IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no: 5418/05

In the matter between:

BERG EN DAL ESTATE (INCORPORATING MOUNTAINDALE ESTATE) HOMEOWNERS ASSOCIATION Applicant

and

L. F. VAN HUYSSTEEN N.O. (in his capacity as Arbitrator in a dispute between the applicant and second and third respondent) First Respondent

CHRISTOPHER JOHN BRUNT N.O. Second Respondent

GLEN LLOYD SHERWELL N.O. Third Respondent

and

CASE NO. 787/2006

In the matter between:

BERG EN DAL ESTATE (INCORPORATING MOUNTAIN-DALE) HOMEOWNERS ASSOCIATION Applicant

and

CHRISTOPHER JOHN BRUNT N.O. First Respondent

GLEN LLOYD SHERWELL N.O. Second Respondent

JUDGMENT

ELOFF, A. J.

[1] The applicant in both applications before me is a Home Owners' Association as contemplated by and established in accordance with the provisions of section 29(1) of the Land Use Planning Ordinance, No 15 of 1985 (Cape) ("LUPO"), known as the Berg en Dal Estate (Incorporating Mountaindale Estate) Home Owners' Association. In approximately 1992, the Berg en Dal Home Owners' Association came into being when its constitution was approved by the relevant Local Authority, being the City Council of Cape Town. Subsequently, and in about 1994, the Western Cape Regional Services Council ("the RSC") approved of the rezoning and subdivision of erf 4670, Hout Bay, for purposes of the establishment of a township thereon. The RSC, following the requirements of section 29(1) of LUPO, imposed, as one of the conditions of approval, that before any land unit was transferred or built upon, a Home Owners' Association be established. The result was the establishment of the Mountaindale Home

Owners' Association. In about 2002, the Berg en Dal Estate Home Owners' Association and the Mountaindale Estate Home Owners' Association became amalgamated with one another, and the applicant was born from such amalgamation. On 1 September 2002, the constitution of the applicant, incorporating Mountaindale Estate, became of force. The applicant is, by virtue of the provisions of section 29(2)(a) of LUPO, a body corporate which is governed by such constitution.

[2] The Chris Brunt Trust ("the Trust") is the owner of Erf 8242 Hout Bay, which is situated in the Mountaindale portion of the estate. It is represented in both applications before me by its two trustees, being the second and third respondents. It is a member of the applicant Home Owners' Association. Erf 8242 apparently came into existence as a sub-division of Erf 5966 which, in turn, came into being as a sub-division of Erf 4670. The Trust apparently intends to construct a residential dwelling on its property. Whether and to what extent it will, in so doing, be or become subject to a height restriction, may to some extent depend on the outcome of these applications. There have thus far not been, and there are presently no formal height restrictions with respect to the construction of a building on, *inter alia,* erf 8242.

[3] At the time of the establishment of the Mountaindale portion of the estate, the conditions of sub-divisional approval imposed in terms of the provisions

of section 42(1) of LUPO did not include any height restriction with respect to the construction of any building thereon. Clause 9 of the relevant conditions of sub-divisional approval provided that "*the building lines as indicated on 'the attached plan' must be adhered to*". The attached plan appears to have been a "site development plan". That plan was approved by the Chief Town Planner of the Local Authority in September 1996. The site development plan did not regulate the question with respect to building height restrictions. The applicant, subsequently, adopted the attitude that it was necessary to formalise the regulation of building heights and a bulk factor when further sub-divisions within the estate resulted in more erven being created. The applicant raised the issue with the relevant department within the Local Authority, and its trustees were advised to make application for the acceptance of a revised site development plan. An application was accordingly prepared in accordance with such advice, which was thereafter submitted to the Local Authority. It was advertised to all owners of land in the estate (including the Trust). The Trust responded by submitting an objection to the Local Authority in respect of the application for a revision of the site development plan. The Trust also questioned the authority of the applicant to have submitted the application to the Local Authority.

[4] In about March 2005, the second and third respondents, in their capacities as trustees of the Trust, basing themselves on article 80 of the applicant's

constitution (to which I shall revert later), commenced arbitration proceedings against the applicant, in which they sought an award "*declaring that the decision by the [trustees of the applicants] to make application to the South Peninsula Administration for a revised site development plan and amended architectural guidelines to introduce height restrictions less than 8 metres calculated as in the relevant zoning scheme and a coverage/bulk factor other than 50% is invalid and be set aside*".

