Elizabeth Zoning Scheme regulating building activities and land use in Extention 1". The alternative, Equus asserted, would be to order "the mass demolition of all structures in violation of their title deeds and order the cessation of all activities that are not for pure residential use."

24.5 Equus argued that the applicants themselves were in breach of condition C(i)(d) pertaining to their (or the trust's) street frontage line. They own erf 85 in the same street, where they operate a guesthouse, allegedly in violation of all four restrictive conditions. This argument was also repeated in the Equus' answering affidavit and echoed in the memorandum of the Manager: Spatial Planning of the provincial government, which was submitted to the MEC for consideration in his decision under discussion. The allegations were denied by the applicants.

<u>The Trust's Opposition to Equus' Application</u>

[25] There were six objectors to Equus' fourth application. The trust was the strongest objector. I do not intend to deal with each aspect in their letter listing their objections, but there are several relevant points raised therein, which are also contained in the founding, supplementary and replying affidavits filed by the applicants.

[26] The trust disputed Equus' allegation that the vast majority of homeowners in the area were acting in violation of their building line restrictions and submitted that even if "*almost every owner in the township has (sic) taken the law into their own hands*" such unlawful conduct should not constitute support for Equus' application. The applicants denied that they themselves violated the conditions question

and stated that the Magruser Trust (of which they are also the trustees) indeed operated a guesthouse on erf 85, but did so with the necessary consent.

[27] The applicants and the trust disputed that the area had a "multi-use character" as maintained by Equus, having regard to its size and the use of the other erven therein. According to them, the guesthouses in the area all retained their residential character in that generally, only a one or two rooms are let. It was emphasized that the guesthouse built by Equus, covers about the entire area of the erf on which it stands, has eleven rooms and eleven parking bays and there was no other residential property in the area which has been developed to this extent for "multi-use purposes".

[28] The applicants stated that they were unaware of any so-called "township wide application" and described Equus' reference to the "mass demolition" option as "dramatized" and not relevant to its application.

[29] It was further denied that there was any "overwhelming support" for the removal of the conditions in question and the trust highlighted that there was strong opposition voiced by several landowners to the developments effected by Equus.

[30] Under the heading "UNFAIR ADMINISTRATIVE ACTION" the following submissions were made by the trust:

If there was indeed a "township wide" application in the pipeline, it should not be open to Equus to bring its own individual application. If Equus was permitted to bring this fourth application – the previous three all came to nought – a perception of bias would be created, given the history of the matter and the fact that all objections were simply brushed aside.

[31] Under the heading "FAILURE TO DISCLOSE TRUE MOTIVE" the applicants refer to annexure 3 of Equus' application wherein it relies on the municipal Council's special consent to operate six guestrooms on the property. What is not disclosed therein, the applicants contend, is that Equus in actual fact built a second dwelling on the property, covering "*just about the entire area of the erf, for the purposes of conducting a guesthouse establishment having **eleven** rooms or more and **eleven** parking bays. This is not just an ordinary guesthouse: it is a substantial business operation on a residential property*".

[32] It was pointed out, (correctly) that the use of the property was in conflict with the judgment of Froneman J, prohibiting the building of such a large dwelling and also contrary to the municipality's "Guesthouse Policy" which expressly recognizes a legitimate concern that guesthouses in the municipal area are becoming too large *"in ordinary residential*

neighbourhoods and contribute to the invasion of privacy of neighbouring properties".

[33] It was also submitted that Equus' application had no substantive merit because it had not put forward any grounds justifying why it would be desirable to remove the restrictive conditions in the interest of the development of the township, (i) the area, or (ii) the public as contemplated in section 2 of the Removal Act. The trust maintained that the only reason advanced by Equus which could possibly justify the removal of the conditions, to be the interests of the area (as required by section 2 of the Removal Act), is Equus' submission that its guesthouse would enhance the appearance of the street with its 'aesthetic nature'. The applicants deny this and say it actually spoils the appearance of the street.

[34] The trust also dealt with the fact that the restrictive title deed conditions are praedial servitudes and submitted that their removal would amount to a deprivation of property rights as contemplated in section 25 of the Constitution.

[35] Finally, the trust submitted that the personal interests of an applicant such as Equus seeking removal of title deed conditions to run a large guesthouse (which they maintain is the only interest persued by Equus) are irrelevant.

[36] The trust lodged its objection to this fourth application to remove the restrictive conditions on 11 March 2009. Two months later, on 27 May 2009, the applicants sent a letter to the MEC enclosing a then recent decision of the Supreme Court of Appeal handed down the previous day which had a direct bearing on the respondents' contention that the restrictive conditions of title deed had been displaced by the Municipality's Township Zoning Regulations.[1] It was the judgment referred to as the *Naidoo* judgment in these proceedings.

The Decision of the MEC

[37] The decision of the MEC was informed by several internal memoranda sent to him by his officials. The strongest views in favour of the removal of the four conditions in question were expressed by the Senior Manager: Spatial Planning who, on 31 March 2010 signed a memorandum (eighteen pages long) in support of the removal. The content of the aforesaid memorandum by the spatial planning manager was summed up by the Superintendent-General: Local Government and Traditional Affairs in his memorandum to the MEC as follows:

"The retention of conditions in the light of the various legislation and policies that must be considered by the municipality and the MEC, is no

[1] *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 SCA at para 31.

longer desirable as it prejudices and prevents development in the townships.

- *Conditions of title are no longer required as town planning tools because they have been replaced by formal and structural town planning schemes and policies; and*
- *The removal of the conditions will not adversely affect the character of the township".*

[38] In his memorandum, the spatial planning manager disputed that Summerstrand Extention was a low-density area, or rather, that it should be permitted to remain one. His memorandum is a vehement denunciation of title deed conditions, or any entitlement by home-owners in the area to live in it a low-density suburb. The running theme in this memorandum (and also the MEC's reasoning) is that restrictive title deed conditions were obsolete by virtue of the existence of the Port Elizabeth Zoning Scheme which supplanted them.

[39] The spatial planning manager asserted that Summerstrand Extention was a multi-use area wherein private sector driven tourism ought to be promoted as a development tool to support the economic, social and environmental goals and policies of the government. In his plea for the increased densification of the area, reference was made to global warming, and climate change, the consequent loss of agriculture

land due to the future formation of deserts, and the concomitant greater demand for resources.

