IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **A476/14**

In the matter between:

TRE DONNE HOMEOWNERS' ASSOCIATION	First Appellant
CITY OF CAPE TOWN	Second Appellant

and

BERGWATER PLASE CC	Respondent

Coram: Dlodlo, J et Henney J et Salie-Hlophe J

Dates of Hearing: 13 May 2016

Date of Judgment: 09 June 2016

JUDGMENT

DLODLO, J

INTRODUCTION

[1] The Respondent was the developer of the luxury estate known as Tre Donne situated near Sir Lowry's Pass Western Cape Province. There were conditions of the coming into being of the estate. For instance one of such conditions of establishment of the estate in terms of the Land Use Planning Ordinance 15 of 1985 was that the developer must establish a homeowners association. It was the responsibility of the developer to draft the constitution. This it did. The Appellant is the Homeowners' Association which the developer brought into being by crafting the constitution thereof pursuance to the conditions imposed on the developer in terms of the Land Use Planning Ordinance. The conditions of subdivision were imposed by the City of Cape Town. The constitution drafted by the developer had to be approved and was in fact approved by the City of Cape Town. Contained in the said constitution are two clauses which form the subject of this appeal. These are clause 6.3 which reads as follows:

> *"The developer or representative of the developer will be an Excom member in perpetuity"; and clause 10.4 which reads as follows:*

"The developer will not be liable to pay any levies with regard to any unsold properties within the development."

[2] The Appellant describes these aforementioned clauses as unusual. I hasten to mention that in the answering papers an expert witness Mr. Maree stated the following:

"In my experience with regard to a development of this nature, the developer of such community scheme is sometimes, in terms of special conditions asserted in its constitution by a developer, exempted from paying levies to the homeowners association in respect of unsold and undeveloped properties in the development for the duration of a specific development period."

It is of importance that paragraph 15.3 of the Constitution in its original form stated the following pertaining to the clauses complained of by the Appellant:

"Paragraphs 6.3 and 10.4 of this constitution cannot be amended."

The above is described by the Appellant as an entrenchment clause.

[3] The developer reportedly owns eight unsold erven and two of the biggest and most valuable erven are inhabited by the developer's

members and employees and no levies are paid in respect of these erven. In contravention of paragraph 15.3 of the constitution in its original form and on 13 May 2010 at an annual general meeting, the Appellant removed clauses 6.3, 10.4 and 15.3 from the constitution of the Appellant. In response the Respondent launched an application which is the subject-matter of this appeal in terms of which it sought a declaratory in terms of which the decision taken by the Appellant to remove clauses 6.3, 10.4 and 15.3 from the Constitution are declared unlawful. In the alternative (as per an amendment of the Notice of Motion) the Respondent sought an order in terms of which the decision by the Appellant is reviewed and set aside. On 27 May 2015 my brother Smit AJ granted the relief as prayed for in paragraphs (a), (b), (c) and (d) of the Notice of Motion. This appeal concerns the findings and an order made by Smit AJ.

BACKGROUND FACTS

[4] It has been mentioned in the introductory portion of this judgment that the Respondent is the developer of the Tre Donne Estate. It must also be added that the estate concerned is a residential development which originally comprised 81 erven and reportedly it now comprises

87 erven. At the time that the subdivision was approved by the then Helderberg Municipality (subsequently inherited by the City of Cape Town) a condition of subdivision was that the constitution be prepared for a homeowners' association which would manage the estate and that the then local authority had to approve the said constitution. This as we now know eventuated.

[5] The lands on which the roads are situated within the development were transferred to the Appellant and the latter is thus responsible for the maintenance thereof as well as the maintenance of the storm water and sewerage service on the property (as well as the water supply to the individual owners and refuse removal). In order to enable the Appellant to properly function the Appellant (Homeowners' Association) is entitled to raise a monthly levy against each and every property in the development.

[6] From the year 2000, when the Constitution in its original form was approved by the City certain amendments were made to the constitution over a period of time (for an example in 2002). Thereafter and from September 2011, the Appellant started rendering levy

statements to the developer (the Respondent in these proceedings) for monthly levies in relation to the unsold properties within the development. In response to these levy statements received a letter was addressed to the estate manager pointing out that the developer is not indebted to the Appellant because the latter had no entitlement to raised levies against the former in terms of the constitution.

