



Republic of South Africa

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

Case No: A 408/2017

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Sher
The Hon. Mr Justice Engers (Acting)

Hearing: 1 August 2018
Judgment: 7 August 2018

In the matter between:

GEORG SEBASTIAN DE KOCK

Appellant

and

BITOU MUNICIPALITY

First Respondent

**THE MINISTER OF LOCAL GOVT, ENVIRONMENTAL
AFFAIRS & DEVELOPMENT PLANNING**

Second Respondent

SHOPRITE CHECKERS (PTY) LTD

Third Respondent

SHEILA GRACE STOREY

Fourth Respondent

RAY ANNE COOK

Fifth Respondent

JUDGMENT

BINNS-WARD J (SHER J and ENGERS AJ concurring):

[1] This is an appeal to the full court from a judgment of Steyn J, who sat alone at first instance. The learned judge dismissed an application by the appellant to review and set aside a planning appeal decision made by the Minister of Local Government, Environmental Affairs and Development Planning (Western Cape) in terms of s 44(2)

of the Land Use Planning Ordinance 15 of 1985 (C) ('LUPO')¹ as well as the related antecedent decisions of the Bitou Municipality. The appeal was brought with leave obtained from the Supreme Court of Appeal in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013.

[2] Section 44 of LUPO was a relic from the old order governmental structure. It was enacted when there was a hierarchical relationship between local and provincial government; a position materially different from the scheme of 'distinctive, independent and interrelated' spheres of government that subsists under the modern constitutional dispensation. It became constitutionally incompatible in the post-Constitutional era because it purported to invest powers in the provincial sphere of government to override decisions made by local government in the exercise of municipal planning functions that now fall within the exclusive executive authority of a municipality.

[3] The impugned decision was made by the provincial minister on 20 May 2015, more than a year after the confirmation by the Constitutional Court in the *Habitat Council* case² that s 44 of LUPO was invalid. The Court's confirmation of the invalidity of the provision was of no effect in the current matter, however, by reason of its order that the declaration of invalidity was not retrospective, and would not apply to appeals in terms of s 44 that were already pending at the time that the declaration was made. The planning appeal that was in issue between the parties in the court a quo had been lodged by the appellant with the provincial minister on 23 December 2013, more than three months before the Constitutional Court's judgment.

[4] Insofar as relevant to this matter, s 44 of LUPO provided that -

- (1) (a) An applicant in respect of an application to a council in terms of this Ordinance, and a person who has objected to the granting of such application in terms of this Ordinance, may appeal to the Administrator, in such manner and within such period as may be

¹ LUPO has since been repealed and replaced by the Western Cape Land Use Planning Act 3 of 2014 (with effect from 1 December 2015 in respect of the Bitou Municipality – in terms of Proc. 30 of 2015, published in Provincial Gazette Extraordinary No. 7539, dated 1 December 2015).

² *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9; 2014 (4) SA 437 (CC), 2014 (5) BCLR 591. The judgment was delivered on 4 April 2014.

prescribed by regulation, against the refusal or granting or conditional granting of such application.

(b)

(c)

(d)

(2) The Administrator may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated in subsection (1)(a), (b), (c) or (d) or uphold it wholly or in part or make a decision in relation thereto which the council concerned could have made.

(3) For the purpose of this Ordinance:

(a) An application referred to in subsection (1)(a) shall be deemed to have been granted or conditionally granted or refused by the council concerned in accordance with action taken by the Administrator under the provisions of subsection (2);

(b) ... ; and

(c) A decision made by the Administrator under the provisions of subsection (2) shall be deemed to have been made by the council concerned.

(‘Administrator’ was defined in s 2 of the Ordinance to mean ‘the competent authority’ to which its administration had been assigned in terms of s 235(8) of the Interim Constitution.³ The provincial minister was designated as ‘the competent authority’ for the purposes of administering LUPO, and the references in s 44 to ‘*the Administrator*’ therefore fell to be construed as references to the incumbent of his office.)

