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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. 7964/01

In the matter between:

ARUN PROPERTY DEVELOPMENT (PTY) LTD **PLAINTIFF**

and

THE CITY OF CAPE TOWN **DEFEDNANT**

JUDGMENT DELIVERED ON WEDNESDAY, 31 OCTOBER 2012

DLODLO, J

INTRODUCTION

[1] The Plaintiff, Arun Property Development (Pty) Ltd ('Arun') is the registered owner of portions 57 and 61 of the farm Langeberg 311, Durbanville (the 'property'). The Defendant is the City of Cape Town ('the City'). Arun purchased the property from the University of Stellenbosch ('the University') in or about 1997 and it was thereafter consolidated to form Erf 10357. Prior to Arun's purchase of the property, the University had, in or about 1987/1988 instructed Dennis Moss Partners (City planners and architects) and Brunette Kruger and Stofberg (consulting engineers) to advise it regarding the future use and exploitation of the property. They advised the University that the property fell within the logical expansion

area of Durbanville district and that the value of the property would be optimized if it was used for township development purposes.

[2] During the course of the investigations the advisers, in considering the relevant planning documents that regulated municipal planning in the area, established that various planning instruments, such as structure plans adopted in terms of section 4 of the Land Use Planning Ordinance No. 15 of 1985 (C) ('LUPO') and transport plans for the Cape Metropolitan Area which had been established in terms of the Urban Transport Act 78 of 1977 made provision for a hierarchy of roads. Thus, for example, the Provincial Executive Committee had approved a structure plan for the area north of the N1 in terms of s 4(6) of LUPO on 13 June 1988 ('the 1988 structure plan). This structure plan provided for five categories of roads. Order 1 (freeway), order 2 (primary arterial), order 3 (secondary arterial) and order 4 (local arterial) were essentially of a non-residential area. The fifth category was so-called access routes, serving a residential function.

BACKGROUND

[3] This planning structure burdened the property with a planned primary road system consisting of:

(a) An order 1 (trunk roads and main roads) road North/South – Kuilsriver highway (previously known as Main Road 81 and currently known as Main Road 81 and the R300 extension). (b) An order 2 (primary distributors) road – East/West De Villiers extension (also known as Golf Course Road). (c) An order 2 (primary distributors) road – North/South – Brackenfell Boulevard in the East.

It was clear therefore, that no application for rezoning and subdivision of the property with the view to a township development would be approved by either the local or provincial authorities unless such a development plan

was reconcilable and in line with existing planning, and in particular unless it made provision for and indicated the required public road reserves therein. The University's consultants met with the relevant municipal officials to *inter alia* determine what the City's requirements in respect of the provision of civil services for development on the property were. The officials confirmed that the approval of any development proposal was going to be dependent on compliance with existing planning for road infrastructure as referred to above.

[4] The University subsequently lodged certain applications in the early 1990's with the City to obtain the necessary approvals for township development. In respect of some of those applications, the application for rezoning of the property to subdivisional area being one of them, the City did not possess the necessary delegated authority and it merely acted as a commenting authority to the Department of Local Government Housing and Works. On 3 September 1992 the University was informed in writing that the Ministerial Representative had approved the application of the property from its agricultural zoning to *subdivisional area* (the 'subdivisional area approval'). The subdivisional area approval was informed *inter alia* by a Traffic Impact Assessment prepared by BKS Consulting Engineers. This report pointed out that the development of the property was not going to have that significant an impact on the existing road infrastructure. If seen in isolation, it was reported that such impact could be addressed by relatively minor improvements to the existing road system.

[5] After Arun acquired the property it employed its own team of Consultants, whose investigations confirmed the background history as summarized above. Arun's Town Planning Consultant, Mr Dirk Larsen of Steyn Larsen

Town and Regional Planners ('Steyn Larsen') was informed in particular that the requirements with regard to the road infrastructure as set out in the 1988 structure plan and related documents, such as transport plans for the Cape Metropolitan Transport Area, had to be complied with. This included the obligation to provide for the planned higher order roads over the property as referred to above. Arun's Consultants prepared and submitted to the City a subdivision application (the 'development application') with a view to the lawful undertaking of what was primarily a residential development. The application was prepared having taken into account the requirements of the road infrastructures as investigated and advised. The City approved at three different occasions the three phases of the development. Each one of the approvals included confirmation of the rezoning of specified portions of the property to 'Public Streets' as well as conditions relating to the design of the road infrastructure. It is important to note that it was not made a condition of the development approval that the road portions had to be ceded to the City at no cost.

