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

CASE NO: 1663/2015
Date heard: 20 August 2015
Date delivered: 20 October 2015
REPORTABLE

In the matter between

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY
Applicant

And

YVETTE GEORGIOU
t/a GEORGIOU GUESTHOUSE AND SPA
First Respondent

BRAMBLE GLEN HOMEOWNERS ASSOCIATION
Second Respondent

C VAN DER TOUW
Third Respondent

Local government planning law – application by decision-maker to review and set aside decision to re-zone property and grant special consent for use of property as licensed hotel – re-zoning granted subject to removal of restrictive condition – such 'condition' not within ambit of s 42 of Land Use Planning Ordinance 85 of 1985 – unlawful – local authority bound to take into account existence of rights

conferred by restrictive condition – precluded by s 39 of LUPO and zoning scheme regulations from granting authorization of permission contrary to terms of restrictive condition – decision set aside
Zoning scheme – grant of special consent for use of property – no application for special consent made – procedure peremptory – decision to grant consent in absence of application unlawful – decision set aside

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JUDGMENT

GOOSEN, J.

1. The first respondent is the owner of three adjacent properties (erven 1756, 2318 and 2787, Lorraine[1]) situated along the Kragga Kamma Road in Port Elizabeth. The first respondent conducts a boutique hotel and spa from buildings situated on the properties. The conduct of this business and the nature and extent of buildings on the properties has been the source of considerable controversy

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[1] The properties will be collectively referred to as "the properties" unless reference needs to be made to a specific property in which event it will be referred by its erf number.

and has resulted in substantial litigation. This is the third application brought by the applicant.

2. On 18 November 2013 the applicant was compelled to launch interdict proceedings against the first respondent under case number 3347/2013. In that application the applicant sought to interdict the first respondent from utilising erf 2318 as a health spa contrary to the residential 1 zoning applicable to the property. The application was heard on 8 May 2014.[2]

[2] Nelson Mandela Bay Municipality v Yvette Georgiou t/a Georgiou Spa (Unreported case no 3347/2013, ECHCPE, 17 September 2015. The interdict sought was granted.

3. During April 2014 the applicant initiated a further application in which it sought an order that certain buildings constructed on the properties without approved plans in terms of the National Building Regulations and Building Standards Act, 103 of 1977, be demolished. The applicant also sought certain interdictory relief prohibiting the use of the properties, contrary to its zoning and contrary to the restrictive conditions of title applicable to the properties. That application was heard during March 2015 and judgment was delivered on 26 July 2015 granting the relief sought.[3]

4. The present application is brought in terms of section 6 (1) of the Promotion of Administrative Justice Act, 3 of 2000 (hereinafter referred to as "PAJA") to set aside decisions taken by the Executive Mayor on behalf of the applicant on 10 November 2014. The first decision (hereinafter the "re-zoning

[3] Nelson Mandela Bay Municipality and another v Yvette Georgiou t/s Georgiou Spa and another (Unreported case no 1222/2014, ECHCPE, 26 July 2015)

decision") concerns the re-zoning of each of the three erven from residential 1 zoning to residential 3 zoning. The second decision which was incorporated in the resolution adopted by the Executive Mayor (hereinafter referred to as "the special consent") concerns the granting of consent to the first respondent to operate a licensed hotel and a chapel on the properties. These decisions were taken pursuant to a re-zoning application made by the first respondent on 9 December 2013 in which the first respondent sought a re-zoning of the properties from residential 1 zoning to business 1 zoning.

5. The first respondent opposes this application. The second and third respondents are parties cited by virtue of their interest in the subject matter of the application as owners of properties in the area and as having filed objections to the first respondent's aforementioned re-zoning application.

Background

6. The facts giving rise to the present application are, in essence, common cause. They may be summarised as follows:

6.1. The properties are situated adjacent to one another and are located in a residential urban area. The properties are all zoned as residential 1 properties in terms of the Port Elizabeth Zoning Scheme which applies to the area.

6.2. Each of the erven is subject to certain restrictive condition of title. In the case of erf 1756 its use is restricted to residential purposes only. In addition to this restriction erf 1756, along with erven 2318 and 2787, is burdened with restrictions regarding the nature and extent of buildings which may be erected on the erven and the area within which such buildings may be erected.

6.3. The three erven have not been consolidated into a single erf although the first respondent utilises the three erven *de facto* as a single property.[4]

[4] In case no 1222/2014 the encroachment of buildings across building lines applicable by virtue of the restrictive conditions was one of the matters dealt with by the court.

6.4. The first respondent applied for the re-zoning of erf 2787 from residential 1 to residential 3 zoning during 2007. On 18 February 2009 the Executive Mayor refused the application and simultaneously refused an application for special consent to use the property to operate a hotel. Special consent was however granted for the operation of a 12 bed-roomed guest house on the property.

6.5. On 18 August 2010 the Executive Mayor again refused an application for special consent to operate a health spa on erf 2318 and instead granted special consent to operate a 4 bed-roomed guest house on the property.

6.6. The first respondent built a gymnasium and chapel on erf 2787 without approved building plans. The chapel encroaches upon the rear building line as specified by a restrictive condition applicable to the erf. A sunroom and enclosed patio were erected on erf 1756 without approved building plans. It was these buildings which formed the subject of the application under case number 1222/2014 referred to above.

6.7. The first respondent operates a boutique hotel and spa from the properties. It was this conduct which formed the basis upon which case no 1222/2014 was brought and which the court found to be unlawful.

7. On 9 December 2013 the first respondent made application for the re-zoning of the subject properties from residential 1 to business 1 zoning.[5] The purpose of the application was to facilitate the development of "a 5-star hotel…spa, conference centre & gift shop".[6]

8. An application for re-zoning of property is regulated by the provisions of the Land Use Planning Ordinance, 85 of 1985

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[5] This application for re-zoning was initiated after the applicant had initiated the interdict proceedings in case number 3347/2013.

[6] As set out in the application for the change in the use of land submitted by the first respondent to the applicant.

