THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 155/09

WILMA EMMERENTIA VAN RENSBURG NO **First**

Appellant

PHILLIPUS STEPHANUS VAN RENSBURG NO
Second Appellant
(in their capacities as trustees for the time being of the Hobie Trust)

and

PERAPANJAKAM NAIDOO NO

First Respondent

PURSOTHAM NAIDOO NO
Second Respondent
SHASHI NAIDOO NO
Third Respondent
ANTHOSH NAIDOO NO
Fourth Respondent
(in their capacities as trustees for the time being of the Shan Trust)

Case no: 455/09

PERAPANJAKAM NAIDOO NO

First Appellant

PURSOTHAM NAIDOO NO
Second Appellant
SHASHI NAIDOO NO
Third Appellant
SESHAMMA MOODLEY NO **Fourth**
Appellant
ANTHOSH NAIDOO NO
Fifth Appellant
(in their capacities as trustees for the time being of the Shan Trust)

and

WILMA EMMERENTIA VAN RENSBURG NO **First**

Respondent

PHILLIPUS STEPHANUS VAN RENSBURG NO
Second Respondent
MEC FOR HOUSING, LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS **Third**
Respondent
EASTERN CAPE PROVINCE

NELSON MANDELA METROPOLITAN MUNICIPALITY

Fourth Respondent

THE REGISTRAR OF DEEDS **Fifth**
Respondent

Neutral citation: *Van Rensburg NO v Naidoo NO* (155/09); *Naidoo NO v Van Rensburg NO* (455/09) [2010] ZASCA 68 (26 May 2010)

CORAM: Navsa, Heher, Van Heerden, Mhlantla JJA and Saldulker AJA

HEARD: **3 May 2010**
DELIVERED: **26 May 2010**
SUMMARY: **Two linked appeals – nature of rights derived from restrictive conditions in title deed stated to be subject to alteration discussed – zoning regulations and town planning schemes not overriding restrictive conditions – the Removal of Restrictions Act 84 of 1967 not applicable – power of Member of the Executive Council of the Eastern Cape Province to alter or amend restrictive conditions – delegation not properly proved – decision made without reference to written objections in any event liable to be set aside – power of court of the same division and of equal jurisdiction to set aside or otherwise interfere with order intended to be final in effect discussed – held that in the prevailing circumstances the court had no such power either by way of inherent jurisdiction or in terms of the Uniform rules of court – held that justice required the prior order to be executed.**

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Van der Byl AJ and Dambuza J, each sitting as court of first instance in two separate but related matters).

1. In *Wilma van Rensburg NO & another v Perapanjakam Naidoo NO & others* (case no 155/09):
(a) the appeal is upheld with costs including the costs of two counsel.

(b) the order of the court below is set aside in its entirety and substituted as follows:
'The application is dismissed with costs including the costs of two counsel.'
2. In *Perapanjakam Naidoo NO & others v Wilma van Rensburg NO & another* (case no 455/09):

(a) the appeal is dismissed with costs including the costs of two counsel.

(b) the appellants' legal representatives are precluded from recovering any costs from the appellants related to the unnecessary and duplicated parts of the record (one third thereof).

JUDGMENT

NAVSA *et* MHLANTLA JJA: (Heher, Van Heerden JJA and Saldulker AJA concurring)

[1] These two linked appeals, which are before us with the leave of this court have been consolidated, and are the culmination of protracted litigation between feuding neighbours. The two appeals necessitate consideration of three judgments of the Port Elizabeth High Court. In the first, Froneman J had ordered that approvals granted by the Municipality, to legitimise construction work, which had already been completed in the north eastern corner of an erf in Summerstrand Township, Port Elizabeth, be set aside and that the entire northern building on that erf be demolished, as well as the top storey and staircase leading to it of another building situated in the north-western corner of the erf, within 60 days of the date of the order. He also ordered an abatement of a nuisance emanating from that erf.[1] In the second high court judgment, delivered on 8 July 2008, which is the subject of the first appeal before us under case number 155/2009, Van der Byl AJ, purported to declare parts of Froneman J's judgment, delivered on 30 March 2007, to be of no force and effect and made certain allied orders. In the third judgment, delivered on 2 June 2009, which is the subject of the second appeal under case number 455/2009, Dambuza J reviewed and set aside a decision of the Member of the Executive Council of Local Government & Traditional Affairs, Eastern Cape Province (the MEC) to remove restrictive title deed conditions in relation to the erf referred to above.