THE CLAIM

[6] Arun claims that the subdivision was confirmed, which in turn would have resulted in the automatic vesting of the land shown as public open space and public streets in the City. In particular, Arun claims that:

(a) The road portions exceeded the needs created by and required for the development and it is consequently claiming compensation for the land surrendered in excess of the needs of the development. (b) Alternatively, that Arun is still the lawful owner of the roads portion. (c) Arun's claim is based on section 28 of LUPO read with the Regulations made in terms of section 47 of LUPO, in particular regulations 37 and 38. Section 28 of LUPO reads as follows:

'The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need.'

[7] It is not disputed that the subdivisions were granted in terms of section 25 of LUPO and that such subdivisions were confirmed. The subdivisions were confirmed, in each case, on the date of transfer of the first erf in such phase to the purchaser thereof. Such dates are set out in paragraph 11 of the particulars of claim and were duly confirmed in evidence. Consequently, the requirement for vesting which is set by section 28 has been met. Arun claims that the compensation to which it claims it is entitled should be calculated in terms of section 26(1) of the Expropriation Act, 63 of 1975. In particular, it claims that insofar as the right to ownership of public streets vests in the local authority in terms of section 28 of LUPO, that such right of ownership is a *'taking'* as contemplated by section 26(1) of the Expropriation Act, alternatively that the land in question had been constructively expropriated and thereby expropriated in terms of section 26(1) of the Expropriation Act. Arun submits furthermore that sections 12(1), (2) and (5) of the Expropriation Act determine the calculation for compensation in respect of that Act and that Arun is consequently entitled to the compensation as set out in Annexure 'Q' to its Particulars of Claim which compensation amounts to R13 429 756.00. In

paragraph 22 of its particulars of claim, Arun advances an alternative claim. This claim was introduced consequent upon the argument raised by the City in the exception argued before Erasmus J. Arun claims that to the extent that it is found that the relevant public streets on the property are in excess of the normal needs required for the development, that those portions of the property have not vested in the City and that the right of ownership thereto remains with Arun.

SEPARATE ISSUES

[8] Arun and the City agreed on a separation of issues, in terms whereof the issues raised by paragraph 14 of the Plaintiff's particulars of claim as amended were, together with any quantification of the Plaintiff's claim, to stand over for later determination, if necessary. The parties agreed that for the purpose of the determination of the issues at this stage of the proceedings it was to be assumed (without the City admitting this to be the case) that portion of the public streets indicated as running over Arun's land at the granting of the subdivisions referred to in paragraphs 10.1 to 10.3 of the particulars of claim ('the subdivisions') exceeded the normal need therefor arising from the subdivisions ('the excess land'). Arun and the City have agreed that in these circumstances (and on the above assumption) the issues to be decided at this stage of the proceedings are the following:

(a) Does the excess land remain vested in Arun, or has it vested in the City in terms of section 28 of LUPO? (b) If the excess land has vested in the City in terms of section 28 of LUPO, is Arun entitled to compensation in respect of the excess land in terms of section 28 of LUPO? (c) If Arun is entitled to compensation in terms of section 28 of LUPO, is such compensation to be reckoned as contended for in terms of paragraphs 19 or 20 of the particulars of claim? The first two issues are

inter-related. As indicated above, Arun's main claim is predicated upon the excess land having vested in the City. Its alternative claim is in line with the City's contention that the excess land remains vested in Arun.

[9] I fully agree that indeed it is axiomatic that legislation is not presumed to take away prior existing rights unless that expressly appears from the legislation. It is of course equally axiomatic that an intention to take away or confiscate property without compensation should not be imputed to the legislature unless it is expressed in unequivocal terms. In this regard Mr Rosenberg contended that in principle, if an owner of land has, under compulsion of law, to permit the taking of his or her land, he or she should be compensated fully unless the confiscating legislation clearly provides to the contrary. Mr Rosenberg relied on ***Administrator Cape v Associated Buildings*** 7957 (2) SA 317 (A); ***Belinco (Pty) Ltd v Bellville Municipality and Another*** 1970 (4) SA 589 (A); ***South Peninsula Municipality and Another v Malherbe NO and Others*** 1999 (2) SA 996 (C).

[10] The above-mentioned presumption does indeed now find expression in our Constitutional order in terms of section 25 of the Constitution. In this regard I was also referred to the general principles set out in ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Urban Reservist and Another***; ***First National Bank of SA Ltd t/a Westbank v Minister of Finance*** 2002 (4) SA 768 (CC) at 810H - 811F. It is perhaps fitting that I quote Ackermann J (writing for the Constitutional Court) in the above matter:

"[100] Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s25 when the 'law' referred to in s25(1) does not provide sufficient reason for the particular

deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivations and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive.

(f) General speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s36 (1) of the Constitution.

(h) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case,*

always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s25."

