IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2500/2015

In the matter of
EX PARTE MARK GREGORY WHITFIELD

CASE NO: 2373/2016

In the matter of
EX PARTE IDRIS DALA

CASE NO: 3406/2016

In the matter of
EX PARTE MARK CHRISTOPHER WRIGHT

CASE NO: 3654/2016

In the matter of
EX PARTE LIBELE HOLDINGS TRUST

CASE NO: 3782/2016

In the matter of
EX PARTE TANIA SCHAËFER

CASE NO: 4044/2016

In the matter of
EX PARTE ANDREW ERROL ROSS

CASE NO: 4082/2016

In the matter of
EX PARTE PIERRE BOUWER KITCHING N.O. AND OTHERS
In re the Removal of Restrictive Conditions of Title

Date heard: 3 February 2017
Date delivered: 28 March 2017
REPORTABLE

JUDGMENT

GOOSEN, J.

1. This judgment deals with seven similar applications in which the applicants seek orders removing or amending certain restrictive conditions of title incorporated in the title deeds of their respective properties. In recent years a large number of cases of a similar nature have served before courts in this division. More recently, when the matters which are the subject of this judgment came before the court sitting at Port Elizabeth, Eksteen J, who was called upon to decide one of the matters was constrained to raise questions regarding the exercise of the court's jurisdiction in relation to the removal of a restrictive condition of title in the light of the provisions of the Spatial Planning and Land Use Management Act, Act 16 of 2013 which came into effect on 1 July 2015. When that case came to be argued several other matters, of a similar nature, had been enrolled for hearing. As a result Plasket J and Roberson J referred each of the matters to a full court of this division in order

that the issue of jurisdiction be determined.[1] The cases were enrolled for hearing on 3 February 2017.

2. At the hearing of the matter it was established that publication of the order referring the matters to this court had not been carried into effect by the office of the Registrar. Notwithstanding this the court considered that, in the circumstances, it was not debarred from adjudicating the issues raised and accordingly proceeded to hear submissions on behalf of the applicants. Ms *Bands* appeared on behalf of five of the applicants and Ms *Potgieter* appeared on behalf of one of the applicants. A further applicant abided the decision and did not appoint counsel to appear. Each application is to be determined on its own merits. We have however prepared a single judgment addressing the essential legal question relating to jurisdiction but will deal with each of the applications under separate headings hereunder.

3. We begin with a consideration of the ambit of this court's jurisdiction to remove or vary a restrictive condition of title as it has been articulated in a long line of cases prior to the commencement of the new legislation. Thereafter we consider whether the provisions of the Spatial Planning and Land Use Management Act, Act 16 of

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[1] Plasket J and Roberson J issued an order requiring that the Registrar cause service of the court order referring the matter to a full court for determination of the identified issues to be effected on the Nelson Mandela Metropolitan Municipality, the local Attorneys Association and the Society of Advocates and that the order be published in newspapers circulating in the area of jurisdiction of the court.

2013[2] (hereinafter to be referred to "the Spatial Planning Act") have in any manner altered either the ambit of the court's authority, or defined the circumstances in which it may be exercised. We will then turn to the particular matters before us.

4. It has long been settled that the High Court has no inherent jurisdiction to remove, vary or suspend a restrictive condition of title to land. The rationale lies in the nature of a restrictive condition which, in its essence, is a form of contractual stipulation in terms of which a transferor of land regulates the exercise of the transferee's dominium over the property. The condition of transfer of the land to the successor in title is endorsed upon the title deeds and, by reason thereof, restricts the use to which the property may be put by succeeding successors in title. Such conditions may also confer rights upon the holders of title to other properties by defining the relationship between portions of land or by conferring upon such other lot holders a right to enforce the restrictive condition applicable to the property in question. In this respect such conditions are in the nature of servitudes. Given the nature of these conditions of title and the rights that are thereby conferred they cannot be removed, varied or suspended except with the consent of all of the parties whose rights and interests are regulated thereby.

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[2] The commencement date is 1 July 2015 (*Proclamation No. 26, Gazette No. 38828* dated 27 May 2015).

5. In *Ex parte Gold*[3] Ramsbottom, J expressed this principle in the following terms:

> A vendor and a purchaser may, in their contract of sale, agree that the user of the land sold is to be subject to a restrictive condition. The restriction can be registered against the title of the land affected and when registered it constitutes a servitude. If the agreement was one between the vendors and the purchaser only, and was not one which enures for the benefit of other land or other persons, the vendors alone can enforce it. If, in those circumstances, the person who is entitled to enforce the servitude and the person whose land is burdened agree that the servitude should be cancelled, the servitude is brought to an end. But since it has been registered in the Registrar of Deeds the intervention of the Court is required for authority to be given for the alteration of the register and the title deeds of the property burdened. That is the simplest case.
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> Servitudes of this kind can be created which enure for the benefit of other parties, as is explained in *Alexander v. Johns*, 1912 A.D. 431, *Dadoo Ltd. v. Krugersdorp Municipality*, 1920 A.D. 530 (see the judgment of Wessels, J. at p. 532, where the principle is very clearly stated), *Ex parte Johannesburg Diocesan Trustees*, 1936 T.P.D. 21, *Eiffel Mansions (Pty.) Ltd. v. Cohen*, 1945 W.L.D. 200, and numerous other cases. In such a case too, all the persons who are entitled to enforce the servitude may consent to its cancellation. If they do so, the Court may give effect to their consent by authorising the Registrar of Deeds to alter the register and the applicant's title deeds.