[5] The first respondent was appointed as Arbitrator to determine the disputes in the arbitration proceedings. On 28 April 2005, he published his Award, to which I shall refer more fully below. In paragraph 6.1 of his Award, he granted an order "*in the terms as requested by claimants [the second and third respondent in their capacities as trustees of the Trust] in paragraph (a) of the statement of claim – the decision is invalid and is hereby set aside*". The *ratio* of the Award appears from paragraph 5.8 thereof, reading "*I can find nothing in the above clauses [of the applicant's constitution] that would empower the HOA [the applicant] to make the application in question*". This paragraph (and others to which I shall later refer) raised certain questions in the applicant's mind, including that as to whether the Arbitrator had determined any of the disputes submitted to him. The question that the Arbitrator in fact determined was whether the applicant's constitution empowered it to make the application for the revision of the site

development plan. Whether that question fell within the scope of the terms of his reference as Arbitrator is one of the crucial questions to be determined in the applicant's application under case number 5418/05..

[6] The applicant's application under case number 5418/05 ("the first application") is for a review of the Arbitrator's Award, on the basis that the Arbitrator decided an issue that was not amenable to arbitration, and/or that had not been referred to him for determination, and that, accordingly, he exceeded his powers in determining that question. The applicant, accordingly, seeks an order directing that the Award be set aside in terms of the provisions of section 33(1)(b) of the Arbitration Act, No 42 of 1965 ("the Act"). In the alternative, the applicant seeks a declaratory order to the effect that the Award is invalid "*insofar as it purports to hold that the Applicant does not have the legal standing to make an application for the imposition of additional conditions in terms of section 42 of the Land Use Planning Ordinance 15 of 1985 (Cape) which, if approved, would result in development restrictions in respect of erven within the Berg en Dal (including Mountaindale) Estate narrower than those generally applicable in terms of the relevant provisions of the zoning scheme*". This relief is sought on the assumption that the arbitral Award is to stand, i.e. that it is not to be set aside on review.

[7] In the application under case number 787/2006 ("the second application"), the applicant seeks an order declaring that it is "*entitled in law, subject only to compliance with any procedural requirements in its constitution, to apply to the Local Authority*" for the waiver or amendment of any conditions imposed in terms of section 42(1) of LUPO and/or for the imposition of additional conditions as contemplated in terms of section 42(3)(b) of LUPO. The background to this application is that the applicant apparently realised that the advice that had been given to it to apply for a revision of the site development plan was incorrect, and that it should actually make application for an amendment or the imposition of additional conditions in terms of section 42(3) of LUPO. The applicant, however, fears that unless the arbitral Award is set aside, the effect thereof, albeit that it relates to a different type of application, namely for the revision of the site development plan, will be to embarrass it in relation to its intended application for additional or amended conditions to be imposed in terms of section 42(3) of LUPO, because it is anticipated that the Trust will contend that the Award bars any such application by the applicant.

[8] The Trust opposes both applications, and it counter applies for the Award to be elevated to the status of an order of Court in terms of the provisions of section 31 of the Act. A number of issues, mostly of a legal nature, arise from the affidavits filed of record. None of the factual disputes emerging

from the affidavits filed of record has any significant bearing on the resolution of the issues in the two applications. To the extent that they are relevant, I shall, in accordance with the principles enunciated in **Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd**, 1984 (3) SA 623 (AD) at 634 E to 635C, adopt the Trust's version. The main issues can be identified as follows:

(a) Was the dispute which the Arbitrator determined amenable to arbitration?

(b) Did the Arbitrator exceed his jurisdiction by determining a dispute that had not been referred to him for determination?

(c) Did the Arbitrator determine that the applicant did not have the legal standing to make an application for the imposition of additional conditions in terms of section 42 of LUPO, as contemplated by prayer (b) of the notice of motion in the first application?

Was the dispute which the Arbitrator determined, amenable to arbitration?

[9] As emerges from paragraph [5] above, and as will appear more fully below under the rubric "Did the Arbitrator exceed his jurisdiction by determining a dispute that had not been referred to him", the question that the Arbitrator

determined was whether the applicant's constitution empowered the applicant to make an application for the revision of the site development plan.

[10] Mr Rosenberg, who appeared on behalf of the applicant, submitted that this question was not amenable to arbitration, and he based his argument on two grounds, *viz* firstly, that such question was one concerning the applicant's status, and that, accordingly, and by virtue of the prohibition contained in section 2(b) of the Act, the reference of such question to the Arbitrator was legally impermissible. His second argument was that clause 80 of the applicant's constitution, which permits the resolution of certain disputes by way of arbitration, contemplates only what Mr Rosenberg terms "*domestic constitutional matters or disputes, and not rights and obligations which the parties might have by virtue of public law, and which do not arise directly from the contractual relationship between the parties*".

[11] I deal firstly with the argument based on section 2(b) of the Act. What is prohibited in terms thereof is "*a reference to arbitration...in respect of any matter relating to status*". The term "*status*" is not defined in the Act.

