Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 23868/2015

In the matter between:

ATLANTIC BEACH HOME OWNERS ASSOCIATION NPC	Applicant
and	
CITY OF CAPE TOWN	First Respondent
ATLANTIC BEACH MANAGEMENT (PTY) LTD	Second Respondent

Court: Justice J Cloete

Heard: 14 June 2016 and 29 August 2016

Delivered: Friday 28 October 2016

JUDGMENT

CLOETE J:

Introduction

[1] The applicant (HOA) asks for final interdictory relief against the second respondent (ABM) to restrain it from conducting certain activities (detailed in the amended notice of motion) from the latter's golf club house situated in the Atlantic Beach Golf Estate at

Melkbosstrand outside Cape Town. At all material times Mr Allen Usher has been the directing mind of ABM. He is also the deponent to ABM's affidavits. According to HOA both Mr Usher and another shareholder of ABM, a Mr Bill Taylor, are also homeowners in the estate. Mr Usher describes himself as a businessman, entrepreneur and estate agent.

[2] ABM in turn counter-applies for a similar order against HOA in respect of certain activities (detailed in the notice of counter-application) conducted by it since about 2011 through appointed contractors from its leisure centre which was erroneously built on the same land as the clubhouse. It is not in dispute that the activities which HOA and ABM respectively complain of are indeed conducted.

[3] HOA premises its relief on two bases. The first is a restrictive title deed condition imposed in its favour in a title deed registered in the Deeds Office on 14 October 1999. The second is the City of Cape Town Municipal Planning By-law 2015 (the planning by-law). HOA contends that ABM's activities are in breach of both. ABM on the other hand only relies on the planning by-law in support of its counter-application, given that the title deed restriction does not operate in its favour.

[4] HOA initially also sought relief against the first respondent (the City). The latter is the owner of the land which it leases to ABM in terms of a notarial lease concluded on 13 July 1999 between its predecessor, the Melkbosstrand local council (which for convenience I will also refer to as the City) and the developer of the golf estate,

Johnnic Property Developments Limited and later Skeena Trading Company (Pty) Ltd (the developer). The notarial lease was ceded and assigned to ABM by the developer on about 30 August 2004. The City is also of course the entity responsible for regulating its own zoning scheme in relation to the land under the planning by-law.

[5] On 26 February 2016 the City agreed to take all reasonable measure to enforce compliance with clause 5.4 of the notarial lease which stipulates that the lessee shall at all times observe the conditions of title of the land concerned. It also agreed to enforce the planning by-law. This agreement was made an order of court on the same date. The order also records that HOA would not proceed further against the City.

[6] In its counter-application ABM seeks an order against HOA only (and not the City as well). The City has however filed affidavits for the assistance of the court explaining its attitude towards the zoning issue. These affidavits were filed at the behest of ABM and HOA consented to their admission.

[7] There is also a separate application by HOA to strike out certain paragraphs of ABM's answering affidavit in the main application. I will deal with this later.

Relevant factual background

[8] Given the history of this matter and the nature of the defences raised by ABM it is necessary to set out the relevant factual background in some detail. The Atlantic Beach Golf Estate comprises 860 residential erven plus another 3 erven – namely

3656, 3822 and 3828 Melkbosch Strand – which make up the golf course land. It is the golf course land which forms the subject matter of the dispute. It is this land which is owned by the City and leased to ABM in terms of the notarial lease which terminates on 31 December 2048, subject to ABM's right to renew the lease for a further 49 years.

[9] Back in 1998 the City granted approval to the developer in terms of s 25(1) of the Land Use Planning Ordinance 15 of 1985 (LUPO) for the rezoning, subdivision and development of the land on which the estate is situated, subject to certain conditions. One of the conditions was that once the development of the golf course had been completed, the golf course land was to be subdivided from the rest of the development and transferred back to the City. This occurred, as did the conclusion of the notarial lease.

[10] The golf club house is situated on Erf 3822. It is owned and operated by ABM. The leisure centre is also erroneously situated on Erf 3822, on a portion which ABM sub-leases to HOA. The leisure centre is owned and operated by HOA through independent contractors. The latter is in the process of procuring subdivision of *'its'* portion of Erf 3822 as a preliminary step towards taking transfer of that portion.

[11] The leisure centre has a swimming pool, indoor gym, tennis courts, a cafeteria and a function room which it uses to host weddings, birthday parties, conferences, corporate gatherings and the like.

[12] ABM uses its clubhouse to also host functions such as weddings, gala dinners. cocktail parties and conferences. It has hosted these functions since the clubhouse opened in 2000, at an average of approximately 20 such functions per year. These have been hosted for members of the public, as well as members of the HOA.

