THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case number: 168/2003

In the matter between:

MSUNDUZI MUNICIPALITY **APPELLANT**

and

MEMBER OF THE EXECUTIVE COUNCIL OF KWAZULU-NATAL PROVINCE FOR HOUSING **FIRST RESPONDENT**

REGISTRAR OF DEEDS KWAZULU-NATAL **SECOND RESPONDENT**

CORAM: MPATI DP, ZULMAN, BRAND, HEHER JJA and

JONES AJA

HEARD: 5 MARCH 2004

DELIVERED: 23 MARCH 2004

Summary: Section 3(3)(a) of Act 79 of 1984 – exemption from municipal rates – State property held in trust– meaning of – whether first respondent succeeded the South African Development Trust as trustee in respect of property concerned and is thus exempted from rates.

JUDGMENT

BRAND JA :

[1] The Premier of the KwaZulu-Natal Province is the registered owner of an immovable property situated within the municipal jurisdiction of the appellant (the 'Municipality'). The first respondent ('the MEC') is responsible for the administration of the property, and, more particularly, for its development to provide housing for low-income residents of the Province. This appeal has its origin in a contention by the MEC that the property is exempt from rates levied by the Municipality by virtue of the provisions of s 3(3)(a) of the Rating of State Property Act 79 of 1984. The Municipality did not agree with this contention. Consequently, the MEC brought an application in the Natal Provincial Division for an order effectively declaring that his contention be upheld. He cited the Municipality as a respondent in the application together with the Registrar of Deeds, KwaZulu-Natal, who is the second respondent in these proceedings. Though the Registrar of Deeds did not oppose the application, the Municipality did. Notwithstanding such opposition the court *a quo* (Pillay J) granted the declaratory order sought. His judgment has since been reported as *MEC for KwaZulu-Natal Province for Housing v Msunduzi Municipality* [2003] 1 All SA 580 (N). The Municipality's appeal against that judgment is with the leave of the Court

a quo.

[2] The Rating of State Property Act commenced on 1 July 1988. It repealed various laws which formerly exempted State property from rates levied by local authorities. Accordingly, s 3(1) declares all State property susceptible to such rating (subject to the discounts provided for in terms of s 4), unless specifically exempted by ministerial notice in the Government Gazette. To this general declaration of rateability various exceptions are created in terms of s 3(3). The exception relied upon by the MEC is the one provided for in subsec 3(a). It reads:

'(3) No rates shall by virtue of subsection (1) or otherwise be levied by a local authority on the value of State property – (a) held by the State in trust for the inhabitants of the area of jurisdiction of a local authority or a local authority to be established.'

[3] The property under consideration is undoubtedly 'State property' as defined in the Act. As to why it is 'held in trust', as envisaged by s 3(3)(a), the MEC's contentions were, broadly stated, as follows:

(a) the property was formerly held in trust by the South African Development Trust ('the SADT'), which was established in terms of s 4 of the Development Trust and Land Act 18 of 1936 ('the 1936 Act'), for the benefit of the Black people of South Africa;

(b) although the SADT has since been abolished in terms of the Abolition of Racially Based Land Measures Act 108 of 1991 ('the Abolition Act'), there is nothing in the Abolition Act or in the various legislative enactments following upon the demise of the SADT which caused the property to change its status as *trust property*;

(c) that, consequently, he succeeded the SADT as trustee in respect of the property, and he is giving effect to that trusteeship by developing the property to provide housing for the homeless and the poor inhabitants of the area, who are, essentially, the same beneficiaries as those envisaged by the 1936 Act.

[4] The Municipality, on the other hand, though conceding that the property was formerly held *in trust* by the SADT, denied that the notion of trusteeship survived the abolition of the SADT and, consequently, that the property can be regarded as being *held in trust* within the meaning of subsec 3(3)(a) of the Rating of State Property Act.

[5] The court *a quo* preferred the MEC's contentions to those advanced by the Municipality. The evaluation of that preference requires an examination of the somewhat intricate evolvement of transitional legislation, affecting the property, since 1992, when the SADT was

abolished, until 1999, when the property eventually came to be registered in the name of the Premier of the KwaZulu-Natal Province and also became incorporated into the valuation roll of the Municipality.