[40] One of the themes expounded upon this memorandum was that "tourism must be private sector driven". In this regard the spatial planning manager relied on Chapter 1, section 3 of the Development Facilitation Act, 6 of 1995 (DFA) which describes a number of developmental parameters which was listed by him in his memorandum as being:

"1. *Policy, administrative practice and law should promote efficient and integrated land development in that they should promote the integration of the social, economic, institutional and physical aspects of land development.*

2. *Promote integrated land development in rural and urban area in support of each other.*

3. *Promote the availability of residential and employment opportunities in close proximity to or integrated with each other.*

4. *Optimise the use of existing resources including amongst others land, bulk infrastructure, roads, transportation and social facilities.*

5. *Promote a diverse combination of land uses.*

6. *Discourage the phenomenon of urban sprawl in urban areas and contribute to the development of more compact towns and cities.*

7. *Contribute to the correction of historically distorted spatial patterns of settlement in the Republic and the optimum use of existing infrastructure in excess of current needs and,*
8. *Encourage environmentally sustainable land practices and processes".*

[41] Strong reliance was also placed on the Land Use Planning Ordinance 15 of 1985 and other later, legislation with their strong emphasis on the socio-economic development and the promotion of tourism. These were the National Environmental Management Act 107 of 1998, the Local Government Systems Act 32 of 2000 and the Land Use Planning Ordinance 15 of 1985, which were implemented to interpret the meaning of the phrase "the development of the township" as meaning the socio-economic development of urban area generally, rather than a specific township.

[42] A small costing exercise also performed to demonstrate that a guesthouse which houses ten visitors a month, would benefit the local economy with approximately R1 440 000.00 per annum. The point was also made that not far from Summerstrand Extention 1, where hotels, a casino, and guesthouses were flourishing, the erven did not have restrictive conditions in their title deeds. The spatial planning manager viewed this as discriminatory.

[43] There was even a challenge to one of the objectors (obviously the first applicant) who "*also runs a guesthouse in this extention and it is important to note that there is no record of any application, concerning the objector's properties, for the removal of exactly the same restrictive conditions. This however has not stopped the objector from expounding the virtues of the need to retain these conditions, the same ones that she is in violation of !*"

[44] Paragraphs 10 a-j of the memorandum is an opinion on the "*Reasons why conditions of title deed cannot be classified as servitudes*" and it is set out over three pages. Noteably, this opinion (held out as correct), was forwarded to the MEC notwithstanding the judgment of Froneman J handed down on 29 March 2011. In this judgment, the restrictive title deed conditions were specifically held to be praedial servitudes.

[45] The following paragraphs cited from the memorandum, were striking examples of the mindset of the spatial planning manager:

45.1 *"In the overall context, urban areas in South Africa are uneconomic in that for most part due to low densities, single land use (reinforced through title conditions) and our reliance on cheap transport, our urban areas have sprawled across the landscape".*

45.2 *"Municipalities are no longer concerned with the provision of infrastructure, emergency services, administration etc, they are also mandated to be actively involved in poverty alleviation, job creation in the form of local economic development and so on".*

45.3 *"Title deeds, or rather the conditions contained therein are controlling existing resources and by their very nature are restrictive. They bind, amongst other things, land and the use thereof to a set of values that persisted many years ago".*

[46] The following rhetorical questions were posed by the spatial planning manager to make his point, such as:

- *"How does a restrictive condition promote land use?" and also,*
- *"Promote employment?"*
- *"Efficient use of scarce resources?"*
- *"Tourism plans for the municipality?"*

And with regard to title deed conditions' the following was asked:

- *Does the condition by virtue of its retention prejudice development?*
- *Does the condition by virtue of its retention prevent development?*
- *Is it desirable to retain the condition if it negatively affects other areas?*
- *Is it desirable to retain the condition if it negatively impacts on the public interest? What is the character of an area? Who determines it? One Resident?"*

[47] The following statement in the memorandum is also very significant:

"In a very short space of time, there was the need for huge stadiums, rapid transport systems, new levels of security, facilities to cater for the anticipated demand and this includes accommodation."

[48] The aforesaid is a clear indication that the FIFA Soccer World Cup 2010, which was to be hosted in June 2010, played a major part in the reasoning of the spatial planning manager. As one can recall, there was a clamour at the time to provide accommodation for the anticipated thousands of spectators and visitors. Significantly, the event was over in the next month and the urgent need for accommodation was temporary and that consideration was entirely irrelevant to Equus' application.

[49] His apparent view that such areas and their title deed conditions are the cause of the present environmental, social and economic ills (urban sprawl, ever-increasing municipal rates and stunted economic growth) is patently misconceived. The aforesaid reasoning unfortunately found its way into the reasons given by the MEC for granting Equus' application as can be seen in the MEC's first reason for approving the application set out below.

[50] The memorandum of the spatial planning manager was described by the Manager: Land Use Management as "an indepth and extremely well-researched and informative exposition of the various legislation and policy documents that need to be considered and the basis upon which an application for the removal of restriction title deed condition needs to be assessed."

[51] It is therefore not surprising that it was uncritically adopted by the officials in question. It is important to note that the Superintendent-General reported to the MEC in his memorandum that the Municipality, on 11 November 2009, recommended the removal of conditions C(i)(a)(b) and (d), but not of C(i)(c) (the condition which stipulates that no more than half of the area of the house be built upon) and commented thereon as follows:

> "With regard to the municipality's reluctance to recommend the removal of condition C(i)(c), the Chief Town Planner also recommends the removal of this condition as it is precisely the same as contained in the Town Planning Scheme and need not be retained in the title deed and removing it now will mean that an application to do so in the future won't be necessary."

[52] In his support for the removal of the conditions, the Manager: Land Use Management also included the motivation (if it can be called that) for removing condition C(i)(c) as set out above. The reasons for supporting the removal are the same reasons as contained in the Superintendent's memorandum which was adopted by the MEC.

[53] The Superintendent reported to the MEC that the Planning Advisory Board recommended that the application be approved for the following reasons:

- *"Before approving the removal of a restrictive title condition, the MEC must be satisfied that doing so will be in the interest of the establishment or development of any township or in the interest of any area or in the public interest and, in the present case, the restriction must be one binding on the owner of the land by virtue of a restrictive condition or servitude registered against the title deed and which relates to the subdivision of the land or the purpose for which the land may be used or the requirements to be complied with or observed in connection with the erection of buildings or the use of the land. The conditions in question restrict the owner's use of the property and the removal will be in the interest of the development of the township in that it will enable that part of the township to be efficient and integrated, it will enable the maximum use of available resources and will promote the development of residential and work opportunities near to each other and the integration of different land uses;*
- *The municipality has supported the removal of the restrictive conditions and the zoning scheme adequately covers land use managements; and*
- *The title deed conditions in question are obsolete and are no longer required for land use management purposes.*

[54] On 14 April 2010 the chairperson of the Planning Advisory Board recommended the approval of the removal of the title deed conditions in question and enclosed a memorandum of the Manager: Land Use Management and Administration.