[11] Mr Rosenberbg contended that section 42 (2) of LUPO is an example where, subject to specific requirements, a local authority is permitted to take a portion of an Applicant's land, without compensation, upon the granting of a rezoning or subdivision. This Court dealt with and analyzed the provisions of section 42 (2) of LUPO in ***Malherbe's*** case *supra*. Mr Rosenberg correctly submitted that in construing the provisions of LUPO, a purposive interpretation should be followed and that that would place the legislation within its context. Undoubtedly LUPO is aimed at regulating land use and planning. An essential element of land use planning is and remains sustainable development of land. In this regard, town planning consultant Mr G Underwood dealt with the concept of development, the developmental duties of local government, and the contributions made and to be made by the property development and construction industries in this regard. In this context, he referred to the findings of the Venter Parliamentary Commission of 1982, a commission established to enquire into, report on and make recommendations regarding methods to promote development, and in particular to promote the provision of sufficient residential urban land and to reduce the cost thereof. At the time, township establishment and land use applications were being processed in the Cape Province in terms of the old Townships Ordinance, 33 of 1934. This was an outdated piece of legislation, according to Mr Underwood, which did not satisfactorily address prevailing requirements.

[12] One of the important issues dealt with by the Venter Commission was the determination of responsibility for costs as between local authorities and township developers. In this regard, the Commission recommended that

the township establisher should accept responsibility for the installation and financing of all engineering services internal to the township and that the local authority should accept responsibility for the installation and financing of the external services. In Mr Rosenberg's submission, LUPO, and in particular section 28 and section 42 (2), reflect broadly an assumption of the principle that the developer is responsible for internal services, while the local authority should accept responsibility for external services. The submission, in my view, cannot be assailed. I agree with it.

[13] In fact section 28 was dealt with by Erasmus J in his judgment of 15 November 2005 in respect of the second set of exceptions which the City had noted against Arun's Particulars of Claim. Erasmus J considered what the primary function of section 28 is and held, in paragraph [24] of his judgment that it was clearly to determine that, at confirmation of a subdivision, the right of ownership of public streets and public places clearly vests in the applicable local authority. The Judge found that section 28 consists of two components, the first of which is that ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 vests in the local authority in whose area of jurisdiction that land is, after the confirmation of such subdivision. He agreed with counsel for Arun that the word 'all' indicates that the legislator wanted to give a comprehensive meaning to public streets and public places, and that the right of ownership of all public places and public streets indicated as such on the application for subdivision then vests in the local authority in terms of section 28.

[14] In paragraph [29] of his Judgment, Erasmus J emphasised that the second component of section 28 concerned the circumstances in which the aforementioned right of ownership would vest without the local authority

having to pay compensation therefore, and agreed in paragraph [31] with counsel for Arun that, by necessary implication, section 28 of LUPO also determined the circumstances in which the local authority would be liable to pay compensation (where the provision of public streets and public places is not based on the normal needs arising from the development). Judge Erasmus concluded in paragraph [33] of his judgment that in his opinion, Arun was entitled to compensation insofar as the provision for public streets and public places at subdivision was not based on the normal needs which arose from the development. The principle of *stare decisis* requires that this Court follow its previous decision unless convinced that such decision is wrong. See Hahlo and Kahn ***The South African Legal Background and its System*** (1st ed) at 251. However, in the ***The City of Cape Town v Helderberg Park Development (Pty) Ltd*** 2008 (6) SA 12 (SCA), the City had imposed a section 42 (2) condition of approval requiring the developer (Helderberg) to cede land to the City at no compensation. Farlam JA, who wrote the majority judgment, consequently held that the developer was not entitled to later claim compensation for land it effectively agreed to give to the City at no cost. It was postulated as follows in paragraph [4] of the judgment:

'[4] *I agree with the submission of counsel for the appellant that the imposition of condition 'u' in the purported exercise of the powers vested in the local authority by s 42 of LUPO did not constitute expropriation because the owner was not obliged to submit to the vesting of his land subject to the condition. This is because the owner could have avoided the vesting of these portions of its land by not proceeding with the proposed subdivision...'*

He elaborated further at paragraph [7] of the judgment:

'[7] *Furthermore the owner could have appealed to the Premier under s 44 of LUPO against the imposition of the condition and on the*

basis of the concession made by the appellant for the purposes of the adjudication of this part of the case its appeal should have succeeded. If it had not it could have successfully taken the decision to impose the condition on review. But it did not do any of these things. It actually applied for the extension of the allegedly invalid approval of the subdivision (invalid because it was based upon an invalidly imposed condition) when it was due to expire. It thereafter proceeded with the subdivision for which it obtained approval and now seeks to be compensated for doing so.'