[5] The litigation in the court a quo had its genesis in decisions by the Bitou Municipality, purportedly in terms of ss 16(1) and 25(1) of LUPO, permitting the rezoning and subdivision of certain land for development purposes. One of the land units concerned was owned by the third respondent (Shoprite Checkers (Pty) Ltd), and the other jointly owned by the fourth and fifth respondents. The object was to allow a commercial building development by Shoprite Checkers to take place on a consolidated erf to be constituted upon the acquisition by it for that purpose of part of the land owned by the fourth and fifth respondents. The applications for the necessary planning permissions, which were made in terms of ss 17(1) and 24(1) of the Ordinance, respectively, were submitted to the local authority by a firm of planning consultants jointly engaged by the landowners.

³ Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

[6] The land owned by the fourth and fifth respondents was zoned for agricultural purposes. It needed to be rezoned and subdivided to be rendered amenable for development as proposed by Shoprite Checkers. It was also ‘*agricultural land*’ within the meaning of that term in the Subdivision of Agricultural Land Act 70 of 1970 (‘the Subdivision Act’).⁴ Such ‘*agricultural land*’ can be subdivided lawfully only if the Minister of Agriculture gives consent in terms of s 3 of the Subdivision Act. The required consent was granted only on 27 January 2014, several weeks after the municipality had approved the planning applications.

[7] The appellant had objected to the planning applications. Notwithstanding the objection, a functionary of the municipality, purporting to act under delegated authority, gave local authority approval to them on 5 December 2013. It was common ground that the functionary had acted outside the limits of his delegated authority. The mayoral committee and executive mayor sought to ‘rectify’ the resultant invalidity by re-approving the planning applications on 16 October 2014. The court a quo took the view, consistently with the common stance of the parties, that the latter decision was also invalid because the local authority was by then *functus*. The possibility that the later decision merely ratified the earlier unauthorised one and whether, if so, it had been within the powers of the executive mayor in executive committee (as distinct from the municipal council) to have done so was not canvassed in the papers. The evidence therefore does not permit a consideration of those questions, which could bear on the legality of the planning approvals given at local government level. The appeal can, however, be determined assuming (without deciding) that the purported act of ‘rectification’ was indeed nugatory.

[8] The appellant’s appeal to the provincial minister was of the sort provided for in s 44(1)(a) of LUPO. The effect of the minister’s decision of the appeal was accordingly deemed, in terms of s 44(3)(a) and (c), to be the determination by the Bitou municipal council of the rezoning and subdivision applications by Shoprite Checkers and the fourth and fifth respondents.

[9] The gravamen of the court a quo’s judgment was that the invalidity of the decisions of the municipal functionary and the mayor and mayoral committee was immaterial because the effect of the provincial minister’s determination in terms of

⁴ Parliament decided to repeal Act 70 of 1970 as long ago as 1998, but the repealing legislation has yet to be brought into effect.

s 44(2) read with s 44(3) of LUPO was to substitute the antecedent decisions. The court considered in the circumstances that if the minister's decision were able to withstand scrutiny on judicial review, any invalidity that might have attached to the antecedent decisions was immaterial. It therefore did not make any orders reviewing and setting aside the antecedent decisions.

[10] The appellant contended that the court a quo erred in its reading of the relevant provisions of s 44. His counsel argued that s 44(2) afforded the provincial minister the power to make one, and only one, of three types of decision. In effect, so the argument went, the minister was required to choose between (i) dismissing the administrative appeal, (ii) upholding the appeal in whole or in part or (iii) making a decision in relation thereto which the council concerned could have made. The argument was advanced with particular emphasis on what was submitted to be the disjunctive import of the word 'or' wherever it appears in s 44(2).

