REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 21732/14

In the matter between:

GRANT G LEMKE N.O.	First Applicant
RYAN D LOTTER	Second Applicant
and	
KNYSNA MUNICIPALITY	First Respondent
LEISURE ISLE RESIDENCE CC	Second Respondent

Delivered: 08 February 2017

JUDGMENT

BOQWANA, J

Introduction

[1] This is an application for the review and setting aside of the decisions by the first respondent ('the Municipality') to grant approval for the subdivision of erf 7476, Knysna into two portions, namely, Portion A (476 m²) and Remainder erf 7476 (726 m²), in terms of s 24 of the Land Use Planning Ordinance, No. 15 of 1985 ('LUPO'); and a departure to allow a building line of 1,57m in lieu of 2m between a portion of the existing dwelling house and the proposed new subdivision boundary on the proposed remainder erf 7476, Knysna, in terms of s

15 (1) (a) (ii) of LUPO as indicated on the plans of subdivision number KE7476H and KE7476j drawn by Mark de Bruyn dated June 2013 and May 2014 on 31 July 2014 respectively. An issue has been raised regarding the incorrect citation of the applicable provisions of LUPO which I return to later in the judgment.

[2] The applicants also seek the Court to substitute the decisions by dismissing the second respondent's application to the Municipality, in the event that it decides to review and set aside such decisions, on the basis that the Municipality's officials could not be trusted to make objective decisions as they had conducted themselves fraudulently in the process of approving the second respondent's application; and that all the necessary information has been placed before this Court putting it in as good a position as the Municipality.

[3] An interdict to restrain the second respondent from taking any further steps in executing the first respondent's approval is no longer being pursued.

[4] The application before me is only opposed by the Municipality. At the start of the hearing of this matter, I enquired about the position of the second respondent to these proceedings, having not been satisfied by service on it. I adjourned the proceedings to allow the applicants to ascertain from the second respondent whether it had received the application and what its attitude was in relation to these proceedings. After the adjournment, Counsel for the applicants, Mr Bruwer, presented me with a letter apparently from the second respondent's attorneys indicating that the second respondent would not be opposing the application provided that the cost order sought against it was abandoned. Mr Bruwer indicated that the applicants would not persist with a cost order against the second respondent.

Factual background

[5] The applicants are neighbours of the owners of the property known as erf 7476, which is the subject of these proceedings. The first applicant is a trustee for the time being of the Richmond Trust with the Master's Ref No. IT366/2008,

Cape Town ('the trust') which is the registered owner of erf 1853, Leisure Isle, Knysna. Mr Grant George Lemke ('Mr Lemke') who is the deponent to the applicants' founding and supplementary affidavits resides at the same address. He is married to Mrs Claire Ruth Lemke ('Mrs Lemke') who is also one of his fellow trustees. The second applicant ('Mr Lotter') is the registered owner of erf 1852 situated at 14 Founders Road, Leisure Isle, Knysna. The second respondent is the owner of erf 7476. Mr Thom van Gool ('Mr Van Gool') is the main interest holder in the second respondent.

[6] Erven 1852 and 1853 are contiguous to erf 7476. Erf 7476 was previously two erven 1854 and 1855 which were consolidated to form erf 7476 in July 1990. The trust purchased 1853 on 18 August 2008. The Lemkes and the Van Gools have been neighbours since then. The two families have been friendly with each other over the years and usually enjoyed visits and drinks together. The Van Gools have a permanent residence somewhere in Gauteng and would usually visit Knysna over the December period for about three weeks.

Applicants' case

[7] Mr Lemke alleges that in July 2013 and whilst the Van Gools were in Knysna, they mentioned to Mrs Lemke that they wanted to subdivide their property. Mrs Lemke indicated that they [the Lemkes] would be interested in buying the property if so subdivided, as they did not want anyone to erect a structure on the northern boundary of their property, as this would adversely affect the use and enjoyment of their property.