[6] Until 1992 the property was registered in the name of the SADT, by virtue of s 6 of the 1936 Act, to be administered, in terms of s 4(2) of that Act, 'for the settlement, support, benefit and material and moral welfare of the Black people of the Republic', as defined with reference to the Population Registration Act 30 of 1950. In terms of s 18, all land vested in the SADT was held for the exclusive use and benefit of Blacks. It could only be sold or let to Black people. If the SADT wished to dispose of the land to someone who belonged to another racial group, it required consent to the transaction by both Houses of Parliament. While the property was registered in the name of the SADT, it did not fall within the area of any municipality. Instead, it was administered in accordance with the provisions of Proclamation R163 of 1974 ('the 1974 Proclamation') which was issued by the then State President in terms of s 30(6) of the Black Administration Act 38 of 1927. The latter Act was, like the 1936 Act and the Population Registration Act, one of the mainstays of the apartheid structure. It entitled the Governor-General and, subsequently, his successor, the State President, to establish what were referred to as

'black towns'. The 1974 Proclamation essentially provided for the administration of the area in which the property is situated through a system of managers and superintendents. Pertinent for present purposes is para 40 of the 1974 Proclamation. It conferred the power on the Minister of Bantu Administration and Development, as surrogate local authority, to impose rates and taxes on property owners in the area, with the proviso in para 40(7)(a) that 'land which belongs to the Trust, the State and the South African Railways' would be exempted from such rates and taxes. According to the definition section of the Proclamation the term 'Trust' referred to the SADT.

[7] I now turn to the provisions of the Abolition Act which eventually led to the repeal of the 1936 Act and the termination of the SADT as an institution. In accordance with the preamble of the Abolition Act, its stated objects were, inter alia:

'to repeal … certain laws so as to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land',

and

'to provide for the … phasing out of certain racially based institutions and statutory and regulatory systems'.

Not surprisingly, the 'institution' and the 'measures' created under the Black Administration Act and by the 1936 Act were among the very first earmarked to be dismantled in terms of the Abolition Act. Parliament obviously realised, however, that the dismantling process would take some time. Consequently, s 12(1) made it possible for the repeal of certain sections of the 1936 Act to take effect on different dates determined by the State President by way of proclamation in the Government Gazette. Section 12(2) specifically provided that the State President could, in order to bring about the phasing out of the SADT, by proclamation in the Government Gazette –

'(a) transfer any assets (including land) or right acquired and any liability or obligation incurred by the Trust to an Administrator, a Minister or the State … and the Administrator, Minister or State shall after such transfer be deemed to have acquired the asset or right or to have incurred the liability or obligation'.

According to s 12(3):

'Any transfer or assignment referred to in subsection (2) shall be subject to any term, condition, restriction or direction of the State President as specified in the relevant proclamation.'

[8] In accordance with Parliament's contemplation in s 12 of the Abolition Act, the State President issued three proclamations, Proclamation R26, R27 and R28 of 1992, that were published

simultaneously in the Government Gazette of 31 March 1992, all with effect from 1 April 1992. In terms of para 2 of Proclamation R28, the State President repealed all the sections of the 1936 Act that were still in force, including ss 4 and 18. In para 1(e) of the same proclamation he transferred the property under consideration to the Minister of Regional and Land Affairs, on the stated condition that it would be held by him 'subject to any existing right, charge or obligation on or over such land'. Para 1(h)(ii) expressly provided that 'land … transferred in terms of the provisions of this Proclamation … shall be deemed to vest in the State and to be State property…'.

[9] The 1974 Proclamation was not repealed in 1992. On the contrary, Proclamation R26 (schedule 1 part 3 para 2) designated the then Administrator of Natal as the authority responsible to administer the area which included the property concerned, in accordance with the provisions of the 1974 Proclamation. At the same time, Proclamation R26 (schedule 3 para E) provided for the amendment of the 1974 Proclamation in certain respects. Of relevance for present purposes are the amendments (in paras E1 and E5) which brought about the deletion, firstly, of the definition of the term 'Trust' in para 1 and, secondly, of the reference to 'the Trust' in para 40(7) of the 1974 Proclamation. It will be