[12] Mr Rosenberg placed reliance on the views of Butler and Finsen **Arbitration in South Africa**, 1993, paragraph 2.5.1, pp52-54 in support of his argument that the question as to whether certain conduct is *ultra vires*

the constitution of a body corporate is a matter of status, and which would therefore be struck by the section of the Act. The learned authors, in turn, place reliance on the decision of this Court in **Grobbelaar v De Villiers**, 1984 (2) SA 649 (C) at pp656B-C and 657C in support of their view that such dispute is a status matter. Grobbelaar's case was one in which a member of an incorporated juristic person, being Mamreweg Wynkelder Koöperatief Bpk sought to raise the issue in arbitration proceedings as to whether the directors of such corporate entity had acted *ultra vires* its Memorandum of Association. The applicant in that case contended that such dispute was in principle, by virtue of the nature of the dispute, not arbitrable. No reference was made to section 2 of the Act. The Court considered and commented upon the contention of the applicant before it,but then proceeded to dispose of the application on an entirely different basis. The Court, nonetheless, relying on English authority (*viz* **Heard v Pickthorne,** 82 LJ (KB) 1264; [1913] 3 KB 299 (CA), **McEllistrim v Ballymacelligott Co-operative and Dairy Society Ltd,** 1919 AC 548 (HL); 1918-19 All ER Rep 1294 at p654F-G and **Cox v Hutchinson**, 1910 Ch 513 at p656E-F) concluded that English law was to the effect that *ultra vires* acts are not arbitrable, and that logic and good sense demanded that such principle also be applied here.

[12] I must confess to having experienced some difficulty in finding a sufficient parallel between the three English authorities relied upon in Grobbelaar's case, and the issue confronting me in this case. In any event, I am required to interpret section 2 of the Act, employing the usual and well-known canons of construction. This a different exercise to that upon which the Court in Grobbelaar's case embarked. Nonetheless, Butler and Finsen, *op cit,* having referred to Grobbelaar's case, suggest that "*...the court [in Grobberlaar's case] without referring to s 2 or the common law, decided that the rule of English law whereby an act* ultra vires *the constitution of the body corporate was not subject to an arbitration clause in that constitution could be applied in our law in appropriate circumstances".* On this basis, the authors comment as follows at p54:

> "*There seems to be no reason why a member cannot agree to be bound by an arbitration clause covering all disputes between the association and its members including the validity of the termination of a member's membership. This is therefore not a matter of status for purposes of the Act. On the other hand, a company or other body corporate cannot by contract validly determine whether or not an act is* ultra vires, *that is beyond the capacity or power of the body corporate concerned*"

and they conclude by asserting that "*It follows that the question of whether or not the act is* ultra vires *is a mater of status which cannot be determined by arbitration*"

I mention in passing that Professor Butler, one of the two authors of Arbitration in South Africa, *op cit*, wrote the section on Arbitration in **The Law of South Africa**, vol 1, second edition. In relation to the meaning of the term *"status"* as used in section 2 of the Act, he comments thus in paragraph 556 on p408: *"...it clearly covers matters which the parties are not entitled to dispose of by agreement".* In support of this statement, he places reliance on Arbitration in South Africa, *op cit* at pp53-4, and on a report of the SA Law Commission on Arbitration.

[13] I am of the view that the meaning which Butler and Finsen attach to the term *"status"* as used in section 2 of the Act is too wide. As a starting point, I highlight that Butler & Finsen submit, at p54 of their cited work, correctly in my view, that

> *"Because of the support of both the legislature and the courts for arbitration and because of the principle of freedom of contract coupled with the consensual basis of arbitration, it is submitted that the phrase* 'any matter relating to status' *should be restrictively interpreted to minimise its limiting effect on the use of arbitration".*

[14] The *"status"* of a person, wrote Professor Boberg in **Law of Persons and the Family**, 2nd ed, p65:

> *"...is a term of convenience, shorthand for the cumbersome expression 'rights, duties and capacities'. A person's status is his or her overall legal position in relation to other persons and the community: the aggregate of his or her various rights, duties and capacities".*

He added:

"But a word of warning is necessary here. In the context of status we refer only to those rights and duties acquired en bloc *by the operation of legal rules, such as the status of minority, or the status acquired by marriage. Particular rights and duties acquired* ad hoc, *for example, by entering into a contract, are not regarded as forming part of a person's status".*

Professor Boberg was, of course, here dealing with natural persons, and not artificial persons. Nonetheless, his views are instructive in relation to the meaning to be ascribed to the term "*status",* as used in section 2 of the Act.

[15] What encompasses and what factors may affect the status of an artificial juristic person? Such "person" has no physical existence, and exists only in contemplation of law (**Madrassa Anjuman Islamia v Johannesburg Municipal Council**, 1919 AD 439 at 449; F du Bois *et al,* **Wille's Principles of South African Law**, 9th ed, p395). Juristic persons include:

(a) entities incorporated in terms of a general enabling enactment such as companies, banks and co-operatives;

(b) entities or institutions especially created and recognised as juristic persons in separate legislation, eg universities and public corporations such as the South African Broadcasting Corporation;

(c) associations that comply with the common law requirements for the recognition of juristic personality, such as churches, political parties and trade unions.