6. In the *Gold* matter the court was concerned with a condition imposed in terms of the Townships and Town Planning Ordinance[4] i.e., in the exercise of statutory powers in the public interest. The court held that even in such circumstances a court may grant a declarator authorising the Registrar of Deeds to remove, amend or vary the condition, provided that the administrative or statutory body which imposed the condition in the public interest consents thereto.[5]

[3] 1956 (2) SA 642 (T) at 646 C-G
[4] Ordinance 11 of 1931 (T)
[5] *Gold* at p. 649 D-E

7. In *Ex parte Rovian Trust (Pty) Ltd*[6] the court described the ambit of the authority exercised by a court in such matters as follows:

> The Supreme Court, unlike the Administrator, has no independent overriding power to delete or curtail a restrictive condition in a title deed on good cause shown. Rights, after all, are created when restrictive conditions of this kind are imposed and registered. These rights are both contractual and servitudal in character. The transferor of a property may agree with the transferee that the restrictive condition is to benefit him or his property alone. He alone may then enforce it. Or he may agree separately with the transferee of every lot that the restrictive condition will enure to the benefit of every other lot holder in the township concerned. Each such agreement is constructed as a contract in favour of third parties. The transferee, in terms of his own contract, is a debtor *vis à vis* the transferor and every other lot holder. By the same token, in respect of every other contract which the transferor enters into with every other lot-holder, he is considered to have accepted the benefit and is therefore a creditor. Every lot-holder thus becomes contractually obliged to observe but also entitled to enforce the restrictive conditions.
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> Upon registration these rights become real rights and their operation is extended to the successors of the original contracting parties, regardless of whether they were aware of the existence of these conditions or not. Every property is at once a servient and a dominant tenement. The third parties in whose favour the condition was originally imposed, or their successors in title, are qualified to enforce the terms of the servitude against the offending owner of the servient tenement. Outsiders may perhaps derive peripheral or incidental benefits from the operation of the servitude, but they alone are entitled to enforce it. They, *par excellence*, are also the "interested persons" who can object if the deletion of the restrictive condition is sought.
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> <u>The Court is not empowered to interfere with these rights by deleting the restrictive conditions of its own accord. The most the Court can do is to declare that these rights, for some extraneous reason, no longer exist. Any means by which rights are extinguished in law would qualify as a sufficient extraneous reason. The Court exercises no discretion, it functions solely as a body of enquiry.</u> One such extraneous reason may be that the right has been terminated by bilateral consent; another is that it has been waived unilaterally. But of course, only the holder of the right can agree to cancel or can waive it. If the right is enjoyed by more than one person, each holder must consent to its deletion before the Court can make a declaration to that effect.
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> (emphasis added)

8. In that matter the court went on to explain the procedure adopted in circumstances where practical considerations render it difficult to obtain the prior consent of all

[6] 1983 (3) SA 209 (D&CLD) at 212 E – 213 C

interested parties. In those circumstances the "expedient of constructive consent" is achieved by issuing a rule *nisi* and requiring publication of the proposed order, thereby creating a duty upon interested parties to speak. In these circumstances, silence may be regarded as being as good as consent.

9. With these principles in mind Leach J (as he then was) set out the practice as it applies in this division in *Ex parte Saiga Properties (Pty) Ltd*[7] as follows:

> The practice of issuing a rule *nisi* in a case such as this has developed as a result of the difficulty of identifying substantial numbers of interested parties, the probable impossibility of securing the express consent of all such parties and the high cost of serving the application on all of them, even if identified. This would particularly be the case where, for example, a property is situated in a township where there are numerous lot holders (which seems may well here be the case) – see, for example, *Ex parte Krynauw* 1948 (3) SA 622 (W) at 624 – 5, and *Ex parte Millsite Investment Co (Pty) Ltd* (*supra*). But that practice does not obviate the necessity for steps to be taken to obtain the consent of parties clearly interested and readily identifiable: for example, the owners of land immediately adjacent to the property in question, the local authority or the relevant township board. Nor does it do away with the necessity of giving such interested parties notice of the application so as to enable them to oppose the relief sought, if so inclined.
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> Furthermore, an applicant who seeks relief is not entitled merely to approach this Court and obtain a rule *nisi* as of right without setting out the relevant facts and explaining why it is impossible or impractical to obtain the consent of other interested parties. There is no reason why any person should expect the Court through its process to obtain the consent of other interested persons on his behalf when he could reasonably have obtained such consent. An applicant should, therefore, at the very least, put the Court into the picture as far as he can by providing details of where the property is situated, the size of the township, who the other interested parties may be, whether he has been able to identify such other parties, whether the attitude of such parties to the proposed deletion has been canvassed and, if so, their attitude to the proposed variation or deletion of conditions. The applicant should also outline as far as possible the history of the property, why the condition is now sought to be removed were initially registered against the title deeds, why such removal is desirable and why other interested parties are likely to consent thereto. After all, a rule *nisi* is not without consequences and, in a case such as this, should only be granted where, *prima facie*, final relief will probably be granted.

[7] 1997 (4) SA 716 (E) at 720 A–E

10. What these authorities demonstrate clearly, in my view, is that the jurisdiction of the court to authorise a deletion, variation or suspension of a restrictive condition arises from the fact that interested parties are vested with a common law right to waive, vary or abandon their rights coupled with the fact of the exercise of such right by the parties concerned. The court does no more than enquire into and establish that such common law right has been properly exercised by the parties who are entitled to exercise it. And, once it is satisfied in this regard, it issues a declarator which authorises the Registrar of Deeds to effect an appropriate endorsement of the title deeds in accordance with the provisions of the Deeds Registries Act.[8] The only authority which is entitled to endorse any alteration upon a registered deed is the Registrar whose authority is determined by the Deeds Registries Act.

11. The question which arises in relation to the present matter is whether the provisions of the Spatial Planning Act have in any manner limited the court's authority to give effect to the exercise by interested parties of their common law right to waive, or amend, or vary their rights. The answer to this question requires an outline of the background to and a brief exposition of the relevant provisions of the Spatial Planning Act.

[8] Act 47 of 1937

12. The enactment of the Spatial Planning Act marks a significant development in planning law in South Africa. Prior to its enactment, as the preamble records, land use management and spatial planning was characterised by a multiplicity of laws at different spheres of government originating from a pre-1994 spatial planning regime based on racial inequality and segregation. The consequence for planning law was fragmentation, duplication and unfair discrimination. Although previous legislative efforts, most notably in the form of the Development Facilitation Act[9] had sought to create a sustainable and constitutional framework for spatial planning and land use planning these did not achieve the alignment required between the different spheres of government and the integration of the multitude of land use planning laws which applied.

13. Following the Constitutional Court's confirmation of the order declaring chapters V and VI of the Development Facilitation Act invalid[10] , the legislature undertook the task of preparing what has now been enacted as the Spatial Planning Act. This Act takes the form of framework legislation which seeks to facilitate the establishment of what the preamble describes as

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[9] Act 67 of 1995

[10] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* 2010 (6) SA 182 (CC)

> "a uniform, recognisable and comprehensive system of spatial planning and land use management....throughout the Republic, to maintain economic unity, equal opportunity and equal access to government services"

and which

> "... promotes social and economic inclusion."