[13] Although HOA has been aware of these activities since 2000 (it was incorporated on 6 January 1999) it is fair to say that HOA has only been in a position to do something about them since 2005 for the following reasons. First, the development phase was only completed during about September 2005, and until that date the developer enjoyed the right to host golf tournaments *'or other events'* in terms of clause 3.8.3 of the HOA's memorandum of incorporation. Second, during the development phase the developer, as it was entitled, appointed the directors of HOA (then referred to as trustees) and also appointed ABM to manage the estate and to run HOA until completion of the development. It was only at the end of the development phase that HOA could appoint its own directors and became entitled to cancel ABM's management contract. As previously stated, the notarial lease was only ceded and assigned to ABM during August 2004.

[14] On the ground floor of the clubhouse there are three boardrooms or meeting rooms and a spa (the beauty salon). Upstairs there is a banqueting room (which can accommodate 150 people and which can be used as a conference facility) and a restaurant (which can accommodate 70 people). According to ABM the clubhouse was designed and planned with the intention to use these features and facilities.

Construction was completed shortly before it opened its doors in 2000. The beauty salon has operated from the clubhouse since 2002. It is rented out to a private entity which has no connection with the estate.

[15] The relevant title deed restriction contained in the deed of transfer in terms of which the developer transferred the golf course land back to the City (then known as the Blaauwberg Municipality) provides that:

> *'The* [erven] *herein transferred shall be used for a golf course and golf club facilities only.'*

[16] There is no dispute that this title deed restriction was imposed in HOA's favour, nor that ABM was not a party to the agreement underpinning it. The words *'golf club facilities'* are not defined. However HOA's memorandum of incorporation defines the golf club as *'the communal buildings serving the golf course'.* Clause 4.2 of the Executive Summary annexed to the deeds of sale of the individual residential erven (whose purchasers thus became members of the HOA) records that:

> *'In terms of the title conditions of the erven upon which the Club is located, the property may not be used for any purpose other than a golf course.*

[17] Clauses 5.4 and 7 of the notarial lease stipulate that:

> *'5.4 The lessee shall at all times observe the conditions of title of the property…*

> 7. *The leased premises shall only be used for the purpose of a golf course, club house and other ancillary uses relating thereto, as from time to time may be determined by the lessee.'*

[18] The words *'other ancillary uses relating thereto'* are not defined. Clause 5.1.2 of the notarial lease places an obligation on the lessee to construct and maintain *'an appropriate clubhouse and other facilities and amenities considered by the lessee to be appropriate'*; *'the facilities'* are defined as *'all improvements and amenities to be erected on the property including the clubhouse, restaurant and other amenities'*; and *'club'* is defined as *'the club operations to be conducted on the property by the lessee or its nominee as provided in this notarial lease'*.

[19] Clauses 5.3 and 5.5, and their positioning in relation to clause 5.4, are also relevant. Clause 5.3 provides that the lessee *'shall conduct the activities for which the leased premises are let in accordance with generally accepted good practices and will promote, encourage and foster the game of golf'* for those *'entitled to play golf on the golf course'*. Clause 5.4 then deals with the obligation of the lessee to *'at all times observe the conditions of title of the property'*. Thereafter clause 5.5 obliges the lessee to *'procure the formation of a licenced club on the leased premises'* for those *'entitled to play golf on the golf course'*.

[20] As previously stated the development phase of the estate came to an end during about September 2005. From approximately that time ABM's use of the clubhouse facilities became controversial.

[21] Although not clear exactly when the dispute arose, arbitration proceedings commenced in December 2006 in relation to ABM's use of a portion of the clubhouse for an estate agency operated by Mr Usher (Usher Realtors (Pty) Ltd). HOA sought to enforce the title deed restriction concerned against ABM amongst others. As is apparent from the arbitration award ABM did not take issue with its conduct (the estate agency) falling foul of the title deed restriction.

[22] Instead it contended that HOA had waived its right to rely thereon by virtue of its signature of an agreement and consent to the operation of a sales office on the golf course land. This agreement had in fact been signed by Mr Usher on HOA's behalf in his capacity as director or trustee of HOA before the end of the development period. The arbitrator not only found that the operation of an estate agency was in breach of the title deed restriction but also that there had been no waiver on the part of HOA.

[23] In May 2006 another dispute arose. HOA contended that Mr Usher had failed to carry out his fiduciary duties as a director of HOA when his trust acquired shares in the developer instead of procuring control of the golf course lease for the HOA. The HOA sought to have the relevant transactions set aside and for the shares to be transferred to it. HOA and ABM, together with the Allen Usher Trust, agreed however that in the event that the arbitrator awarded in HOA's favour, then ABM would cede and assign the golf course lease to HOA which in turn would sub-lease it back to ABM.

[24] An arbitration agreement was concluded. That became the subject of further arbitration proceedings, principally it would seem in relation to whether or not HOA was obliged to make payment of 25% of its levy income on a monthly basis to ABM in accordance with its articles of association. On 19 November 2008 the arbitrator concerned found in favour of ABM.