[8] Mr Lemke further alleges that during October 2013, he received a telephone call from Mr Van Gool who informed him that Mr Mark de Bruyn (who is a professional land surveyor) was going to send them an email and that it would assist the Van Gools greatly if the Lemkes could sign the forms that de Bruyn was going to send to them. Mr Lemke further states that he received the email from Mr de Bruyn a few days later on 3 October 2013, attaching the following documents: a motivation report for the proposed subdivision of erf

7476 and relaxation of internal building line dated June 2013; a blank form titled '*Comments to application*' and a letter written by Mr Van Gool to Mr and Mrs Lemke.

[9] The letter stated that Mr Van Gool had reached the age of retirement and needed to arrange his finances so as to prevent becoming a burden to his family in future; that he needed a garage to accommodate his vehicle and items like a small boat, bicycles, lawnmower as well as garden tools. Mr Van Gool further stated that he needed to sell the remaining portion of the subdivided stand to finance his aforesaid plans; that the stand 7476 was previously two smaller stands, namely, erven 1854 and 1855 and that the original house was built over the boundary of these two stands without those ever having been consolidated; that when he bought the house in November 1989 he was advised by his conveyancing attorneys to consolidate the two stands which he did soon afterwards and because the house was now partially built on both stands it was impossible to subdivide the property into the original two stands without demolishing a large part of his house; and that he employed a land surveyor to measure up the property and suggest a subdivision, taking into account the space needed to build a garage which left a portion after subdivision of about 476 m² for him to sell. He then referred to other stands in the area which were less than 500 m² in size and included the Plan for subdivision with his letter.

[10] Subsequent to the receipt of this email, Mr de Bruyn telephoned Mr Lemke and asked him to sign the letter and put in a good word for the Van Gools with the neighbours. Mr Lemke advised Mr de Bruyn that if Mr Van Gool needed money, the Lemkes would be prepared to purchase the subdivided stand at a fair market related price and consolidate it to the trust's stand, erf 1853. He further informed Mr de Bruyn that he wanted to preserve the value of their property (i.e. erf 1853), and not have problems of individuals building a massive dwelling on the subdivided stand which would affect their property negatively. Mr Van Gool

advised that he wished to proceed with the subdivision and reiterated his request for the Lemkes' assistance with the neighbours.

[11] On 18 October 2013 both Mr Lemke and Mr Lotter received a registered letter from the Municipality together with some annexures. In the letter, the Municipality requested comments on the application for the proposed subdivision and building line relaxation on erf 7476, such comments to reach them before Monday, 2 December 2013. The second page of the letter that Mr de Bruyns had sent to the Lemkes was attached but the first page was missing. Mr Lemke believes that this was a deliberate omission by Mr de Bruyn. His concern is that the missing page had indicated that the subdivision of erf 7476 had already been granted.

[12] Mr Lemke also finds it somewhat disturbing that the Municipality's letter to the proposal was reflected on the page which appeared to be the official motivation from the Municipality's planning department as to why the subdivision should be granted. This, according to him, was done before the surrounding neighbours had had the opportunity to object to the application for the subdivision and the relaxation of the building line.

[13] Mr Lemke also received a free weekly publication distributed in the municipal area of Knysna giving notice in terms of s 24 of LUPO of an application for subdivision of erf 7476 and the relaxation of the building line.

[14] On 20 November 2013, the second applicant, Mr Lotter objected to the proposed subdivision and building line relaxation through a letter written by his attorneys. On 28 November 2013, Mr Lemke wrote a letter on behalf of the trustees of the trust also objecting to the subdivision and building line relaxation. He did not hear anything from the Municipality until he received a registered letter dated 18 August 2014 which informed him of the Municipality's decision to approve the second respondent's application and that he had no right of appeal. After receiving the Municipality's letter, he discussed the matter with his fellow trustees and they decided to take the matter further. He also discussed the

approvals with the other neighbours who had objected to the second respondent's application, including Mr Lotter, who was particularly of the view that the matter should be taken further as his property would be adversely affected by the approvals.