[2] In the first appeal, the power of a high court, not sitting as a court of appeal, to suspend or nullify final orders granted in the same division, in relation to the issues referred to in the preceding paragraph and to make related orders, falls to be considered. In the second appeal the question is whether the MEC's decision was rightly reviewed and set aside. The appeal against the order of Van der Byl AJ is referred to as the suspension appeal. The appeal against the order of Dambuza J is referred to as the review appeal.

[3] The opposing litigating trustees are as follows. The trustees for the time

[1] The judgment of Froneman J is reported as *Van Rensburg NO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE).

being of the Shan Trust are Perapanjakam Naidoo, her husband Purshotam Naidoo and three other members of their family. The trustees for the time being of the Hobie Trust are Phillippus and Wilma Van Rensburg, who are husband and wife. The litigating parties are referred to as the Shan and Hobie Trusts respectively.

[4] The Hobie Trust is the owner of erf 104, situated at 4 Sixth Avenue, Summerstrand, Port Elizabeth. The Shan Trust owns erf 105, situated at 3 Seventh Avenue, Summerstrand, Port Elizabeth. The Hobie Trust property abuts the northern boundary of the Shan Trust erf. The Shan Trust conducts the business of a guest house on erf 105.

[5] The litigation between the parties relates to certain structures on erf 105 that were constructed, extended and renovated over time by the Shan Trust, in furtherance of the guest house business it conducts on the premises. The following issues arise:

(a) whether erf 105 could be used for purposes other than that of a private residential dwelling;

(b) the legality of authorisations to conduct a guest house business, granted by the Nelson Mandela Metropolitan Municipality (the Municipality);

(c) the legality of approvals of building plans by the Municipality to regularise buildings already constructed on erf 105; and

(d) the power of the MEC, to alter or amend restrictive conditions in a title deed, more particularly in relation to erf 105.

[6] As will become apparent, chronology and sequence are crucial to a proper appreciation of the issues in both matters. At the outset it is necessary to deal with the history of Summerstrand, the township in Port Elizabeth in which the properties in question are located. Although there appears to be some confusion about the date of the establishment of Summerstrand Township, there is force in the submissions on behalf of the Hobie Trust, that relevant documentary evidence tends to show that the township was established by the Administrator of the then Cape Province at a time when the Townships Ordinance

13 of 1927 was in force. The Townships Ordinance 33 of 1934 repealed the earlier Ordinance, with effect from 1 January 1935. Section 63 of the 1934 Ordinance provided that any matter pending under the 1927 Ordinance and uncompleted should be completed in terms of that earlier Ordinance.

[7] At the time of the establishment of Summerstrand Township the following restrictive conditions were inserted in title deeds in favour of all erf-holders:

'C. SUBJECT FURTHER to the following conditions contained in Deed of Transfer T999/1944 imposed by the Municipality of the City of Port Elizabeth in terms of the provisions of Township Ordinance No 13 of 1927 in favour of itself and any erf-holder in the Summerstrand Extension Township (and *subject to alteration and amendment by the Administrator*):

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

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

(c) That no more than half the area of this erf shall be built on.

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

[8] It is now necessary to deal with the history of material events in relation to erf 105, which regrettably, is lengthy and complex. The Hobie Trust became owner of erf 104 in 1989. The Shan Trust became owner of erf 105 in 1996 and at that stage there was only one main dwelling situated on its southern boundary with a double garage outbuilding on the western edge.

[9] The Shan Trust conducted the business of a guest house on erf 105 by virtue of a special consent given to it by the Municipality, ostensibly in terms of its Zoning Scheme Regulations. The first consent was provided on 28 March 1996 and limited the Shan Trust to a maximum of four bedrooms for hire. On 17 September 2002 the Shan Trust applied for a further departure from the Zoning Scheme Regulations to operate a guest house with a total of 11 rooms for hire. The Hobie Trust, together with five other owners and residents in the vicinity, objected to the application. Almost two years later, on 28 July 2004, the

Municipality resolved to grant the Shan Trust's application, subject to certain conditions. An appeal by the Hobie Trust to the MEC against that decision was unsuccessful.