(**The Law of South Africa**, vol 20, part 1,First Re-issue, p309, paragraph 342).

[16] It follows logically that the status of each of these entities or associations relates, in the first place, to the fact of its existence, and the nature thereof. In the case of an incorporated company, its status is determined, firstly, by its incorporation in accordance with statutory prescripts. Its nature is dictated by the type of company that is incorporated, being, eg, a public company, a private company, or a company incorporated in terms of section 21 of the Companies' Act, no 61 of 1973 as amended. Its status can then subsequently be or become altered, eg by the conversion from a private company to a public company, or to a close corporation. Its status in respect of its rights, duties and capacities, (to borrow professor Boberg's terminology) can also be affected by supervening events, eg when it is wound up, dissolved, placed in judicial management, or deregistered. At

least some of these events can be brought about by the company itself, eg by way of a voluntary winding up.

[17] I believe, against this background, that where the term "*status*" as used in section 2 of the Act applies to a juristic person, it relates to its existence and nature, and the question whether it has the capacity to acquire rights and to incur obligations.

[18] Section 29 of LUPO contemplates the coming into being of a Home Owners' Association upon the approval of its constitution by the Local Authority in question. I assume that the applicant came into being when the combined constitution of the Berg en Dal Estate Home Owners' Association and the Mountaindale Estate Home Owners' Association was approved by the Local Authority. Clause 87 thereof, incidentally, permits amendments thereof by way of a special resolution adopted by a special general meeting of the members. I do not believe that the question that the Arbitrator determined is one concerning the applicant's status, within the meaning of that term as used in section 2 of the Act.

[19] I now turn to Mr Rosenberg's second argument relating to the arbitrability of the question determined by the Arbitrator. Paragraph 80 of the applicant's constitution provides:

"*ARBITRATION*

80 Any disputes, questions or differences arising at any time between Members or between Members and Trustees out of or in regard to:

80.1 any matters arising out of this Constitution; or

80.2 the rights and duties of any of the parties mentioned in this Constitution; or

80.3 the interpretation of this Constitution

shall be submitted to and decided by arbitration on notice given by any party to the other interested parties.

[20] In my view, the question that the Arbitrator determined fell squarely within the ambit of paragraph 80.3 of the applicant's constitution. What the Arbitrator considered to be necessary, was for him to interpret the applicant's constitution so as to determine whether it enclothed the applicant with the power to make the application for the revision of the site development plan. His determination does not bind anyone other than the parties thereto. I, therefore, disagree with Mr Rosenberg's second argument as to the arbitrability of the question determined by the Arbitrator.

Did the Arbitrator decide an issue that had not been referred to him for determination?

[21] The starting point is to ascertain the terms of the reference of the dispute between the arbitrating parties to the arbitration, so as to determine the ambit of the Arbitrator's jurisdiction. No express agreement was, at any stage, reached between the arbitrating parties as to the definition of the dispute which the Arbitrator was required to determine. In the founding affidavit in the first application, the applicant alleged, *inter alia*, that "*the ambit of the dispute declared by the Second and Third Respondents was framed in its statement of claim and accordingly the issues referred to the First Respondent for determination were likewise circumscribed*". The Trust did not dispute this statement in its answering affidavit. It was, however, common cause between the parties before me that the definition of the disputes submitted to the Arbitrator for determination encompassed all those that arose from all of the pleadings exchanged between the parties in the arbitration proceedings. I mention, in passing, that a carefully circumscribed and clear definition of an Arbitrator's jurisdiction (which can, of course, be supplemented by subsequent agreement) is a salutary practice, if not essential, in order to avoid later challenges to such jurisdiction. A mere reference to the pleadings already exchanged or to be exchanged, does not cater for the situation where the Arbitrator is later called upon to allow amendments to pleadings which may have the effect of adding further disputes. There is a school of thought which asserts that the

absence of a clear definition of the disputes or issues in an agreement or reference to arbitration may impugn its validity.