[7] A meeting was subsequently held and a decision was arrived at in terms of which what was perceived to be the offending clauses in the constitution were removed in their entirety. On 10 March 2011 the City of Cape Town approved the amendments only insofar as it addresses the requirements in Section 29 (2) (b) (ii) and (c) of Ordinance 15 of 1985 commonly referred to as LUPO. The contention advanced on behalf of the developer is that by removing clauses 6.3, 10.4 and 15.3 from the original constitution of the Tre Donne Homeowners' Association, the Appellant did not address any requirements as set out in Section 29 (2) (b) (i) and (ii) and (c) of LUPO and that therefore the City of Cape Town did not approve of these amendments. On behalf of the Appellant it is contended differently.

GENERAL DISCUSSION AND OBSERVATIONS

[8] The Appellant's case on appeal, according to Mr. Bridgman, is based on two main points, namely the principle of legality and that the developer followed an incorrect procedure. As far as the principle of legality is concerned we were referred to **City of Tshwane Metropolitan Municipality v RPM Bricks** 2008 (3) SA 1 (SCA) at para 24 of the judgment. I set out paragraph [24] of the latter judgment:

> *"[24] With respect to Boruchowitz J, what he postulates is, in my view, the antithesis of that demanded by the constitution. Section 173 of the Constitution enjoins Courts to develop the common law by taking into account the interests of justice. The approach advocated by the learned Judge, if endorsed, would have the effect of exempting Courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the ultra vires doctrine mitigatory. None of that would be in the interests of justice. Nor, can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality."*

We were also referred to **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council** 1999 (1) SA 374 (CC) where the Constitutional Court made the following observation:

> *"The rule of law-to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law."*

[9] In Mr. Bridgman's contention not only does clause 10.4 of the Constitution of Tre Donne Home Owners' Association (in its original form) offends against Section 29 of Lupo but the attempt to entrench it by clause 15.3 offends against the Constitution itself in particular Section 151 (4) providing that the National or a Provincial Government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. In Mr. Bridgman's submission the entrenchment clause seeks explicitly to compromise and impede the municipality's ability to exercise its powers and perform its functions. I do not share the view that the entrenchment clause 15.3 of the Appellant's Constitution in its original form trumps the Constitution of the Republic of South Africa. It is true that the Court *a quo* expressed a view in an *obiter dictum* that the provisions of clauses 10.4 and 15.3 may very well be *ultra vires* the provisions of the enabling subsection 29 (2) (c) of LUPO. But the Court *a quo* also stated *"but this does not mean that the Respondents may simply erase those provisions from the Constitution."* The views expressed

by the trial Judge in an *obiter dictum* hardly benefits the Appellant herein. The Appellant did not file a counter application for any such conceivable declaration in the court *a quo.* The second leg of Mr. Bridgman's argument is that a wrong procedure was followed by the developer in dealing with the problem it faced brought about by the removal of the offending clauses. It is argued that an appeal in terms of Section 62 of the Local Government Municipal Systems Act 32 of 2000 could have been a better option for the developer. It is contended that the decision of the City of Cape Town could also have been appealed against in terms of Section 44 (1) (a) of LUPO. Failing the two options in Mr Bridgman's contention the developer should have brought a review application in terms of Section 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[10] Perhaps in order to facilitate this discussion it is of importance to refer specifically to relevant Sections of LUPO. Section 41 (1) of LUPO provides as follows:

> *"When the administrator or council grants authorisation, any application or adjudicates upon an appeal under this Ordinance, he may do so subject to such conditions as he may think fit".*

Section 29 (1) of LUPO reads as follows:

> *"Either the administrator or the council concerned, as the case may be, may impose conditions under section 42 as the granting of an application for subdivision in terms of section 25(1), in relation to the compulsory establishment by the applicant for the subdivision of a homeowners' association".*

Section 29 (2) (b) reads as follows:

> *"(b) shall have a constitution which-*
>
> *(i) has as its object the control over and the maintenance of buildings, services and amenities arising from the subdivision concerned;*
>
> *(ii) provides for the implementation of the provisions of paragraph (c), and*
>
> *(iii) has been approved by the council concerned in order to ensure that the provisions of subparagraphs (i) and (ii) are being complied with, and*
>
> *(c) shall have as its members the owners of land units arising from the subdivision concerned who shall be jointly liable for the expenditure incurred in connection with the association".*

THE CONSTITUTION OF THE APPELLANT AND THE APPROVAL OF AMENDMENTS THERETO BY THE CITY OF CAPE TOWN

[11] As pointed out earlier the City of Cape Town approved the proposed amendments to the Constitution of the Appellant *"only insofar as it pertains to Section 29 of the Ordinance".* Obviously reference to Section 29 hereinabove contained is reference to Section 29 (2) (b) because that is the Section relevant herein. In other words, as Mr. Heunis pointed out, the City only approved the amendment insofar as it related to: (a) the control over and the maintenance of buildings, services and amenities; (b) the implementation of paragraph (c) thereof which relates to the liability of the landowners with regard to the expenditure incurred by the Homeowners' Association. The City did not grant consent to any amendments to the Constitution other than the ones referred to above.

[12] One needs to bear in mind that a local authority (which the City is) does not have the authority to review and set aside its own decision in the sense that it approved the original Constitution which entrenched the rights of the developer in relation to unsold erven. Seemingly the biggest fear on the part of the Appellant is that the right of the developer shall endure in

perpetuity. It, however, needs to be borne in mind that as soon as the last erven is sold, the clauses complained of shall find no application. Consequently the City of Cape Town does not have the authority to consent to an amendment that will remove these rights or that will disentitle the developer to these rights. That is the reason why, probably, the City chose to abide and is not participating in these proceedings. Regard being had to the qualification the City attached to the so-called approval, it is abundantly clear that indeed the City was fully aware of this truth. It must have been well advised not to take sides.

[13] Generally Constitutions of governing groups or cluster housing (as the Appellant herein) differ widely on varying practices. Thus the absence of uniformity simply means that the provisions of each new Constitution of a homeowners' association must be studied in order to solve any conceivable management issues. See in this regard **LAWSA** 2nd edition, Volume 24 para 295. In terms of the conditions of subdivision in terms of LUPO as well as in terms of the Appellant's Constitution in its original form all the individual owners of properties within the development called Tre Donne are members of the Homeowners' Association (the Appellant herein). The developer (the Respondent in these proceedings) holds title of the unsold

properties in terms of the original title deed of the undivided property (Farm 854 Gardenia).

[14] The fact of the matter is that all the individual owners hold title in terms of new title deeds created when transfer was effected of the individual plots from the old mother deed (in terms of which the developer holds title) to the individual owners' properties within the development. Clause 6.3 and 10.4 of the Appellant's Constitution in its original form were certainly entrenched in the Constitution with the consent of the City of Cape Town and the sole purpose thereof was to provide protection to the developer. Even Mr. Abraham Tertius Maree (one of the deponents in the answering papers) stated it categorically that:

> *"12. The rationale behind such a condition is that a developer normally bears the bulk of the expenses of providing services, roads and other infrastructure during the development period and should not be burdened with levies in respect of his unsold, unimproved erven in addition to such expenditure during that period".*

I am in full agreement with the observations made by Mr. Maree. It makes business sense that the developer protects itself in the manner it was done in the instant case. Accordingly the Appellant did not and does not have the authority and entitlement to resort to

removing these clauses from the Constitution. The decision taken by the Appellant to remove these clauses was certainly *ultra vires* and should have been correctly perceived to be an impossible one to take. See in this regard **Eastern Cape Provincial Government and Others v Contractprops 25** (Pty) Limited 2001 (4) SA 142 (SCA).

IS THE CONSTITUTION A CONTRACT?