[15] Mr Lemke alleges that Mr de Bruyn did not provide him with a full application which he purportedly sent to the Municipality. The motivation report indicated that nine annexures were attached to the report but Mr de Bruyn only provided him with four annexures. It appears that the second respondent made an application for a subdivision and removal of the title deed building lines but this page was neither forwarded to the trust by Mr de Bruyn nor formed part of the notice from the Municipality. The application was also for a relaxation of the building line along the common boundary line between portion A and the remainder erf 7476 to 1m, 'to allow for an acceptable erf size for portion A'.

[16] According to Mr Lemke what was also confusing about the second respondent's application was that Mr de Bruyn stated that the application in terms of the Removal of Restrictions Act 84 of 1967 ('RORA') was being submitted simultaneously with its application for subdivision and relaxation but that application was never forwarded to the trust. Mr Lemke was advised by his legal representatives that an application in terms of RORA should be addressed to the Premier of the Province and not the Municipality, although it needed to be served on the Municipality.

[17] Mr Lemke also alleges that there are other confusing statements which create an impression that the application to which the trust was requested to comment on was not a subdivision application but an application to a 'previous condition' by the Municipality, which allowed the existing building to remain on portion A, but no new building was permitted on Portion A. According to Mr Lemke, if that had been the case, it would mean that the 18 October 2013 notice was on the face of it a sham as the subdivision and the building line relaxation had already been granted, which according to him, would explain part of the

report by the Municipality's official motivating the previous approval. If the situation was as incorrectly described, then it is inconsistent with Mr de Bruyn's motivation report. The inconsistency, according to Mr Lemke, could only suggest that a subdivision had been granted prior to the trust being informed by Mr de Bruyn and the Municipality.

[18] In a nutshell, the objections of the trust to the application for the subdivision and the relaxation of the building line were primarily two-fold. First, the trust alleged that the new erf to be created was significantly smaller than the erf size prior to consolidation which offends para 3.2.4 of the Knysna Zoning Scheme Regulations ('the Scheme Regulations'). Secondly, para 3.2.2 of the Scheme Regulations provided that no building or portion thereof, except boundary walls and fences, shall be erected on a site closer than 4.5m from the street boundary or less than 2 m from the lateral and rear boundaries of the site.

[19] The objections further pointed out, that immediate neighbours would be negatively impacted as the proposed portion A, consisted of an awkward narrow strip of land which would physically border five erven and narrow dimensions. The Leisure Isle had a village atmosphere and ambience and that the proposed relaxation of the building line to 1 m and squeezing a dwelling on an awkward portion of land would be inconsistent with this and would be more in line with a townhouse complex development. According to the trust, it was difficult to conceive where visitors to portion A would park. The trust also pointed out inconsistent statements in Mr de Bruyns' report as part of its objections. In his objections, Mr Lotter pointed out, *inter alia*, that the new size portion A would be less than 500m² which would allow the building coverage of the erf to result in a 238m² size house (whereas the previous erf size which was more than 500 m², would have allowed a coverage of a 193 m² sized house).

[20] According to Mr Lemke, the Municipality indicated in their letter that they approved the subdivision in terms of s 24 of LUPO and granted the application

for a departure to allow a building line in terms of s 15 (1) (a) (ii) of LUPO which were not empowering provisions.

[21] Lastly, the Municipality was silent on Mr de Bruyn's statement that the subdivision and removal of the building lines had been granted previously which Mr Lemke also views with suspicion.

Municipality's case

[22] Mr Grant Easton who is the Municipal Manager of the Municipality deposed to the answering affidavit supported by the affidavit of Mr Michael Maughan-Brown, the Director: Town Planning and Development as well as the confirmatory affidavit of Mr Seretse Mthembu, a Town Planner at the Municipality.