[22] The Trust (represented by the second and third respondents before me, as claimants in the arbitration) made, *inter alia*, the following allegations in its statement of claim in the arbitration proceedings:

> "*14. Neither at the time of the approval of the zoning and sub-division of Erf 4670, nor at the time of the approval of sub-division of Erf 5966, when Erf 8242 came into existence, or at any time thereafter, was/were any separate condition/s imposed or registered by the relevant statutory or any other official authority relating to building height restrictions and/or a coverage/bulk factor other than 50% in respect of Erf 8242.*
>
> *15. As a result of the aforegoing:*
>
> *15.1 The building height restriction/s prescribed by the relevant zoning scheme i.e. 8 metres to a point midway between the eaves and a ridge in the case of a pitched roof, was applicable to Erf 8242 at all relevant times.*
>
> *15.2 The coverage/bulk factor of 50% was applicable to Erf 8242 at all relevant times.*
>
> *17. Thereafter [being after the amalgamation of the Berg en Dal Estate Home Owner's Association and the Mountaindale Estate Home Owner's Association referred to above] during or about November 2003, the Defendant purported to adopt a resolution which purported to authorise them to make application to the City of Cape Town (South Peninsula Administration) for the approval of a proposed amendment of the officially approved site development plan and agricultural guidelines in order to enable them to introduce stricter height restrictions, and a more restrictive method of calculation of those height restrictions and a new coverage/bulk factor of 36% in respect of dwellings of more than one storey,*

inconsistent with those allowed by the relevant zoning scheme pertaining to, inter alia, Erf 8242.

18. *Claimants aver that the Defendant had no power or authority to make the said application due to one, more or all of the following reasons:*

18.1 *Defendant purported to adopt the resolution referred to in paragraph 17 above while other proposed restrictive provisions would only affect those owners with vacant land while owners who had already built in excess of the newly proposed restrictions would remain unaffected without having consulted with Claimants who afforded them the opportunity of making representations which constituted an unfair discriminatory decision which is not in accordance with the rules of natural justice, including the audi alteram partem rule.*

18.2 *The Defendant not being the registered owner of Erf 8242 has no power or jurisdiction to apply for the amendment of the conditions imposed when the township was approved, alternatively, the application amounts to a departure application in terms of section 15 of LUPO which only the owner could apply for.*

18.3 *The Defendant in any event has no power to make the application in the absence of an approval or authority obtained from its members at a meeting which was duly called and constituted in terms of the provisions of its purported constitution, which did not occur.*

18.4 *When the Claimants purchased Erf 8242 they obtained a vested statutory right to build in accordance with the height restriction of 8 metres and coverage/bulk factor of 50%, both calculated in accordance with the relevant zoning scheme regulations which cannot be deprived without compensation as provided in Section 25 of the Constitution of the Republic of South Africa.*

19. *In the premises the Claimants are entitled to an order declaring that the Defendant has no power or authority to make the said application to the South Peninsula*

Administration and that the decisions it took in that regard be declared invalid and set aside."

The relief claimed by the Trust was for "*(a) An order declaring that the decision by the Defendant to make application to the South Peninsula Administration for a revised site development plan and amended architectural guidelines to introduce height restrictions less than 8 metres calculated as in the relevant zoning scheme and a coverage/bulk factor other than 50% is in valid and be set aside*;".

[23] In its plea in the arbitration proceedings, the applicant, as defendant, stated as follows:

"*6.* *AD PARAGRAPHS 14 AND 15*

It is admitted that at the time of the sub-division of Erf 5966 no conditions were imposed additional to those which had been imposed upon the sub-division of Erf 4670 Hout Bay. Save as aforesaid, and to the extent that they are inconsistent therewith, the allegations in these paragraphs are otherwise denied. Without derogating from the generality of its denial, the Defendant pleads that upon a proper construction of the conditions of sub-division read with the provisions of s29(1) of LUPO and the constitution of the homeowners' association the design and development of any building of Erf 8242 falls to be controlled by the Homeowners' Association and that accordingly any development parameters applicable in terms of the zoning scheme regulations are liable to be limited or modified having regard to the Homeowners' Associations' obligation to exercise control over building in the context of its duties in respect of the promotion, advancement and protection of the communal

and group interests of the members of the association generally.

8. *AD PARAGRAPH 17*

It is admitted that the defendant adopted the resolution described in this paragraph. Defendant denies the implication and the Claimants' use of the word 'purported' that the resolution was invalidly adopted.

9. *AD PARAGRAPH 18*

The allegations in this paragraph are denied.

10. *AD PARAGRAPH 18.1*

The allegations made in this sub-paragraph are denied. Defendant pleads in any event that the adoption of the resolution to make an application to the local authority did not constitute a decision which affected the claimants' rights. To the application to the local authority was in any event not amenable to determination without a process of advertisement and consideration of any objections received consequent thereto as contemplated in terms of s42(c) and (4) of LUPO. Any determination by the local authority will furthermore be amenable to appeal to the 'Administrator' in terms of s44 of LUPO.

11. *AD PARAGRAPH 18.2*

Defendant pleads that any party with sufficient interest is entitled to make an application for the variation of conditions imposed in terms of s42 of LUPO. By virtue of its aforementioned objects the Defendant is vested with sufficient interest to make application for the variation of the conditions imposed upon the subdivision of all the constituent parts of The Berg en Dal Estate (incorporating Mountaindale Estate).