remembered that para 1 of the 1974 Proclamation defined the term 'Trust' as a reference to the SADT while para 40(7) rendered both 'State property' and 'Trust property', ie SADT property, free from any rates and taxes imposed by the Minister of Bantu Administration and Development, as surrogate local authority. The reason for the amendment occasioned by para E of Proclamation R26 is fairly clear. Since Proclamation R28, which was published in the same issue of the Government Gazette, announced the final demise of the SADT, any reference to property 'which belongs to the SADT' would no longer have any meaning. As far as the exemption from rates and taxes was concerned, the amendment was, however, purely cosmetic. The amended para 40(7) still rendered 'property which belongs to the State' free from rates and taxes imposed by the Administrator of Natal as the new surrogate local authority. Since all properties formerly held by the SADT now became State property, by virtue of Proclamation R28, they still enjoyed the same immunity from rates and taxes, but now in the different category of State property.

[10] The 1974 Proclamation, as amended, was eventually repealed in terms of s 15(4)(a) of the Local Government Transition Act 209 of 1993. Proclamation LG73 of 1995, issued under that Act, determined that the property under consideration was to be incorporated into the area of the

Pietermaritzburg-Msunduzi Transitional Local Council, which was the predecessor of the Municipality. In the interim, liability for rates was governed by para 12(3) of Proclamation LG 73 of 1995 which provided that:

'The systems of rating in operation within the area of jurisdiction of the Transitional Council at the date of effect of this Proclamation [ie 10 February 1995], including any existing valuations of immovable property and any exemptions from rates, shall … continue in operation in such areas until such systems and valuations have been replaced by a system of rating and a valuation roll adopted and prepared for the area of the Transitional Council as a whole.'

It appears to be common cause that, since no 'system of rating' was in operation in respect of the property concerned on 10 February 1995, its immunity from rates was extended, by virtue of the transitional provisions in para 12(3), until 1 July 1999, when it came to be incorporated into the valuation roll of the Municipality. Whether the property continues to enjoy that immunity subsequent to 1 July 1999, is wholly dependent on the validity of the MEC's contention that it should be regarded as being *'held in trust*' within the meaning of s 3(3)(a) of the Rating of State Property Act. If the contention is invalid, the property is susceptible to rates imposed by the Municipality.

[11] Before considering that crucial issue, it is necessary first to revert to the facts. As stated in para 7 above, ownership of the property concerned was transferred from the SADT to the Minister of Regional and Land Affairs in terms of para 1(e) of Proclamation R28. It appears, however, that the Minister did not manage the property through his own department. In 1994 and in 1997, he issued two General Powers of Attorney designating, first, the then Natal Provincial Administration and, subsequently, the Department of Housing of the KwaZulu-Natal Provincial Government under the control of the MEC, as the authority responsible for the management and development of the property. Since the General Power of Attorney issued in 1997 appears, for present purposes, to have superseded the earlier one, I will, for the sake of convenience, refer to the 1997 document as 'the General Power of Attorney'. In terms of the General Power of Attorney the delegation of authority to the Department of the MEC was made subject to the condition that the property be developed, primarily, for housing projects which would benefit the homeless residents of the province.

[12] According to the MEC's founding affidavit, the property is utilised in accordance with the condition imposed by the Minister in the General Power of Attorney. At present, so the MEC explained, there is a

substantial backlog for low-income housing in the KwaZulu-Natal Province. The total number of housing units that will become available through the housing projects on the property, is approximately 8 000 which will accommodate approximately 32 000 beneficiaries.

[13] The reason why the property was transferred to the Premier of the KwaZulu-Natal Province in 1999, so the MEC explained, was to facilitate the registration of developed erven on the property in the names of formerly homeless people for whose benefit the development was taking place. However, the MEC stated, if the Municipality was entitled to the substantial rates levied on the property, continuation of the current housing projects would not be feasible. Moreover, he proceeded, it would also be impossible to transfer the individual housing units to the beneficiaries, since the applicable provincial legislation requires a certificate to the effect that municipal rates had been paid before any transfer can be effected.

[14] In the answering affidavits filed on behalf of the Municipality, it was denied that the whole of the property will be utilised for housing purposes. Some parts of the property, so it was stated, will be used by the State for other purposes such as schools and public buildings while

other parts will be utilised for commercial and community facilities. In an attempt to meet this objection, the MEC amended his notice of motion by excluding 'components of the property used by an organ of State for any purpose other than housing' from the ambit of the declaratory order sought. In the event, the exclusion brought about by the amendment was incorporated as a proviso to the declaratory order granted by the court *a quo*.