[55] On 5 October 2010 the Senior Manager Land Use Management and Administration furnished the applicant's attorneys of record (at their request) with the MEC's reasons, for approving the renewal of the restrictions over Erf 102, Summerstrand. These were:

(1) The removal of the restrictive conditions will be in the interest of the township in that it will enable the township to be efficient and integrated, it will enable the maximum use of available resources and will promote the development of residential and work opportunities near to each other and the integration of different land uses.

(2) The municipality has supported the removal of the restrictive conditions and;

(3) The title deed conditions are obsolete and no longer required for land use management purposes since the zoning scheme adequately covers land use management.

[56] After the institution of the present review proceedings, the MEC delivered "Further Reasons" together with the record filed in terms of Rule 53 of the Uniform Rules of Court.

[57] These further reasons for the decision taken by the MEC were summed up by counsel for the applicants as follows:

1. The restrictive conditions of title were inserted for the purposes of town planning and land use management at a time when there were no zoning scheme regulations. There are now zoning scheme regulations which adequately and appropriately cater for town planning and land use management and the interests of the public. The presence and enforceability of an appropriate town planning scheme is thus a relevant consideration in considering whether, in the public interest, it is necessary to retain the restrictive conditions.
2. The zoning scheme regulations adequately and appropriately cater for the preservation of the essential characteristics of Summerstrand. It is thus no longer necessary to retain the restrictive conditions.
3. The restrictive conditions do not adequately and appropriately cater for town planning and land use management because they are inflexible (their amendment and removal is

cumbersome, costly and time-consuming); their inflexibility often restricts and hampers the appropriate economic and social development of an area the essential characteristics of which have not remained static; and they are a relic of the past (they do not adequately taken into consideration the objects of local government as enshrined in section 152 of the Constitutional of the Republic of South Africa, 1996 ("the Constitution")).

4. Over the four years preceding, May 2010, thirteen applications for the removal of identical restrictive conditions had been approved.

5. Although the removal of the restrictive conditions from the title deed of Erf 102 may impact negatively on the property rights of the Hobie Trust (i.e. its use and enjoyment of Erf 104), the broader interests of the public and of the Summerstand area generally rendered it desirable to remove the restrictive conditions.

[6] The decision to remove the restrictive conditions from the title deed of Erf 102 was taken a few days prior to the *Naidoo* judgment.

Grounds For Review

[58] The grounds upon which the applicants bring the application are set out in their founding affidavit deposed to by the first applicant. The applicants contended, *inter alia* that the decision is:

58.1 Unconstitutional in that it amounts to an abrogation of the real and registered servitude rights enjoyed by the trust and others over erf 102.

58.2 Unlawful for not being made within the terms of the provisions and procedures, or in accordance with the MEC's powers contained in section 2 and 3 of the Removal Act.

58.3 Constitutes "administrative action" as defined in PAJA, and therefore it falls to be reviewed and set aside on the grounds of unlawfulness and being unconstitutional in that the decision was taken without proper consideration of the objections to the application lodged by the trust.

58.4 Reviewable, also because the reasons advanced by the MEC for his decision reveal that he considered irrelevant and unintelligible factors and incorrectly considered the restrictive conditions to be "obsolete" and that they were supplanted by the third respondent's zoning scheme regulations. The applicants relied on the fact that the Supreme Court of Appeal held that the aforesaid stance was unacceptable and invalid on more than one occasion.

58.5 Arbitrary, because the trust and other erf owners in Summerstrand Extention had registered real rights, which they were deprived of by virtue of the MEC's decision, and therefore it offends section 25(1) of the Constitution.

58.6 So unreasonable that the MEC could not properly, or at all, have applied his mind to the decision. He allowed irrelevant and erroneous considerations to influence his decision, or he failed to properly consider the material placed before him, particularly by the objectors to Equus' application.

58.7 Unjustifiable in relation to the reasons given for it by the MEC. It is not compatible with a rational evaluation of the evidence placed before the MEC. The reasons for the decision are also incomprehensible and not in accordance with the considerations that the MEC was required to consider in terms of section 2 of the Removal Act.

[59] The applicants submitted that the decision under scrutiny was clearly not in the interests of the landowners of Summerstrand or its

development. It only served the needs of Equus at the exclusion of others.

[60] The applicants in addition, contended that the MEC was *functus officio* when he made the decision, as far as clauses C(i)(a) and (d) are concerned. The MEC had given the go-ahead for the removal of the aforesaid clauses and his decision was set aside by a judge of this Court who substituted that decision with one refusing the removal.

Discussion

[61] In his categorization of title deed conditions as an amorphous group of regulations which are obsolete, the MEC committed a fundamental and reviewable error, by considering that they were supplanted by the Port Elizabeth Zoning Scheme which "adequately covers land use management". A zoning scheme as a matter of law does not override title deed restrictions[2].

[62] In *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration Western Cape, and Others* Griesel J had the following to say about branding title deed

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[2] *Malan and Another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 40 E-F where Joubert JA added: 'Moreover, a consent by a local authority in terms of a town planning scheme does not *per se* authorize the user of an erf contrary to its registered title deed conditions.

conditions as relics 'of the past' and abolishing them in favour of the applicable zoning scheme:

> 'However, this is not the philosophy of the [Removal] Act and it was inappropriate and irregular for the Minister to have allowed himself to be swayed by this consideration. In my view the Minsters' approach in this regard is fundamentally unsound[3]'.

[63] The MEC argued that the *Camps Bay Ratepayers* case is distinguishable from the present matter. I disagree. It was also argued that the title deed conditions relied upon were 'at odds' with the zoning scheme in that case.

[64] In the *Camps Bay* matter the Minister also relied on reports denouncing title deed conditions, which informed his reasoning as in the present case. The remarks of Griesel J therefore find equal application here. The learned judge reasoned that if it were in the interest of the public or the interest of all properties to be subject to zoning restrictions, the legislature would have abolished all restrictive conditions by Statute. Instead, it has laid down a procedure, in the Removal Act, whereby such conditions can be removed if it were in the public interest to do so[4].

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[3] 2001 (4) SA 294 (C) at 324 E-G.
[4] *Camps Bay Ratepayers and Resident's Association and Others v Minister Planning, Culture and Administration, Western Cape, and Others* at 324 E.

[65] Froneman J, in his judgment of 29 March 2008 specifically referred to section 1.6.5 of the Port Elizabeth Town Planning Scheme (i.e. the applicable zoning scheme regulations) which states:

> "Nothing in these regulations shall be construed as permitting any person to anything which is in conflict with the conditions registered against the title deed of land".