[10] Extensive improvements on erf 105 were embarked on by the Shan Trust from the time that it became owner. These were effected in three phases. It appears that at almost every stage of the development the plans and approvals followed the construction work on the premises. In respect of improvements effected during 2000 it is admitted by the Shan Trust that no building plans were approved by the Municipality until 2004. The Shan Trust's contention that it effected the improvements in the *bona fide* belief that the plans had been approved before construction commenced has an unconvincing and hollow ring to it.

[11] An outside staircase extending an existing one, in a building on the north-western side of the erf leading to the roof of a second storey, was not depicted on the approved plan. Once again, the Shan Trust's explanation that this was an oversight on the part of the architect, in our view, is too glib. In 2006, and after much litigation, the Shan Trust sought to overcome this problem by submitting a site development plan in pursuit of ex post facto approval.

[12] It is also clear that, prior to the special consent granted to it by the Municipality to extend its guest house facilities from four rooms to 11, the Shan Trust had already been letting and hiring 11 rooms. It is disingenuous to suggest, as the Shan Trust does, that it had lodgers in the additional rooms rather than guests.

[13] During 2004, after an application was launched in the Port Elizabeth High Court by the Hobie Trust to interdict the Shan Trust from using erf 105 unlawfully, officials of the Municipality inspected the property and found that rooms were unlawfully used on a permanent basis as accommodation for post-graduate students, that a staircase extended beyond the building line and that a number of kitchens had been installed within the existing buildings, contrary to the zoning

regulations. The Municipality demanded that the Shan Trust cease the unlawful use of the property and ensure that the construction work complied with zoning regulations within 30 days.

[14] As a result of the attitude adopted by the Municipality, and in the hope that the matter would be resolved to its satisfaction, the Hobie Trust withdrew its application for an interdict. The Shan Trust did not, however, satisfy all of the demands made upon it by the Municipality. This led to a further application by the Hobie Trust in the Port Elizabeth High Court, in which it sought, inter alia, an order for the demolition of the offending buildings on erf 105.

[15] The Municipality initially opposed the application and the Shan Trust decided in the light thereof, not to do so. However, one day before the answering affidavit by the Municipality was due to be filed, it made a demand upon the Shan Trust, similar to its previous demand referred to in para 13 above. According to the Shan Trust it responded by submitting new plans in an attempt to legitimise the buildings already constructed. The Municipality denied having received those plans.

[16] During February 2007, and before the application was heard, the Municipality withdrew its special consent to a departure from the zoning regulations, in terms of which it had granted the Shan Trust permission to conduct a guest house with 11 rooms. It subsequently also withdrew its opposition to the application by the Hobie Trust. In response, the Shan Trust entered the fray and sought a postponement from Froneman J, in order to do the following:

(a) to take the necessary steps to review the Municipality's withdrawal of its special consent;

(b) to make an application for the removal of the restrictive conditions from the title deed of Erf 105 Summerstrand;

(c) to resubmit a detailed site development plan and building plans in respect of improvements to Erf 105 Summerstrand.

At the same time the Shan Trust undertook, in an apparent attempt at appeasement, to abate the nuisance complained of.

[17] Froneman J, characterised the purpose of the postponement application as follows:

'[It] is in essence to give it time to construct a defence to the claims in the main application.'

The learned judge stated that the Shan Trust was required to show that it *prima facie* had a *bona fide* defence. He took the view that, even though the Hobie Trust had raised the restrictive title conditions in the main application set out in para 8 above as a ground for relief for the first time in supplementary affidavits at the end of October 2006,[2] the Shan Trust had done nothing in this regard until it sought a postponement in March 2007. Froneman J also took into account that the Shan Trust had failed to provide any legal or factual basis for the proposed review of the Municipality's decision to withdraw its special consent and for the setting aside of the restrictive title conditions. Consequently, the learned judge refused the postponement and ordered the Shan Trust to pay the costs, including the costs of two counsel.