14. It sets out to define spatial planning functions at municipal, provincial and national levels and to provide for the exercise of such functions by the appropriate spheres of government as envisaged by the Constitution, thereby addressing the principal issue giving rise to the Constitutional Court's ruling in the *Johannesburg Metropolitan Municipality* matter.

15. The Spatial Planning Act introduces important innovations in relation to planning and land use management at municipal level. The key innovation involves the establishment of municipal planning tribunals. These tribunals, which can also be established as joint tribunals for more than one municipality, are to consist of municipal officials and independent experts. Elected councillors are specifically excluded.

16. The Act sets out the objects to be achieved in spatial planning and land use management[11] and provides a set of principles to guide the adjudication of land development applications.[12] "Land development" is defined by the Act to mean

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[11] Section 3

[12] Section 42

'the erection of buildings or structures on land, or the change of use of land, including township development, the subdivision or consolidation of land or any deviation from the land use or uses permitted in terms of an applicable land use scheme'. "Land use", in turn, is defined to mean 'the purpose for which land is or may be used lawfully in terms of a land use scheme, existing scheme or in terms of any other authorisation, permit or consent issued by a competent authority, and includes any conditions related to such land use purposes'. This latter phrase of the definition appears to include reference to registered conditions of title.

17. A further important change brought about by the Spatial Planning Act concerns the alignment of administrative decision-making in relation to the removal or variation of restrictive conditions of title with that in relation to spatial planning and land use management. Whereas prior to the Spatial Planning Act spatial planning and land use management at municipal level was separated from the decision making in relation to the removal of restrictive conditions, the Act now locates the decision-making in relation to restrictive conditions at the level of the municipal sphere. The obvious consequence of this is that decisions in relation to restrictive conditions of title are now to be taken by the same authority that is responsible for land use management at municipal level thereby ensuring that such decisions

accord with the broader objects of spatial planning and land use management as determined by a municipality in terms of the Spatial Planning Act.

18. Section 41 provides that:

> (1) The Municipal Planning Tribunal, upon application in the prescribed manner, may
>> (a) change the use, form or function of land; or
>> (b) remove, amend or suspend a restrictive condition.
>
> (2) An application contemplated in subsection (1) includes an application for –
>> (a) township establishment;
>> (b) the subdivision of land;
>> (c) the consolidation of different pieces of land;
>> (d) the amendment of a land use or town planning scheme, except any change affecting the scheme regulations in terms of section 25 (2) (a); or
>> (e) the removal, amendment or suspension of a restrictive condition.

19. Whether an application made to the Municipal Planning Tribunal for the removal, amendment or suspension of a restrictive condition of title is a "land development application" (assuming that any significance attaches to such designation) need not be decided. What is clear is that a Municipal Planning Tribunal may decide one or more applications in relation to land including an application for the removal, amendment or suspension of a restrictive condition of title.

20. Section 42 provides the framework for adjudication of applications made to a Municipal Planning Tribunal. Subsection (1) sets out the factors to be considered in the following terms:

> (1) In considering in deciding an application a Municipal Planning Tribunal must –
>> (a) be guided by the development principles set out in Chapter 2;

> (b) make a decision which is consistent with norms and standards, measures designed to protect and promote the sustainable use of agricultural land, national and provincial government policies and the municipal spatial development framework; and
> (c) take into account –
> (i) the public interest;
> (ii) the constitutional transformation imperatives and the related duties of the State;
> (iii) the facts and circumstances relevant to the application;
> (iv) the respective rights and obligations of all those affected;
> (v) the state and impact of engineering services, social infrastructure and open space requirements; and
> (vi) any factors that may be prescribed, including timeframes for making decisions.

21. The section further provides that an application may be approved in whole or in part, or be rejected. There is no requirement that parties whose rights are affected by the removal or variation of a restrictive condition of title must consent to such removal or variation.

22. What this suggests is that the basis upon which an application to remove a restrictive condition is to be decided is, in essence, the same as that which applies in relation to any other land development application. The Act however, deals further with restrictive conditions of title.

23. Section 45 (6) states that:

> Where a condition of title, a condition of establishment of a township or an existing scheme provides for a purpose with the consent or approval of the administrator, a Premier, the townships board, or any controlling authority, such consent may be granted by the municipality, and such a reference to the administrator, a Premier, the townships board or controlling authority is deemed to be a reference to the municipality.

24. Section 47 further provides that:

> (1) A restrictive condition may, with the approval of a Municipal Planning Tribunal and in the prescribed manner, be removed, amended or suspended.
> (2) a removal, amendment or suspension of a restrictive condition contemplated in subsection (1) must, in the absence of the contemplated written consent, be effected –
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> (a) in accordance with section 25 of the Constitution and this Act;
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> (b) with due regard to the respective rights of all those effect affected and to the public interest; and
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> (c) in the prescribed manner,
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> if such removal, amendment or suspension will deprive any person of property as contemplated in section 25 of the constitution.
> (3) A Municipal Planning Tribunal considering an application to remove, amend or suspend a restrictive condition is not liable to compensate any person for any loss arising from or related to a decision made in good faith and in terms of this Act to remove, amend or suspend a restrictive condition.
> (4) Notice of an application to remove, amend or suspend a restrictive condition, which operates for the benefit of the State must be in writing and given in the prescribed manner to the organ of state, which is responsible for the administration of the law or the performance of the function to which such condition relates.
> (5) An applicant at whose instance, a restrictive condition is removed, amended or suspended in terms of this Act, must, within the prescribed period, and in the prescribed manner, apply to the Registrar of Deeds concerned for the appropriate recording of such removal, amendment or suspension, and the Registrar of Deeds must, in the prescribed manner record such removal, amendment or suspension.