[15] It is important to note that the Appellant is a voluntary association constituted in terms of the conditions of subdivision. Members of the Appellant are all registered owners of properties in the estate. They became members of the Appellant voluntarily upon purchasing properties within the estate subject to the Constitution in its original form ie including the clauses complained of and which are under discussion. See **Dainfern Valley Homeowners' Association v Falkner and others** 2010 (JOL) 2060 at 6 (GSJ). Those clauses could not be varied by the Appellant. In my view the Constitution in its original form constitutes a contract between the members which can only be amended in terms of that same contract. That this resembles a non-variation clause in commercial contract is beyond question. A pertinent question was put to Mr. Bridgman in this regard. But the

response sought to water down the contractual nature of this establishment. Mr. Bridgman argued that even if it was a contract with a non-variation clause his submissions will remain the same. He referred us to a paper apparently delivered in August 2015 by Professor Dale Hutchinson in which the latter concluded that the non-variation clause as such is not cast in stone. The Professor enumerates five reasons why he contends the non-variation clause is not cast in stone. These are: *"(i) can be trumped by countervailing public policy; (ii) especially if constitutional value is implicated; (iii) expect arguments in future that enforcement of the nvc would be offensive to public policy in the circumstances of the case; (iv) public policy does not take into account considerations of fairness and reasonableness".*

[16] I do not intend to take issue with the Professor. It suffices to mention thought that our law as it stands recognises non-variation clause in a contract as meaning exactly what it says. Non-variation clauses are part and parcel of virtually all contracts concluded by persons engaged in business enterprise. The same must be said of restraint of trade clauses in an employment agreement. The advent of the

constitutional era did not outlaw clauses like non-variation and restraint of trade. Of course these when inserted in a contract and/or an employment agreement (as the case may be) must not be *contra bones mores*. The restraint of trade must not prevent a person from being economically active in keeping with the prescripts of the constitution.

[17] Perhaps in the interest of completeness one needs to mention that the homeowners' association is established (as it were) by an application for subdivision as a body corporate must have a constitution which has as its object control over and the maintenance of buildings, services and amenities arising from the subdivision, and to provide for the limitation of the provisions relating to the expenditure set out below and which has to be approved by the municipality (the then Helderberg Municipality). See **LAWSA** 2nd Edition, Volume 28, para 471. It is indeed correct as submitted by Mr. Heunis that by approving the constitution submitted to it by the developer at a time of subdivision, the City of Cape Town performed an administrative function. Our law is that administrative decisions stand until they are set aside by a Court. See **Club Mykonos**

Langebaan Limited v Langebaan Country Estate Joint Venture and Others 2009 (3) SA 546 (C). In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) also reported as [2004] 3 ALL SA 1; [2004] ZASCA 48 it was found that certain permission granted by the administrator was unlawful and invalid from inception but then the Supreme Court of Appeal proceeded to hold as follows in paragraph 26:

> '*Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked…No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'*

The above has come to be known as the Oudekraal principle. In simple language this says the consequences of those actions remain regardless of whether they were correct or not.

[18] I would be slow in accepting that the drafting of the constitution of the Appellant herein must be regarded as a unilateral act. I do not accept that Section 42 (3) (a) of LUPO specifically allows for the amendment of conditions such as those contained in the Appellant's constitution. Sections 42 (1) and 42 (3) quoted and referred to *supra* make it apparent that these provisions seemingly have no relevance herein. The constitution (and in particular the clause that stipulates that the developer does not have to pay levies in relation to unsold erven) does not dictate terms in perpetuity. At the risk of being repetitive, as soon as the last erf is sold this clause clearly has no further consequences for the Appellant. It is contended on behalf of the Appellant that the Constitution of the Appellant is a form of delegated legislation. Mr. Bridgman relied on **Administrative Law** by Professor Yvonne Burn for the aforementioned contention concerning subordinate legislation. At page 195 the Professor states the following:

"The characteristics of subordinate legislation, which is generally directed towards implementing social policies intended to advance the public interest, rather than resolving individual disputes, are the following:

(1) Subordinate legislation creates, terminates, or varies general relationships and the same legislative form must be applied consistently whether a relationship is created, terminated or varied. Therefore, a general relationship cannot be regulated by way of resolution.

(2) Specific rules of administrative law govern the repeal, amendment, promulgation and tabling of subordinate legislation. Legislative administrative actions need not be tabled in order to be valid. If the action is invalid tabling will not cure its invalidity.

(3) The sub-delegation of an administrative power will be accepted only where there is express authority to delegate, or the delegation is strongly implicit in the wording of the enabling statute. The reason behind this prohibition is obvious – legislative administrative actions create general rules which have general application and effect and the enabling Act determines who should exercise the specific power.