[18] In the main application, Froneman J had regard to the relevant restrictive conditions. In essence they provide that the erf be used for residential purposes only, that only one single house dwelling for use by a single family and ordinary outbuildings required for such use may be built on the erf, and that no garage other than for ordinary use for persons residing on the erf may be erected. The learned judge stated that these kinds of restrictive conditions took precedence over the Municipality's zoning and planning schemes and that this followed from their characterisation in our case law as praedial servitudes in favour of other erf holders.[3] He concluded that any possible permission by the Municipality to build or use buildings contrary to the restrictive conditions could not be lawful. Froneman J went on to make the orders referred to in para 5 above. He refused

[2] Initially the grounds on which the Hobie Trust relied were: (a) the non-compliance with the National Building Regulations and Standards Act 103 of 1977, (b) contraventions of Zoning Scheme and Land Use Planning regulations and (c) the irregular granting by the municipality of special consent to use the buildings as part of a guest house.

[3] *Op cit* note 1 at para 8.

leave to appeal against his judgment.

[19] An application for leave to appeal against the judgment of Froneman J was refused by this court on 25 September 2007 and in due course by the Constitutional Court on 1 November 2007.

[20] In the meanwhile on 27 June 2007, approximately three months after the judgment of Froneman J, the Shan Trust applied to the Premier of the Eastern Cape for the removal of the applicable restrictive conditions. On 17 July 2007 the Hobie Trust objected in writing to the application by the Shan Trust and substantiated its opposition.

[21] On 11 October 2007, the MEC, purporting to act under delegated authority from the Premier of the Eastern Cape Province (the successor to the erstwhile Administrator), granted consent for the removal of Condition C (a), (b), (c) and (d) from Title Deed No T26430/1996 in respect of erf 105[4] and substituted therefor the following condition:

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

It is common cause that when the MEC made the decision to remove the restrictive conditions, she did not have before her the written objection by the Hobie Trust.

[22] On 7 November 2007 the Hobie Trust requested reasons for the MEC's decision to remove the restrictive conditions. Reasons were supplied on 1 February 2008.

[23] The Shan Trust resorted to yet further litigation. On 8 January 2008 an application was launched in the Port Elizabeth High Court, in terms of which it

[4] Set out in para 7.

sought an order setting aside parts of the order of Froneman J, alternatively an order that parts of his order be declared to be of no force and effect. Furthermore, an order was sought suspending that part of Froneman J's order in terms of which the Shan Trust was required to demolish and remove the top storey and the accompanying staircase of the building in the north western corner of erf 105, pending a decision of the Municipality in relation to the site development plan that it intended presenting for approval. From the perspective of the Shan Trust this would legitimise the offending structures, ex post facto. Further relief, irrelevant for present purposes, was also sought. This application was heard by Van der Byl AJ.

[24] On 26 March 2008, before the Shan Trust's application was ripe for hearing, the Hobie Trust instituted proceedings in the Port Elizabeth High Court to have the MEC's decision reviewed and set aside, inter alia, on the grounds that:

(a) the decision amounted to an abrogation of the real and registered praedial servitude rights of the Hobie Trust as well as of other residents in Summerstrand;
(b) the decision was not properly made in terms of the Removal of Restrictions Act 84 of 1967 (the Act);
(c) the decision constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and fell to be set aside on the bases set out above as well as it having been taken without hearing the affected parties, including the Hobie Trust and other residents in Summerstrand;
(d) the objections of the Hobie Trust and other affected residents were not considered;
(e) the MEC lacked statutory authority to make the decision removing the restrictive conditions.

[25] Before the Hobie Trust's application was heard, judgment was delivered in the Shan Trust application referred to in para 23 above. Van der Byl AJ made the following orders:

'1. It is declared that, because of the removal of the restrictive conditions contained in paragraph C of Title Deed No. T 26430/1996 in respect of Erf 105, Summerstrand, Port Elizabeth, by virtue of a decision of the [MEC] taken on 11 October 2007, paragraphs 1 and 2 of the order granted in Case No. 1668/06 on 30 March 2007 have become of no force and effect.