12. *AD PARAGRAPH 18.3*

The allegation in this sub-paragraph is denied. In notification of the aforegoing the Defendant pleads that the adoption of the resolution occurred within the plenary powers of the Trustee Committee provided in terms of clause 34 of the constitution ...

13. AD PARAGRAPH 18.4

The allegations made in this sub-paragraph are denied. In any event the issue of alleged deprivation of property (which is denied) and any right to compensation which notionally might arise from any determination which might be made by the local authority (or the 'Administrator' on appeal in terms of s44 of LUPO) have no bearing on Defendant's right to apply for a variation of the conditions imposed in terms of s42 of LUPO. Defendant pleads that the Claimants are not entitled in law to pre-empt the determination of the application by means of these proceedings.

14. AD PARAGRAPH 19

In the premises the conclusion pleaded in this paragraph is denied."

[24] The Trust requested further particulars of the applicant for purposes of preparation for the arbitration. It is necessary to quote the following paragraphs of the Trust's request for particulars for preparation for the hearing:

"*2. AD PARAGRAPH 6 OF DEFENDANT'S PLEA*

2.1 For purposes of the construction relied upon by the Defendant in this paragraph, the Defendant is requested to specify:

2.1.1 on exactly which conditions of subdivision does it rely?

2.1.2 on exactly which provisions of the constitution of the homeowners' association does it rely?

3. AD PARAGRAPHS 6 AND 12 OF DEFENDANT'S PLEA

3.1 Is it the Defendant's case that it has the power, in terms of the particulars pleaded in paragraphs 6 and 12 of its plea, to amend the building height restrictions and coverage/bulk factor pleaded in paragraph 15 of the statement of claim or is it the Defendant's case that it merely has the power to apply for the said amendments in accordance with the relevant statutory provision?

3.2 If the latter, is it the Defendant's case that it is legally entitled to make the application without:

3.2.1 the owner's authority?

3.2.2 *without giving the owner an opportunity to make representations?*"

The applicant, as defendant, responded as follows to these requests for particulars:

"*2. AD PARAGRAPH 2*

2.1 The defendant relies on the conditions of sub-division read as a whole, but without derogation from the generality of the aforegoing, particularly on those conditions described in paragraph 4.2 of the defendant's plea.

2.2 The defendant relies on the constitution of the Homeowners' Association of Berg en Dal Estate (incorporating Mountaindale Estate), ... read as whole, but without derogation from the generality of the aforegoing, particularly on clauses 1-4, 6, 9, 11, 20, 21, 24,34, 35 and 38

3. AD PARAGRAPH 3

> *The particulars sought in terms of this paragraph are not relevant to the issue before the Arbitrator in terms of the claimants' statement of claim. The sole issue before the Arbitrator is whether the defendant's action in applying for the amendment of certain conditions in terms of section 42 of Land Use Planning Ordinance was legally competent. The defendant contends that the issue referred for arbitration by the claimant raises matters of both public and private law and contends further that only the matters of private law, being the competence of the trustees of the defendant to make this application within the ambit of the powers in terms of the defendant's constitution are arbitrable."*

[25] Mr Rosenberg contended that the question determined by the Arbitrator, to which I alluded in paragraph [5] above, does not feature in any of the paragraphs of the pleadings quoted above. Before elaborating upon his argument and that of Mr le Roux , who appeared for the second and third respondents, I highlight the undermentioned passages contained in the Arbitrator's award, which seem to me to be relevant to a determination of the question under discussion.

Having alluded to some of the relevant facts and to paragraph 18 of the Trust's statement of claim (quoted in full above), the Arbitrator recorded that:

> "*In Brunt's heads of argument furthermore specific submissions are made that the HOA [a reference to the applicant] constitution does not empower it to apply for the restrictions.*
>
> 2.4 *Accordingly I am asked to declare the decision by the HOA to be invalid.*"

The Arbitrator proceeded as follows:

"*5.2 It is common cause that the application by the HOA has as its purpose to introduce stricter height restrictions and a lesser bulk factor to Brunt's Erf 8242 than those factors currently applicable in terms of the zoning scheme (see 2.1). It may be mentioned also that it is common cause that the only special building restrictions on Erf owners that were imposed by the local authority when approving the sub-division were building lines. The application is clearly an application for the diminution of Brunt's existing building rights in terms of the current zoning scheme.*

5.3 It is therefore necessary to analyse and interpret the HOA constitution to ascertain whether the HOA has the power to make such an application. This is a matter between Brunt and the HOA.

Although this line of enquiry is not expressed or raised in the statement of claim, it was pleaded to on behalf of the HOA, and extensively dealt with in argument by both parties. There is obviously no prejudice involved and I am, as also mentioned before, entitled to decide the matter on the basis as set out above.