[66] It appears that the MEC either ignored the aforesaid provisions of the zoning scheme protecting title deed conditions and the judgment of Froneman J. Section 6(2)(d) of PAJA entitles a Court to review administrative action if it was materially influenced by an error of law. Where the error is deliberately made, a Court is all the more entitled to interfere with that decision.

[67] It was argued on behalf of the MEC that the MEC did not simply adopt the approach that the zoning scheme trumped the restrictive conditions of title, but considered whether in the interests of residents including the applicants, were adequately protected. In this regard the MEC considered that the zoning scheme regulations are adequately and appropriately catered for town planning, land use management and in the interest of the public and pertaining to an area which has changed much over the last eighty years. Much was made of the fact that the restrictive conditions were first introduced in the 1930's.

[68] Counsel for the MEC relied on the decision in *Hira and Another v Booysen*[5] insofar as it was held therein that if a tribunal incorrectly interprets a statutory criterion whether or not the decision taken will be rendered invalid, depends upon its materiality and as a consequence, if the facts found by the tribunal are such as to justify its decision, even on the correct interpretation, then, (in the absence of another ground of review) there would be no basis for interference. The adequacy of the zoning scheme is, it was submitted, only one of the grounds upon which the MEC relied in reaching his decision.

[69] The applicants' counsel also relied on the judgment in *Hira*[6], where it was held that if the tribunal applied the correct criterion, but there are no facts upon which the decision can be reasonably justified the decision can be set aside on review.

[70] In my view, it was incumbent upon the MEC to recognize that restrictive conditions and zoning scheme regulations serve different purposes. The first is aimed at the preservation of specific ownership rights, and the second is the general regulation of general town planning standards.

[71] What seems to have been disregarded in this matter, or lost sight of, is the fact that Equus' applications (all four of them) were brought

[5] 1992 (4) SA 69 (A) at 93 G-H.
[6] At 93 - G

under the Removal Act and the MEC was required to make his decision in terms of section 2(1)(a) of the Removal Act. The MEC had to be satisfied that it was "desirable" to remove the conditions in question (1) in the interest of the establishment or development of any township; (2) the interest of any area; or (3) in the public interest.

[72] In the *Camps Bay Ratepayers* case Griesel J had the following to say on what is intended in the aforesaid section:

> Unless the Minister is as a fact satisfied as to the presence of one or more of these circumstances, a jurisdictional fact for the exercise of his power to remove conditions is absent. And if he is subjectively satisfied, this view is one which is susceptible to review if his conclusion was, objectively speaking, unreasonable . . 1. The personal interest of the applicant for removal is irrelevant. The interest which must be served by the removal are the broader interests of the township, area or public. 2. The fact that the removal may not be undesirable does not in logic mean that such a removal is as a fact desirable. The test laid down by section 2(1) is a positive one, not a negative one. In other words, the test is the presence of a positive advantage which will be served by granting the application not the absence of a negative advantage".[7]

[73] The zoning scheme regulations do not adequately cover the preservation of essential characteristics of Summerstrand Extention 1. Even though there are several guesthouses in the area, the township retained its residential character irrespective of the assertions to the

[7] At 321 B-E. See also: *Walele v City of Cape Town and Others* 2008 (6) SA 129 CC para 60 note 73, where the approach as set out in this paragraph of Griesel J was followed.

contrary. It does not have a tourist or entertainment zone character such as the areas where the hotels, casino and restaurants are situated. The zoning scheme regulations on the other hand, are applicable to a much larger portion of the Nelson Mandela Bay area. These regulations are uniformly applied except insofar as they conflict with title deed conditions.

[74] The applicants also make the important point that with regard to zoning scheme restrictions, the owners in the area or township are at the mercy of special consents which the municipality may or may not grant, whereas if they themselves wished to enforce the title deed restrictions, there can be no derogation from the conditions.

[75] The purpose of the insertion of the restrictive conditions into the title deed, was never considered by the MEC. It could be for no other reason than to preserve the amenities of the erven in Summerstrand Extention 1 as low-density, single residential properties with sea views and to maintain their single residential sea-side suburbs character of the area.

[76] There is no indication that the MEC ever knew the true nature of the use of the property. The spatial planning manager for instance accepted that Equus was running a lawful guesthouse with the approval of the municipality. This is apparent from his memorandum dated 31 March 2010. This contradicts the earlier findings of Froneman J in his judgment

of 29 March 2009 wherein it was held that the continued construction of the guesthouse would be unlawful.

[77] The MEC's initial reasons furnished are, as can be seen from the factual background set out above, copied from the reasons of the Planning Advisory Board, who in turn relied on the spatial planning manager's memorandum, which he praised. The aims put forward in the spatial planning manager's memorandum may be laudable, as they are clearly aimed at socio-economic development in the broad sense. However, the legislation relied on therein, is not applicable to the situation under consideration. Equus can hardly be viewed as a candidate for receipt of the intended benefits of a socio-economic nature. It has put forward nothing in its application to the MEC that has anything remotely to do with the aims of socio-economic development. The MEC's decision promotes the financial interests of an individual applicant (Equus) who has not demonstrated that it would further any of the socio-economic aims set out in the legislation relied upon, and that is simply irrational.

[78] The spatial planning manager in effect pronounced that upmarket areas such as the one under consideration have no right to exist. This view is misguided while property may still be privately owned, which right is protected by the Constitution.

[79] The MEC stated in his answering affidavit that Equus' guesthouse "will create job opportunities and will generate revenue for the Eastern Cape Province". Equus never mentioned these considerations in its "Reasons" for bringing the application for the removal of the restrictive conditions, neither were they part of the MEC's initial reasons given for his decision. This is an afterthought even if it was given at the appropriate time as an actual reason for the decision. Insofar as it echoes the reasoning of the spatial planning manager, it is not a basis for infringing upon the preservation of rights of the erven in the area under consideration.

[80] It was submitted on behalf of the MEC that he considered that "public interest" should include socio-economic factors and so took into account the revenue and job creation potential of Equus' guesthouse activities. The latter consideration was mentioned several times in the MEC's submissions. He also considered that the character of the area has changed and is no longer a low-density area, and also that identical restrictive conditions have been removed from the title deeds of other properties. In addition to these circumstances the MEC maintains that he remains of the view that the relevant Zoning Scheme provisions can adequately protect the character of the area.

[81] Thus, it was argued, the MEC exercised his discretion in a judicial manner and fully considered the merits of Equus' application. As a

consequence, it was submitted that the MEC's decision was not an arbitrary deprivation of property either. The MEC urged that his decision must be regarded in the light of his reasons as a whole.