2. The [Municipality] is ordered to consider and process the site development plan and building plans, Annexure R to the founding affidavit, submitted to it by the Applicants on 7 June 2006 (of which copies have been submitted to it on 20 March 2007).

3. Paragraph 3 of the order granted by Froneman J on 30 March 2007 is suspended in terms of Rule 45A until such time as the [Municipality] has finally considered and processed the site development plan and building plans referred to in paragraph 2 of this order, whereafter the parties, depending on the outcome of such consideration and processing, are granted leave to approach this Court on the same papers, supplemented as the circumstances may require, for further appropriate relief.

4. The [Hobie Trust] is ordered to pay the costs of this application including the costs attendant upon the employment of two counsel.'

[26] Van der Byl AJ took into account that the Hobie Trust's review application was pending. He noted, with dismay that the Hobie Trust had refused to agree to a postponement of the Shan Trust's suspension application to allow for the finalisation of the review application. In dealing with the merits of the application, the learned judge had regard to numerous decided cases dealing with the maxim *cessante ratione legis cessat ipsa lex*, which literally translated reads as follows:

'If the reason for a law falls away, the law itself falls away.'

He considered whether it applied to interpretation of statutes only or whether it could be applied in relation to judgments and orders of court and concluded that a judgment and order may fall away if the *causa* fell away.

[27] Van der Byl AJ said the following in relation to the orders issued by

Froneman J:

'I am in grave doubt whether Froneman J would have, had the existence of the restrictive conditions been the only issue on which he was called upon to consider the demolition of the northern building, issued the orders in question if the restrictive conditions had at the time of his judgment already been removed, albeit after the northern building had already been erected.'

[28] The learned judge concluded that the removal of the restrictive conditions removed the *causa* on which the orders were based and that the execution of the orders had become unenforceable. He traversed ground already covered in the application before Froneman J and, unlike the latter, was readily accepting of the Shan Trust's assertion that subsequent to the demand by the Municipality during 2006 it had taken all the neccessary steps to regularise the situation in relation to offending structures on erf 105. It was for that reason that Van der Byl AJ made the orders compelling the Municipality to consider the plans set out in the orders made by him. In relation to paragraph 3 of Froneman J's order, he held that Uniform rule 45A entitled him to suspend it in the terms set out earlier.

[29] Subsequent to the order by Van der Byl AJ, the Hobie Trust's review application was heard and judgment was delivered. Dambuza J held that the decision by the MEC, removing the restrictive conditions, was administrative action in terms of PAJA and that it fell to be reviewed and set aside for failure, inter alia, to have regard to the submissions made by the Hobie Trust. She held further that there had been no proper delegation to the MEC and that the latter had no power to remove the restrictive conditions. Dambuza J accordingly ordered the Registrar of Deeds to reinstate the restrictive conditions to Title Deed No T26430/1996 in respect of Erf 105, Summerstrand.

Conclusions

[30] We intend to deal first with the review appeal. Counsel representing the Shan Trust rightly conceded that he could not contend that the decision by the MEC was not 'administrative action' as defined in PAJA.[5] He focused on the

[5] The MEC is a public authority. When she makes decisions affecting particular holders of title deeds and residents in a township generally she is exercising public power. Her decisions in this regard have a direct external effect.

nature of the rights derived from the restrictive title deed conditions. He sought to characterise them as rights which, from inception, were always subject to alteration or amendment and submitted that residents including the Hobie Trust could not now complain when those restrictive conditions were altered or amended. He relied on the decisions of this court in *Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd* 1945 AD 217 and *Ronnie's Motors (Pty) Ltd v Van der Walt* 1962 (4) SA 660 (A) and on *Garden Cities v Registrar of Deeds* 1950 (3) SA 239 (C).