[25] Thereafter over the period 2009 to 2011 HOA attempted to facilitate a purchase of the notarial lease from ABM in order to obtain control over the operation of the golf course and clubhouse facility. To this end a separate company was formed by HOA. Agreements were concluded in terms of which the new company would pay ABM a purchase price for the lease, payable over a period, while the company would operate the golf course and clubhouse facilities. The company would be funded by debentures issued primarily to HOA's members.

[26] However due to non-fulfilment of various unspecified conditions in the agreements, and after the new company had managed the golf course for a period in 2010/2011, management thereof was returned to ABM which once again proceeded to operate it. (It should be mentioned that although reference is made in HOA's papers only to management of the golf course, it would seem that this reference was intended to include the clubhouse as well, if regard is had to the explanation provided by HOA).

[27] The deponent to HOA's affidavits, Mr Harry White, became its chief executive officer in October 2012. In December 2012 a new board was elected. Mr White states that the main objective at the time was *'to get the estate back on track as the infighting and attempted purchase of the golf course lease led to* [HOA] *being dumped into financial and operational difficulties in 2011'*.

[28] In early 2012 on Mr White's recommendation the board established a working group to *'examine all the rights and matters pertaining to the golf course and land belonging to* [HOA] *as well as other land within the boundaries of the estate belonging to the City'*.

[29] In April 2012 the working group reported that although the title deed restriction precluded ABM from conducting non-golfing activities from the clubhouse (a significant portion of ABM's income), instead of renewing conflict with ABM an attempt should rather be made to acquire the golf course land from the City *'and in that manner obtain some better control over the conduct'* of ABM. This was conveyed to Messrs Usher and Taylor at a presentation held on 19 June 2012.

[30] A copy of this presentation is included in the papers. It reflects *inter alia* that conflict between HOA and ABM had been ongoing; the existence of the title deed restriction limiting the use of the land to a golf course and golf club facilities only; and that *'the historical animosity between the HOA and ABM is well known, indicating that other golf operators would be unlikely to invest substantially to acquire the golf club lease'*.

[31] Under the heading *'The main aggravating factors causing the conflict'* it was recorded that:

> '1. *The 860 home owners do not have any say over the Golf Club and Course as this land, around which their homes are situated, belongs to the City of Cape Town. The lease over this land has been awarded to an independent company (ABM) for a 99 year period. ABM operates a business on this land for the gain of two shareholders that are property owners on the estate.*
>
> 2. *The* [HOA] *currently has no control over the financial or operational affairs of ABM, yet as a result of regulation 8.9 of its Articles of Association, is obliged to contribute 25% or R3.2 million p/a of levies collected from the residents, to ABM.'*

[32] The proposal made to ABM at the presentation was that HOA acquire the rights to the golf course land from the City, thereby *'effectively becoming a partner of ABM for the remainder of the lease period'*. The activities that were being conducted by ABM were not themselves criticised other than in the context of the prohibition by the title deed restriction. The presentation suggests that a *'win-win'* situation would be to effectively permit at least some of these activities to continue (and others to be considered as well) but on the basis that HOA would also benefit financially, and would have control over any such activities.

[33] Thereafter on 26 June 2012 ABM made its own presentation to HOA. It did not address the title deed restriction. On Mr White's unchallenged version, ABM in essence proposed that HOA take over the notarial lease for an exorbitant amount. This proposal was rejected.

[34] In August 2012 HOA gave ABM a draft proposal which it intended submitting to the City to obtain transfer of the golf course land. The proposal was then submitted to the City in September 2012. During 2013 HOA concentrated its efforts on resolving the issue with both ABM and the City. The latter indicated that *'it would have to resolve some issues'* with ABM before it could engage with HOA and consider its proposals.

[35] On 21 January 2014 HOA received a request from ABM to permit a Woolworths store to be operated from the clubhouse. Mr Usher wrote:

> *'Before we go ahead and apply to the City Council we wish to first seek the permission from the* [HOA] *in terms of our Title Deed condition to use a portion of the clubhouse buildings as a convenience store.*
>
> *We trust that our application will meet with the favourable consideration of the* [HOA].*'*

[36] HOA refused this request on 29 January 2014. In his email Mr White again referred to the title deed restriction. He also confirmed that as a consequence of further discussions with ABM during November 2013, the latter was to have made a revised proposal but that this had not been forthcoming. He wrote:

> *'In the absence of any such acceptable proposal having been forwarded, the Board finds it impossible to support any ad hoc action, such as a waiver of the title deed conditions in favour of an independent commercial venture, as no direct, long-term benefit to the Association is apparent or formally secured.'*

[37] Mr Usher responded on 5 February 2014 merely by noting this communication. He did not take issue with any of its contents. Thereafter in March 2014 another dispute arose

between HOA and ABM pertaining to ABM's removal of post and rail fences along the outside edges of the golf course playing area. According to Mr White it then became clear that an amicable resolution of the conflict between these parties in relation to the golf course land would not be possible. This is not disputed by Mr Usher.