[23] Mr Easton outlined the decision- making process in matters like these as follows: The town planning applications are submitted to the Director: Town Planning and Development, who in turn would refer the application to the Manager: Town Planning and Development, who in turn would task one of his town planners to do the ground work relating to such application. The latter would compile a report with regard to the application together with a recommendation and which he/she would submit to the manager and the director of the department who will vet same. The report would then be submitted to the Town Planning and Development Committee ('the TPD Committee') which has been appointed in terms of s 80 of the Local Government: Municipal Structures Act No. 117 of 1998 ('the MSA') to assist the Executive Mayor in matters dealing with town planning. The TPD Committee, after considering the report would then make recommendations to the Mayoral Committee, which would in turn make recommendations to the Council of the Municipality ('the Council'), which would in a general meeting decide on the application. Each member of the Council is served with a hard copy of the application together with relevant documents pertaining to the application. Political parties represented on the Council would caucus on the application and recommendation before the meeting and take a

decision on how to vote on the issue. The outcome of the application is determined by the majority vote in the Council meeting.

[24] Mr Easton alleges that the Municipality took a commercial decision to make an offer to the applicants so as to avoid unnecessary costs being incurred and in remedying any defect that might have occurred as outlined by Mr Maughan-Brown in his affidavit. A letter marked with prejudice is attached to the answering affidavit wherein the Municipality, through its attorneys, offered to agree to an order that the decision to grant the approval be set aside and referred back to the Council with costs on a party and party scale. This offer was apparently rejected by the applicants. The Municipality, according to Mr Easton elected to oppose the matter because of what it viewed as scurrilous attacks contained in particularly the applicants' supplementary affidavit. As a result, thereof, it seeks a cost order on a scale as between attorney and own client.

[25] The Municipality's case, in a nutshell is, that whilst it is admitted that Mr Mthembu erred in not realising that the departure application submitted on behalf of the second respondent did not specifically state that a departure was also sought from the land use restriction contained in Regulation 3.2.4, this error was not material by reason of the fact that the object of s 15 (2) of LUPO, namely public participation, had been achieved in this regard as is evidenced by the very vociferous objections submitted by the objectors including the applicants.

[26] Secondly, according to the Municipality, Regulation 3.2.4 does not contain an absolute prohibition against subdivision, which would result in a size smaller than prior to consolidation. A departure therefrom is authorised in terms of s 15 (1) (b) of LUPO.

[27] Thirdly, although Mr Mthembu did not specifically mention Regulation 3.2.4 in the recommendation, the notice of the application by the second respondent gave the sizes of the two affected erven post subdivision; the notice was not only published in the local newspaper but was addressed to the applicants as well as other potentially affected adjoining land owners; Mr Mthembu

pertinently drew attention to the fact that the subdivision will result in Portion A being smaller than the original size of erf 1854; the actual application of the second respondent, the motivation in the objections thereto would have been submitted to the TPD Committee for consideration; everybody concerned with the subdivision application was accordingly aware of the fact that Portion A will as a result of the subdivision be smaller in size than the original erf and that the application was affected by Regulation 3.2.4. In addition to that, it is clear from the objection received that the majority of the objectors were fully aware of the effect of the subdivision and hence, their objections based on a reference to this Regulation. The mere fact that no specific mention was made of this Regulation by Mr Mthembu did not mislead anybody nor was it a misrepresentation let alone a fraudulent act perpetrated by him on anybody.

[28] Fourthly, in the absence, of any mention of non-compliance with any statutory requirement, it should be accepted that Mr Mthembu was satisfied that the statutory requirements had been met. In the result both Mr Maughan-Brown and the TPD Committee on which he sat as the responsible director, dealt with the subdivision application as including a departure relating to the smaller erf size of Portion A and which the TPD Committee approved as being desirable. According to Mr Maughan-Brown, it was considered by the TPD Committee that far from the subdivision allowing for only a small dwelling to be erected on Portion A, the subdivision will in fact allow for a larger dwelling to be erected due to the coverage being permitted pursuant to the provisions of Regulation 3.2.2 which would now be 50% instead of 35%. This would have applied to the original erf 1654. This was hence enhancing rather than detracting from the value of surrounding properties.