[31] In *Rossmaur* an application to the then Administrator of the Province for the removal of restrictive conditions was unopposed and the Administrator subsequently removed them. The respondent applied to court to have the Administrator's decision declared *ultra vires*. The court of first instance and this court had regard to the Ordinance in terms of which the Administrator purported to act and concluded that the Administrator had no power to deprive erf-holders of their rights. At pp 228-229 of *Rossmaur* the following appears:

'Where an application to establish a township has been granted subject to a requirement, imposed on the recommendation of the Townships Board, that restrictive conditions as to the use of lots are to be included in the titles, such conditions, when once included in the titles of the lotholders, if not framed in terms which expressly render them subject to future cancellation or variation, must be regarded as conferring rights of a permanent nature, which cannot be cancelled or varied either by the Townships Board itself, or by any other authority, by virtue of powers of "administration" exerciseable over the township concerned.'

[32] The Shan Trust's reliance on *Rossmaur* is misplaced. That case dealt with the Administrator's power to deprive erf-holders of their right. The dictum in the preceding paragraph is no authority for the proposition that an affected erf-holder should not be afforded a hearing. In the present constitutional structure such a

proposition is untenable.[6]

[33] It is true that in *Garden Cities* the high court held that owners were not entitled to be consulted on an Administrator's decision to amend or alter restrictive conditions. That case was decided by a provincial division almost 60 years ago. It is unsustainable under the current constitutional dispensation and perhaps even wrongly decided then.[7]

[34] It is necessary to address the MEC and the Municipality's attitude towards the rights of land owners, derived from restrictive conditions in their title deeds. The Municipality and the MEC appear to adopt the position that the Municipality's policies and zoning regulations trump the rights of owners derived from their title deeds. This is unacceptable.

[35] In *Malan & another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 40E-G this court said the following:

'[I]t must be borne in mind that a town planning scheme does not overrule registered restrictive conditions in title deeds. Moreover, a consent by a local authority in terms of a town planning scheme does not *per se* authorise the user of an erf contrary to its registered restrictive title conditions. See *Ex parte Nader Tuis (Edms) Bpk* 1962 (1) SA 751 (T) at 752B-D; *Kleyn v Theron* 1966 (3) SA 264 (T) at 272; *Enslin v Vereeniging Town Council* 1976 (3) SA 443 (T) at 447B-D.'

[36] Froneman J, in arriving at the conclusions referred to above, stated (at para 8):

'It is common cause that this kind of restrictive condition takes precedence over the municipality's zoning and planning schemes. Generally this follows from their characterisation in our case law as praedial servitudes in favour of other erf holders (*Ex parte Rovian Trust (Pty) Ltd* 1983 (3) SA 209 (D) at 212E-213F; *Malan and Another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 40B-I) and in this case also, particularly, from the

[6] See in this regard s 6(2)(c) of PAJA. That Act was promulgated in furtherance of the fundamental right to administrative action that is lawful, reasonable and procedurally fair.
[7] *Buffalo City Municipality v Gauss and Another* 2005 (4) SA 498 (SCA) at paras 7 and 8.

express wording of clause 1.6.5 of the Council Zoning Scheme Regulations. Consequently, any possible permission by the municipality to build or use buildings contrary to the conditions cannot be lawful.'

See also *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape and others* 2001 (4) SA 294 (C) at 324E-G.

[37] 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.

[38] Section 84 of the Act provides for notice to be given to affected persons in the event of a contemplated removal of restrictive conditions. In the present case the MEC and the Municipality disavowed any reliance on the Act and relied solely on the right reserved to the Administrator to alter or amend the restrictive conditions, as provided for in the title deed.

[39] Furthermore, the MEC's reliance on a delegation by the Premier is misplaced. First, the title deed itself does not provide for delegation. Second, no delegation was proved. In this regard the onus rested on the MEC. See *Chairman, Board on Tariffs and Trade & others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A) at 31F-H. The MEC relied on a proclamation in terms of which the administration of the Act was assigned to her.[8] Given that the MEC and the Municipality disavowed reliance on the Act it is of no assistance to them.

[8] Proclamation No 6 of 1998, Provincial Gazette No 323 31 July 1998.