(hereinafter referred to as “LUPO”) I shall deal with some aspects of the procedures to be followed and the criteria to be applied to be applied in adjudicating such applications later in this judgment. For present purposes it need only be noted that the application was advertised and elicited objections from the second and third respondents. The application was duly processed by the relevant officials of the applicant and came before the Executive Mayoral committee on 10 November 2014 [7] when the Executive Mayor made the following decision:

> (a) That, notwithstanding the objections received, and in terms of Provincial Circular LDC/GOK, 9/1988 the application to amend the Port Elizabeth Zoning Scheme (TPA 8615) by the re-zoning of Erven 2787, 2318 and 1756, Lorraine, from Residential 1 to Business 1, be refused.
> (b) That, notwithstanding the objections received, and in terms of Provincial Circular LDC/GOK, 9/1988, the Port Elizabeth Zoning Scheme be amended (TPA 8615) by the re-zoning of Erven 2787, 2318 and 1756 Lorraine, from Residential 1 to Residential 3 be granted, subject to the following conditions:

[7] The re-zoning decision was approved at a stage when the applicant was awaiting judgment in case number 3347/2014 and after proceedings had been commenced in case number 1222/2014.

> (i) The restrictive conditions applicable to Erven 2787, 2318 and 1756, Lorraine being removed.
> (ii) Erven 2787, 2318, and 1756 Lorraine being consolidated;
> (iii)….
> (c) The application for a Council Special Consent (EC 300/2014), to permit a Licensed Hotel, and a place of worship (Chapel) on Erven 2787, 2318 and 1756, Lorraine be approved, subject to the Chapel being limited to the existing footprint.

9. It is these decisions, namely the approval of a re-zoning from residential 1 to residential 3 and the granting of special consent to use the properties to conduct a licenced hotel and place of worship that the applicant seeks to have reviewed and set aside.

10. The applicant contends that the application raises the following issues for determination, namely:

10.1. whether conditional re-zoning of the properties subject to the removal of a restrictive condition is lawful;

10.2. whether such re-zoning is permissible having regard to s 39 (1) (c) of LUPO; or

10.3. whether it is ultra vires the Zoning Scheme since none of the secondary uses are in fact primary uses associated with other use zones; and

10.4. whether the re-zoning is "desirable" within the meaning of section 36(1) of LUPO and / or reasonable and justifiable in the circumstances.

11. In answer to the application the first respondent contends, in the first instance, that the application is not properly before the court by reason of the fact that the deponent to the founding affidavit, the municipal manager, is not authorized to bring the application. In relation to the merits of the application it is contended that a conditional re-zoning is not precluded by operation of law or by the application of s 39 (1) of LUPO. It is also contended that the re-zoning is not undesirable and its approval is not unreasonable or unjustifiable in the circumstances.

The authority to bring the application

12. The founding affidavit filed in support of the applicant's application was deposed to by the municipal manager of the applicant. The first respondent's challenge to the authority of the municipal manager was raised for the first time shortly before argument of the application. The first respondent filed an application to file a supplementary affidavit in which the

challenge is raised. It was argued that whilst the point is belatedly taken if it is a good point it will be decisive of the matter and ought therefore to be allowed to be taken. On behalf of the applicant Mr. *Euijen* submitted that it was impossible to deal with the issues raised on such short notice and in particular to obtain an affidavit by the municipal manager regarding the delegation of authority by the municipal council. A copy of the full delegation of authority adopted by the council in terms of s 55 of the Municipal Systems Act was therefore handed up from the Bar. Mr. *Scott*, for the first respondent, accepted that it must be received and dealt with as if formally proved.

13. The further affidavit filed by the first respondent raises no issues of fact. It states merely that the municipal manager's reliance on his general delegated authority (as contained in the written delegations) is not sufficient.

14. Mr. *Scott* argued that since the municipality itself seeks to set aside its own decision a specific resolution of the municipal council is required and that the delegated authority of the municipal manager does not extend to such proceedings.

15. In terms of s 151 (2) of the Constitution the executive and legislative authority of a local authority vests in its municipal council. All authority is exercised by the municipal council. It

does so in accordance, *inter alia*, with the provisions of the Local Government: Municipal Systems Act 32 of 2000 (hereinafter “the Systems Act”). The long title of that Act makes it clear that it is enacted to provide "for the manner in which municipal powers are exercised and performed" and "a framework for local public administration". The preamble also provides that the Act is enacted to ensure that the "new system of local government...is efficient, effective and transparent".

16. Chapter 7 deals with local public administration. Part 2 of the Chapter deals with the roles and responsibilities of political structures and office bearers. It is here that one finds the responsibilities of the municipal manager set out in s 55. Section 55 (1) (m) confers on the municipal manager the statutory authority to:

> "exercise...any powers and the performance of any duties delegated by the municipal council, or sub-delegated by other delegating authorities of the municipality, to the municipal manager in terms of s 59."

17. Part 3 deals with the system of delegation and provides in s 59 that:

> (1) A municipal council must develop a system of delegations that will maximize administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may –
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> (a) delegate appropriate powers ..... to any of the municipality's other political structures, political office bearers, councilors, or staff members;
> (b) instruct ay such political structure, political office bearer, councilor, or staff member to perform any of the municipality's duties; and
> (c) withdraw any delegation or instruction.