[38] Mr White also states that during 2013 and 2014 ABM leased a portion of the clubhouse to a telecommunications business and displayed an advertisement for an estate agency to operate from the premises. Later in 2014 yet another dispute arose. According to Mr White ABM embarked on an aggressive marketing and advertising campaign to widely promote the restaurant (including a delicatessen) at the clubhouse for use by the public, as well as various other uses of the clubhouse. This included ABM advertising the clubhouse as a conference and event facility able to host *'just about any event'*. This specific allegation is not disputed by Mr Usher, although he maintains that nothing intrinsically changed in the golf club's operations other than a rebranding of the restaurant and fresh marketing efforts.

[39] HOA then finally decided to formally complain to the City. Various communications between HOA and the City followed over the ensuing months. However the City failed to take active steps against ABM and eventually this application was launched in December 2015.

[40] It is common cause that the golf course land is zoned *'Open Space 3 – Special Open Spaces'* in accordance with schedule 3 of the City of Cape Town Municipal Development Management Scheme (DMS) contained in the planning by-law. *'Open*

Space' is defined as *'land not designated as public open space or not deemed to be an ancillary use, which is used primarily as a site for outdoor sports, play, rest and recreation, or as a park or nature area; and includes ancillary buildings, infrastructure and uses. but excludes shops, restaurants and gymnasiums'*.

[41] The relevant extract from the DMS (item 104) provides that:

> *'The OS 3 zoning is appropriate for relatively large areas where open space has special characteristics that require a separate zoning to ensure that the purpose and function of the open space is maintained. Many other zonings allow for open spaces as primary, consent or ancillary uses and such open spaces do not need to be zoned as OS 3. However some land uses such as golf courses, parklands and landscape areas can benefit from this zoning which provides limitations on development, but also allows a range of consent uses to cater for leisure needs and uses compatible with open spaces.'*

[42] The consent uses which the City may grant on application include use as a *'place of assembly'* and *'place of entertainment'*. In its answering affidavit ABM contended that the City had given its consent, or was deemed to have done so, to the use of the golf clubhouse as a place of entertainment and assembly via conclusion of the notarial lease. Implicit in this contention was the acknowledgement by ABM that the activities which it conducts from the clubhouse, in the absence of such consent, fall foul of the applicable zoning of the land.

[43] In its explanatory affidavit filed at a later stage the City's deponent, Mr Dewaldt Smit, who is the District Manager, Blaauwberg District: Planning and Building Development Management, set out the history of the zoning scheme. He explained that utilisation of

the land as a golf course is permitted as a primary use of open space. The clubhouse is an ancillary use and permitted. However a range of purposes for which the clubhouse and leisure centre are allegedly used, if correct, are either not permitted at all under the zoning scheme, alternatively, are permitted only as a consent use. At the time of deposing to his affidavit on 17 August 2016, no consent uses had been granted, or for that matter applied for, and were not and could not have been granted via conclusion of the notarial lease as alleged by ABM.

[44] In particular, Mr Smit confirmed that the uses not permitted are a beauty salon, restaurant or conferencing and events facility. Use of the clubhouse for wedding functions, motivational seminars and training, corporate launches, teambuilding events, gala dinner banquets, cocktail parties, year-end functions, birthday parties, conferences, private parties, auctions and annual general meetings are not permitted unless linked to the use of the golf course or clubhouse.

[45] In respect of ABM's allegations that the clubhouse was specifically designed to accommodate these facilities, and the plans were approved on that basis, Mr Smit states that they did not (and in any event could not) have allowed for uses not permitted by the zoning of the property including the conducting of a restaurant. Mr Colin Lovember (the City's principal planning officer in the same branch as Mr Smit) deposed to a confirmatory affidavit.

[46] Mr Usher then deposed to a further affidavit in which Mr Lovember was alleged to have recently advised him that because these uses were reflected on the approved

building plans, they were lawful under s 39(2) of LUPO. This in turn was denied by Mr Lovember in yet another affidavit. He also stated that the building plans as approved do not include a restaurant. HOA also referred to the conditions of approval of the building plans, one of which is that the owner of the building must nonetheless comply with any applicable title deed condition or other legal provision in relation to the land.

[47] During argument on 29 August 2016 the court was informed from the bar by counsel for ABM that it had just made application to the City for a consent use in the preceding few days. Although no further information was provided in this regard by ABM, it is accordingly fair to accept that, whatever its stance might have been in the past on the zoning issue, ABM now acknowledges that the activities which it conducts as listed by Mr Smit are unlawful because they are not permitted by the zoning provisions applicable to the golf course land.

[48] HOA in turn accepts that some of its activities conducted at the leisure centre are also prohibited by the zoning scheme. There is no evidence of any prior demand having been made by ABM or the City for HOA to cease such activities. The first indication of ABM's complaint was the counter-application. In response HOA undertook to halt these activities (and consented to an appropriate order to that effect) until such time as transfer of *'its'* portion of the land has occurred, or formal consent has been obtained from the City. This undertaking was contained in Mr White's replying affidavit deposed to on 23 March 2016.