[40] The two grounds referred to above, separately and together, are fatal to the Shan Trust case. There also appears to be force in the submissions on behalf of the Hobie Trust, that the power to alter or amend does not include the power to remove or delete. Further, since restrictive conditions are usually inserted to preserve the identity of an area, the Municipality might be required to engage with other neighbours and owners in the area. Even if the area has undergone some change, it does not necessarily follow that further change is warranted or unchallengeable. Steps have apparently been taken by the Municipality in an attempt to engineer a blanket removal of restrictive conditions in the Summerstrand area. As far as is known, no progress has yet been made. It is, however, for the reasons aforesaid, not necessary for any further discussion on these or any other issues in respect of the review appeal.

[41] For the reasons set out above, the conclusions of Dambuza J cannot be faulted.

[42] We turn to deal with the suspension appeal. In interpreting a judgment the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules relating to documents. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole to ascertain its intention. In this regard see *Administrator, Cape & another v Ntshwaqela & others* 1990 (1) SA 705 (AD) at 715F-H.[9]

[43] It is necessary to place Froneman J's judgment and conclusions in proper perspective. First, Froneman J was apprised of the Shan Trust's intention to

[9] Drawn from *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A).

apply to have the restrictive conditions removed and he clearly and rightly did not think it would be of any consequence. Second, the learned judge very carefully considered the conduct of the Shan Trust over the years and concluded as follows (at para 10):

'On the papers before me the Shan Trust has shown a flagrant and sustained disregard, not only for the legitimate interests of its neighbours, but also for the local authority requirements, over a very long period of time.'

[44] Froneman J went on to consider whether a damages claim rather than a demolition order might meet the exigencies of the situation. He took into account the diminution in value of the Hobie Trust property as a result of the Shan Trust's conduct. He reasoned that although a damages claim was viable, it was important to bear in mind that the continued enjoyment of the privacy of those living as neighbours to erf 105 would be destroyed if he failed to order demolition. He took into consideration that the title conditions sought to preserve the character of the suburb and that developments at erf 105 undermine it.[10]

[45] It should be borne in mind that in the application heard by Froneman J, the Shan Trust was aware of the allegations made against it by the Hobie Trust. It is clear that the repeated offending conduct of the Shan Trust, set out above, was traversed in the affidavits filed by the Hobie Trust. The Shan Trust chose, at its peril, to leave opposition to the Municipality.

[46] It is not surprising that Froneman J was unwilling to grant the Shan Trust the postponement sought. He had rightly concluded in the main application, that the Shan Trust had lagged behind the law once too often and that enough was enough! Thus, Froneman J's orders were intended to have immediate effect. The 60 day period within which the demolition order was to be effected was stipulated for practical purposes, namely to enable the owners and demolishers to do the

[10] See para 12 of the judgment.

necessary within a time frame. There can be no doubt that he intended that immediate steps be taken to ensure execution of the relevant orders.

[47] It is against that background that the application before Van der Byl AJ should be seen. Van der Byl AJ failed to appreciate the full import of Froneman J's judgement. It re-engaged on issues decided finally by Froneman J, namely, whether the offending conduct by the Shan Trust should continue to be countenanced. It will be recalled that Van der Byl AJ directed the Municipality to consider plans which, if approved, would ostensibly legitimise the contravening structures. Van der Byl AJ did what he was not empowered to do, namely, declaring in final terms, an order made by a court of equal jurisdiction to be of no force and effect.[11] He was not sitting as a court of appeal or review in respect of Froneman J's judgment and yet his reasoning reflects hallmarks of those procedures.

[48] The cases relied upon by the court below, dealing with the rationale for court orders falling away because of subsequent events, are distinguishable. In *S v Mujee* 1981 (3) SA 800 (Z) an accused had been convicted of failing to make payments under a contribution order to a named certified institution in contravention of provisions of the applicable Maintenance Act. On review it appeared that the child concerned had previously been discharged from the institution and that the contribution order should therefore have been discharged. The court held that since a contravention of the applicable statutory provision was dependent on the contribution validly being in force, it could not have been the law's intention to treat as valid, a maintenance order when the entire object of the order had fallen away. Put differently, the court had intended that

[11] As appears from what is set out in para 25 above Van der Byl AJ nullified Froneman J's order setting aside any building plan approvals granted by the Municipality in relation to the building that had already been constructed in the north eastern corner of erf 105.

contributions be made for as long as the child was in an institution. That scenario is a far cry from the facts of the suspension appeal. Froneman J had intended the orders he made to be final and to be executed. As far as he was concerned the Shan Trust had come to the end of the road.