18. It is necessary to refer only to two relevant delegations contained in the document handed up by agreement between the parties. Section C deals with general delegations of administrative office bearers. Clause 6.1 relates to the delegations to the municipal manager and provides that the municipal manager has, *inter alia*, the following powers:

6.1.16 The power to institute and defend any legal action on behalf of the municipality.

6.1.33 The power to take all steps necessary to comply with the Promotion of Administrative Justice Act, Act 3 of 2000.

19. The ambit of the authority delegated to the municipal manager is very broad. At face value the language of the delegation includes the power to institute proceedings such as the present application, namely to review a decision which is in effect one taken by the municipal council. As I understood the argument advanced by the first respondent it was that these delegations cannot, as a matter of principle, extend to include the authority to initiate review proceedings of a decision taken by the body that delegated the authority to the municipal manager. In developing the argument reference was made to Mgoqi v City of Cape Town and another[8] and Mbatha v Ehlanzeni District Municipality and others.[9]

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[8] 2006 (4) SA 355 (C)

20. In both of those matters however what was in issue was the authority to appoint a municipal manager. In the Mgoqi matter the issues concerned the extension of a contract of employment of a municipal manager by the executive mayor of the council. The court was called upon to consider the ambit of actual delegation of authority to the executive mayor in the context of, *inter alia*, sections 57 and 60 of the Systems Act. The former deals with the employment of a municipal manager whereas the latter deals the restriction of certain delegations to executive committees or executive mayors. Neither of those sections are of any application in the present matter. Although the question of the authorization of the executive mayor to bring the application was raised in that matter, the question turned upon an interpretation of the resolution which had been adopted by the municipal council.[10] No principle such as that which the first respondent sought to advance in this matter was considered by the court.

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[9][2008] 5 BLLR 417 (LC)

[10]Mgoqi (supra) at par 128 - 134

21. The Mbatha matter concerned the question whether the municipal council had lawfully delegated its authority to suspend or charge the municipal manager to the executive mayor. The decision turned on the proper interpretation of s 60 of the Systems Act.

22. Neither of these two cases is accordingly of assistance to the first respondent. No issue of legal principle was established in those judgments which might find application in the present matter. Mr. *Scott* was unable to point to any authority which requires the imposition of a restriction on the exercise of

delegated authority such as he contended for and I have been unable to find any such authority.

23. The Systems Act does not impose such restriction upon the authority to delegate powers to political office bearers or staff. To interpret the delegations in the manner suggested would be to read into the terms of the delegations words which, had it been intended to limit the powers, the municipal council no doubt would have included. Effect must be given to the delegations as they are framed. After all, the adoption of the scheme of delegations by a municipal council is an act which is carried out in the exercise of power conferred upon an elected body by the Constitution. That act was, it must be accepted, carried out with the object of rendering the system of local administration efficient and effective. The language of the delegations is also clear and, it seems to me, there is no room for a construction such as the first respondent contends for.

24. In the circumstances the challenge to the authority of the deponent to the founding affidavit cannot succeed.

The legal framework

25. A zoning scheme regulates the use of property within a municipal area by establishing defined usages of property in

geographic areas. The geographic zones form a spatial framework within which land development occurs. A zoning scheme is therefore a planning instrument[11] and a legislative framework by which the rights and interests of owners of land is regulated.[12]

26. In Walele v City of Cape Town and Others [13] O'Regan J said the following :

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[11] Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) at par 57

[12] Broadway Mansions Limited v Pretoria City Council 1955 (1) SA 518 (A) at 523B where it was held:
The general purpose of a town-planning scheme is to provide for the co-ordinated, and harmonious development of the municipality to which it relates….A town-planning scheme is much more than projected works; it has the characteristics of legislation i.a. in order to condition its own realisation…making wide inroads into private rights.

[13] 2008 (6) SA 129 (CC) par 130

> The result of a zoning scheme is thus to restrict the rights of all owners in an area. Yet zoning schemes also confer rights on owners, because owners are entitled to require that neighbouring owners comply with the applicable zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure. Owners in the area are also entitled to be heard when land is rezoned. A zoning scheme is therefore a regulated system of give and take: it both limits the rights of ownership but also confers rights on owners to expect compliance by neighbours with the terms of the mutually applicable scheme. The result is that where an owner seeks to use his property within the terms of the zoning scheme, it cannot be said that the rights of surrounding owners are affected materially or adversely.

27. A ‘zoning scheme’ is defined by s 2 of LUPO to mean ‘a scheme consisting of scheme regulations and a register, with or without a zoning map’. The register consists of a publicly accessible record of all departures from generally applicable land use restrictions authorised by the local authority concerned. The term ‘zoning’ in turn is defined to mean ‘a category of directions setting out the purpose for which land may be used and the land use restrictions applicable in respect of the said category of directions, as determined by the relevant scheme regulations’.

28. The Port Elizabeth Zoning Scheme promulgated in terms of s 9 (2) of LUPO and which applies in this instance, defines the several zones into which land may be zoned. These categories permit the zoning of land for, *inter alia*, residential, commercial, industrial and agricultural purposes. The scheme includes a table setting out for each use zone the primary or permitted uses (being those use rights conferred by virtue of the zoning); the secondary or consent uses (being those uses as may be conferred by the granting of consent by the council); and prohibited uses (which are uses to which the property may not be put).

29. In addition to the specified permitted uses which attach to a zoning the scheme regulations make provision for a wide range of land-use restrictions which apply generally to each use zone. These land use restrictions relate to the extent of improvement of the land.[14] The scheme regulations deal with these in Part IV as "development parameters" the purpose of which is to determine:

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[14]The term 'land-use restriction' is defined by LUPO to mean a 'restriction, in terms of a zoning, on the extent of the improvement of land'.

> (T)he density of development, the maximum coverage of buildings, the maximum height of buildings, the minimum building lines along street and the minimum side and rear spaces between buildings.

30. These parameters are provided for each use zone. Section 15 of LUPO provides for a "departure" from these land use restrictions in accordance with a specified procedure. It is however not necessary to deal with this aspect. For present purposes it is necessary only to note that the development parameters set for each use zone apply automatically according to the zoning unless such land use restrictions are varied by way of conditions imposed in terms of section 46 (1) of LUPO upon approval of a re-zoning or the granting of a consent use.[15] This means that upon the approval of a re-zoning for example, the set of use rights conferred include

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[15] A 'departure' is defined to include an altered land-use restriction '(i) imposed in terms of s 15 (1), or (ii) imposed in terms of a condition by virtue of any provision of this Ordinance…'

the defined permitted uses and the property development parameters provided for in the scheme regulations.