[15] Farlam JA in the majority judgment referred to a number of judgments in which our Courts had held that a party who has at his or her disposal the remedy of appeal or review and does not make use of it will not be allowed to claim damages because such party could and should have utilised the appeal or review procedure available in terms of the legislative framework. In Mr Rosenberg's submissions these considerations are not applicable in the present matter as, there being no conditions having been imposed in terms of section 42 of LUPO, there was consequently no applicable appeal or review procedure. In order to bolster his submission in this regard, Mr Rosenberg contended as follows:

"The present matter is therefore clearly distinguishable from the Helderberg case in that the development approval was not made conditional upon the gratis cession of the roads portion by the developer to the City. This concomitantly meant that Arun had no remedy by way of a section 44 internal LUPO appeal, nor could it have taken any decision related to such an appeal on review. It cannot therefore be argued that Arun had at its disposal a remedy or remedies which would have protected its interests in the circumstances." In Mr Rosenberg's submission the road portion vested in the City automatically by virtue of section 28 and that Arun was at no

stage in a position to object to or appeal against the cession of the land to the City without receiving compensation. Importantly, Arun only became aware of the fact that it was not going to be compensated for the roads portion when its claim was rejected in or about February 2000 after it had claimed compensation for the provision of the land in October 1999.

[16] I have also been referred to ***Belinco (Pty) Ltd v Bellville Municipality*** 1970 (4) SA 589 (A) at 597D in which the following was stated:

'The answer seems to me to depend in the main on the degree of freedom of choice. The rule is based on democratic dudgeon towards confiscation of private property, and the assumption that the elected Legislature shares that distaste. In the present case the appellant company owns land on which business premises already exist. It wishes to add to such premises, and the plans comply with the municipal building regulations. In these circumstances to withhold approval of the plans, unless the company surrenders nearly a quarter of its land without compensation, seems to me to be in effect holding it to ransom in its lawful ordering of its affairs; yet that is the sort of situation which clause 8(A)(i) covers and would sanction. In principle the distinction between ransom and uncompensated expropriation seems to me so delicate as to lack any discernible robustness.'

In ***Helderberg*** majority judgment Farlam JA concluded in paragraph [6] that on the facts before him he did not believe that the developer had been held to ransom by the City *'in its lawful ordering of its affairs'*.

[17] In line with the judgment of Erasmus J referred to *supra*, Heher JA held at paragraph [20.14] of the *Helderberg's* minority judgment that section 28 of LUPO does by necessary implication provide that if the provision of public streets over land, indicated as such at the granting of an application

for subdivision of land, is not based on the normal need therefor arising from the subdivision, the owner shall, to the extent that it is not so based, become entitled to just and equitable compensation from the local authority in whose area of jurisdiction the land is situated, when, upon the confirmation of the subdivision, ownership of those streets vest in that local authority.

Contrary to the majority, Heher JA held that ***Helderberg*** had in fact overpleaded the matter and that all that was necessary to determine the appeal was to examine the interpretation of section 28, which he interpreted in their favour. It is such an examination, and not the consideration of any conditions of approvals and what remedies Arun can avail itself of, I would think, which was what the majority in ***Helderberg*** had ultimately deliberated, which is applicable in the current case. It is important that I mention that the City relies on the majority judgment in ***Helderberg*** case which is binding on me. I undertake to deal with Mr Roux's submissions in this regard later on *infra*.

[18] In paragraphs [39] to [43] Heher JA in the minority judgment in ***Helderberg*** confirmed that there can be no doubt that 'vesting' is the primary object of section 28 and that the implications of 'without compensation' cannot be ignored. He held further that it was sophistry to submit that the fact that the owner can refrain from rezoning or subdividing his land confers on him a freedom of choice and that such an interpretation would place stagnation above development, while LUPO is intended to regulate development in an orderly fashion and not to stultify it. He concluded in paragraphs [39] and [41] that:

'[39] Thus, the provisions of s 28, although primarily concerned with the vesting of land, are <u>founded in a compulsory taking</u> and when, abused in the manner set up by the respondent's case, give rise to a

situation so close to confiscation that application of the statutory principle of interpretation is both appropriate and necessary.

[41] Consistent with the rule of interpretation, and even without need to resort to the Constitution, s 28 is capable of meaning that the vesting of public places and streets beyond the normal need arising from a particular subdivision will give rise to a claim for compensation at the instance of the former owner of the land. Indeed that is the only logical inference to be drawn as the correlative of the negative postulation as to compensation in s 28: if it were not so the conditional clause linking the absence of compensation with normal need would be superfluous. But of course s 28 must, in so far as it compulsorily requires the giving up of land to a local authority, be interpreted in the spirit of s 25(2) of the Constitution ie subject to the payment of just and equitable compensation.' (Underlining added)

[19] Mr Rosenberg contended that the learned Judge (reference to Heher's minority Judgment in ***Helderberg*** case) correctly found in paragraph [43] that in considering an application for subdivision under section 25 of LUPO, a local authority will no doubt take into account the extent of public roads and places shown on the sub-divisional map and the need for such and that it will also weigh the financial implications to it flowing from the vesting of such roads and places, knowing that it is only where what is provided is based on normal need arising from the subdivision that such land comes to it free of compensation. Indeed Heher JA found nothing anomalous in requiring a local authority to pay for the excess beyond normal need irrespective of whether the developer has deliberately or accidentally provided for more public space than he was

obliged to. I want to conclude the discussion of the minority judgment of Heher JA by setting out his concluding paragraph [46] *infra*:

'[46] Section 28 caters for the passing of ownership to a local authority without the need for formal transfer of ownership and the possible delays and disputes to which that process may give rise. It enables the local authority to control and manage such places and streets as soon as the applicant for subdivision is legally entitled to exercise his approved rights. The section lays down its own criteria for compensation which apply to all cases of subdivision, including those consequent upon rezoning. It serves a purpose independent of a condition laid down under s 42 providing that land be ceded free of charge, and operates irrespective of whether such a condition has been imposed.'

I bear in mind that Cameron JA in ***True Motives 84 (Pty) Ltd v Mahdi and Another*** 2009 (4) SA 153 (SCA) had the following to say:

"However, it is well established that precedent is limited to the binding basis (or ratio decidendi) of previous decisions. The doctrine obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (obiter dictum), and is not binding on subsequent courts." See Para [101]

[20] Of course Mr Roux contended differently. He contended that there can be no doubt that the Supreme Court of Appeal interpreted section 28 of LUPO. In his submission the use of the words "on a proper construction thereof" makes it quite clear that the section is being interpreted. According to Mr Roux by expressly rejecting the interpretation attached

to section 28 by Heher JA, the majority of the Supreme Court of Appeal interpreted the section to say that:

"on a proper construction of s 28 ... the owner of land subject to an approved subdivision application (do not) have a claim for compensation from the local authority concerned in respect of those portions of the public streets vesting in the authority upon the confirmation of the subdivision which exceed the normal need therefor arising from the subdivision."

Mr Roux contended that it is also instructive to note that in interpreting the meaning of section 28, Farlam JA specifically used the words ***"the owner of land subject to an approved subdivision"***, and that this makes it clear that it is of general application and not restricted to the facts of that particular case (a reference to ***Helderberg*** case). I do not agree with Mr Roux on this submission. Mr Roux placed emphasis also on paragraph [3] of ***Helderberg*** where Farlam JA illustrated inequitable results which may result if a different interpretation is to be attached to section 28. I was invited to note that having already found what remedy the landowner does not have upon a proper construction of section 28 Farlam JA proceeded to mention the remedies he does in fact have. Accordingly, in Mr Roux's submissions Helderberg case *supra* is not at all distinguishable from the facts of the instant matter. He contended that this Court remains bound by the aforestated interpretation in terms of the *stare decisis* rule. Mr Roux referred me in this regard to the recent judgment of the Constitutional Court in ***Camps Bay Ratepayers' and Residents' Association v Harrison*** 2011(4) SA 42 (CC) where Brand AJ, said the following regarding the *stare decisis* doctrine:

"This argument raises issues concerning the principle that finds application in the Latin maxim of stare decisis (to stand by decisions previously taken), or the doctrine of precedent. Considerations

underlying the doctrine were formulated extensively by Hahlo & Kahn. What it boils down to, according to the authors, is: '(C)ertainty, predictability, reliability, equality, uniformity convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.' Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution to deviate from this rule is to invite legal chaos....

As to the influence of s 39(2) on post constitutional decisions of higher tribunals, this court expressed itself in no uncertain terms when it said:

'It does not matter ... that the Constitution enjoins all courts to interpret legislation and to develop the common-law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals....

High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue.'

Of course, it is trite that the binding authority of precedent is limited to the ratio decidendi (rationale or basis of deciding), and that it does not extend to obiter dicta or what was said 'by the way'."

[21] In this regard I also bear in mind remarks contained in ***Blaauwberg Meat Wholesalers v Anglo Dutch Meats (Exports)*** 2004(3) 160 SA SCA namely:

"With regard to the criticism of the conclusion arrived at in Albestra expressed by the Court a quo, this Court has only recently had reason to administer a gentle rebuke to a Judge of the High Court who, to use the words of Schutz JA, 'considered that this court should be given the opportunity of .....ending its earlier judgment': S v Kgafela 2003 (5) SA 339 (SCA) at 341 A-D, and, with reference to the judgment of the House of Lords in Cassell and Co Ltd v Broome and Another [1972] AC 1027 at 1054E, to remind courts on a lower tier of the necessity 'to accept loyally the decision of the higher tiers'. It is unfortunate that the occasion to repeat this admonition has occurred again. Also relevant to the misplaced criticism by the Court below are the remarks by Cloete J in Dischem Pharmacies (Pty) Ltd v United Pharmaceutical Distributors (Pty) Ltd 2003 CLS 9 at para [13] concerning the very judgment now under appeal:

'In the absence of a constitutional challenge, to which other considerations would apply, perceived equities are not a legitimate basis to depart from a decision of a higher Court or to avoid the strictures of a statute.'"