[49] *Ras & andere v Sand River Citrus Estates (Pty) Ltd* 1972 (4) SA 504 (T), *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) and *Bekker NO v Total South Africa (Pty) Ltd* 1990 (3) SA 159 (T) were all concerned with the question whether the *causae* for writs of execution remained extant. These cases do not assist the Shan Trust.

[50] Purporting to act according to the provisions of Uniform rule 45A,[12] Van der Byl AJ suspended Froneman J's order, in terms of which the Shan Trust was required to take the necessary steps to demolish the offending structures on erf 105. He did so even before the stated reason for nullifying it had materialised, and without proper appreciation of what Froneman J had intended.

[51] Apart from the provisions of Uniform rule 45A a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.[13]

[52] A court will grant a stay of execution in terms of Uniform rule 45A where the underlying *causa* of a judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As

[12] Uniform rule 45A reads as follows:
'The court may suspend the execution of any order for such period as it may deem fit.'
[13]See Farlam, Fichardt, Van Loggerenberg *Erasmus Superior Court Practice* B1-330.

a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action.[14]

[53] Froneman J had regard to whether justice would be done by ordering the demolition. He considered an alternative measure, namely damages, but importantly, thought that the conduct of the Shan Trust over the years had been flagrantly disrespectful of the law and the rights of others. Seen from this perspective Van der Byl AJ erred in suspending the relevant order. Even though he may have taken a different view it was not appropriate for him to prefer his view to that of Froneman J.

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

[55] One remaining aspect calls for attention. The record in the review matter was prepared by the Shan Trust's legal representatives. It contains a great deal of irrelevant and duplicated matter. The Hobie Trust's representatives were not approached timeously to avoid this unfortunate result. Counsel representing the Shan Trust conceded that fault could rightly be attributed to his attorneys and was unable to provide a basis for resisting an order that his attorney should be precluded from recovering from his/her client such costs incurred in consequence

[14] *Erasmus Superior Court Practice* B1-330 to B1-330A.

of those unnecessary portions being incorporated into the record. In our view, at least a third of the record was unnecessary.

[56] For all the reasons set out above, the following order is made:

1. In *Wilma van Rensburg NO & another v Perapanjakam Naidoo NO & others* (case no 155/09):

(a) the appeal is upheld with costs including the costs of two counsel.

(b) the order of the court below is set aside in its entirety and substituted as follows:

'The application is dismissed with costs including the costs of two counsel.'

2. In *Perapanjakam Naidoo NO & others v Wilma van Rensburg NO & another* (case no 455/09):

(a) the appeal is dismissed with costs including the costs of two counsel.

(b) the appellants' legal representatives are precluded from recovering any costs from the appellants related to the unnecessary and duplicated parts of the record (one third thereof).

_____

M S NAVSA
JUDGE OF APPEAL

_____

N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

Case no 455/09

For Appellant:	H J Van der Linde SC J D Huisamen
Instructed by:	Greyvensteins Nortier Inc, Port Elizabeth E G Cooper Majiedt Inc, Bloemfontein
For Respondent:	O Rogers SC M Euijen
Instructed by:	De Villiers & Partners, Port Elizabeth Honey Attorneys, Bloemfontein

Case no 155/09

For Appellant:	O Rogers SC M Euijen
Instructed by:	De Villiers & Partners, Port Elizabeth Honey Attorneys, Bloemfontein
For Respondent:	H J Van der Linde SC

J D Huisamen

Instructed by: 1st – 5th Respondents:
Greyvensteins Nortier Inc, Port Elizabeth
E G Cooper Majiedt Inc, Bloemfontein

6th & 8th Respondents:
Rushmere Noach Inc, Port Elizabeth
(Abiding with the decision of the Court.)

7th Respondent:
State Attorney, Port Elizabeth
State Attorney, Bloemfontein