31. Applications for re-zoning are made in terms of s 16 of LUPO. The procedure requires notice to adjacent property owners, public advertisement of the application and the consideration of any objections received. ‘Re-zoning’ involves the alteration of a zoning scheme by amendment of the zoning map and, where applicable, the register that forms part of the scheme.[16]

[16] See s 2 read with s 16(3) of LUPO. The latter provision requires the local authority to amend the zoning map and register ‘as soon as practicable after approval’.

32. Section 36 governs the basis for refusal of applications. An application may only be refused if the proposed alteration of the zoning or the envisaged consent use lacks desirability or by reason of its effect upon existing rights (cf. Booth and others NNO v Minister of Local Government, Environmental Affairs and Development Planning and another[17]).

33. Section 39 of LUPO provides that:

> (1) Every local authority shall comply and enforce compliance with –

[17] 2013 (4) SA 519 (WCC) at 531 I – 532 B; 533 B – 534 D

(a) the provisions of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Townships Ordinance, 1934 (Ordinance 33 of 1934);
(b) the provisions incorporated in a zoning scheme in terms of this Ordinance, or
(c) conditions imposed in terms of this ordinance or in terms of the Townships Ordinance, 1934,

and shall not do anything, the effect of which is in conflict with the intention of this subsection.

(2) No person shall –

(a) contravene or fail to comply with –

(i) the provisions incorporated in a zoning scheme in terms of this Ordinance, or
(ii) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934,

except in accordance with the intention of a plan for a building as approved and to the extent that such plan has been implemented, or

(b) utilise any land for a purpose or in a manner other than that intended by a plan for a building as approved and to the extent that such plan has been implemented.

34. It is important to observe that s 46 of LUPO renders non-compliance with the provisions of, *inter alia*, s 39 (2) a criminal offence.

35. Section 42 deals with conditions which may be imposed when an application for re-zoning, subdivision or a departure is approved by the local authority. The relevant provisions read as follows:

(1) When the Administrator or a council grants authorization, exemption or an application or adjudicates upon an appeal under this Ordinance, he may do so subject to such conditions as he may think fit.

(2) Such conditions may, having regard to –

(a) the community needs and public expenditure which in his or its opinion may arise from the authorization, exemption, application or appeal concerned and the public expenditure incurred in the past which in his or its opinion facilitates the said authorization, exemption, application or appeal, and

(b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

include conditions in relation to the cession of land or the payment of money which is directly related to requirements resulting from the said authorization, exemption, application or appeal in respect of the provision of necessary services or amenities to the land concerned.

(3) …

(4) …

36. Clause 1.6.5 of the Zoning Scheme provides as follows:

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

37. Before turning to consideration of the issues to be decided reference must briefly be made to the concept of a “consent use” and the procedure which governs the granting of such consent by a local authority. The LUPO does not deal with consent uses, these are provided for by the applicable zoning scheme. The Port Elizabeth Zoning Scheme draws a procedural distinction between two types of consent, namely where consent may be granted without compliance with the advertising requirement stipulated in regulation 3.18 of the scheme regulations and ‘special consent’.

38. In relation to the latter, the procedures set out in regulation 3.18 must be complied with. Special consent is required in respect of secondary uses for all use zones. The procedures may be summarised as follows: before an application is made the applicant must publish an advertisement giving notice of the intention to apply and must lodge proof of such advertisement with the council; written notice of the application must be served by registered post or hand upon the adjoining or affected owners and proof of such service must be lodged with the council.[18]

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[18] Regulation 3.18 states:

3.18.1 Except where otherwise specified any person intending to make application to the Council for its Special Consent for a use, whether partially or wholly for any purpose requiring its Special Consent in terms of this Scheme shall before making application –

1. Publish an advertisement in both an Afrikaans and English newspaper circulating in the area, giving notice of his intention to make such application and shall lodge with the Council proof of such publication together with the application;
2. Serve written notice of the proposal either by registered post or by hand on the adjoining / affected property owners whether the property is developed or not, provided that where the written notice is served by hand, a copy of the notice so served signed by the adjoining / affected owner

39. It is important to note that whilst an application for re-zoning and one for special consent may be dealt with simultaneously (as evidently occurred previously in applications made by the first respondent), LUPO and the scheme regulations contemplate two separate and distinct applications.

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acknowledging that he has received the notice shall be lodged with the Council in proof of such service.

3.18.2 The notice, as prescribed by Council from time to time, shall state that any person having any objection to the proposed use may lodge such objection together with the grounds thereof with the Council in writing within fourteen days after the date of the last advertisement and shall further state where the plans, if any, may be inspected.

3.18.3 On receipt of any objection referred to in regulation 3.18.2 the Council shall. Without delay, refer the objection to the applicant for his comments.

3.18.4 The Council shall take into consideration any objections which have been received within the said period of fourteen days and the applicant's comments on objections and shall within seventy (70) days after receipt of the applicant's comments on any objection, notify the applicant and the persons, if any, from whom objections were received of its decision.

Is re-zoning subject to removal of a conflicting restrictive condition lawful?

40. The argument advanced by the applicant is that such a "conditional re-zoning" is prohibited by clause 1.6.5 of the Zoning Scheme Regulations and is in conflict with the common law principles applicable to the status of restrictive conditions of title.

41. The first respondent argued that the effect of the condition imposed is that the subject properties may not be used for the intended purpose and that this accords with the principles set out in Malan and others v Ardconell Investments (Pty) Ltd [19]that a zoning scheme approval or consent does not *per se* confer rights in conflict with the terms of a restrictive condition of title. It was also argued

[19] 1988 (2) SA 12 (A)

that s 39(1) of LUPO does not preclude the granting of such a conditional consent and that the decision does not offend regulation 1.6.5 of the Zoning Scheme.

42. It was common cause that the re-zoning of the subject property to residential 3 purports to confer primary use rights which are in conflict with the restrictive condition registered against the title deed. The primary uses of a residential 3 property includes dwelling units, residential buildings and guest houses and its secondary uses include licensed hotels, medical uses, places of amusement, public assembly, worship, assembly and instruction, institutions, special uses and parking.