[15] From the judgment of the court *a quo,* it appears that its decision in favour of the MEC is substantially based on the following five propositions. (For the sake of convenience, the relevant pages of the court's reported judgment are referred to in parenthesis):

(a) The stated objective of the 1936 Act (whatever its underlying motive and political philosophy may have been) was that the land be held by the SADT in trust and 'administered for the settlement, support, benefit and material and moral welfare of the Blacks of the Republic' (s 4(2)). The intention of the legislature in abolishing the SADT was to do away with a racially based institution and not to deprive the beneficiaries of the trust of existing rights which had accrued to them under the 1936 Act. Consequently, the MEC, as the successor to the SADT, is holding the land in trust for the inhabitants of the area (590g-591g).

(b) In terms of para 1(e) of Proclamation R28 of 1992 the property was transferred by the State President to the successor in title of the SADT 'subject to any existing rights, charge or obligation'. While the use of the words 'charge or obligation' evinces the intention that the successor in title should continue to hold the property in trust, the reference to 'rights' must be understood to perpetuate the exemption from payment of rates enjoyed by the SADT (591g-592b).

(c) Further support for the conclusion that the beneficiaries under the trust created by the 1936 Act did not lose their rights when that Act was repealed, is to be found in the provisions of s 12(2)(c) of the Interpretation Act 33 of 1957 (592b-c).

(d) The General Power of Attorney issued by the Minister of Regional and Land Affairs, despite not creating a trust in itself, carried through the obligations of the SADT to administer the property 'for the settlement, support, benefit and material and moral welfare' of the inhabitants of the area (592b-d).

(e) In so far as there is ambiguity and uncertainty about the meaning of s 3(3)(a) of the Rating of State Property, such ambiguity can be resolved by invoking the provisions of ss 26, 39(2) and 229 of the Constitution of the Republic of South Africa, Act 108 of 1996. A proper

consideration of these provisions also favours the conclusion that the property under consideration is being *'held in trust*' as envisaged by s 3(3)(a) (592d-594b).

[16] I shall consider each of these five propositions in turn. The first proposition (referred to under (a) in para 15 above) departs from the premise that the SADT as an institution can be divorced from the regime of trusteeship in which it played the role of trustee. Though both the institution and the regime were racially based, so the reasoning goes, the legislature must be understood to have intended in 1991, when it adopted the Abolition Act, that, in spite of the fact that the institution was to be abolished, the regime must remain. I cannot agree with this line of reasoning. The regime was as racially based as the institution and common sense dictates that the legislature's intention must have been to do away with both. In so far as this common sense approach needs any reinforcement, it is provided by the preamble to the Abolition Act which declares its central objective to be, not only the abolition of racially based institutions, but also of racially based 'statutory and regulatory systems'. Confirmation that the trusteeship regime could not survive the transformation to the non-racist system contemplated by the Abolition Act, is that both the court *a quo* in its judgment and counsel for the MEC

in argument in this court were compelled to transpose the benefits of the trust from the racist concept of 'Black people' to the non-racist 'inhabitants of the area'. The conclusion is therefore unavoidable that the trust could only survive the abolition of the 1936 Act if both the trustee and the beneficiaries of the trust had been replaced by different people. Moreover, the very terms and conditions which governed the trusteeship of the SADT were embodied in those sections of the 1936 Act, such as s 18, that were finally abolished by Proclamation R28. It follows that any 'trust' which survived the abolition of the SADT cannot be one governed by the extinct provisions of the 1936 Act. It must be a different trust with a different trustee, different beneficiaries and different governing provisions. The whole tenor of the court *a quo*'s reasoning, that the MEC succeeded the SADT as trustee of essentially the same trust, is therefore untenable. That much was conceded by counsel for the MEC during argument in this court.