25. Before turning to the interpretation of the relevant provisions it is appropriate to record that the "prescribed manner" of an application for the removal of restrictive condition is set out, in framework form, in the Spatial Planning and Land Use Management Regulations.[13] Chapter 3 of the Regulations deals with land development and land use applications. Regulation 14 requires a municipality to determine the manner and format of applications, the fees payable and the

[13] Promulgated in *Government Notice R239, Government Gazette 38594* dated 23 March 2015. Commencement date 13 November 2015 [*Government Notice 1126, Gazette No. 39415* dated 13 November 2015]

timeframes applicable to each component of an application. Regulation 15 provides that in the event that a municipality does not designate a municipal official to decide certain land development and land use applications (as may occur in terms of s 35 (2) of the Spatial Planning Act), then all applications are to be decided by the Municipal Planning Tribunal. The Regulation further provides for the designation of categories of land development and land use applications by a municipality. Schedule 5 to the Regulations provides for standard categories of land development and land use applications. A Category 1 application is one for "any consent or approval required in terms of a condition of title, a condition of establishment of a township or condition of an existing scheme or land use scheme". A Category 2 application includes an application for "the removal, amendment or suspension of a restrictive condition of title relating to the density of residential development on a specific erf where the residential density is regulated by a land use scheme in operation". The Schedule further provides that all Category 1 applications and all opposed Category 2 applications are to be decided by the Tribunal and that unopposed Category 2 applications are to be decided by the designated municipal official. It must be emphasised that this categorisation serves as a guide to the determination of categories by a municipality. However what the guide points to is that applications relating to the removal, amendment or suspension of restrictive conditions of title are to be processed in accordance with the set of procedures determined by a municipality or as regulated and are to be adjudicated in the context of land use planning and management principles set out in the Spatial Planning Act. The removal, amendment or suspension of restrictive conditions of title must accordingly align with the broader objects and principles set out in the Act.

26. The Spatial Planning Act does not deal with the removal, variation or suspension of a restrictive condition pursuant to a Court order to such effect. There is accordingly no provision which stipulates the circumstances in which such Court order may be made. This, in my view, is not surprising given the nature and ambit of the Court's authority as set out above.

27. The now repealed Removal of Restrictions Act[14] also did not address the Court's authority to issue a declarator authorizing the Registrar of Deeds to give effect to the consent of parties whose rights were regulated by a restrictive condition of title. The Court's authority was in no way constrained by the statutory regime regulating the circumstances in and procedure by which a restrictive condition could be removed or varied or suspended in terms of the Removal of Restrictions Act.

[14] Act 84 of 1967

28. The Spatial Planning Act establishes a new administrative procedure for the removal of a restrictive condition. It does so by placing the authority in the hands of the Municipal Planning Tribunal or designated municipal official as the case may be. It further seeks to establish criteria for the exercise of such authority which are consonant with the criteria to be applied in relation to spatial planning and land use management decisions generally.

29. The fact that the Spatial Planning Act does not specifically address the ambit of Court's authority, in my view, militates against a finding that the Court's authority is in any manner altered. If the legislature had intended to exclude a Court from issuing a declaratory to the effect that the rights conferred by a registered condition of title have been extinguished, either by bilateral consent or by unilateral waiver (cf. *Ex parte Rovian Trust (supra)* at 213C), then it would undoubtedly have done so in express terms.

30. Having said this it is nevertheless necessary to deal with the meaning and effect of section 47 of the Spatial Planning Act. Subsection (1) states that a restrictive condition may be removed or amended <u>with the consent</u> of the Municipal Planning Tribunal. In subsection (2) it is provided that a removal, amendment or suspension of a restrictive condition must, <u>in the absence of the contemplated consent</u>, be effected in accordance, *inter alia,* with section 25 of the Constitution. It is not

immediately apparent to what the phrase 'contemplated consent' refers. If it refers to the consent of the Municipal Planning Tribunal to which reference is made in subsection (1) then it is difficult to conceive of how and upon whose authority a restrictive condition could be removed or amended in such circumstances, since there is no statutory body other than a Municipal Planning Tribunal which has the authority to remove, amend or suspend a restrictive condition. The authority to remove, amend or suspend a restrictive condition is conferred upon a Municipal Planning Tribunal by s 41(1).

31. Section 47 must be read as the statutory framework regulating the removal of restrictive conditions. A registered deed may only be endorsed by the Registrar of Deeds acting in accordance with the Deeds Act and in terms of any other law authorizing such act. The Deeds Act makes no specific provision for the removal, amendment or suspension of a registered restrictive condition of title. The now repealed Removal of Restrictions Act provided, in section 2, for the alteration, suspension or removal of restrictive conditions upon certain criteria by the Administrator (later Premier of a province) by publication of a notice to that effect in a Provincial Gazette. Section 6 of that Act in turn placed upon the Registrar of Deeds the obligation to effect endorsements upon the relevant deeds as soon as possible after publication of the notice. Section 47(5) of the Spatial Planning Act now provides that an applicant for the removal of a restrictive condition must,

within a prescribed period and in accordance with a prescribed manner, apply to the Registrar of Deeds for the 'appropriate recording of such removal, amendment or suspension' of the restrictive condition. No doubt the Registrar will only act upon such application where the Municipal Planning Tribunal has consented as contemplated in Section 47(1). This subsection therefor is to be read as the statutory basis upon which effect may be given to the removal, amendment or suspension of restrictive conditions.

32. We need not decide what meaning to attach to the phrase 'contemplated consent' in s 47(2) for present purposes. That is so because a Court has no authority to grant a declaratory order relating to the removal of a restrictive condition of title in the absence of the consent of an interested party. In deciding whether or not to grant such declaratory relief it exercises no discretion and acts as a court of enquiry. Section 47(2) finds no application in matters such as those with which this judgment is concerned.

33. The only question is whether s 47 (1) precludes a Court from authorizing the removal of a restrictive condition unless the Municipal Planning Tribunal has consented thereto. It was argued that the use of the word 'may' in the subsection is to be understood as being discretionary rather than peremptory in nature and

that the subsection is to be understood as leaving – unaltered - the Court's authority to authorise the removal of a restrictive condition. The argument, it seems to me, is misdirected. The issue is not whether restrictive conditions may only be removed, amended or suspended by a Municipal Planning Tribunal. Rather it is whether the consent of a Municipal Planning Tribunal must be obtained before a Court will grant a declarator authorizing such removal.

34. Section 47 must be read in conjunction with s 41. The latter section confers upon a municipal planning tribunal the power to remove, amend or suspend a restrictive condition of title. The former section regulates that power. Section 47, it should be said, is rather clumsily formulated. Subsection (1) refers to the consent of a municipal planning tribunal whereas it has the power to remove a restrictive condition in terms of s 41. Subsection (2) then references an application as contemplated by subsection (1) and, furthermore, refers to the absence of 'the contemplated written consent'. At first blush this appears to refer to the consent of the municipal planning tribunal dealt with in subsection (1) but on closer reading that cannot be so, since it is the municipal planning tribunal which has the power to remove a restrictive condition and it can hardly do so if it does not consent thereto.