[11] Focussing on the effect of a single word in any text without taking appropriate account of the context in which it has been employed is an elementary error of interpretation. The fallacy of the interpretative approach contended for on behalf of the appellant is highlighted in the words of Rumpff CJ in *Swart en 'n Ander v Cape Fabrix (Pty) Ltd*⁵:

*Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.*⁶

The chief justice's observation concerned the construction of a deed of contract, but the principle inherent in it is equally applicable to the interpretation of any other type of instrument, cf. e.g. *Natal Joint Municipal Pension Fund v Endumeni Municipality*.⁷

[12] Words capable of bearing a particular meaning in one setting can have a very different import in another context. Indeed, no deep research is required to turn up

⁵ 1979 (1) SA 195 (A), at 202C.

⁶ 'What must, of course, be accepted, is that when the meaning of words in a contract fall to be determined, it is not feasible to cut them out and stick them on a clean sheet of paper, then to assess what their meaning is. In my view it is axiomatic that one has to consider the words concerned with reference to the nature and purpose of the contract, and also to the context of the words in the contract as a whole.' (My translation.)

⁷ [2012] ZASCA 13, [2012] 2 All SA 262 (SCA), 2012 (4) SA 593, at para. 18.

decisions of the courts that illustrate that contextual consideration sometimes results in the conjunction ‘or’ being properly construed as actually denoting ‘and’, or ‘and/or’.⁸ The observation by Innes CJ nearly a century ago in *Barlin v Licensing Court for the Cape*⁹ that

‘...the words “and” and “or” are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject matter’

has been borne out in a variety of contexts by several subsequent judgments.¹⁰

[13] It was common ground in the court a quo, correctly so in my view, that the character of the administrative appeal afforded in terms of s 44(1)(a) was of the first type identified in *Tikly and Others v Johannes NO and Others*,¹¹ namely ‘*an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information*’. The provincial minister was called upon to consider and determine the planning applications afresh. In doing so he was afforded all the powers that were available to the decision-maker of first instance. He was not constrained only to decide whether or not the municipality had exercised a proper discretion, or competently made a determination within its powers. He was empowered to substitute his own decision, even if the determination at first instance by the municipality had been competently made.¹²

[14] The evident object of s 44 was to provide for finality to be achieved in respect of land use planning decisions in a relatively expeditious and effective manner. These objects are underscored by the absence of any provision for the Administrator to refer the matter in question back to the decision-maker of first instance; he was empowered instead to make the definitive determination himself.

⁸ The use or implication of the ‘bastard conjunction’ ‘and/or’ (pace Lord Simon LC in *Bonitto v Fuerst Brothers & Co Ltd* [1944] AC 75 at 82) has frequently been deprecated, but it is nevertheless firmly entrenched; see (1972) 89 SALJ 190.

⁹ 1924 AD 472, at 478.

¹⁰ See, for example, *R v Lucknow Transport Co (Pty) Ltd* 1957 2 SA 83 (N), especially at 85G-H, *JN De Kock en Seuns (Edms) Bpk v Elektriesiteitsvoorsieningskommissie* 1983 3 SA 160 (A) at 163H and 168B, *S v Jordaan and Others* [2017] ZAWCHC 132; 2018 (1) SACR 522 (WCC) at paras. 126-129.

¹¹ 1963 (2) SA 588 (T) at 590.

¹² See *Habitat Council* (Constitutional Court) *supra*, at para. 15.

[15] It is impossible to read s 44(2) in the manner contended for on behalf of the appellant congruently with the powers that were clearly invested in the provincial minister by the section read as a whole. On the appellant's construction, a provincial minister who dismissed an appeal could not ameliorate the result by adding conditions to the decision made at first instance, because in doing so he would be combining two of the mutually exclusive so-called options. If he upheld an appeal in part, the part of the decision at first instance not overturned on appeal would remain standing, but the minister would not be able to remedy the conceivably limping result of a partially successful appeal by making any additional decision in relation to the matter that the municipality could have made. The effect of such construction would be to negate the obvious purpose of 'a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information'.