(4) Subordinate legislation must fall within the scope of the Constitution, and the enabling Act. It may not conflict with either the Constitution or the empowering statute or restrict the provisions of a statute. Further, being subordinate legislation, it may not be vague. In other words the public must know what is expected of them, or what they are prohibited from doing or allowed to do in terms of the legislative instrument in question."

[19] In my view there is no need to compound issues in the instant case. Brought to its bare minimum, the issue is simply that the Constitution as approved by the City of Cape Town governs the internal workings of the homeowners' association (the Appellant in *casu*) in relation to property owned by the Appellant itself and the services rendered by it to the members of the association. Therefore clause 15.3 of the Constitution in its original form does not offend against the constitutional mandate contained in Section 151 (3) of the Constitution of the Republic of South Africa. Perhaps one needs to underline that all the members of the Appellant became voluntary members of it subject to the Constitution (as approved by the City of Cape Town) when they purchased properties within the estate. I fully agree with Mr. Heunis that the City of Cape Town is *functus officio* in relation to the decision previously taken in terms of Section 29 of LUPO. In **De Freitas v Somerset West Municipality** 1997 (3) SA 1080 CPD the Court reasoned as follows *inter alia*:

"It follows that the application should be granted unless Mr. Roux was not functus officio and was entitled to withdraw his approval once he realised that his assumption about the designed system's ability to cope with a 1:50 year flood was incorrect or unless respondent's

counter-application for an order setting aside the approval should succeed. (I pause here to say, in parenthesis, that I am not sure that Mr. Roux would have been entitled to impose as a condition the requirement that the system had to be able to cope with a flow of 5.4 cubic metres of water a second (5.4 cumecs), which the parties appear to accept as a 1:50 year flood, because included in the figure of 5,4 cumecs is runoff from higher lying developed land which cannot be regarded as natural flow which respondent, as owner of the land immediately to the north of erf 4698, is entitled to discharge upon applicant's land. In view of the conclusion to which I have come on the other parts of the case, however, it is not necessary for me to express an opinion thereon.)

Was Mr. Roux functus officio when he purported to withdraw his approval?

In my view, the answer to that question is clearly in the affirmative. That that is so appears clearly from the authorities to which Mr. Tockar, who appeared for the applicant, referred me, viz Thompson, trading as Maharaj & Sons v Chief Constable, Durban 1965 (4) SA 663 (D) (where Henning J said:

'Generally speaking, a person to whom, a statutory power is entrusted is functus officio once he has exercised it, and he cannot himself call his own decision in question')

and Baxter Administrative Law at 375, as well as Wiechers Administrative Law at 169 (it being clear that Mr. Roux's decision in this case to approve the plans is what Professor Wiechers calls a 'beneficial disposition').

Should Mr. Roux's decision be set aside?"

Indeed where the functionary had the power to decide and it applied its mind (as the City did when approving the original Constitution) the decision can as a general rule not be set aside, altered or varied even if on the merits it was 'wrong' and in making it the functionary concerned made an error of fact. See **De Freitas v Someset West Municipality** *supra*. In fact in the latter case it was categorically held that "to hold otherwise would be to turn basic principles of administrative law relating to discretionary decisions on their heads". I agree with the above reasoning.

IS THE PROCEDURE ADOPTED

BY THE DEVELOPER CORRECT?

[20] In terms of Section 7 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"):

"(a) only an administrative action can be reviewed in terms of said Act; and

(b) administrative action is defined as follows:

'administrative action means any decision taken, or any failure to take a decision, by –

(a) An organ of State, when –

(i) Exercising a power in terms of the Constitution or Provincial Constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation: or

(b) *A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision".* See **Promotion of Administrative Justice Act: A Commentary** (2nd Edition by Ian Curry page 43).

Regard being had to the aforegoing decision by the Appellant to amend the Constitution contrary to the stipulations (entrenchment clause) contained therein cannot in my view be classified as an administrative action in terms of PAJA. If I am correct in this regard this certainly means the review process was not at all available as a remedy to the Respondent, the developer.