[49] During argument counsel for HOA contended that ABM had failed to exhaust its alternative remedy (i.e. approaching the City to take steps against HOA), despite the earlier unequivocal undertaking contained in Mr White's replying affidavit.

The defences raised by ABM

[50] It is against this background that the defences raised by ABM in its papers fall to be considered. They are that the title deed restriction, properly interpreted, permits the activities complained of to be conducted. Alternatively, if ABM is incorrect in this regard then *'the HOA has for fifteen years acquiesced in ABM's having conducted the relevant activities'* and has thus waived the benefit of the title deed restriction, or is estopped from enforcing it. It was also alleged that it *'would be inequitable to permit the HOA to enforce it against ABM in the circumstances…'*.

[51] During argument counsel for ABM clarified what it had meant to convey in relation to the alternative defence. He made it clear that this defence turns squarely on tacit waiver and not either estoppel (for which ABM had in any event not made out a case) or acquiescence in the strict legal sense. He thus rightly submitted that the test to be applied against the facts is that set out in *Road Accident Fund v Mothupi* 2000 (4) SA 30 (SCA), also reported at 2000 [3] All SA 181 (A).

[52] I will first consider the main defence, to which the principles of interpretation set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) of course apply. As previously stated, ABM contends that the title deed restriction,

properly interpreted, permits use of the golf club house for the activities complained of. It essentially advances two arguments in this regard.

[53] First, the kinds of activities which it conducts are alleged to be a widely-practised, acceptable means by which golf clubs supplement their income. That being so, it is submitted, this is a factor which the court can and should take into account in interpreting the title deed restriction so as to give it a reasonable, sensible and businesslike meaning. Second, the notarial lease concluded around the time when the title deed restriction was imposed is relevant to the context of its imposition. It is submitted that the parties to that lease (i.e. the City and the developer) intended that the lessee be permitted to use the clubhouse for ancillary uses which include the activities complained of.

[54] In support of its first argument ABM relied on evidence in the form of a *'survey'* which its attorneys informally conducted among 12 golf clubs in Cape Town and surrounding towns. The *'results'* of this survey were not confirmed under oath by any of the club officials interviewed. Moreover, no information was provided concerning the basis upon which the clubs were conducting these activities lawfully, such as the existence or otherwise of any title deed restrictions, zoning provisions or consent uses granted. It was for these reasons that HOA applied to have these portions of the answering affidavit struck. The evidence presented by ABM in this regard is not only hearsay. It is also, in the circumstances, irrelevant to the issue at hand. It follows that the striking out application must succeed and this dispenses with the first argument.

[55] As far as the second argument is concerned, I accept that the notarial lease does provide some context to the circumstances in which the title deed restriction was imposed. However in my view this weakens rather than strengthens the interpretation which ABM seeks to place on the restriction.

[56] The notarial lease expressly stipulates that the lessee must at all times observe the conditions of title of the golf course land. It provides that the leased premises shall only be used for the purpose of a golf course, clubhouse and other ancillary uses relating thereto. The Oxford Dictionary defines *'ancillary'* as *'providing the necessary support to the primary activities of an operation or organisation'*, and the Merriam-Webster's Dictionary gives the simple definition of the word as *'providing something additional to a main part or function'*. The memorandum of incorporation of HOA defines *'clubhouse'* as *'the communal buildings serving the golf course'*.

[57] The title deed restriction itself stipulates that the golf course land is to be used for a golf course and golf club facilities only. The deeds of sale of the residential erven refer expressly to the title deed restriction and that in terms thereof the golf course land may not be used for any purpose other than a golf course. One of the conditions of approval of the club house plans was that the owner of the building is not absolved from compliance with any title deed condition or other legal provision applicable to the land.

[58] Clause 5.3 of the notarial lease obliges the lessee to promote, encourage and foster the game of golf. Clause 5.5 obliges the lessee to procure the formation of a licenced club on the golf course land for those entitled to play golf on the golf course.

[59] Moreover the applicable zoning provisions do not permit the activities complained of without the City's consent, which has not been furnished. According to Mr Smit one of the preconditions for consent to be granted is that, at the very least, the activity proposed must be linked to the use of the golf course or club house.

[60] I accept that in terms of the notarial lease ancillary uses of the club house are those as may from time to time be determined by the lessee. However the thread running throughout the historical agreements, approvals and other relevant documentation is that such ancillary uses should relate only to the primary function and purpose of the land, namely promoting and supporting the sport of golf.

[61] This being the case, and having regard to what is set out above, I conclude that the only reasonable interpretation to be placed on the title deed restriction is that the club house facilities similarly fall squarely into the same category, and that the restriction does not permit any activity or use which does not achieve these purposes. It follows that the main defence fails.