[82] The fact that Equus did not in its application, allude to the job creation potential of its guesthouse, was a clear indication that he brought an independant mind to bear on Equus' application, the MEC argued. This would only be a proper inference if the MEC had sufficient independant information in this regard. There is no suggestion that he did. His views in relation to job creation are based on the spatial planning manager's memorandum and the spatial planning manager clearly did not apply his mind to this particular guesthouse, its size and the history preceding its existence, but dealt with the desirability of guesthouses in general and before the advent of the Soccer World Cup.

[83] Another error of law made by the MEC (probably also in reliance on the legal opinion of the spatial planning manager), was with regard to the meaning and effect of restrictive title deed conditions. According to the MEC, the restrictive title deed conditions are personal servitudes in favour of the municipality (the servitude holder). The erf owners merely own servient tenements and there are no praedial servitudes between the relevant erven *inter se* in the townships. The law as it presently stands does not support the reasoning of the spatial planning manager as adopted by the MEC.

[84] In his judgment of 29 March 2008 (under case number 1440/07), Froneman J held the following in paragraph 21:

> "The title deed conditions are registered not only against the neighbouring property title, but also against the title deeds of a number of properties in the Summerstrand area. There is no dispute between the parties about their legal nature. They are praedial servitudes that enure for the benefit of all other erven in the designated area. Each erf is simultaneously both a servient tenement and a dominant tenement. It is servient in the sense of being encumbered by the title deed condition in favour of all the other similar erven, and dominant in the sense of being favoured by the title deed condition in respect of the other similar erven[8]."

[85] The aforesaid view as to the nature of restrictive conditions was also confirmed by the Supreme of Appeal in the *Naidoo* matter[9]. The MEC's view to the contrary, as expressed in his answering affidavit, is a reviewable error of law. The question of praedial servitudes leads to another of the applicants' grounds for review.

[86] Section 25(1) of the Constitution provides:

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

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[8] See also: *Van Rensburg and Another NNO v Naidoo and Others NNO*; *Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA) at para 31.

[9] At paragraph 36 and also by Froneman J as stated before in *van Rensburg and Anotehr NNO v Nelson Mandela Metropolitan Municipality and Others* 2008 (2) SA 8 (SE), para 8. See also: *Ex parte Rovian Trust (Pty) Ltd* 1983 (3) SA 209 D and *Malan and Another v Ardconnel* (*supra*) at 40 B-I.

[87] The meaning of 'arbitrary' deprivation of property was determined by the Constitutional Court and held to be when there is insufficient reason for the deprivation or it is procedurally unfair.[10] In *Ex Parte Optimal Property Solutions CC*[11] it was held that 'property' as meant in section 25(1) of the constitution includes any right to, or in property, including registered praedial servitudal rights. The total removal of such rights for insufficient reason is therefore equal to the arbitrary removal of such rights. Counsel for the applicants, is with respect, correct in submitting that the MEC's decision resulted in a total deprivation of property and "*the extinction of the registered praedial servitudal rights, of the dominant tenements".*

[88] The reasons given by the MEC for the removal of the conditions in question are hardly sufficient in my view, as illustrated above, and therefore their removal constitutes an arbitrary deprivation of the registered praedial servitudal (property) rights of the dominant tenements.

[89] The MEC's decision therefore also falls foul of section 6(2)(h) of PAJA, which provides that if administrative action is so unreasonable that

[10] *First* National Bank of South Africa t/a Wesbank v Commissioner South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 708 (CC) at para 100.
[11] 2003 (2) SA 136 (C) at para 19.

no reasonable person could have so exercised the power, or performed the function in question, a Court may set it aside.

[90] The decision of the MEC constituted administrative action. The right to fair administrative action is protected by the Constitution (section 33(1) and (2) of the Bill of Rights and also item 23(6) in Schedule 6 to the Constitution). Administrative Action must be procedurally fair, lawful, reasonable and justifiable in relation to the reasons given for it. The Courts have a duty to determine whether the outcome was rationally justifiable. In *Carephone (Pty) Ltd v Marcus NO and Others*[12] it was held that the aforesaid provisions "introduced a requirement of rationality on the *merits or outcome* of the administrative decision, which goes beyond procedural impropriety, or irrationality only as evidence of procedural impropriety".

[91] Decision makers must also apply their minds to all the relevant and material information placed before them, evaluate it properly and accord it such weight as the degree of its importance requires[13]. In terms of section 6(2)(e)(iii) of PAJA a court has the power to review administrative action taken where relevant considerations were not considered and irrelevant ones taken into account.

[92] The MEC made assertions which are factually incorrect or unsupported by any evidence, such as that judicial notice could be taken

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[12] 1999 (3) SA 304 (LAC) at paragraphs 31.
[13] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amicii curial*) 2006 (2) SA 311 (CC).

"*that the Summerstrand Area has since become studded with businesses, hotels, guesthouses, and blocks of flats, the Boardwalk Casino, restaurants and shopping centres. In fact, opposite and just across from the Applicant's house is the Marine Hotel".* Reference is also made to the Raddison Blu Hotel which was recently built. The facts were used in support of the MEC's denial that Summerstand Extention 1 is a low-density area.

[93] The erven in the area under consideration are single residential properties in a low density area with a residential character. It is of no assistance to the first two respondents to rely on the fact that neighbouring areas have hotels and casino's. The Raddison Blu Hotel falls outside the area under consideration and the other hotel mentioned has been there for a very long time. These neighbouring areas have no title deed restrictions and are tourism and entertainment orientated. Mr Ellis should rather have chosen a property for Equus to operate a large guesthouse in one of those areas.

[94] Guesthouses in the area generally, have maintained their residential character and are not remotely run as businesses of the magnitude contemplated by Equus, as the trust pointed out in its letter of objection to Equus application.

[95] The MEC ought to have considered the ninety-four objections to Equus' application more closely, or at least some of them. The point was made that there were only six objectors which was apparently viewed as, an insignificant number. If regard is had to the fact that Equus was permitted to bring four applications for the removal of the restrictive title deed conditions, and that there were many objections from the start, that statement is factually incorrect. In total, there were 94 objections since Equus commenced its applications for removal of title deed conditions. These objections formed part of the record and many legitimate concerns were raised therein. The objections were substantial and many sound reasons why the application ought not to have been granted, were advanced in them. Very important aspects were put forward for consideration in them. Their contents put paid to Equus' assertion that there was overwhelming support for the removal of the restrictions. It appears that the applicants justifiably complained that these objections were "simply brushed aside". There was also no basis to accept that there was 'overwhelming support' for Equus' application. The contrary seemed to be true.