35. If section 47 is read as regulating the power to remove a restrictive condition <u>by a municipal planning tribunal</u>, then the section makes sense. Seen in this light subsection (1) confirms that a restrictive condition may be removed with the consent of a municipal planning tribunal whereas subsection (2) provides that the provisions of section 25 of the Constitution apply in circumstances where the removal will have the effect of depriving a person of a right to property. The reference to the absence of 'contemplated consent' can only refer to the consent of a party whose rights are or may be affected by the removal of a restrictive condition.

36. Section 47(2) can have no application in circumstances where a Court is moved to authorise the removal of a restrictive condition. That is so because a Court has no power to grant such order in the absence of consent of all interested parties. The Court, as has already been pointed out, serves merely as a court of enquiry to establish whether all interested parties have by mutual agreement or unilateral waiver abandoned their rights. If it is satisfied that this is so it may issue a declaratory to that effect.

37. Is section 47(1) to be understood as requiring the consent of a municipal planning tribunal in all circumstances where a court is moved to authorise the removal of a restrictive condition? In our view, no. Section 47(1) says no more than that a

restrictive condition may, pursuant to the Spatial Planning Act, be removed with the consent of a municipal planning tribunal. Such consent is to be obtained in the prescribed manner, i.e. by way of an application made to the municipal planning tribunal and is to be granted subject to ss 42 and 47(2).

38. Section 47 does not deal with the circumstances in which a Court may grant an order authorizing the removal of a restrictive condition. The Act does not confer upon a municipal planning tribunal a general power in relation to restrictive conditions which it may exercise of its own volition. It may only exercise its powers upon application made by parties who are specified in terms of section 45, which includes an owner of the land concerned. The fact that a municipal planning tribunal has the power to remove a restrictive condition upon application does not mean that it has any legal interest in the removal of a particular restrictive condition. Thus in the simplest of cases to which Ramsbottom J referred in *Ex parte Gold*[15], where a restrictive condition in the form of a servitude enures solely for the benefit of the transferor and transferee, it is difficult to conceive that, in addition to the consent of both of those parties, the consent of a municipal planning tribunal would also be required before a Court would authorise the removal of the restrictive condition. There can of course be no doubt that the parties to such a restrictive

[15] See paragraph 5 above

condition would be entitled to make application to a municipal planning tribunal to remove the restrictive condition just as they would be entitled to seek a Court order to similar effect.

39. There is a further consideration. Section 45(6) provides that where a condition of title provides for a purpose with the consent of the Administrator, Premier, townships board or controlling authority then such consent may be granted by the municipality concerned. The Regulations make provision for the procedure by which such consent of the municipality is to be obtained. They provide, in Schedule 5, for certain standard categories of land development and land use applications. An application for consent or approval which may be required in terms of a condition of title is defined as a category 1 application which must be referred to a municipal planning tribunal. The stipulation of a procedure to be followed does not alter the fact that the power to consent vests in the municipality.

40. In summary therefore: a Court's power to grant an order authorizing the removal or amendment of a restrictive condition of title upon proof that all interested parties have consented thereto is not affected by the provisions of the Spatial Planning Act. In each instance it will be necessary to establish that all interested parties have indeed consented thereto.

41. We turn now to deal with each of the applications before us in turn.

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42. Following the launch of the application on 30 June 2015 it was postponed on several occasions. Ultimately on 29 March 2016 Cossie AJ granted a rule nisi returnable on 24 May 2016. On the return day the matter was again postponed and the rule was extended. On 6 September 2016 Eksteen J made the order referred to in the introduction to this judgment. On that occasion the matter was removed from the roll. As a consequence the *rule nisi* lapsed. It appears from the court file that the matter was enrolled on 22 September when the rule was reinstated and the matter was then postponed to the date when these matters were heard by this Court. It therefore falls to this Court to consider whether to confirm the rule nisi.

43. The restrictive condition sought to be removed is contained in Clause F2 of the title deed and reads as follows:

> F. SUBJECT FURTHER to the following conditions contained in Deed of Transfer T3597/1968 imposed by the Controlling Authority in terms of Section 11(6) of Act 21 / 1940:
>
> 1. ....

> 2. Not more than one dwelling house together with such outbuildings as are ordinarily required to be used in connection therewith shall be erected on the land except with the written approval of the Controlling Authority as defined in Act 21/1940.

44. The reason for seeking the removal of the restrictive condition is to bring the permitted use of the property, which is described as agricultural property, in line with fact, inasmuch as more than one dwelling has been erected on the property. In this regard the applicants state that the second dwelling was erected at a stage "when it was not known that building plan approval need be sought".

45. Leaving aside for the moment the reasons as articulated by the applicants, the further allegations made by the applicants bear repeating.

> 13. [The applicants are] unable to state with any authority the reason for the imposition of the aforesaid restrictive condition. However, as is apparent from the Title Deed in question, the restrictive condition dates back to a time when there was no zoning scheme to regulate town planning and town planning was accordingly regulated by way of conditions contained in Title Deeds.
>
> 14. It is further apparent from the Title Deed that the condition is not registered in anyone's favour but is instead registered against the property.
>
> 15. Since the imposition of the restrictive condition, and more particularly in the last number of years, numerous property owners in the Farm Port Elizabeth area have undertaken substantial renovations to their properties, including the erection of second residential dwellings, and accordingly same will not be out of character for the area in which the property is located.

16. In the circumstances, I respectfully submit that there is no particular necessity for the retention of the restrictive conditions on the Title Deed for the property.

46. It is necessary to make two comments about these allegations. Firstly they reflect a widespread tendency, in applications of this nature, to assume that restrictive conditions are quaint, somewhat old fashioned devices which preclude 'modern' approaches to land development and that they serve little or no purpose. On this basis such conditions can, without more, be deleted. This assumption is of course entirely without substance or merit. As was stated in *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*[16],

> Restrictive conditions of the kind in question enure for the benefit of all other erven in a township, unless there are indications to the contrary. They are inserted for the public benefit and, in general terms, to preserve the essential character of a township. In this regard see *Malan* at 38B-C and 39F-G. If landowners across the length and breadth of South Africa, who presently enjoy the benefits of restrictive conditions, were to be told that their rights, flowing from these conditions, could be removed at the whim of a repository of power, without hearing them or providing an opportunity for them to object, they would rightly be in a state of shock.