43. In Van Rensburg NO and another v Nelson Mandela Metropolitan Municipality and others [20]Froneman J stated that restrictive conditions of title, by reason of their character as praedial servitudes, enjoy precedence over the provisions of a zoning scheme. The learned judge referred to well-known authority in this regard [21] and went on to state that "any possible permission to utilize the property or buildings contrary to the conditions cannot be lawful".[22]

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[20] 2008 (2) SA 8 (SECLD)

44. The Supreme Court of Appeal, in Van Rensburg NO v Naidoo NO; Naidoo NO v Van Rensburg NO[23] specifically endorsed this finding.

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[21] Ex Parte Rovian Trust (Pty) Ltd 1983 (3) SA 209 (D) ; Malan and another v Ardconnell Investments (Pty) Ltd 1988 (2) SA 12 (A)

[22] Van Rensburg supra at par 8

[23] 2011 (4) SA 149 (SCA)at par 36

45. Mr. *Scott* argued that these authorities do not specifically preclude the granting of a conditional approval of a re-zoning application subject to the condition that the restrictive condition be removed before the use rights conferred by the re-zoning are executed or put into effect. This was so he argued because the imposition of the condition precluded the use of the property contrary to the restrictive condition and therefore did not fall foul of the principle enunciated in the authorities, nor indeed the terms of regulation 1.6.5.

46. Mr. *Scott* submitted that the condition imposed in (b) (i) of the resolution approving the re-zoning of the property, from residential 1 to residential 3, namely that:

> The restrictive conditions applicable to erf 2787, 2318 and 1756, Lorraine being removed.

falls within the ambit of s 42 (1) and, therefore, that the approval of the re-zoning does not permit anything to be done in conflict with the conditions of title. It was his argument that this "condition" is in effect a condition precedent which precludes the use of the subject properties for the intended use until such time as the restrictive condition is removed.

47. In this regard he referred to South African Broadcasting Corporation v Transvaal Townships Board[24] and Enslin v Provincial Administrator, Transvaal [25] as authority for the proposition that such conditional approval does not offend the principles set out in the aforementioned authorities.

48. In the SABC matter the court was concerned with the granting of a consent to use property to which a restrictive

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[24] 1953 (4) SA 169 (T)

[25] 1976 (3) SA 443 (T)

condition of title limiting its use to residential usage, for the establishment of a broadcasting studio. The local municipality had approved the development of the broadcasting studio 'for town planning purposes'. An appeal was heard by the Townships Board which came to the conclusion that clause 40 of the applicable town planning scheme did not permit the granting of the consent given. The matter was heard a judge in chambers who endorsed the Township Board's interpretation. On appeal against that decision the question to be decided was whether that interpretation of clause 40 was correct. Murray J dealt with the basis of the resolution granting the consent as follows:

> The effect of the resolution is that as far as concerns the City Council the use of the lot as a broadcasting centre is sanctioned as in keeping with town planning considerations, but this does not override the restrictive conditions in the applicant's title, and while those conditions stand the City Council does not sanction the desired use of the stand is such use is prohibited by those conditions. If (as appears to be the case) the City Council is empowered to attach conditions to its grant of consent, I see no objection too what it has done, which is in effect to attach to its grant of consent the condition that the applicant before availing itself of such consent must take the necessary steps to have these restrictions on use removed from its title.
>
> The second respondent's contention goes to the length that the City Council deliberately excluded from its power to grant consent for the use of properties for purposes fitting in with town planning considerations these properties subject to conditions preventing such use, even though it was well aware that once it had consented to the use asked for, the owner could approach the Administrator for the removal of the restrictions. This appears to me to be most unlikely.

> For the above reasons I have come to the conclusion that the Board erred in holding that the City Council was precluded by clause 40 from granting a consent, qualified as it was by clause 15 of its resolution, for the use of the lot in question as a broadcasting studio.

49. The first respondent relied heavily upon these passages as establishing the principle that a conditional re-zoning was permissible.

50. In order to understand the reach of the decision in the SABC matter it is necessary to consider what the court was there called upon to decide and in what legislative context the decision was made. The judgment of the court is set out in the judgment of Murray J, with Neser J concurring. Clayden J wrote a separate judgment agreeing with the order made by Murray J but in which he advanced different reasons.

51. Firstly the SABC matter did not concern a re-zoning application. It involved a consent to use of a building as a broadcast studio. Little, if anything turns on this, but it is as well to bear in mind that what was at issue was not the

conferring of generally defined use rights as attach to the zoning of a property. Secondly, the court was required to interpret clause 40 of the particular zoning scheme that applied and it sought to do so against the background of the provisions of the Removal of Restrictions Act 48 of 1946.

52. The reasoning of Murray J in relation to whether clause 40 precluded the granting of a conditional consent commences at p 173 of the judgment and proceeds as follows:

> In regard to the first point it must be borne in mind that the Townships and Town Planning Ordinance, 11 of 1931, as amended by sec. 7 of Ord. 20 of 1941, conferred extremely wide powers directed towards the removal of restrictions imposed on the use of property by title deed or township

> conditions. After this section had been declared *ultra vires* in November, 1944, by the Appellate Division (*Rossamur Mansions (Pty.), Ltd. v Briley Court (Pty.), Ltd., 1945 A.D. 217)* Act 48 of 1946 was assented to on 20th June, 1946. The Act does not sanction the removal by the Administrator of a Province of such restrictions as relate to mineral rights, supply of liquor or sale of land or use of land by non-Europeans, but applies to three classes of purposes for which such removal was desired – (1) use for ecclesiastical purposes, (2) use for State purposes and (3)
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> "where the Administrator is satisfied that it is desireable to do so in order to enable the owner of the land concerned to use it for any purpose for which he may use it in terms of a town planning scheme"
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> in operation by law in respect of the township in question.