[96] Equus maintained that no landowners in the area are, as of right, entitled to a sea view. However, the preservation of a sea view of the erven between Seventh and Fourth Avenues must be one of the purposes of the condition that maintains the street frontage building line at 30 Cape Feet. This condition clearly maintains wide avenues which gives the area

expansive unhindered views of the sea. The reasoning of Equus and the MEC, taken to its logical conclusion, envisages that only the landowners who have the largest and highest dwellings will have a sea view. The photographs of the house built by Equus reveals a disproportionately large structure, covering almost the entire area on which it is built which will ensure it a seaview. This seems to be a form of urban bullying, in my view. The MEC's officials or the MEC himself ought to have read, and not ignored the judgments handed down in this ongoing dispute. In paragraph [26] of the judgment of Froneman J in case number 1440/07 (of 29 March 2008), the learned judge summed up the position as follows:

> "Counsel for the municipality argued that it would be unreasonable for the municipality to have to ascertain in each case whether a proposed building is intended for use by a single family or not . . . a little bit of common sense would also help. In the present matter the municipality knew that the neighbour [Equus] first sought to have plans for two buildings approved, then adapted those plans to conform technically with zoning regulation use. The municipality knew that, less than a week before approval of the amended plans, the neighbour also applied for the eleven bedroom new building to be used as a guesthouse. The neighbour has also alleged that it has applied for the restrictive title deed condition to be removed in terms of the Removal of Restrictions Act. Not much imagination is needed to deduce what the primary intended use of the house is, nor does the extent of the building – eleven rooms – immediately suggest use by only one single family".

[97] By not considering relevant considerations and by taking into consideration irrelevant considerations, the MEC's decision is clearly open to judicial review.

[98] Another important factor in this case is that the municipality was initially reluctant to recommend the removal of condition C(i)(c) (that no more than half of this erf be built upon). This is very significant. Instead of brushing this consideration aside, the MEC or its officials should have paid closer attention to the reason for this condition. If every landowner in the area were permitted to build on virtually the whole of its (or his or her) walled-in erf, as Equus has done, the consequences could be disastrous. For example, the ever-increasing floods in Port Elizabeth serves as a reminder of the serious drainage problems in built-up areas. A substantial increase in buildings and dwellings on each property would present a greater demand for municipal water and electricity and the existing resources and systems for the area might not be able to sustain a continuous increase in supply.

[99] Equus' excuse for building in contravention of the restrictive conditions, is that Mr Ellis did not know about the restrictive conditions at first. Also, Equus withdrew its first, second and third applications, to deal with all four conditions in one application. None of the aforesaid considerations are excuses for what is the present, *de facto* situation. Equus has built the biggest structure it possibly could on its property to

operate the largest guesthouse in the area, and it is all completely unlawful. The MEC should have stood critical to the aforesaid situation but instead espoused the cause of Equus to a disquieting degree.

[100] In my view, the MEC did not properly apply his mind to the issues before him and reached a conclusion which is not rationally connected to the facts before him. The MEC also did not apply the correct legal principles pronounced upon in judgments which have a direct bearing on the decision he was called upon to make. In doing so he made errors in law, which rendered his decision reviewable and it falls to be set aside. Clearly, this is a matter where justice demands that the MEC's decision must be substituted with one refusing Equus' application.

<u>Was the *functus officio* when taking his decision?</u>

[101] The applicants contended that when the MEC exercised his powers in terms of section 2 and 3 of the Removal Act, he was *functus officio* in respect of conditions C(i)(a) and (d) by virtue of the order of Jansen J on 13 November 2008. Equus disputed this assertion on the basis that Jansen J never dealt with the merits of the application.

[102] Counsel for the applicants firstly relied on section 10(1) of the Interpretation Act 33 of 1957 which provides that "[*w*]*hen a law confers a power or a duty then, unless the contrary intention appears, the power*

may be exercised and the duty shall be performed from time to time as the occasion requires". One of the limitations to the administrative power of a public official to rescind or vary their decisions or part of them, is when they are *functus officio.* It means that once a public official exercising a discretionary power has taken a decision affecting the rights and interests of individuals, he may not reverse or alter his decision except in exceptional circumstances. The principle is firmly entrenched in our law.[14] Where the rights and interests of other parties are at stake, as opposed to where only one person's interests are affected, the public authority is regarded a *functus officio* after making a decision unfavourable to the party seeking him to revisit it.[15] The author Baxter[16] also makes the point that there is little case law on the subject, but what there is, favour the *functus officio* principle.

[103] The MEC argued that the municipality erred in publishing the incorrect address for erf 102 in the advertisement of Equus' application and therefore the MEC's decision was set aside on the basis of a procedural flaw, and not its merits. It was submitted that when the application was properly advertised and no longer subject to the same procedural flaw that bedevilled Equus' first application. The circumstances had therefore sufficiently changed to justify a

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[14] See, *inter alia, Mining Commissioner v Getz* 1915 TPD 323; *de Freitas v Somerset Mining Policy* 1997 (3) SA 1080 (C) at 1082 H-I; *Financial Services Board and Another v Schalk Willem de Wet No and Others* 2002 (3) SA 525 (C) at 581 D-E.

[15] *Bronthorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd and Another* 1950 (3) SA 598 (T) at 601 F-H.

[16] Administrative Law (1984) at 373.

reconsideration of the matter and the principle of *functus officio* finds no application.

[104] The *functus officio* principle usually arises where the decision of the administrator sought to be revisited has been an unfavourable one. The MEC never displayed any intention of making any decision adverse to Equus. The facts in this matter have clearly demonstrated that much. A Court has however substituted the MEC's decision with one unfavourable to Equus. Jansen J did not simply issue the order in question because some of the respondents were in default. Before him was a review application and he was obliged to grant proper (just and equitable) relief as required by section 8 of PAJA. In exercising that power, Jansen J substituted the MEC's decision for one which refused Equus' application. Equus' fourth application was brought only one month after the Order of Jansen J on 13 November 2008. No changed circumstances were alleged to have occurred in this period which could justify revisiting an unfavourable decision.

[105] The aforesaid order of Jansen J was never challenged and remains extant and final. This is all the more reason why the MEC was not entitled to revisit the application for removal in respect of conditions C(i)(a) and (d). Regrettably this is not the first example of the MEC disregarding Court orders and its support of Equus' unlawful course of conduct embarked on since 2006.