[21] In the Court a *quo* the developer sought a declaratory. This is the remedy also resorted to in the case **Club Mykonos Langebaan v Langebaan Country Est Joint Venture** 2009 (3) SA 546 (C). The following observation made by the Court in **Club Mykonos** *supra* is of importance:

"The primary relief sought was declaratory in nature, and the court could only make a finding about the second enforcement issue once it had determined the first declaratory issue. In Luzon Investments (Pty) Limited v Strand Municipality and Another 1999 (1) SA 215 (C) at 230(a) the full bench quoted

with approval from the decision of the Supreme Court of Canada in Solosky v The Queen 1979 (105) DLR (3D) 745 at 745 where it was held that 'declarator relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a real issue considering the relative interests of each has been raised and falls to be determined".

In Luzon Investments, where a live and real issue between the parties have been fully canvassed in the evidence and in argument it was found to be appropriate to make an order which has settled the dispute between the parties being made in terms of the prayer for alternative relief".

I am of the view that it is pointless for purposes of this judgment to spend too much time on the allegation (for instance) that the Constitution of the Appellant is not a recording of an agreement. This aspect was correctly put to rest in the following formulation of the Court in the same **Club Mykonos** case *supra:*

"It must be born in mind in the Coopers & Lybrand matter that the court was concerned with the interpretation of the document evidencing a bilateral juristic act, namely an agreement to receive book debts. The imposition by the council of conditions in question was not the recording of an agreement but the unilateral administrative act. There are, of course aspects in the approval process which resemble the process of concluding a

contract. Thus in Estate Breed v Perry-Urban Areas Health Board 1955 (3) SA 523 at 431C-U it was said that 'there is authority and reason for holding that steps by which a township is established ….involve mutual consent between the administrator and the applicant as to the township conditions and the administrator may be regarded, not inappropriately, as making an offer to the applicant which latter must accept if a township is to be brought into the existence'. Once they are imposed the conditions acquire a force of law because section 39 of LUPO compels both the local authority and all other persons to comply with them".

Therefore one can safely assume that the City of Cape Town in imposing the condition that the Respondent had to present the Constitution to it for its approval made an offer which was accepted by the Respondent and once approved the terms and conditions of the Constitution of the Appellant formed the base (as it were) of the contract between firstly the Respondent (developer) and the City of Cape Town and secondly between the Respondent and the individual members of the homeowners' association (the Appellant herein).

[22] The Appellant's argument that the initial application that served before my brother Smit AJ should have been by way of review in

terms of Rule 53 of the Uniform Rules of Court is in my view not correct. In **Johannesburg Stock Exchange and Another v Witwatersrand Nige Limited and Another** 1988 (3) SA 132 (A) at 152 Corbett JA (as he then was) stated the following:

> *"Broadly, in order to establish review grounds, it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice'.*
>
> *Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily and capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner afore stated (some of these grounds tend to overlap)".*

In the first place the decision by the Appellant to remove what it perceived to be offending clauses in the Constitution could never have been made because to do so would be unlawful as a result of the clause in the same Constitution which barred the amendment or the removal of the applicable clauses from the Constitution.

[23] It is argued on behalf of the Appellant that the Respondent should (in the alternative) have appealed in terms of Section 62 of the Local Government Municipal Systems Act 32 of 2000 by giving written notice of such appeal as per invitation to do so in a letter of 10 March 2011. In the first place the letter of 10 March 2011 is addressed to the chairperson of the Appellant and not the Respondent, the developer. The same argument is brought to the fore and is based on the letter from the City dated 21 April 2011. It is being argued that the Respondent should have appealed against decision removing the clauses under discussion in terms of Section 44 (1) (a) of LUPO. It is needless to mention that the letter of 21 April 2011 was also addressed to the chairperson of the Appellant and not the Respondent who is the developer. Moreover, the decision was not taken by the City of Cape Town but it was taken by the Appellant itself. The point is that it is not the City of Cape Town that amended the Constitution – the Appellant did that. All what the City did ultimately was merely to rubber stamp the amendment. The City was not empowered to do what it did. This appeal has no merits and it must be dismissed.

ORDER

[24] In the circumstances I make the following order:

(a) The appeal is dismissed with costs.

D V Dlodlo
Judge of the High Court

R C Henney
Judge of the High Court

I agree and it is so ordered.

G Salie-Hlophe
Judge of the High Court