53. Murray J went on to consider the argument that the terms of clause 40 contained a limitation upon the type of consent that a municipality may give and concluded as follows (at 174E):

> If the second respondent's contention is sound, moreover, it is impossible at the moment to take advantage of sec. 1 (3)

> (a) of Act 48 of 1946 which regards the determination by a town planning scheme of the permissible use of the property as a condition precedent to the owner's right to secure removal of servitudinal restrictions on such use.
> (Emphasis added)

54. It is in this context that the passages referred to above and which follow on from this finding must be read.

55. Clause 40 of the relevant town planning scheme utilizes language which is not dissimilar to that employed in regulation 1.6.5. Here however the similarities with the present end. The Removal of Restrictions Act 1946 was specifically enacted to create a permissive mechanism by which restrictive conditions could be removed. The mechanism so created envisaged a process by which the prior determination of "town planning considerations" relating to the property could be obtained.

56. It is against the background of this legislative scheme that the court in SABC came to the conclusion that the scheme regulations permitted the granting of a consent "for the purposes of town planning" and accordingly that a conditional grant of consent could be given. This represents the *ratio decidendi* of the judgment. As noted by Cameron JA in True Motives 84 (Pty) Ltd v Mahdi and another[26] it is the *ratio* which constitutes binding authority and not those statements which are *obiter dictum.*

57. The Enslin v Vereeniging Town Council matter concerned the question whether a consent to use property, to which a condition regarding the removal of a restrictive condition of title applied had lapsed. The town planning scheme made provision that a consent would lapse within 12 months of the date on which the consent had been given. The owner of the property applied for consent to use the property for purposes of operating a crèche. The application was refused by the town council. On appeal the consent was given subject to the condition that the restrictive condition of title limiting the use of the property for residential purposes be varied in terms of the Removal of Restrictions Act 84 of 1967, the legislation

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[26]2009 (4) SA 153 (SCA)

which presently applies. A subsequent application for the removal was granted. The question before the court was whether the consent that had been given took effect on the date on which it was initially granted by the town council or on the subsequent date when the restrictive condition was removed.

58. The court found that the date on which consent was given by the town council was the operative date for determining whether the consent had lapsed.[27] In coming to that conclusion the court relied upon the distinction between a consent which is given for "town planning purposes only" and the consent authorizing "actual use" of the property given by an entirely different authority.[28] In drawing this distinction the court relied upon the judgment of Clayden J in the SABC matter.[29] The lawfulness of the consent granted on appeal

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[27] Enslin (supra) at 449E

was not considered and appears to have been accepted by both parties and by the court. What is striking about the judgment is that no reference was made to the main judgment in the SABC matter, namely the judgment of Murray J.

59. The judgment in the Enslin matter does not therefore address the principal issue in this matter, namely whether the granting of a consent or a re-zoning in conflict with a

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[28] Enslin (supra) at 447A

[29] Enslin (supra) 447E-448H

restrictive condition of title is lawful if it is granted subject to the condition that the restrictive condition of title be removed or varied. The question therefore is whether the SABC matter establishes a general principle which is of application to the present matter. In my view it does not. Firstly, as is indicated above the SABC matter concerned the interpretation of a clause in the relevant town planning scheme in the context of the legislation which was then applicable.

60. Section 2 of the Removal of Restriction Act 84 of 1967 now regulates the process for the variation or removal of restrictive conditions of title. The section does not, unlike Act 48 of 1946, make provision for an approved town planning use of and as a ground for the removal of a restrictive condition of title. What an applicant is required to show is that the variation or removal of a restrictive condition is desirable in the interests of the development of the area or the public interest.

61. In my view both the SABC and the Enslin matters are distinguishable. I am in any event not at all persuaded that they establish a generally applicable principle which is to be applied to the present matter. Before turning to examination of the ambit of s 42 there is one aspect, the relevance of which will become clear later this judgment, on which the Enslin judgment is of assistance. As noted above, the court in that matter found that the condition relating to the restrictive condition did not constitute a condition precedent to the consent given. That finding was based on the construction of the consent as given for “town planning purposes only” and that the “condition” did no more than draw to the attention of the applicant that clause 48 of the relevant scheme provided that the consent should not be construed as conferring rights in conflict with a restrictive condition of title.

62. It was on this basis that it was found that the consent “for town planning purposes” took effect on the date that it was granted by the local council and not on the date of “fulfilment” of the condition by removal of the restrictive condition of title. In essence the court found that the “condition” was not a condition at all. It was a reservation which gave expression to the legal position encapsulated in the terms of the town planning scheme (page 449D). It is worth observing that the term of the “condition” in the SABC matter more clearly indicates that it was a reservation of the legal position provided by clause 40 of the town planning scheme in that matter. This finding is instructive when regard is had to the nature of the ‘condition’ imposed in this matter.

63. I turn now to consider the ambit of s 42 of LUPO. The concept of a “condition” is, understandably, not defined by LUPO. In order to discern its ambit therefore and whether a particular “condition” is one lawfully imposed in terms of the section, it is necessary to consider, firstly, the type of approval given and the type of conditions which ordinarily are relevant to

such approval. It is also necessary to examine the interplay between s 42 and s 39 in order to understand the character and efficacy of such conditions.

64. In this instance we are dealing with a re-zoning. The term “zoning” as already noted refers to the “category of directions” given by the local authority to define the purpose for which land may be used and the land use restrictions which are to apply. The act of zoning therefore is the determination of that set of directions. As already noted, each use zone is subject to a defined land use restrictions dealt with in the development parameters provided for in the Zoning scheme. These apply automatically unless a departure, by way of the imposition of a condition in terms of s 42 of LUPO, is authorised. In this regard it is important to note that a departure is defined, in terms of s 2 off LUPO, to include a condition imposed in terms of s 42(1). The imposition of a condition in terms of section 42 (1), in the context of a re-zoning, therefore relates to the determination of specific land use restrictions to be applied to the property

concerned. (cf. Camps Bay Ratepayers Association and others v Hartley and others[30]).