[106] It was submitted on behalf of the MEC, that the ability of an administrator to revisit a previous decision is to be exercised when it is in the public interest. In my view, this principle is not applicable to the present matter where Equus' application is not for the benefit of the public interest, but for its own benefit. Not even Equus advanced this argument in support of its fourth application to the MEC. According to Equus, it had previously applied for the removal of two of the restrictive conditions, C(i)(b) and C(i)(c), but withdrew its application in order to apply in one application for removal of all the restrictions. In support of this fourth application to the provincial government for removal of the restrictive conditions in the title deed, Equus advanced several 'reasons' or submissions which require mentioning.

[107] Section 165(4) and (5) of the Constitution obliges the MEC to respect and accept orders of this Court. By granting Equus' application despite the court order in question, the MEC has in effect ignored the Court's order, as he has also ignored the rights created by the restrictive conditions of title by consenting to their removal as a matter of course, whenever zoning scheme regulations are applicable.

The Counter-Application by Equus and the Contempt Application

[108] The municipality, or third respondent brought an application for an order to be made, in the event that an order is granted directing the third respondent to demolish the buildings referred to in paragraph 2.1 of Froneman J's order of 20 October 2009 under case number 2007. The order sought is to the effect that Equus Training and Consulting CC and Mr Ellis, respectively the first and second respondents in the counter-application under case number 3498/2010, should be ordered to pay the costs of demolition, in the event that the third respondent is ordered to demolish the same, jointly and severally the one paying the other to be absolved. An order to the effect that the first and second respondents pay the costs of the counter-application is also sought.

[109] The applicants in the review application (Case No. 3399/2010) applied that the application be set aside as an irregular step in terms of the Uniform Rule 30, since the municipality is not an applicant in the matter. I am disinclined make the order sought by the municipality, as it is inappropriate in these proceedings (which the third respondent did not oppose), to order Equus and Mr Ellis to pay the municipality's demolition costs. That is a matter to be decided in different proceedings. I might just mention that if the municipality's officials had applied their minds to this matter and ensured that the applicable court orders were obeyed, the present situation could have been averted. The third respondent's application is therefore set aside as irregular and it is ordered to pay the

applicants costs of the application, which does not include the costs of two counsel.

[110] The applicants sought further orders to give effect to the demolition orders of Froneman J. At the hearing of this review application Equus brought a counter-application in terms of Uniform Rule 45A for an order suspending the execution of the demolition orders, pending the outcome of the present review application, as well as an application dated 1 February 2010, to the provincial government (the MEC) by the municipality in terms of the Removal Act, for a general removal of the restrictive conditions in the title deed applicable to properties in the Summerstand area.

[111] Because of their non-compliance with the abovementioned two demolition orders of Froneman J, Mr Ellis (the representative of Equus) has been cited in contempt proceedings as Equus' representative and in his own right (as an accessory to the contempt of court by Equus) in terms of section 332(2) of the Criminal Procedure Act 51 of 1977 under case number 3498/2010.

[112] On 16 July 2010, Equus re-submitted a building plan to the municipality for re-consideration under the National Building Regulations and Building Standards Act 103 of 1977 for a building on the property. The applicants maintain that this act by Equus is conclusive proof thereof

that Mr Ellis and Equus have no intention of complying with the demolition orders, but submitted that the question of wilfulness should be referred to oral evidence with a directive that Mr Ellis must testify and be cross-examined. Draft orders which incorporated such orders were handed in at the conclusion of argument on the review application.

[113] The applicants contend that the municipality is also in contempt of the demolition order pertaining to it, despite its notice of intention to abide the order.

[114] Equus and Mr Ellis oppose the application to have them placed in contempt of court.

[115] Mr Ellis and Equus contend that they are not in contempt of the demolition orders because they acted on the legal advice from their lawyers to the effect that: (1) The MEC's decision (presently under review) to remove the restrictive title deed conditions meant that the *causa* for the demolition orders had fallen away; (2) The aforesaid decision made it possible to seek an order to suspend the execution of the demolition order pending finalisation of the review.

[116] An application was brought by Equus to that effect and was to be considered along with this application for review. By agreement the

contempt application is to be postponed and heard as soon after judgment in the present matter was handed down.

[117] In considering the application to suspend the demolition order, the following is significant: When the application for demolition was argued before Froneman J (the application which resulted in the demolition orders of 20 October 2009), Equus applied for a postponement pending the outcome of the fourth application. The application was dismissed and the following was said:

"The first respondent has consistently, over an extended period of time, sought to advance its own interest in operating a guesthouse without any proper regard to the fact that it was doing so unlawfully until it had successfully applied for the restrictive title conditions (*Enslin v Vereeniging Town Council* 1976(3) SA 443 (T)). In my judgment it would undermine the Court's role, as 'enforcer of the law' (see: *United Technical Equipment* above, at 347 G-H), if someone could use its extended unlawful course of conduct and the consequences thereof, such as the construction and cost of completed work, as a reason why the law should not take its ordinary course (cf. *Enslin*, above, at 452 H). This goes for the demolition part of the order as well, as I will presently indicate in relation to the other application".

[118] In the *Naidoo* matter Froneman J as the court *a quo*, also refused a postponement in similar circumstances. This is what the Supreme Court of Appeal had to say about the matter at paragraphs [46], [52], and [54] of that judgment:

"[46] It is not surprising that Froneman J was unwilling to grant the Shan Trust the postponement sought. He had rightly concluded in the main application, that the Shan Trust had lagged behind the law once too often, and that enough was enough! Thus, Froneman J's, orders were intended to have immediate effect. The 60-day period within which the demolition order was to be effected was stipulated for practical purposes, namely to enable the owners and demolishers to do the necessary within a time frame. There can be no doubt that he intended that immediate steps be taken to ensure execution of the relevant orders.

[52] A court will grant a stay of execution in terms of Uniform Rule 45A where the underlying *causa* of a judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action.

[54] There certainly was no case to be made at any stage for a rescission of any part of Froneman J's judgment. The learned judge had correctly concluded that, insofar as the offending structures were concerned, and having regard to the unlawful conduct of the Shan Trust over the years, the time for finality had come. The principle of legality, a cornerstone of the Constitution, applies to government and governed alike. Repeat transgressors such as the Shan Trust are undeserving of the protection afforded by Van der Byl AJ. Froneman J intended finality. The effect of Van der Byl AJ's judgment is recrudescence. (emphasis added)

[119] The Supreme Court of appeal dismissed Equus' application for leave to appeal against the demolition orders handed down by Froneman J.

[120] In *Kotze v Kotze*[17] Herbstein J held:

> "The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands".