47. The second comment relates to the paucity of consideration given to the particular condition sought to be removed. The bald assertion is made that the applicants do not know why the condition was inserted. Yet there is no reference in the founding affidavit to the relevant legislation referred to in the condition itself.

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[16] 2011 (4) SA 149 (SCA) at par 37

48. The relevant legislation is the Advertising on roads and Ribbon Development Act, Act 21 of 1940. It remains extant on the statute book. Its purpose is twofold, as its long title suggests, namely to regulate the display of advertisements outside urban areas at places visible from public roads and, inter alia, to regulate the erection, construction or laying of structures near certain pubic roads.

49. Section 11 of that Act extensively regulates the restrictions which may be imposed in relation to the establishment or extension of townships situated wholly or partially outside of an urban area. The area where the property in question is situated is such an area.

50. The Act also defines a 'controlling authority' which, in relation to a road is defined to mean "the administrator concerned: Provided that in relation to any road within the region of a Regional Services Council in the province of the Eastern Cape .... The said Council shall be the controlling authority....".

51. The Regional Services Councils no longer exist. Their functions have been taken over by District Councils or by Metropolitan Councils in respect of property which falls within the jurisdiction of such a Metropolitan Council.

52. There are no allegations in the papers which deal with this aspect. There are also no allegations which address the question as to what steps have been taken to obtain the consent of the controlling authority.

53. Section 11 (6), (7) and (8) of Act 21 of 1940 makes it clear that the condition may only be removed or cancelled with the consent of the controlling authority.

54. This is one of those instances referred to in *Ex Parte Gold* where the consent of the statutory body is a necessary jurisdictional fact for the exercise of the court's authority to authorise the removal of a restrictive condition.

55. It bears mentioning that the provisions of s 45(6) of the Spatial Planning Act may well apply, thereby requiring that consent be obtained from the municipality (in this case the Nelson Mandela Bay municipality). In that event the provisions of the Spatial Planning Act regulate the mechanism by which such consent is to be obtained. This requires that an application be made to the municipal planning tribunal.

56. Whilst it is accepted that the application papers have been served upon the municipality and that publication of the *rule nisi* has occurred, I do not consider that the expedient of 'constructive consent' can be applied in circumstances where

the consent of a statutory body is specifically required and where there exists a legislated mechanism by which such consent is to be obtained.

57. In *Rovian Trust* Nienaber J expressed the view that,

> I am in some doubts as to whether the notion of constructive consent can be stretched to the point where the Administrator is believed by the applicant to have consented by silence when in another context he expressly informed the applicant that he was unable to express consent until the matter had been advertised and aired and all interested parties had been afforded an opportunity of objecting.[17]

58. This view was expressed in the context of the applicant in that matter having first sought the consent of the Administrator and being told by the Administrator that his consent could not be given upon consideration of an application to remove the restrictive condition. It was argued in that matter that the particular condition did not enure to the benefit of other lot-holders and that the Administrator and local authority should be taken to have consented by reason of their failure to oppose the application made to court. The case was decided on the basis that the restrictive condition did enure to the benefit of other lot-holders and that the lack of consent of other lot-holders was fatal to the application.

59. The remarks of Nienaber J nevertheless suggest that where the process of obtaining the consent of the municipality requires adherence to a regulated application

[17] *Rovian Trust (supra)* at 216H

procedure it is doubtful that constructive consent can be inferred from mere failure to oppose. It is not necessary however to decide the matter. As already indicated the applicant does not address the question of obtaining the consent of the 'controlling authority' in any manner at all. In this respect the application is defective. As pointed out in *Ex parte Saiga*[18] an applicant is required to set out relevant facts and to explain why it is impossible or impractical to obtain the consent of interested parties.

60. In the circumstances the *rule nisi* cannot be confirmed. The application falls to be dismissed. The applicants are possessed of statutory mechanisms and procedures by which to secure that which they seek in this application. Those mechanisms, in my view, permit the appropriate and relevant authorities to take into account the broad set of criteria now provided in the applicable legislation and to decide such application having full and proper regard to the public interest where the consent of all affected parties cannot be or has not been obtained.

[18] *Supra*

<u>Ex parte Dala: Case No. 2373/2016</u>

61. The applicant seeks the removal of three conditions of title registered against the title deed of a residential property situated in Mount Croix, Port Elizabeth. The first concerns a restriction that not more than one dwelling together with the necessary outbuildings shall be erected on the property. The second concerns a restriction relating to the area of the land upon which buildings may be erected and the third concerns an encroachment restriction prohibiting the erection of a building or part of a building within twenty feet of the street line which forms the boundary of the erf.

62. The application however suffers from a material defect. The application proceeds upon the basis that the administrative procedure provided for in the Removal of Restrictions Act is unduly cumbersome and that it will occasion the applicant prejudice because of undue delay. No reference is made to the fact that that legislation has been repealed and that the authority to deal with land use applications, including the removal of restrictive conditions now vests in the municipal planning tribunal.

63. The application is motivated on the basis that the removal of the restrictive conditions is necessary because the applicant wishes to erect a further dwelling on the property. No allegations are set out in the papers to justify the removal of the second and third restrictive conditions.

64. The provisions of the Spatial Planning Act are plainly applicable. That Act now confers the authority to make decisions relating to the zoning of land, its subdivision and the removal of restrictions upon a municipal planning tribunal. In circumstances where a land use application, for example to obtain authorisation to erect a second dwelling, will be required to be made to the municipal planning tribunal, no real reason exits to engage the Courts in order to have a restrictive condition of title removed. Such an application can be determined by the municipal planning tribunal simultaneously with other land use applications made in respect of the subject property.

65. In this instance, it appears that the restriction relating to a single residential dwelling is one that enures for the benefit of all lot-holders in the township and was one introduced in the public interest. The Spatial Planning Act seeks, as has been explained hereinabove, to facilitate integrated administrative decision-making in relation to land development in order to achieve the objects of the Act. In these circumstances, particularly where such land development issues will of necessity

have to be considered by the municipal planning tribunal in relation to the property concerned, this Court will be astute not to interfere with the proper exercise of those powers by authorizing the deletion of a restrictive condition based on the consent of a limited number of interested parties and the constructive consent of others.