[62] Turning now to the alternative defence of tacit or inferred waiver of the title deed restriction by HOA. In *Mothupi* the relevant test was set out at paras [15] – [19] as follows:

'Inferred waiver

[15] Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it. The right in question in the instant case is the statutory provision specifically accorded to the Fund to avert claims which are out of time.

> *"It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms"* (SA Eagle Insurance Co Ltd v Bavuma *1985 (3) SA 42 (A) at 49G-H).*

[16] The test to determine intention to waive has been said to be objective (cf Palmer v Poulter *1983 (4) SA 11 (T) at 20C-21A;* Multilateral Motor Vehicle Accidents Fund v Meyerowitz *1995 (1) SA 23 (C) at 26H-27G;* Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd *1996 (2) SA 537 (C) at 543A-544D). That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations (cf* Traub v Barclays National Bank Ltd *1983 (3) SA 619 (A) at 634H-635D;* Botha (now Griessel) and another v Finanscredit (Pty) Ltd *1989 (3) SA 773 (A) at 792B-E); secondly, that mental reservations, not communicated, are of no legal consequence (*Mutual Life Insurance Co of New York v Ingle *1910 TS 540 at 550); and thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional* alter ego, *the reasonable person standing in his shoes.*

[17] The third aspect has not yet been finally settled by this Court, or so it would seem (cf Thomas v Henry and another *1985 (3) SA 889 (A) at 896G-898C). What the one party now says he then intended and what his opposite number now says he then believed, may still be relevant (*Thomas v Henry and another (supra*) 898A-C) although not necessarily conclusive. The knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver (*Martin v De Kock *1948 (2) SA 719 (A) at 732-733. With those two qualifications I propose, in this judgment, to apply the test of the notional* alter ego.

[18] The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists. A complication may arise where a person's outward manifestations of intention are intrinsically contradictory, as for instance where one telefax indicates an intention to waive and another, perhaps as a result of a typographical error, does not. That problem does not arise in this case and consequently need not be discussed (cf Mahabeer v Sharma NO and another *1985 (3) SA 729 (A) at 737 D-E). Nor is it necessary to consider some of the other problems relating to waiver which do not arise in this case, such as whether the manifestation of an intention to waive must of necessity be communicated to the other side, and, if so, whether by some means or another it must always be "accepted" or acted upon by the other party (cf* Traub v Barclays National Bank Ltd *(supra) at 634H;* Botha (now Griessel) v Finanscredit (Pty) Ltd *(supra) at 792B-E;* Segal and another v Segil *1992 (3) SA 136 (C) at 144J-146J; 155B-156J;* Southern Witwatersrand Exploration Co Ltd v Bisichi Mining Plc and others *[1997] 3 All SA 691 (W) at 700c-702d).*

[19] Because no-one is presumed to waive his rights (cf Ellis and others v Laubscher *1956 (4) SA 692 (A) at 702E-F, one, the onus is on the party alleging it and, two, clear proof is required of an intention to do so (*Hepner v Roodepoort-Mardisburg Town Council *1962 (4) SA 772 (A) at 776D-779A;* Bortslap v Spangenberg en andere *1974 (3) SA 695 (A) at 704 F-H). The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.'*

[63] For the reasons already given, I will only deal with HOA's actions (and inaction) since it was placed in a position to enforce the title deed restriction in 2005. The factual background detailed above reveals that, although HOA did not take formal, positive steps in relation to the specific activities now complained of until 2014, ABM's use of the club house has been the subject of ongoing conflict and controversy between these parties since as early as 2006.

[64] First, there were the arbitration proceedings in respect of ABM's use of a portion thereof as an estate agency. Second, there was the dispute about Mr Usher's failure to procure control of the golf course lease for the HOA and the further arbitration in relation thereto. These disputes spanned the period 2006 to 2008. From 2009 until 2011 HOA tried unsuccessfully to wrest control over the golf course and clubhouse from ABM. In 2012 HOA established a working group to explore ways in which it could obtain better control over these facilities and ABM's conduct in relation thereto. ABM's representatives were informed during the same year that this was what HOA intended. To the extent that Mr Usher might at that stage have been under the impression that HOA had historically tolerated at least some of ABM's activities, he must have been under no illusion, after HOA's presentation in June 2012, that HOA knew that such activities were prohibited by the title deed restriction and did not unconditionally condone them.

[65] It is however necessary to deal at this juncture with HOA's proposal to ABM at that presentation, given that it effectively suggested becoming a *'partner'* of ABM for the remainder of the lease period on the basis that at least some of the activities would continue to be permitted (and others would be considered), provided however that HOA also derived financial benefit therefrom and exercised control thereover. This could be construed as the type of complication referred to in *Mothupi*, namely *'where a person's outward manifestations of intention are intrinsically contradictory'*.