[17] The concession on behalf of the MEC that the 'trust' which forms the keystone of his case must be a new trust, immediately gave rise to the question as to when and how this new trust came into existence, particularly since there is no reference to a 'trust' in any of the transitional enactments which followed upon the abolition of the SADT. To this

question counsel for the MEC could give no defensible answer and I am also unable to think of one. Furthermore, since the governing provisions of the SADT had been repealed, the question arises: what are the governing provisions of this new trust? In short, what is the MEC as trustee allowed to do with the trust property? On the MEC's papers, the answer to this question, which found favour with the court *a quo*, is that the MEC is bound by the terms of the trust to utilise the property for the provision of housing for the homeless and the poor. The problem with this answer is that, as a fact, some parts of the property are utilised for other purposes which also happen to be for the benefit of the same people, but not for housing. It will be remembered that these parts of the property were excluded from the ambit of the court *a quo'*s order. This exclusion entails the suggestion, however, that those parts of the property are no longer held in trust and, consequently that a part of the property can change its trust character depending on the purpose for which it is utilised. The result would also be that, in so far as the MEC has allowed parts of the property to be utilised for other purposes, he has acted in breach of the conditions of the trust. Since these suggestions are clearly indefensible, counsel for the MEC was bound to concede that the distinction drawn between those parts of the property utilised for

housing purposes and those which are not, cannot be sustained. As a consequence, his further submission was that the MEC is enjoined by the terms of the trust to utilise the property, not only for housing, but for the benefit of the people in the area. I think it can be accepted as a statement of general validity that the MEC is obliged to utilise the property for that purpose. This does not justify the conclusion, however, that such obligation was imposed upon the MEC by the provisions of any trust. It is a governmental obligation which stems from the relationship between government and its subjects and not from the fiduciary duties of a trustee (see eg *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619 (HL); *Tito & others v Waddell and others (No 2) Tito and others v Attorney General* [1977] 2 All ER 129 (Ch D) 237). If State property is to be regarded as being *held in trust* within the meaning of s 3(3)(a) of the Rating of State Property Act solely because the responsible functionary of State is obliged to utilise the property for the benefit of the public, very few State properties will fall outside the ambit of the section.

[18] This brings me to the second proposition (referred to under (b) in para 15 above), which relies on the condition imposed by the State President in para 1(e) of Proclamation R28, that the transfer of the property from the SADT to the Minister of Regional and Land Affairs was

'subject to any existing right, charge or obligation on or over such land'. What is significant in my view, is that the State President did not expressly provide for the continuation of the trust, particularly, since such a provision would not be an unfamiliar one. It had been used by the legislature on previous occasions. So, for example, ss 13(1)(b) and 36(3) of the Self-Governing Territories Constitution Act 21 of 1971 rendered the transfer of property contemplated in that Act 'subject to any existing charge, obligation or *trust* on or over such property' (my emphasis). (Cf *President of the Republic of Bophuthatswana and another v Millsell Chrome Mines (Pty) Ltd and others* 1996 (3) SA 831 (B).) As I have indicated, the court *a quo* found that, notwithstanding the absence of any express reference to 'trust' in para 1(e), the expression 'charge and obligation' is wide enough to include the obligations of the SADT as trustee. In support of that finding, counsel for the MEC devoted a substantial part of his argument in this court to the various possible meanings which the expression 'charge or obligation' could entail. I find it unnecessary, however, to embark upon the same investigation. For present purposes it is, in my view, sufficient to say that I do not agree with the court *a quo*'s finding that the reference to a 'charge or obligation over the land' was meant to include the SADT's obligations as trustee. It

should be borne in mind that the SADT's obligations as trustee were imposed upon it by those provisions of the 1936 Act that were expressly repealed in para 2 of Proclamation R28. An argument which leads to the conclusion that the State President must have intended to reintroduce those very same obligations that he had just repealed by implication and through the backdoor of para 1(e) can, in my view, not be sustained. Furthermore, as I have indicated, the SADT's obligations as trustee were of the very racially based kind that the legislature sought to abolish in terms of the Abolition Act.

[19] The further argument which found favour with the court *a quo*, was that the 'rights' preserved in para 1(e) of Proclamation R28, must have included the SADT's immunity from rates and taxes. This argument bears no relation to the facts. Immediately prior to Proclamation R28 the SADT enjoyed its immunity from rates by virtue of para 40(7) of the 1974 Proclamation. Though para 40(7) was amended by Proclamation R26, the Minister who succeeded the SADT as owner of the property continued to enjoy the same immunity, because the property became State land which remained exempted from rates despite the amendment to para 40(7) of the 1974 Proclamation. There was therefore no need for the State President to perpetuate the immunity from rates previously

enjoyed by the SADT by means of an obscure reference to 'rights' in para 1(e) of Proclamation R28.