[121] The aforesaid approach was adopted by Streicher JA in *Clipsal Australia v GAP Distributors*[18] where the learned judge of appeal also referred with approval to *Culverwell v Beira*[19], where Goldstein J said that chaos would result if people were allowed to defy court orders with impunity. See also: *Bezuidenhout v Patensie Sitrus Beherend Bpk*[20]*.*

[122] Equus has manifestly adopted the stance that court orders are not binding on it and it will continue to do as it deems fit. Regrettably this brazen attitude apparently enjoys the support of government officials at various levels.

[123] Given Equus' course of conduct thus far, there are no circumstances which could possibly persuade me that real and substantial justice compels me to order the suspension of the orders granted by Froneman J. On the contrary, I consider it appropriate to make orders in this matter to ensure compliance with the aforesaid demolition orders.

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[17] 1953 (2) SA 184 (C) at 187 F-G.
[18] 2010 (2) 289 (SCA) at 298 G-H – 299A-B.
[19] 1992 (4) SA 490 (W) at 494 A-E.
[20] 2001 (2) SA 224 E at 228F – 23A.

[124] I further make the following orders in this matter:

[125] Review Application (Case No. 3399/2010)

(1) The decision of the first respondent dated 21 May 2010 and published in Notice 185, Government Gazette No 2372, is hereby set aside and substituted with the following:

"The Application for the removal of the four restrictive conditions (Clauses C (i), (ii), (iii) and (iv)) contained in Deed of Transfer No. T 81901/2006 is hereby refused".

(2) The first and second respondents are ordered to pay the applicants' costs of this application (including the costs of two counsel) jointly and severally, the one paying the other to be absolved.

[126] Counter–Application by the first and second respondents (Case No. 3498/2010)

1. The First and Second Respondents' counter-application delivered on 18 January 2011 is dismissed.
2. The First and Second Respondents, jointly and severally the one paying the other to be absolved, shall pay the Applicant's costs in

the aforesaid counter-application, including the costs of two counsel.

3. The First and Second Respondents shall comply with paragraph 1.2 of this Court's order of 20 October 2009 in case number 3649/2006 and paragraph 2.1 of this Court's order of 20 October 2009 in case number 1440/2007 by demolishing the structures and buildings referred to therein within a period of two months from the operative date of this order, which shall be either the date of the present order, or in the event of any applications for leave to appeal, from the date of the dismissal of the last of such applications or the dismissal of the last of any ensuing appeals as the case may be. For the avoidance of doubt, it is stated that the structures and buildings referred to in paragraph 2.1 of this Court's order of 20 October 2009 in case number 1440/2007 are all of the structures and buildings upon Erf 102 Summerstrand.
4. Should the First and Second Respondents fail or refuse to comply fully and timeously with paragraph 2.1 of this Court's order of 20 October 2009 in case number 1440/2007 by demolishing the structures and buildings referred to therein within a period of two months from the operative date of this order, the Third Respondent shall comply with such order by demolishing the buildings referred to therein within a period of nine months from the operative date of this order.

5. Should none of the Respondents comply or comply fully with paragraph 1.2 of this Court's order of 20 October 2009 in case number 3649/2006 and paragraph 2.1 of this Court's order of 20 October 2009 in case number 1440/2007 by demolishing the structures and buildings referred to therein within the period of nine months from the operative date of this order:

   5.1 the deputy sheriff, assisted by such contractors and other persons as are necessary for the task, shall be authorised to demolish the said structures and buildings forthwith;

   5.2 the Respondents shall be liable for the costs attendant upon the demolition by the deputy sheriff, jointly and severally, the one paying the others to be absolved.

6 Should the First and Second Respondents not comply or comply fully with the order in paragraph 3 above by demolishing the structures and buildings referred to therein within the period of two months from the operative date of this order, the Applicants may apply on the same papers, duly supplemented, for orders declaring the said Respondents to be in contempt of such order, imposing on them such punishment as this Court deems fair and appropriate, directing them to pay the costs of that application on the attorney and client scale including the costs of two counsel where employed, jointly and severally the one paying the others to be absolved, and granting the Applicants such further and/or alternative relief as this Court may deem fit.

7 Should the Third Respondent not comply or comply fully with the order in paragraph 4 above by demolishing the structures and buildings referred to therein within the period on nine months from the operative date of this order, the Applicants may apply on the same papers, duly supplemented, for orders declaring the said Respondent to be in contempt of such order, imposing on it such punishment as this Court deems fair and appropriate, directing it to pay the costs of that application on the attorney and client scale including the costs of two counsel where employed, and granting the Applicants such further and/or alternative relief as this Court may deem fit.

[127] Contempt Application (Case No. 3498/2010)

1. The proceedings in the present matter are postponed to a date to be arranged with the Registrar of this Court for the hearing if *viva voce* evidence.
2. The issue to be resolved at such hearing is whether or not the First and Second Respondent's non-compliance with paragraph 1.2 of this Court's order of 20 October 2009 in case number 3649/2007 and paragraph 2.1 of this Court's order of 20 October 2009 in case number 1440/2007 was wilful and *mala fide.*

3. The evidence to be adduced at the aforesaid hearing shall be that of any witnesses whom the parties or either of them may elect to call, subject however to what is provided below:
   - 3.1 save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless:
     - 3.1.1 he or she has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or
     - 3.1.2 The Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence;
   - 3.2 any party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not;
   - 3.3 the fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned;
4. Within two months of the making of this order, each of the parties shall make discovery on oath, of all documents relating to the issues referred to above, which documents are, or have at any time been, in possession or under control of such party.

5. Subject to paragraph 6 below such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.
6. In the case of the First and Second respondents such discovery shall include an obligation to produce for inspection and copying by the Applicants any written advice, memoranda and notes of the advice referred to in paragraph 9 of the Second Respondent's supplementary answering affidavit of 21 November 2011 and in paragraphs 12.3 to 12.4 and 22.5 to 22.8 of the Second Respondent's main answering affidavit of 18 January 2011, it being recorded that the Applicants have undertaken not to disclose the contents of any of such written advice, memoranda or notes to any Judge seized with the Applicant's application for judicial review in case number 3399/10 or any Judges or Court seized with any application for leave to appeal or any appeal in relation to that matter.
7. All questions of costs shall stand over for later determination.

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E REVELAS
Judge of the High Court

Counsel for the Applicants':	Adv Rogers & Adv Euijen
Instructed by:	De Villiers and Partners
Counsel for the 1st Respondent:	Adv Buchanan & Adv Gqanana
Instructed by:	State Attorneys Port Elizabeth
Counsel for the 2nd Respondent:	Adv Ford & Adv Beard
Instructed by:	Pagdens Aottorneys
Date Heard:	20 April 2012
Date Delivered:	23 November 2012