[16] The notion that the minister's powers were constrained by a choice between one of three options would also make it impossible to give a practical meaning to the third of the three so-called options. What was to happen to the appeal if the minister chose the third option, and made '*a decision which the council concerned could have made*'? Was the appeal then to hang in the air, having been neither dismissed (as allowed by the first option), nor upheld (as provided by the second option)? That would be glaringly nonsensical, and it is trite that one of the canons of interpreting legislation is the presumption that the legislature is not readily to be understood to have intended absurd results. It is abundantly clear therefore, when s 44(2) is read contextually and as a whole, that the first 'or' in the provision bears its ordinary disjunctive connotation, whilst the second instance of it falls to be understood as '*and/or*'.

[17] The appellant's counsel sought to qualify his concession that the appeal afforded in terms of s 44 was a so-called 'wide appeal' by arguing that the ability of the provincial minister to 're-hear' the applications and make a substitutive decision, if so minded, had been constrained in the circumstances of this case by reason of the invalidity of the decisions at first instance. The implication was that the exercise of the wide appellate powers given in terms of the provision had to be predicated on a legally valid decision having been made at first instance.

[18] There is no merit in that argument. It finds no support in the wording of the section. On the contrary, it runs directly counter to the effect of the part of s 44(2)

that allowed the provincial minister to make any decision that the council concerned could have made. That clearly meant that if the council had made a decision that was invalid, the minister was empowered to replace it with a decision that the council could have made validly.

[19] An appreciation of the true import of s 44 informs the determination of the next point taken in the appellant's heads of argument, which was that the court a quo erred in not reviewing and setting aside the invalid decisions of the local authority's functionary and the mayoral committee. The argument overlooks that the provision afforded an 'internal remedy' within the meaning of s 7(2)(b) of the Promotion of Administrative Justice Act.¹³ The court a quo could in any event therefore not ordinarily entertain an application by the appellant for the judicial review of the municipality's decisions unless he had exhausted the internal remedy. If, as in the current case, the internal remedy resulted in a substitutive decision, then the antecedent decisions (irrespective of their validity or invalidity) would *ipso facto* cease to exist, both juristically and factually. They would consequently no longer be susceptible to review, unless the effect of the judicial review of the substitutive decision were to effectively resuscitate them. The avoidance of unnecessary judicial review is the very purpose of the requirement that internal remedies must ordinarily be exhausted before a review application can be instituted.

[20] The appellant argued, however, that in the current matter the provincial minister simply dismissed the appeal and did not make any decision in place of the invalid decisions at first instance. The result, so the argument implied, was to leave undisturbed two decisions that the minister had been bound to recognise as unlawful. This gave rise, so the argument proceeded, to three decisions (i.e. the antecedent decisions and that of the provincial minister) each of which was susceptible to being set aside on judicial review.

[21] The court a quo did not squarely engage with that argument, and contented itself with holding that the minister's determination rendered the invalidity of the

¹³ Act 3 of 2000. Section 7(2)(b) provides in material part as follows: '*Subject to [the existence of exceptional circumstances being established on special application], a court or tribunal must, if it is not satisfied that any internal remedy ... has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act*'.

antecedent decisions ‘immaterial’. I am not persuaded that that approach was essentially unsound in the given circumstances.

[22] Technically, it would no doubt have been preferable for the minister to have upheld the appeal, set aside the invalid antecedent decisions of the municipality, and substituted them with a decision of his own of the same practical effect. The outcome would, however, have been indistinguishable from the effect of his decision merely to dismiss the appeal.¹⁴ On either formulation, the approval of the planning applications by Shoprite Checkers and the fourth and fifth respondents would be confirmed. It is important to remember, I think, that it is an administrative, not a judicial, decision that is in issue. One should not look to find fault in it for less than perfect formulation if its practical import is clear.