65. In support of this construction it is apposite to note that LUPO makes provision for three types of applications to which s 42 applies, namely departures (in terms of s 15); re-zoning (as already discussed) and subdivisions (in terms of s 24 and 25). Typically subdivision applications, particularly those involving subdivision of large tracts of land for development purposes, involve the imposition of extensive conditions which regulate the use of the subdivided portions of land, the development parameters that are to be applied as a well provision of services, pubic land, servitudinal rights and the like. These are imposed in terms of s 42(1) of LUPO

[30](3430/2010) [2010] ZAWHC 215 (16 November 2010) at par 5 - 6

66. In addition section 42 (2) makes provision for the imposition of obligations relating to the payment of levies and other development contributions which arise in consequence of the change in use of the property concerned.[31] Section 42 (3) in turn provides for a procedure, in terms of the Removal of Restrictions Act, where a variation or waiver of the condition imposed in terms of section 42 (1) arises in the context of an approval of an application made for a consent or re-zoning. The procedure to be applied is that provided for in the Act.

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[31] As for the purpose of these conditions see Herbert Holbrow (Pty) Ltd v Cape Divisional Council 1988 (1) SA 387 (C)

67. In Camps Bay Residents & Ratepayers Association and others v Hartley and others [32] Binns-Ward J examined the nature and character of conditions imposed in terms of s 42. He held that a 'departure' introduced by way of a condition imposed in terms of s 42 is a form of administrative legislation. The learned judge said the following:

> As already mentioned, the provisions of the zoning scheme, including any applicable departures or conditions, are generally obligatory by reason of s 39 of LUPO. They are therefore plainly intended to have the effect of law in a legislative sense, albeit administratively made. Zoning scheme provisions are intended to regulate land use and development so as to promote the co-ordinated and harmonious use of

[32] Supra at par 23

> land; cf. e.g. *Esterhuyse v Jan Jooste Family Trust* 1988 (4) SA 241 (C) at 253H-I. The public, and most certainly the owners and occupiers of land in the close proximity of other land which is to be the subject of altered land use or development, for example, by the erection thereon of new or extended building structures have a cognizable legal interest in compliance with and the enforcement by the local authority with the provisions of the applicable zoning scheme. This has been recognised in many judgment over the years handed down by courts throughout the country.

68. The learned judge then went on to note that[33]:

[33] Supra at par 24

> It is a basic tenet of the rule of law that law cannot be effective if its content is not clear and readily accessible. So, for instance, as Mokgoro J observed in *President of the RSA v Hugo* 1997 (4) SA 1 (CC) (1997 (1) SACR 567; 1997 (6) BCLR 708) at para. [102], in the context of addressing the content of the concept of 'law of general application' in s 33 of the interim Constitution, 'The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law. Further, laws should apply generally rather than targeting specific individuals'; or, as De Villiers J put it in *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T) at 439 C-D, in the context of discussing the presumption against retrospective effect of legislation, 'The ability to arrange one's affairs in the shadow of the law is an essential requirement to the rule of law. The point was made as follows by the American Supreme Court in *Papachristou v City of Jacksonville* 405 US 156 (1972) at 162:
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> 'Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids" *Lanzetta v New Jersey* 306 US 451, 453.'.'

69. In the Hartley matter these observations served to highlight the critical importance of the accessibility of departures imposed by way of conditions in the public register for which provision is made in LUPO. It is important for present

purposes to consider the purpose of s 16 (3) referred to above. That section plainly exists to ensure that the administrative law-making process associated with the approval of a re-zoning is effective by providing for the publication in a publicly accessible form the rights and obligations which flow from such approval. In the present context these observations also point to the fact that the "condition" which the applicant purported to impose is not a "condition" as envisaged by s 42. It is plainly not a 'departure' and therefore is nowhere recorded in a publicly accessible register reflecting the legal commands or prohibitions imposed by the local authority. When regard is had to s 39 (2) read with s 46, non-compliance with a condition constitutes a criminal offence. The local authority is also obliged to enforce compliance with it. It is, in my view, doubtful that such a condition can be positively enforced in terms of s 39 or that a failure to comply with such a condition (in the sense of not applying for the removal of the restrictive condition while not utilizing the property in terms of the envisaged re-zoning) can constitute a criminal offence. The "condition" achieves no more than state the legal position, namely that a use right conferred by LUPO does not take precedence over a conflicting restrictive condition of title. It also serves no purpose in the light of regulation 1.6.5 of the zoning scheme.

70. The conditions envisaged by s 42 do not in my view "suspend" the re-zoning, in the sense that no use rights are conferred or attach to the property "until such time as the condition is met". The granting of a re-zoning implies immediate permission to use the property in accordance with the use rights conferred by such re-zoning. So for example s 16(2) of LUPO makes provision for the lapsing of a re-zoning if within a period of two years after the re-zoning has been approved the property is not used in accordance with the re-zoning. Furthermore, the imposition of conditions which determine the land-use restrictions applicable to the specific property bring about a "departure" from the land-use restrictions which generally apply to the use zone in relation to the re-zoned property. It is difficult to conceive that such conditions would have the effect of "suspending" the re-zoning. Insofar as s 42 (2) conditions are concerned these relate to the payment of levies; the cession of land or the provision of services. General conditions such as the

submission of a site development plans and building plans and the like also, in my view, do not suspend the re-zoning.

71. There is nothing in section 42 which suggests that the re-zoning does not take effect when the approval is granted. If indeed it was intended that the vesting of a use right could be deferred or suspended by the imposition of a condition to that effect it is likely that an appropriate provision would specifically have been enacted. When regard is had to the fact that a re-zoning requires amendment of the Zoning Scheme and Zoning Map as soon as practicable after approval it appears that the effect of a decision to approve a re-zoning is that the use rights are thereby conferred. These are rights that attach to the land concerned. The vesting of a right does not of course mean that such use rights may be lawfully exercised if, in the exercise of that right, a condition is not complied with. Section 39 specifically obliges compliance with imposed conditions and non-compliance with such conditions may render the use of the property unlawful and therefore subject to a prohibitory interdict. In

this sense, conditions imposed by a local authority are "preconditions" for use of the property (cf. Edward Falconer NO and another v Nelson Mandela Metropolitan Municipality (unreported case no 014/2004, ECD, Full Bench delivered 27 February 2004) par [7]). The imposition of conditions in terms of s 42 does not however have the effect of not conferring use rights upon the owner of the property.