66. In the circumstances it follows that the application must be refused.

<u>Ex parte Kitching NO: Case No 4082/2016</u>

67. In this matter similar considerations to those raised in respect of Case no 2373/2016 apply. Here too the applicants seek the removal of a restrictive condition in order to proceed with a land development application by which they seek to obtain the rezoning of the property from residential use to business use.

68. The applicant states that it was advised by a municipal official that it would first be necessary to have the restrictive condition of title, which restricts the use to that of a single residential dwelling, removed before the applicants can proceed with their rezoning application.

69. This advice is plainly wrong. The provisions of the Spatial Planning Act now provide for a range of land use and land development applications to be considered by the relevant municipal planning tribunal. There is no suggestion in that Act that such applications cannot be dealt with simultaneously by a municipal planning tribunal. Indeed the contrary appears to be contemplated since all such applications are to be adjudicated on the basis of the principles enumerated in Chapter 2 of the Act and the factors set out in s 42.

70. The applicants also point out that it seeks the removal of the restrictive condition in order to bring the use of the property in line with its current use, namely for business purposes. That allegation does not avail the applicants. The removal of a restrictive condition serves merely to remove an impediment to use it does not confer any use rights upon the owner of the property. Such use rights are conferred by approval of a defined land use pursuant to a land development application made in terms of the Spatial Planning Act. Accordingly the present application will not 'regularize' the use of the property.

71. For the reasons set out in relation to case no 2373/2016 this application must also be refused.

Ex parte Tania Schaeffer: Case No 3782/2016

72. This application is brought by and in the name of the attorney acting for the Bosch Property Trust which is the registered owner of erf 24 Mill Park, Port Elizabeth. The applicant claims *locus standi* on the basis that the Trust has authorised the firm of attorneys by resolution to commence an application for the removal of a restrictive condition of title applicable to the Trust's property.

73. Reliance is placed upon, *inter alia*, clause 9 of the Trust Deed which provides that:

> Subject to giving effect to the terms and conditions of this Trust Deed, the Trustees shall in administering the Trust, adopt such procedures and take such administrative steps as shall from time be deemed necessary or desireable, including the appointment of any person/s (including and Trustee/s) to render any services or assistance as the Trustees consider necessary for the purposes and administration of the Trust for such remuneration as the Trustees may from time to time determine.

74. This provision of the Trust Deed provides no support for the claim to *locus standi* made by the attorney. To the contrary it serves merely to confirm that the Trustees are entitled to appoint persons to render services to the Trust. The appointment of an attorney to render professional services to a party does not confer upon the attorney *locus standi* to litigate in the attorney's own name nor even in a representative capacity.

75. The other provisions of the Trust Deed upon which reliance is placed also do not assist. Clause 30 confirms that the Trustees have the power to obtain such legal and other professional advice as may be required and Clause 32 confers upon the Trustees the power to institute or defend legal proceedings. The fact that the Trustees may have taken a resolution authorizing the firm of attorneys too act in the matter also does not assist.

76. The resolution provides that Schaeffer Attorneys commence a High Court Application for the removal of the restrictive condition. It also states that the attorneys are 'mandated' to launch the application. The fact that Tania Schaeffer is authorised to sign documents to give effect to the resolution can in no way be construed to mean that the attorney acquires *locus standi* to institute proceedings in her own name.

77. We were not referred to any authority, nor am I aware of any, which suggest that in circumstances such as these an attorney who is instructed to bring an application on behalf of a Trust acquires thereby the right to institute proceedings in its own name. In these circumstances the application is fatally defective and falls to be dismissed.

Ex parte Wright: Case No 3406/2016

78. In this application a *rule nisi* was issued by Chetty J on 4 October 2016. On the return date, 25 October 2016, Lowe j postponed the matter and extended the rule too allow for service of a notice of application for the removal of a restrictive condition to be delivered on all property owners residing in the Fernglen Township.

79. On the further return date the rule was extended to 22 November 2016 and thereafter to the date of hearing before the full Court.

80. The rue *nisi* envisaged the deletion of the restrictions set out in Clauses B. 6 (b), (d) and C. (1), (2), (3), (4) and (5) of the Title Deed. The service of the notice upon all property owners in the Fernglen Township gave rise to 10 letters of objection being received by the applicant's attorneys. In consequence of these objections the applicant's attorney engaged in discussions with each of the objectors. The objections raised by them, as is indicated in the papers, relate to the removal of certain restrictions only. In consequence of this the applicant undertook to abandon its application for the removal of those restrictions to which objection

was raised. The objectors then indicated their consent. This is confirmed by affidavit filed on behalf of the applicant.

81. The applicant only seeks the confirmation of the rule *nisi* in respect of the deletion of Clauses B. 6 (d), and C. (2) and (3), to which the interested parties have consented. These Clauses read as follows:

B.6(d)	No building or structure or any portion thereof, except boundary walls and fences shall be erected nearer than 7,87 metres to the street line which forms a boundary of this erf, nor within 3,15 metres of the rear or 1,57 metres of the lateral boundary common to any adjoining erf, provided that, with the consent of the local authority an outbuilding not exceeding 3,05metres in height, measured from the floor to the wall plate and no portion of which; will be used for human habitation, may be erected within the prescribed rear space. On consolidation of any two or more erven this condition shall apply to the consolidated area as one erf.
C. (2)	That no building shall be erected upon the Erf until the plans and specifications have been submitted to the Company and the said Company or duly qualified architect appointed by the Company for that purpose, has approved of the siting, elevation plans and specifications of such building. The decision of the Company and/or Company's architect shall be final and binding notwithstanding the value of the property to be erected. The walls of any such building shall be of brick and/or stone and/or concrete and the roof of tiles, thatch, slate, shingles or other material approved by the Company.
C. (3)	That every erf shall on its street boundary or boundaries be enclosed by a wall of brick, stone and /or concrete of a design approved by the Company architect.

82. In the light of the abandonment of the relief sought I relation to the other restrictive conditions in the Title Deed no further impediment to the confirmation of the *rule nisi* , suitably amended to reflect the consent to the order, exists and accordingly the rule will be confirmed to that extent.

Ex parte Libele Holdings Trust: Case No. 3654/2016

83. In this application a *rule nisi* was issued on 25 October 2016. That rule was duly extended on 15 November 2016 to 22 November 2016 whereafter it was extended to make provision for the hearing of these matters by a full court.