[23] In the circumstances it would have been to put form above substance for the court a quo to have intervened on review to no practical effect, merely to rectify an arguably technical flaw in the formulation of the minister’s determination. Judicial review is a discretionary remedy.¹⁵ There would be no purpose in the court a quo invoking its discretionary power for no practical reason or effect. There was also little purpose in making a declaration of legal invalidity in respect of the antecedent decisions, if the practical and legal effect of the minister’s decision on appeal had been to substitute them with a valid decision; more especially if regard is had to the effect of s 44(3)(a).¹⁶

¹⁴ In *Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs And Development Planning, Western Cape and others* 2007 (6) SA 65 (C), at 71D-E, Thring J was willing to accept the correctness of the approach of the parties in that matter that ‘*In dismissing the applicant’s appeal ... it would seem that the [provincial minister] made the [local authority’s] decision his own, that the [minister’s] decision replaced that of the [local authority], and that any interference by th[e] Court with the [minister’s] decision on review would ipso facto have the same effect on the [local authority’s] decision*’. In that matter too it would appear that the local authority’s decision may have been invalid by reason of its failure to conduct the investigation into the utilisation at the relevant date of the land in issue that was necessary for the purpose of making the decision in terms of s 14(1) of LUPA that had been sought in the relevant land use application.

¹⁵ The position was described as follows in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA), 2004 (6) SA 222, at para 36: ‘... a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide.’ (Footnote omitted.) The court distinguished the discretionary nature of the judicial review remedy, from the non-discretionary remedy to which a person collaterally challenging the enforcement against him or herself of an unlawfully made obligatory decision was entitled.

¹⁶ See paragraph [8] above.

[24] The appellant further contended that the provincial minister's decision fell to be set aside in any event because the planning applications had been made in the name of the landowners' town planning consultant. Sections 17(1) and 24(1) of LUPO both provide that applications for rezoning and subdivision, respectively, may be made by the 'owner' of the land concerned. 'Owner' was defined in s 2 of the Ordinance as denoting in relation to land *'the person in whose name that land is registered in a deeds registry, and may include the holder of a registered servitude right or lease, or any successor in title to such a person'*.

[25] The reasons why only a registered owner of land, and not a third party, should in general¹⁷ have had the legal capacity to apply for its rezoning or subdivision are self-evident. Zoning determines what the land may be used for, and subdivision determines the manner in which a piece of land hitherto owned as single unit may after subdivision be held and used as a number of smaller separate land units. The effect of rezoning and subdivision may impact materially on the market value of the affected land. These are matters that bear intimately on an owner's proprietary rights in a way in which the laws of property would not countenance impingement by a third party without the owner's authority. The requirement that the 'owner' be registered as such was plainly to assist in the administration of the Ordinance by avoiding dispute or uncertainty in cases where the incidence of actual ownership did not correspond with registered ownership. There was nothing in the provisions, however, that prohibited an 'owner' from using an agent to make the applications; *qui facit per alium facit per se*.¹⁸

[26] Whether or not the applicant for rezoning or subdivision in a given case was the 'owner', as defined, is a question of fact. That Shoprite Checkers and the fourth and fifth respondents were the registered owners of the affected land, and that they sought the rezoning and subdivision of it in the manner applied for, was not genuinely in dispute. It was therefore not in issue that the parties who sought the administrative decisions in question had standing in terms of s 17(1) and 24(1) to make the applications. It was evident from the application papers submitted to the municipality

¹⁷ An exception to the general rule was provided in terms of ss 18 and 14(4) of LUPO, whereby the administrator or a local authority might in certain circumstances - subject to a liability, in terms of s 19, to compensate the owner for any resultant loss of value - obtain the rezoning of private property, irrespective of the owner's wishes.

¹⁸ He who does something through someone else, (in effect) does it himself.

and from the representations made on the landowners' behalf to the provincial minister in respect of the s 44 appeal that the landowners were being represented in the planning applications by their town planning consultants. The provincial minister in point of fact had powers of attorney executed by the respective owners in favour of the town planning consultants before him when he decided the appeal. No-one concerned was confused or misled by the manner in which the applications were framed. In the circumstances the court a quo cannot be faulted for finding no merit in the points that the appellant sought to take in this respect.¹⁹

[27] The remaining issues for consideration arose out of the refusal of the court a quo to entertain the new matter in the appellant's replying papers. The new matter bore on the competence of a local authority to approve an application for the subdivision of agricultural land that was subject to the Subdivision Act prior to the Minister of Agriculture having given his consent thereto as required in terms of s 3 of the Act and nitpicking points about the phrasing of the powers of attorney granted by the fourth and fifth respondents in favour of the town planning consultants engaged by them to attend on their behalf to the planning applications.