(emphasis supplied)

The Arbitrator then analysed some of the paragraphs of the applicant's constitution, and concluded as follows:

5.8 I can find nothing in the above clauses that would empower the HOA to make the application in question."

"5.14 In so far as the HOA has any power regarding building parameters, it merely has supervisory powers as set out in clause 20.2.

5.15 Again it is clear from the above that it was never intended that between a member of the HOA on the one and the HOA on the other, the HOA would have any power at all regarding

later amendments to the basic building parameters applicable to each Erf, including building heights and bulk factors.

6. The Award

6.1 *In the light of the reasons set out above and the findings in paragraph 5.8 and 5.15, I grant an order in terms as requested by claimants in paragraph (a) of the statement of claim – the decision is invalid and is hereby set aside.*"

Having regard to the wording of the relief sought by the Trust in paragraph (a) of its statement of claim, it is plain that the "decision" which formed the subject matter of the Arbitrator's Award embodied in clause 6.1 thereof was that of the applicant, to make application to the South Peninsula Administration for a revised site development plan and amended architectural guidelines. It did not relate to an application which the applicant apparently intends to make for the imposition of additional conditions in terms of section 42 of LUPO, referred to in prayer (b) of the notice of motion in the first application, and in prayer (a) of the notice of motion in the second application.

[26] Can a home be found in the arbitration pleadings for the question which the Arbitrator decided, being whether the applicant's constitution empowered the applicant to make an application to the South Peninsula Administration

for a revised site development plan and amended architectural guidelines to be made? If this question is to be answered in the negative, the Arbitrator exceeded his powers, in that he sought to determine a dispute that did not arise from the pleadings in the arbitration, resulting in his Award falling to be set aside in terms of the provisions of section 33(1)(b) of the Act (**Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare & Others** [2008] 2 All SA 132 (SCA) at pp141-2, paragraph [35]).

[27] In developing his argument to the effect that the Arbitrator had indeed decided a question that fell beyond the ambit of the disputes arising from the pleadings, Mr Rosenberg submitted that none of the allegations made by the Trust in its statement of claim raised the question determined by the Arbitrator. He submitted that the allegations made in paragraph 18.3 of its statement of claim (quoted above) were based on the premise that the applicant's constitution in fact embodied a power to make the application referred to in prayer (a) of the Trust's statement of claim, but that the complaint made therein was that the applicant's members had not at a duly convened meeting, authorised the applicant to make such application.

In my view, Mr Rosenberg's analysis of the allegations contained in its statement of claim and his conclusions arising therefrom are correct. Mr le Roux did, eventually, in argument, not seek to find a home for the dispute which the Arbitrator determined in any of the allegations contained in its

statement of claim. Rather, he based his case on the contents of paragraph 6 of the applicant's plea (quoted above) and on the responses provided by the applicant in paragraphs 2.2 and 3 of its reply to the Trust's request for further particulars for preparation (also quoted above). It is, accordingly, necessary to analyse the allegations made in these paragraphs, and I do so below:

(a) Paragraph 6 of the applicant's plea purported, according to the heading thereof, to constitute a response to paragraphs 14 and 15 of the Trust's statement of claim. I say "purported", because only the first two sentences of paragraph 6 of the applicant's plea related to paragraphs 14 and 15 of the statement of claim. The remainder thereof did not constitute a factual or legal response to paragraphs 14 and 15 of the statement of claim.

Mr Rosenberg contended that such remaining allegations in paragraph 6 of the plea constituted a gratuitous set of statements similar to those that featured in **South African Evangelisation and Missionary Trust v Gumbi**, 1975 (C) SA 636 (D & CLD). In **Gumbi's** case, the defendant in arbitration proceedings had made certain allegations which, so it was held, did not raise any further issues. It was pointed out at p638H of the reported judgment that

"[T]hey implicitly amplified the denial by defendant that plaintiff is the registered occupier of the site by suggesting, without actually alleging, that the Christian Brethren Church is the registered occupier and expressly expatiate upon the denial that defendant derives it right of occupancy from plaintiff". In his judgment, Kumleben J (as he then was) pointed out that the allegations in question were not "issues" defined by the pleadings or relevant to the cause of action and the relief claimed. Reference was made in the judgment to Odgers, **On Pleadings and Practice**, 17th Ed. at p73 where "issues" are described as: "*... some definite propositions of law or fact, asserted by one party and denied by the other, but which both agreed to be points which they wish to have decided in the action*".

Mr Rosenberg contended that the remainder of the allegations contained in paragraph 6 of the plea did not raise any issues (as defined in Odgers, *op cit*) and that they, accordingly, could not serve to define, nor could they assist in defining the dispute determined by the Arbitrator. Such remaining allegations related to the power of the applicant to exercise "*control*" over buildings in its area of jurisdiction, being one of its objects, as decreed by section 29(2) of LUPO and endorsed in some of the paragraphs of its constitution. I tend to

agree with this submission. In any event, such remaining allegations did not constitute a ground or basis for the Arbitrators' determination of the dispute highlighted in paragraph [5] above and in paragraph 5.8 of his Award.