84. The requirements for service and publication of the Rule have been complied with as have the provisions of s 97 of the Deeds Registries Act. There is, in this matter, no impediment to the granting of a final order.

Ex parte Ross: Case No 4044/2016

85. The applicant seeks an order for the removal of three restrictive conditions contained in Deed of Transfer No. T60312/2016 in respect of Erf 263, Sunridge Park, Port Elizabeth. The conditions sought to be removed read as follows:

B.5 (d) No building or structure or any portion thereof, except boundary walls and fences shall be erected nearer than 9,45 metres to the street line which forms a boundary of this erf, nor within 3,15 metres of the lateral boundary common to any adjoining erf, provided that, with the consent of the local authority an outbuilding not exceeding 3,05metres in height, measured from the floor to the wall plate may be erected within the above prescribed lateral space of 9,45 metres reckoned from the rear boundary. On consolidation of any two or more erven this condition shall apply to the consolidated area as one erf.

C.(iii) No building shall be erected upon this erf until the plans and specifications have been submitted to the W.E Londt Family Trust and the W.E Londt Family Trust, or a duly qualified Architect appointed by it for that purpose has approved of the siting, elevation plans and specifications of such building. The decision of the W.E Londt Family Trust and/or its Architect shall be final and binding notwithstanding the value of the property t be erected.

The walls of any such building shall be of brick and/or stone and/or concrete and the roof of tiles, thatch, slate, shingles or other material approved by the W.E Londt Family Trust.

C.(iv) Every erf shall on its street boundary or boundaries be enclosed by a wall of brick, stone and /or concrete of a design approved by the W.E Londt Family Trust's Architect.

86. The application is founded upon a need to deal with an existing non-compliance with the conditions contained in the title deed. In this regard the applicant states that a prior owner conducted building operations on the property with the approval of the municipality by way of approved building plans which resulted in an encroachment on the property contrary to the restrictive building lines set out above. The applicant wishes to undertake further alterations and ins only able to obtain building plan approval when one the restrictive conditions are removed.

87. The applicant has undertaken extensive research in order to locate the W.E Londt Family Trust. The supporting affidavit of the applicant's attorney details these efforts which have included internet searches and the like and communication with those descendants of the original Trust founder whom the attorneys have been able to trace.

88. Furthermore notice of the application has been given to property owners of adjacent erven and to property owners in the immediate vicinity of the subject property.

89. There is, in our view, no impediment to the granting of a rule *nisi* which will allow for notice of the application to be given to as yet unidentified interested parties and to members of the public at large.

The Orders

90. I the result the following orders will issue:

Ex parte Whitfield: Case No 2500/2015

The application is dismissed.

Ex parte Dala: Case No. 2373/2016

The application is dismissed.

Ex parte Kitching NO: Case No 4082/2016

The application is dismissed.

Ex parte Tania Schaeffer: Case No 3782/2016

The application is dismissed.

Ex parte Wright: Case No 3406/2016

The rule *nisi* in relation to the deletion of the restrictions set out in Clauses B 6 (d), C2 and C3 of Title Deed No T 95801/1996 is confirmed.

Ex parte Libele Holdings Trust: Case No. 3654/2016

The rule *nisi* is confirmed.

Ex parte Ross: Case No 4044/2016

1. A rule *nisi* shall issue calling upon all interested parties to show cause to this Court on 25 April 2017 at 09h30, or so soon thereafter as the matter may be heard, why an Order in the following terms should not be made:

   1.1 That clauses B.5 (d), C (iii) and C (iv), as set out in deed of Transfer No. T60312/2016 in respect of Erf 263, Sunridge Park, reading as follows:

   B.5 (d) No building or structure or any portion thereof, except boundary walls and fences shall be erected nearer than 9,45 metres to the street line which forms a boundary of this erf, nor within 3,15 metres of the lateral boundary common to any adjoining erf, provided that, with the consent of the local authority an outbuilding not exceeding 3,05metres in height, measured from the floor to the wall plate may be erected within the above prescribed lateral space of 9,45 metres reckoned from the rear boundary. On consolidation of any two or more erven this condition shall apply to the consolidated area as one erf.

C.(iii) No building shall be erected upon this erf until the plans and specifications have been submitted to the W.E Londt Family Trust and the W.E Londt Family Trust, or a duly qualified Architect appointed by it for that purpose has approved of the siting, elevation plans and specifications of such building. The decision of the W.E Londt Family Trust and/or its Architect shall be final and binding notwithstanding the value of the property t be erected. The walls of any such building shall be of brick and/or stone and/or concrete and the roof of tiles, thatch, slate, shingles or other material approved by the W.E Londt Family Trust.

C.(iv) Every erf shall on its street boundary or boundaries be enclosed by a wall of brick, stone and /or concrete of a design approved by the W.E Londt Family Trust's Architect.

1.2 That the Registrar of deeds, cape Town is authorised to give effect to this Order by endorsing the Deed of Transfer and effecting such endorsements of the Deeds as may be required.

2. Service of the rule *nisi* shall be effected:

   2.1 By prepaid registered mail upon the registerd owners of erven 147, 148, 259, 260, 261, 262, 264 and 277 Sunridge Park;

   2.2 By sheriff upon the Municipal Manager of the Nelson Mandela Metropolitan Municipality;

   2.3 By sheriff upon the Registrar of Deeds, Cape Town.

3. Publication of the Order shall effected:

   3.1 Once in English and isiXhosa in the Herald newspaper; and

   3.2 Once in Afrikaans and isiXhosa in Die Burger newspaper.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

REVELAS, J.

I agree.

E. REVELAS
JUDGE OF THE HIGH COURT

ROBERSON, J.

I agree.

J. M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances:	For the Applicant in Case No. 2500/2015 Adv. I. Bands Instructed by Laubscher Attorneys
	For the Applicants in Case Nos. 3406/2016; 3654/2016 and 4044/2016 Adv. I. Bands Instructed by BLC Attorneys
	For the Applicant in Case No. 4082/2016 Adv I. Bands Instructed by Pierre Kitching Attorneys
	For the applicant in Case No. 3782/2016 Adv. S. Potgieter Instructed by Schaeffer Attorneys
	For the Applicant in Case No.2373/2016 No appearance