[20] As to the third proposition (referred to under (c) in para 15 above) which relies on the General Power of Attorney issued by the Minister, it was recognised by the court *a quo* that the General Power of Attorney in itself does not provide, either expressly or by implication, for the creation of a trust. The true import of the proposition under consideration is therefore that, because the General Power of Attorney enjoined the MEC to utilise the property to provide housing for homeless people, it confirmed the terms and conditions of the trusteeship which the MEC inherited from the SADT. The answer to this proposition, which flows from what has already been said, is that since the MEC did not inherit any trusteeship from the SADT, the obligations imposed by the General Power of Attorney do not support the inference of any trusteeship at all.

[21] The fourth proposition (referred to under (d) in para 15 above) is reliant on s 12(2)(c) of the Interpretation Act 33 of 1957 which provides that:

'12(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed'.

The answer to the proposition that this section is supportive of the MEC's case is that the operative part of the section is based on the supposition that the contrary intention does not appear from the repealing legislation. Once it is recognised that the legislature's intention, in promulgating the Abolition Act, must have been that the trusteeship of the SADT, together with the rights and obligations associated with that trusteeship, would not survive the repeal of the 1936 Act, it becomes apparent that s 12(2)(c) of the Interpretation Act is of no assistance at all.

[22] The final proposition (referred to under (e) in para 15 above) presupposes that the dispute between the parties has its origin in some ambiguity or uncertainty in the provisions of s 3(3)(a) of the Rating of State Property Act. I do not believe that this is so. The question whether the property concerned can be said to be held 'in trust' as contemplated by s 3(3)(a), does not result from any ambiguity in the section itself. It arises from conflicting contentions regarding the effect of the various transitional enactments concerned. However, be that as it may, the essence of the proposition under consideration is that such ambiguity can be resolved by reference to ss 26, 39(2) and 229 of the Constitution.

[23] Section 39(2) enjoins the court, 'when interpreting any legislation … [to] promote the spirit, purport and objects of the Bill of Rights'. However, the only provisions of the Bill of Rights put forward for possible assistance, were those contained in s 26. In terms of s 26(1), 'everyone has the right to have access to adequate housing', while s 26(2) provides that 'the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. The reasoning based on these provisions seems to be that, since the property is developed for low-income housing, it should be exempted from municipal rates. However, for the reasons that I have already stated, the suggestion that those parts of the property which are utilised for housing purposes are held in trust while the rest of the property is not, cannot be sustained. It follows that the question whether the property should be regarded as being 'held in trust' within the meaning of s 3(3)(a) of the Rating of State Property Act cannot be dependent on the purpose for which it is being used. Once this is appreciated, it becomes apparent that the provisions of s 26 do not assist.

[24] Lastly, the court *a quo* found assistance in s 229 of the

Constitution, which provides, inter alia, that 'the power of a municipality to impose rates on property … may not be exercised in a way that materially and unreasonably prejudices national mobility of goods, services or labour'. Since the issue in this matter does not relate to *the way* in which the Municipality exercised its power to levy rates, but to whether it had the power to levy such rates at all, it is not clear what assistance can be derived from s 229. In so far as it is determinable from the court *a quo*'s judgment (at 593-594b) its reasoning seems to be that, because the development of low-income housing is a national goal and priority, the MEC should not be prejudiced in his efforts to give effect to this priority by compelling him to pay rates on the property.

[25] However, the function to decide whether the exemption of the property from rates will be in conflict with national priority is one which falls outside the province of the court. The court's function is to give meaning to s 3(3)(a) of the Rating of State Property Act. If that meaning is considered by the executive to be in conflict with national priority, the property can be exempted from rates by publication of a ministerial notice to that effect provided for in s 3(1) of the Act. This result cannot be attained through implying a trust where none exists.

[26] It remains to be noted, with regard to the matter of costs, that while the Municipality was represented by two counsel in the court *a quo,* only one counsel was instructed to appear on its behalf in this court.

[27] In the result:

(a) The appeal is upheld with costs.

(b) The order of the court *a quo* is set aside and replaced with an order in the following terms:

'The application is dismissed with costs including the costs occasioned by the employment of two counsel.'

.....
F D J BRAND
JUDGE OF APPEAL

Concur:

MPATI DP
ZULMAN JA
HEHER JA
JONES AJA