[66] To my mind, viewed in its proper context, the proposal did not amount to an unequivocal manifestation of an intention on the part of HOA to waive the title deed

condition for the following reasons. First, the crux of HOA's complaint was that the activities conducted by ABM were prohibited by the title deed restriction. Second, to the extent that HOA was willing to permit at least some of these activities to continue, and to consider others, it was on the basis that it would have a meaningful say therein and would derive meaningful financial benefit therefrom. Accordingly, at most, the proposal amounted to an intention to waive provided that certain conditions were met by ABM.

[67] Moreover it appears that ABM understood the proposal as such. In his email requesting permission for the operation of a Woolworths store in early 2014, Mr Usher also wrote that:

> *'I noted with interest that one of the "Nice to Haves" that was listed in your recent survey was a Woolworths...'*

[68] He then proceeded to ask for permission from HOA for the operation of such a store before approaching the City for formal consent. When this request was rejected because any ad hoc waiver of the title deed restriction would not secure a long-term benefit for HOA, Mr Usher simply accepted this. He did not complain that ABM had been lulled into a false sense of security because HOA had already tacitly waived the title deed restriction in any way or had manifested a clear intention to do so. Moreover, it cannot be ignored that tacit waiver was only advanced as a defence in the alternative. ABM's primary stance throughout this litigation has been that the activities conducted are permitted by the title deed restriction.

[69] From 2014 the parties remained at loggerheads about the principal issue, namely use of the golf clubhouse facilities. Although HOA can be criticised for not taking proactive steps at an earlier stage, I do not understand *Mothupi* to mean that this in itself is determinative of the issue. Moreover, the City's inaction from at least 2014 cannot fairly be laid at HOA's door. See also *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C) at 406E-H.

[70] Having regard to the aforegoing I am unable to find that HOA's conduct over the years since 2005 is consistent with no other hypothesis than that it tacitly waived the title deed restriction. It follows that the alternative defence must also fail.

Suspension of the operation of the interdicts

[71] HOA has established the first 2 requirements for a final interdict, namely a clear right and an injury actually committed or reasonably apprehended. It has also established the absence of any other adequate remedy, given that the City (despite the order of 26 February 2016) has not as a fact yet taken action against ABM. Nor has the City voiced any objection to the relief which HOA seeks. On the contrary, when regard is had to the affidavits of Messrs Smit and Lovember, the City appears to support such relief.

[72] In respect of the counter-application, ABM has established the first 2 requirements. Moreover HOA has consented to an interdict and I do not think that any purpose will be served by embarking on a determination of whether there is an adequate alternative remedy, as was only raised on HOA's behalf in argument, save to state that

the absence of a prior demand, the immediately furnished undertaking and ABM's failure to even approach the City for assistance in the first instance (let alone seek any order against it) can be dealt with by way of an appropriate costs order.

[73] ABM has asked that, in the event of HOA succeeding in the main application, the court should suspend the operation of the interdict until the City has considered and adjudicated on its consent use application.

[74] The reason for this request is that if ABM is immediately interdicted from using the golf course land for its unlawful activities it will, amongst other things, have to immediately close the restaurant and cease holding its scheduled functions. It will have to retrench 17 staff members (for many of whom this is their sole source of income). It will also have to cancel its bookings (the schedule annexed to the answering affidavit deposed to on 24 February 2016 lists 15 of these, of which 12 would since have taken place, although I will assume in ABM's favour that others have since been booked, given the forthcoming summer season which is popular for weddings and end of year functions).

[75] On the other hand HOA submits that a suspension of the interdict is not warranted. It sought to demonstrate that the City cannot grant consent in respect of certain uses and that it is unlikely that consent will be granted in respect of others, having regard to the applicable zoning provisions. HOA thus argued that a suspension would be a futile exercise.

[76] It also submitted, on the basis of *Lester v Ndlambe Municipality and another* 2015 (6) SA 283 (SCA) that this court has no discretion to suspend the operation of the interdict because this would amount to countenancing an ongoing illegality which is also a criminal offence (under s 133 of the planning by-law). The latter submission, as I understand it, was premised on the basis that HOA is effectively enforcing the applicable provisions of the planning by-law and not any common law right, and that therefore the court has no discretion to *'deny'* HOA its public law remedy.

[77] Counsel for ABM in turn pointed out that in *Lester* the Supreme Court of Appeal was dealing with a building erected contrary to the National Building Regulations and Building Standards Act 103 of 1977 (the NBSA). One of the issues before the court was the interpretation of s 21 of the NBSA. It held that, once the jurisdictional fact that the building was erected contrary to the NBSA had been established, it was obliged to order complete demolition and had no discretion in this regard. Counsel thus cautioned against interpreting *Lester* in as wide a manner as that contended for by HOA.