72. In the light of these considerations I find that the ‘condition’ imposed by the applicant in approving the re-zoning of the properties from residential 1 to residential 3, namely that the restrictive conditions of title be removed, is not a condition envisaged by s 42 and is accordingly unlawful.

73. A local authority cannot, in deciding whether or not approve a re-zoning application, ignore the rights conferred by a restrictive condition of title. Section 36 sets out the basis upon which an application may be refused. The effect of the approval upon existing rights is one such basis. An objection to a re-zoning may very well be based upon the fact that the property is subject to a restrictive condition of title and that regulation 1.6.5 prohibits anything been done which is in conflict with or contrary to the terms of a restrictive condition. Would a municipality in those circumstances be entitled to say - we are not considering such an objection because from a town planning point of view we approve the re-zoning subject to the removal of the restrictive condition and we do so despite the objection? The answer, in my view, must be no.[34] Furthermore s 39 obliges the local authority to enforce compliance with conditions imposed in terms of LUPO and conditions imposed in terms of, *inter alia*, the Townships Ordinance, 1934. Section 39(1) also pertinently requires that a municipality "not do anything the effect of which is in conflict with the intention" of the sub-section. On this basis too, administrative decision-making which purports to circumvent the effect of a restrictive condition of title by deferring decision-making in relation to it to another

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[34]Cf. Van Rensburg NO v Nelson Mandela Bay Municipality (supra)

administrative decision maker would be unreasonable and irrational.

74. All of this points ineluctably to the conclusion that a conditional re-zoning such as that which occurred in this instance is unlawful. It follows therefore that it must be set aside. In the light of this conclusion it is not necessary to consider whether the decision was also irrational or unreasonable having regard to the alleged lack of desirability. For reasons which will become apparent hereunder it is also not appropriate to enter into the debate on that issue.

The decision to grant Special Consent

75. During argument Mr. *Scott* conceded that if the decision to re-zone the property from Residential 1 to Residential 3 is to be set aside then it must follow that the special consent granted to the first respondent must also be set aside. That is so because the special consent relates to secondary uses in respect of the re-zoning to Residential 3.

76. It is therefore not necessary to consider the several arguments advanced in respect of the special consent granted to the first respondent. I nevertheless consider it necessary to deal with one obvious fatal defect in the special consent which points to a troubling approach adopted by the applicant in the resolution of the application which served before it.

77. As pointed out hereinabove a special consent may be granted by the municipal council in accordance with the procedure set out in clause 3.18 of the Scheme Regulations. The procedure requires an application to council for special consent. The language of the regulation is clearly mandatory. It requires publication of the application in newspapers circulating in the area and written notice of the application by registered post or delivery by hand on the adjoining or affected property owners. The procedure allows for objections and obliges the municipality to take into consideration any objections received.

78. In this instance the special consent was granted by the applicant without there having been an application pending before it. Property owners were notified of an application for re-zoning from Residential 1 to Business 1 and they lodged their objections to such application. That application was refused. They were at no stage informed that the municipality was considering granting a different zoning for which no application had been made and that it was

considering in addition granting special consent in order to permit the authorization of a portion of what the first respondent had originally requested. By doing so the applicant flagrantly disregarded the rights of adjoining or affected property owners and failed to follow a mandatory procedure. On this basis the granting of the special consent is unlawful and must be set aside.

79. The impression that is created is that the applicant - having previously steadfastly refused to countenance the envisaged use of the property - inexplicably and irrationally came to the view that the first respondent should be permitted to use the property in the manner envisaged and that it should be allowed to do so by means of a procedure which circumvented the established and lawful procedures which bind the applicant.

80. It follows from what is set out above that the application must succeed. The relief sought by the applicant was that the approval be set aside and that a decision be made that the application for re-zoning to residential 3 be refused. In the alternative it was suggested that the matter be referred back to the applicant for re-consideration of the application. The decision to refuse the re-zoning to business 1 was not challenged. It accordingly stands as the applicant's decision in respect of the application which served before it. There was, as a matter of fact, no application for re-zoning to residential 3 before it and therefore nothing to remit back to the applicant for re-consideration. If, and only if, the first respondent elects to apply for such re-zoning and / or special consent will the applicant be called upon to determine the application. In these circumstances the appropriate relief will be simply to set aside the unlawful decisions made by the applicant.

81. Finally there is the question of costs. The applicant sought costs only in the event that the application was opposed.

While the unlawfulness of the administrative action was of the making of the applicant itself, the first respondent chose to enter the lists and defend the decision. In the result the applicant succeeded in obtaining the relief it sought. It was accordingly successful and, in my view, the ordinary rule in respect of costs should apply. However, since the applicant would have been obliged to seek the relief it sought in order to correct its unlawful conduct I am of the view that fairness requires that the applicant should bear its own costs in respect of the preparation of the application on an unopposed basis.

82. I therefore make the following order:

1. The decision of the Executive Mayor on behalf of the applicant municipality dated 10 November 2014 to approve a rezoning of erven 1756, 2318 & 2787 Lorraine from Residential 1 to Residential 3 in terms of the Port Elizabeth Zoning Scheme Regulations promulgated under section 9(2) of the Land Use Planning Ordinance, 15 of 1985 is hereby set aside.

2. The decision of the Executive Mayor on behalf of the applicant municipality dated 10 November 2014 to grant special consent to the first respondent to use the aforestated erven to operate a licenced hotel and a place of worship is hereby set aside.

3. The first respondent is ordered to pay the costs of the application, such costs to exclude the taxed costs of drawing and preparing the applicant's founding papers in the application.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Applicant

Adv. M Euijen

Instructed by Gray Moodliar Attorneys

For the First Respondent
Adv. P.W.A. Scott SC
Instructed by Deon van der Merwe Attorneys