[22] Mr Rosenberg after careful analysis of the majority judgment in *Helderberg* case *supra* considered the words "on a proper construction of section 28" as constituting an obiter. He consequently referred me to the exposition by Cameron JA in ***True Motives 84 (Pty) Ltd v Mahidi and Another*** *supra* at paragraphs [103] and [104] of that judgment which reads as follows:

'[103] The most authoritative and illuminating exposition in our law of the distinction between what is binding in a previous decision, and what is stated 'by the way', is that of Schreiner JA in Pretoria City Council v Levinson. He referred to an earlier explanation by De Villiers CJ in Collett v Priest, who stated that the ratio of a decision 'is the principle to be extracted from the case', and 'not necessarily the reasons given for it'. Schreiner JA does not seem to have thought Collett's reasons/ratio distinction convincing, for he waved it aside as depending 'mainly on the meaning attached to those words in their context by the users'. He proceeded instead to suggest a more secure and enduring basis of distinction (citation omitted):

'(W)here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the ratio decidendi, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts . . . and (c) (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.'

[104] In Levinson Schreiner JA applied the ratio/obiter distinction to hold that the court's previous decision in Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd 1945 AD 217 was binding on it. Rossmaur held that section 29 of a Transvaal provincial ordinance was ultra vires under Item 10 of a schedule to the Financial Relations Act 10 of 1913. In addition, Rossmaur examined and rejected an alternative contention that section 29 of the Ordinance was protected by Item 14 of the schedule to the Act. Lower-court judges had held that part of the court's reasoning

was not binding because 'apparently it was thought that the statement [in Rossmaur as to the scope of town-planning in Item 14] was unnecessary for the decision, possibly only in the sense that it might have been reached by a different line of reasoning'. After the exposition quoted above, Schreiner JA rejected the lower courts' conclusion regarding the case's ratio:

'So approaching the matter it seems to me to be clear that what was said in regard to the scope of town-planning in Item 14 in the Rossmaur case was part of the ratio decidendi of that case.'

This was because (Schreiner JA went on to point out), had Rossmaur not held that Item 14 limited town planning to undeveloped areas, the Rossmaur court would have concluded that s 29 'was supportable by the powers given by Item 14' and thus that the section was not ultra vires but valid. It followed that the 'limiting statement' in Rossmaur regarding Item 14 was part of the essential basis of the decision, and binding on subsequent courts. In other words, the court's reasoning on the scope of Item 14 was essential to its decision, since had it held that Item 14 was broader, the decision would have gone the other way.'

Indeed in ***Fellner v Minister of the Interior*** 1954 (4) SA 523 (A) at 542 D-E, Schreiner JA repeated what he had said in the ***Pretoria City Council*** case when he stated the following:

'The decision or judgment, in the sense of the Court's order, by itself only operates of course, between the parties themselves. It can only state law insofar as it discloses a rule.' See further ***Makhanya v The University of Zululand*** 2010 (1) SA 62 (SCA) at para [81]. For completeness it is apposite to set out briefly what Nugent JA said in ***Makhanya*** case.

"But what needs to be borne in mind, as Cameron JA reminds us in True Motives, is that what binds a lower Court is only the ratio of the decision of a higher Court and not what might have been said empassant (though

views of a higher Court that are expressed in that way are always instructive). ……"

[23] On the other hand Mr Roux contended that the interpretation of section 28 by Farlam JA and the majority in ***Helderberg*** case was the "rationale or basis of deciding," and not something that was said **"by the way"**, (to use the words of Brand AJ in ***Camps Bay Ratepayers' and Residents' Association v Harrison*** *supra*. To say that the interpretation of section 28 in the majority was obiter as contended by Mr Rosenberg is perhaps an overstatement. The crux in ***Helderberg*** case *supra* was but to interpret section 28 of LUPO. I do not accept that such interpretation was obiter. It may not have been as detailed as the interpretation contained in the minority judgment but it remains central to the issue which fell to be decided in that case. **Wille's Principles of South African Law** (9th edition) deals with this subject matter at pages 76 – 93 where *inter alia*, the following appears:

"The doctrine of precedent reflects and regulates the 'general duty of judges to follow the legal rulings in previous judicial decisions (Hahlo & Kahn South African Legal System 214) in a manner that terms such decisions into a binding source of law. ……it also plays a role in respect of legislation in as much judicial interpretations of legislation are also subject to this duty. See ***Du Plessis 'Statute Law and Interpretation' LAWSA*** *First re-issue Vol 25 (1) para 313."*

The basic principle is also referred to by the Latin Maxim *stare decisis et non quieta movere*. Loosely translated to mean 'to stand by decisions and not disturb settled points.' The doctrine of precedent (as show above) has been endorsed by the Constitutional Court as an incident of the Rule of Law that serves to 'enshrine a fundamental principle of justice: that like

cases should be determined alike' and promote legal certainty. See ***Wille's Principles of South African Law*** (9th edition) at 77-78.