(b) Turning, then to the applicant's further particulars, it is important to note that the Trust combined paragraphs 6 and 12 of the plea for purposes of posing the questions contained in paragraph 3 of the request for particulars, quoted in paragraph [12] above. The first of these, unsurprisingly, attracted the responses contained in paragraph 2 of the applicant's reply.

(c) The combined response, contained in paragraph 3 of the reply, related, in the first instance, to the remaining allegations contained in paragraph 6 of the plea. In response thereto, the applicant, firstly, declined to supply the particulars sought. It then proceeded to point out, plainly in relation to paragraph 12 of its plea, that the sole issue before the Arbitrator was whether its action in applying for the amendment of certain conditions was "*legally competent*". That phrase must be understood in the context of paragraph 12 of its plea, in which it dealt with the Trust's allegation contained in paragraph 18.3 of the statement of claim to the effect that the applicant had required the power from its members at a duly

constituted meeting to make the application in question. The applicant then proceeded to point out in the remainder of paragraph 3 of its reply that the Trust had in its statement of claim raised issues of both a public and a private law nature, and that it was not prepared to engage with the Trust in the arbitration in regard to the former (obviously in the context of the applicable paragraphs of the pleadings, to which I have already alluded earlier).

(d) I am, against this background, in agreement with Mr Rosenberg's argument to the effect that, having regard to these paragraphs of the applicant's further particulars, read in the context of the portions of the pleadings, and also the paragraphs of the request for particulars that I have quoted, the question which the Arbitrator sought to determine fell beyond the scope of the issues as defined in the pleadings. The consequence is and must be, following the approach adopted in the **Hos+Med** decision, *supra,* that the Arbitrator exceeded his powers, and the first application must therefore succeed, and the counter application must fail.

Did the Arbitrator determine that the applicant did not have the legal standing to make an application for the imposition of additional conditions in

terms of section 42 of LUPO (as contemplated by prayer (b)) of the notice of motion in the first application?

[28] Since the consequence of my finding in relation to the question as to whether the Arbitrator determined an issue that had not been referred to him for determination is that it be answered in the affirmative, this question falls away, and so does the relief sought in paragraph (b) of the notice of motion in the first application.

[29] Mr Rosenberg asked, albeit somewhat faintly, that even if the relief sought in the main application is granted, the second application should also be successful.

[30] The second application relates to the suggested power of the applicant to "*apply to the local authority or* 'the Administrator...' *for the waiver or amendment of any conditions imposed in terms of s 42(1) of [LUPO] when applications for the rezoning and subdivision of erven 5666, 667 4670 and 1480 Hout Bay for the purpose of creating the Berg en Dal and Mountaindale Estates were approved, and/or for the imposition of additional conditions as contemplated in terms of s 42(3)(b) of [LUPO]*"

[31] My difficulty with this relief is that it relates to a contemplated "application" that the applicant intends to make to the Administrator or the Local

Authority that one or the other of these two functionaries (obviously, in the case of the Administrator, his successor-in-law) exercises some or all of the discretionary powers with which he or she is enclothed by virtue of section 42(3) of LUPO. That section does not, either in express, nor, in my view, in implied terms, provide for anyone to apply to the applicable functionary to exercise any of the powers therein mentioned. There is no evidence before me to the effect that a practice has developed according to which an interested party can make such an application. I can, accordingly, not conceive of any legal basis upon which I can grant the relief sought.

[32] I can, however, conceive of the notion that the applicant, one of whose objects is to exercise control, *inter alia,* over buildings in its area of jurisdiction, should be entitled to make representations to the applicable official to the effect that such person should exercise one of the powers vested in him or her by virtue of section 42(3) of LUPO, in order to impose additional conditions "*of the kind contemplated in subsection (1)",* which, conceivably, include a building height or bulk factor restriction. However, there is not sufficient evidence before me to enable me to grant substantive relief of this nature to the applicant. The result is that the second application must fail.

[33] The order which I make is the following:

1. The application launched under case number 5418/05 succeeds, and the relief sought in paragraph (a) of the notice of motion in that application is granted.

2. The second and third respondents are, in their capacities as trustees of the Chris Brunt Trust directed to pay the costs of the application in case number 5418/05;

3. The second and third respondents' counter application for the first respondent's award dated 28 April 2005 in the arbitration proceedings between the second and third respondents, on the one hand, and the applicant on the other for such award to made an order or court in terms of section 31 of the Arbitration Act, no 42 of 1965, is refused with costs;

4. The applicant's application in case number 787/06 is dismissed with costs.

ELOFF, AJ

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No appearance for first respondent