[28] The provincial minister delivered an affidavit in response to the new matter in the appellant's reply. He sought the striking out of the new matter; but, contingently on the court deciding not to strike it out, he also provided an answer to it.

[29] Although no order to that effect was made, the court a quo indicated in the body of its judgment that the new matter was struck out and that no regard would be had to it in determining the review. The appellant failed to make a cogent argument as to how the court of first instance might be held to have misdirected itself in the exercise of its discretion.

[30] Notwithstanding its indication that it would have no regard to the new matter, the court a quo did, however, nonetheless hold that the appellant's reliance on the absence of consent from the Minister of Agriculture was bereft of merit. It did so on the bases: (i) that the Minister's consent had been furnished before the provincial

¹⁹ I am aware from experience in many planning matters when I was at the bar that it was common practice for applications in terms of LUPO to be submitted to the authorities by the owners' professional advisors acting on their clients' behalf. The facts in the matter of *Vandenhende v Minister of Agriculture, Planning and Tourism Western Cape Province and others* 2000 (4) SA 681 (C), to which we referred in argument, testify to the practice. I was not surprised to read that it did not appear to trouble the judges in that case.

minister made his determinative decision in terms of s 44(2) of LUPO and (ii) that the Minister's consent in terms of the Subdivision Act was a discrete legal requirement that had no bearing on the independent exercise by the planning authorities of their powers under LUPO.

[31] The second of the aforementioned bases for the court a quo's determination of the point was indisputably sound. There are a number of highly authoritative decisions in closely analogous situations that support its correctness; see *Minister of Public Works and others v Kyalami Ridge Environmental Association and another*,²⁰ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,²¹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another*²² and *Maccsand (Pty) Ltd v City of Cape Town and others*²³.

[32] As pointed out in *Kyalami Ridge, loc. cit.*, a distinction falls to be made between the taking of a decision and its implementation. The decision to grant the planning approvals was not unlawful merely because the planning permissions granted thereby could not be implemented without statutory authorisation by another functionary required in terms of discrete legislation. LUPO expressly provided for the lapsing of rezoning and subdivision approvals if they were not implemented within a specified period. The decision in *Fuel Retailers* illustrated a situation in which the considerations determining a planning approval for a given development use were discrete from those applicable under different legislation for environmental authorisation to be given for the same use. The object of the valid rezoning of the land could not be implemented in that case because the required environmental approval could not be obtained. So, in the current case, the subdivisional approval in terms of LUPO would become effective only upon confirmation in terms of s 27 of the Ordinance. In order to achieve confirmation the separate registration of at least one of the subdivided land units would have to be obtained in a deeds registry. That could not be done if the Minister of Agriculture's consent in terms of the Subdivision Act had not been obtained; see s 6 of the Subdivision Act.

²⁰ [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652, at para. 59.

²¹ [2007] ZACC 13, 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059.

²² [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123, at para. 80.

²³ [2012] ZACC 7, 2012 (4) SA 181 (CC), 2012 (7) BCLR 690, at para 48.

[33] The second of the aforementioned bases for the court a quo's rejection of the point that the appellant sought to make with regard to the Subdivision Act having been sound, a consideration of the first basis for its finding is unnecessary.

[34] The Supreme Court of Appeal ordered that the costs of the respective applications to the court a quo and to itself for leave to appeal should be costs in the appeal.

[35] For these reasons the following order is made:

The appeal is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

M.L. SHER
Judge of the High Court

K.A.B. ENGERS
Acting Judge of the High Court

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