I conclude this aspect by quoting Hahlo & Kahn's well-known and salutary explanation in this regard:

'The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief on an existing rule and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike; and it conserves the time of the courts and reduces the cost of lawsuits. Certainty, predictability, equality, uniformity convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.'

POLICY SURROUNDING SECTION 28

[24] It is important to note that the City admitted paragraph 17.3 of Arun's Particulars of Claim which reads thus:

'17.3 daar te alle tersaaklike tye geen beleidsbepaling deur die Administrateur gemaak is ingevolge Artikel 28 van die Ordonnansie, waarvolgens padbreedtes soos deur die owerhede benodig vir doeleindes van die hoër orde paaie, deur 'n

grondeienaar kosteloos aan daardie owerhede afgestaan moet word nie.'

However, the City contended that this admission goes no further than admitting that at all relevant times there was no policy as contemplated by section 28, which provided for the giving up of public streets without compensation. But during the course of the cross-examination of the town planner (Mr G. Underwood) Mr Roux put it to him that inasmuch as the 1988 structure plan provided for a contemplated upper order road network which saw both the planned Golf Course Road and Brackenfell Boulevard (the two primary distributors) running across Arun's property, the 1988 structure plan qualified as a policy in terms of section 28, providing a basis for these roads to vest in the City without compensation. Of course as shown earlier on in this judgment the primary purpose of section 28 of LUPO is to provide for the vesting of ownership of public streets and public places after the confirmation of a subdivision. Mr Roux referred me to section Section 122(1) of the Municipal Ordinance 20 of 1974 and submitted that the wording of Ordinance 18 of 1976 is identical. This is perhaps to push the point rather too far.

[25] In Mr Roux's submission the words "without compensation" (in section 28) were included purely because public streets and places vest in the local authority in terms of the Municipal and Regional Services Ordinance it takes place without any compensation. Apart from ***Helderberg*** case *supra* Mr Roux referred me to namely ***Club Mykonos Langebaan v Langebaan Country Estate Joint Venture and Others*** 2009 (3) SA 546 (C) where Koen AJ stated the following:

"[35] But it is clear that the operation of section 28 does not inevitably lead to an automatic vesting. It is only –

> *... if the provision of the said public streets...is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need that a vesting occurs. Whether or not the link road '...was based on the normal need therefor arising from the said subdivision...' was not an issue pertinently addressed in the evidence placed before the court on affidavit in this matter, and to make a finding in this regard would involve an unacceptable measure of speculation."*

[26] The portion of section 28 beginning with the words *'without compensation by the local authority concerned'* stipulates the circumstances in which the local authority will be absolved from paying compensation to the owner of a public street or public place which has vested in it in terms of that section. In other words, despite such vesting no compensation by the local authority is payable if (a) the provision of the public street or public place in question is based on the normal need therefor arising from such subdivision; or (b) the provision of the public street or public place in question is in accordance with a policy determined by the Administrator from time to time, regard being had to the normal need referred to in (a). Truly central to both scenarios mentioned in (a) and (b) above is the *'normal need'* concept. That is to say what may be reasonably concluded as being the subdivision in question's need for such public streets. I agree (as pointed out by Mr Rosenberg) that in neither of the circumstances postulated by section 28 for public streets vesting without compensation in a local authority upon subdivision, is it contemplated that this should occur without the normal need requirement being met. In (a) above, normal need is derived from a

factual enquiry located in the particular context of the subdivision in question. However, with (b), LUPO provides an alternative to such enquiry, namely for the Administrator to adopt and determine a policy. The policy alternative, as contended by Mr Rosenberg, is not intended to open the door to municipalities acquiring land free of the duty to compensate for the purpose of planned public streets which exceed the normal needs of the subdivision. The policy is aimed at providing criteria and standards which may be applied to subdivisions in order to determine a division of responsibility between developer and local authority in relation to services (in this case public streets).