[78] In the more recent decision of *BSB International Link CC v Readam South Africa (Pty) Ltd and Another* (279/2015) [2016] ZASCA 58 (13 April 2016) it was stated at para [27], albeit obiter, that a court has a broad general discretion under the common law and that:

> *'Judicial oversight without a judicial discretion seems, on the face of it, to be a contradiction in terms…'*

[79] There is also an established line of authority in this division that a court has the power to suspend an interdict against a party operating in breach of land use laws to allow that party a period of time to redress the unlawfulness: *Inter Cape Ferreira Mainliner v Minister of Home Affairs* 2010 (5) SA 367 (WCC) at para [184]; *410 Voortrekker Road Property v Minister of Home Affairs* [2010] All SA 414 (WCC) at paras [43] – [59]; *Booth NNO v Minister of Local Government* 2013 (4) SA 519 (WCC) at para [65]; *King Country Investment (Pty) Ltd v Cape Town Ziplines (Pty) Ltd and Others* (6661/16) [2016] ZAWCHC (23 September 2016). Cf *Bitou Local Municipality v Timber Two Processors CC and Another* 2009 (5) SA 618 (C) at paras [32] – [33].

[80] The discretion must be exercised after giving due consideration to all the relevant circumstances: *BSB International Link CC* at para [29]. I intend to suspend the operation of both interdicts for a limited period for the following reasons. First, the length of time that the activities have been conducted. Second, the consequences to employees, contractors and those individuals and corporate entities who have already made bookings for some of these facilities in good faith. Third, relief was understandably sought by neither party on an urgent basis. Fourth, both parties have initiated steps with the City to attempt to redress the unlawfulness of their respective activities. Fifth, it would be inappropriate for me to pre-judge what the City may or may not approve and on what basis (the City is far better placed than this court to do so).

[81] The City has not given any indication as to how long the processes under way will take (I mean no criticism in this regard, given that, at least in respect of ABM, the consent use application was made at the 11th hour). Counsel for ABM suggested that

suspension for a period of 6 months would be reasonable. Counsel for HOA submitted that, were the interdict to be suspended in respect of ABM, the same should apply in respect of HOA, for similar reasons. In the circumstances, I will live with the suggestion of 6 months, subject however to the period of suspension being linked to any intervening approval or rejection by the City.

Conclusion

[82] **In the result I make the following order:**

1. **The second respondent is interdicted and restrained from contravening or permitting the contravention of the title deed restriction imposed in favour of the applicant under title deed number 82956/99, which restricts the use of Erven 3656, 3822 and 3828 Melkbosch Strand, situate in the Blaauwberg Municipality, Cape Division, Province of the Western Cape (*'the premises'*) to use as a golf course and golf club facilities only.**
2. **The second respondent is interdicted and restrained from contravening or permitting the contravention of the City of Cape Town Municipal Planning By-Law 2015 applicable in respect of Open Space 3: "Special Open Spaces" which restricts the use of the premises.**
3. **The second respondent is interdicted and restrained from conducting or permitting the conduct of the business of a beauty salon, restaurant or conferencing and event facility on the premises.**
4. **The second respondent is interdicted and restrained from marketing, offering and conducting or permitting the conduct of the following events at the premises: wedding functions, motivational seminars and training,**

corporate launches, team building events, gala dinner banquets, cocktail parties, year-end functions, birthday parties, conferences, private parties, auctions and annual general meetings (other than those of the applicant or the first respondent).

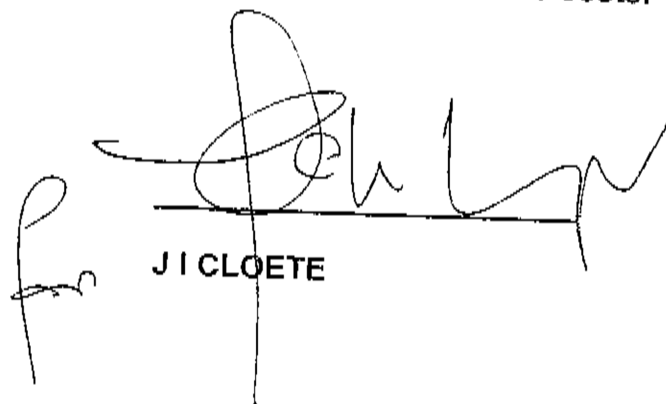
5. The applicant is interdicted and restrained from conducting or operating or permitting the conduct or operation of a restaurant and gymnasium, and from marketing, offering and conducting or permitting the conduct of functions (including wedding functions, cocktail parties, conferences and corporate functions) at the applicant's leisure centre, situated on Erf 3822, Melkbosch Strand.

6. The operation of the interdicts referred to in paragraphs 1 to 5 above shall be suspended for a period of SIX (6) MONTHS from date of this order, or approval or rejection by the first respondent of any application to redress, or effectively redress, the unlawfulness of the activities conducted at the premises, whichever occurs first.

7. Paragraphs 39.6 – 39.9 of the second respondent's answering affidavit in the main application are struck out with costs.

8. The second respondent shall pay the costs of the main application.

9. In respect of the counter-application there shall be no order as to costs.



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