[27] In terms of section 5 of LUPO, the general purpose of a structure plan is to lay down guidelines for the future spatial development of the area to which it relates. A structure plan shall not confer or take away any right in respect of land. Section 4 of LUPO deals with the preparation of structure plan. For instance, the 1988 structure plan is a so-called section 4 (6) structure plan. Such a structure plan is one prepared either by the local authority itself (section 4 (1)), a joint committee (section 4 (2)), or the director (section 4 (3)). After it has been prepared and put through an objection process, section 4 (6) provides that the Administrator shall, after considering objections lodged or representations made in terms of section 4 (5), approve or reject it. It is abundantly clear that a structure plan is and remains a particular statutory instrument serving designated planning purposes and subject to detailed statutory requirements. It should capture the local authority's vision for the area concerned and serve as the municipal spatial development framework within which land use planning and development by the private sector is to take place. Additional to providing a framework of information to be used in the preparation of a township layout, the guideline proposals included in the

structure plan, insofar as it relates to desirability, are to be used by the authorities in the evaluation of applications for rezoning, subdivisions and departures. See section 36(1) of LUPO. See also ***Hayes and Another v Minister of Finance and Development Planning, Western Cape, and Others*** 2003 (4) SA 598 (C) at 624 H – 625 A. Moreover, section 5 (1) of LUPO provides that the general purpose of a structure plan shall be to lay down guidelines for the future spatial development of the area to which it relates in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned. The area referred to the total area covered by the structure plan, and the community concerned refers to the people in such area. It is contended by Mr Rosenberg that as far as Sonstraal Heights is concerned, the 1988 structure plan was not adapted to specifically and exclusively cater for the needs of the Sonstraal Heights land owners and occupants, but it was aimed rather at the broader community.

[28] Based on the above reasons I am constrained to conclude that the 1988 structure plan does not qualify as a section 28 policy. Mr Underwood testified that as far as the 1988 structure plan is concerned, it does not purport to provide any criteria or guidelines for establishing normal need in any particular subdivision, as far as public streets are concerned. With regard to the latter, it confines itself to addressing the location of certain planned upper order roads. It goes without saying that (in the very nature of things) the 1988 structure plan does not (and could not) address the normal needs of the Sonstraal Heights subdivision, which was approved some ten years and more after the structure plan was adopted. Mr Underwood further testified that in his experience provincial policy was generally made available in the form of provincial circulars and designated policy documents. He confirmed that in fact there was a

provincial policy in place providing guidelines and criteria for establishing the determination of the amount of public open space required in a typical township subdivision. There was, however, no corresponding policy emanating from the LUPO competent authority which purported to deal with the question of public streets. Mr Underwood testified further that he would expect and anticipate that any such policy, if it had been determined, would have been published as such. He would not expect to find such a policy contained within a particular structure plan for a designated area, such as the 1988 structure plan.

[29] In the above regard Mr Rosenberg made the following submission:

"We submit that s 28 contemplates a policy determined by the Administrator. This may be contrasted with the structure process prescribed by LUPO, whereby the Administrator himself does not determine the structure plan, he merely accepts or rejects what has been prepared by other bodies. Such policy is to be of general application, and not confined to a particular area or community. It is required to set out criteria or guidelines whereby the normal need requirement for the compensation free vesting of land in the local authority concerned, on subdivision, is to be determined."

I agree with the above submission. I was also referred to ***Club Mykonos Langebaan v Langebaan Country Estate Joint Venture and Others*** 2009 (3) SA 546 (C) at 558D where the Court held that there was no basis for equating a structure plan with a policy determined by the Administrator. As far as the basis for determining compensation is concerned, Arun contended that any compensation to which it is entitled must and falls to be determined in accordance with the provisions of the Expropriation Act 63 of 1975 regard being had to the provisions of

section 26 (1) thereof. This was of course dealt with by Erasmus J in the judgment referred to earlier on in this judgment particularly in paragraphs [42]-[49] of Erasmus' judgment.

[30] the interpretation of section 28 of LUPO in the majority judgment in ***Helderberg*** case *supra* was most certainly premised on the conditions imposed (condition 'u' in the purported exercise of the powers vested in the local authority by section 42 of LUPO). It is also true that in the instant matter no appeal and/or review procedures were available to Arun, unlike in the ***Helderberg*** case *supra*. Mr Rosenberg's submissions with regard to the distinguishing features between ***Helderberg*** case *supra* and the instant matter are quite compelling and persuasive. It is perhaps necessary for the Supreme Court of Appeal to revisit the question of interpretation of section 28 of LUPO in view of the peculiar facts of the instant matter. I am treading/travelling on dangerous grounds by even considering to differ from the judgment of the Supreme Court of Appeal. But the facts in the instant compel me to administer justice in the manner set out in the order I make *infra*.

ORDER

[31] In the circumstances the following order is made:

(a) ISSUE A

The excess land in the instant matter has vested in the Defendant (the City) in terms of section 28 of the Land Use Planning Ordinance 15 of 1985 (C) (LUPO).

(b) ISSUE B

The Plaintiff is entitled to compensation in respect of the excess land, in terms of section 28 of LUPO.

(c) ISSUE C

Compensation contemplated in (b) above shall be calculated in terms of the relevant provisions of Act 63 of 1975.

(d) The Defendant shall pay costs hereof which costs shall include those occasioned by the employment of two counsel.

DLODLO, J