[29] According to Mr Maughan-Brown, the oversight by Mr Mthembu did not materially affect the recommendation of the TPD Committee to the Mayoral Committee, by reason of the fact that had the TPD Committee been aware of the fact that the notice of the application did not include a specific departure in this

regard, it would simply have requested the second respondent to re-advertise the application to ensure strict compliance with s 15 (1) (a) (i), which would have resulted in exactly the same recommendations being made by the TPD Committee to the Mayoral Committee and therefore resulting in the same decision as had been made by the Municipality. Despite the notice of the application not specifically containing a reference to a further departure, the application was not fatal as the object of s 15 (1) (b) namely, public participation, was achieved. Therefore, to elevate Mr Mthembu's oversight to fraud is not only untenable but also malicious and defamatory.

[30] Mr Maughan-Brown further alleges that Mr Mthembu applied his mind to both s 36 (1) and 36 (2) of LUPO in recommending the approval of the subdivision. He is of the view that Mr Mthembu was justified in finding that there was no evidence adduced by any of the objectors upon which he could find that the subdivision would have a negative impact on the surrounding properties or the rights of beneficial enjoyment of their properties by neighbouring owners.

Discussion

Should the application be dismissed for failure to specify the applicable provisions of PAJA?

[31] Before dealing with the merits of the matter an issue was raised by Mr van der Berg on behalf of the Municipality, that the grounds for review upon which the applicants relied, were not properly set out in their papers. According to him, whilst there were some vague references to PAJA from the applicants' papers, it was not clear on which grounds of PAJA they relied as required by law. The applicants cannot, in his view, expect the Court to trawl through the application looking for the review grounds and/or the law relied on. Therefore, if the application is not clear on this aspect, it fell short of the requirements of Rule 53 and should be dismissed. In his view, dismissing it would also send a strong message to other litigants that, applications that do not clearly articulate grounds for review and law the application is based on, would not be tolerated. Mr van der

Berg referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at paras 21 and 27 to advance this point. He argued that the applicants set out an omnibus of conceivable grounds without stating the grounds and law on which they rely. In his heads of argument, he listed what he termed as discernible grounds that he could extract from the applicants' papers, in an attempt to give some structure to their application and those are that: the decision [by the Municipality] was not authorised by the empowering provision (s 6 (2) (a) (i) of PAJA); it was materially influenced by an error of law (s 6 (2) (d)); it contravened a law (s 6 (2) (f) (i); it is not rationally connected to the purpose for which it was taken (s 6 (2) (f) (ii)(aa)) and that it was not a decision which could reasonably be taken (s 6 (2) (h)).

[32] Whilst I agree with Mr van der Berg that the basis of the cause of action should be particularly focused and set out in precise terms by the applicants, *Bato Star* does not propose an outright dismissal of a case where provisions of a statute on which a litigant relies have not been mentioned. It rather suggests the following at para 27:

> '…Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.'

[33] Thus, if the facts alleged by the applicants bear out a cause of action, showing that the provisions of PAJA are relevant and operative; the applicants may escape a dismissal of their case, on the basis that they failed to refer to particular sections of that relevant Act. While that is so, I must agree with Mr van der Berg that the applicants' allegations as to which provisions are applicable is somewhat convoluted and makes it hard to discern exactly which provisions of

PAJA are particularly on point in this case. The applicants have listed possible grounds instead of pointing to exactly which ones are applicable having regard to the facts of this case.

[34] Nevertheless, whilst the applicants have not desirably set out the review grounds as precisely as they should, I am disinclined to dismiss their application on that basis. I am prepared to assume in their favour that, the facts as they appear on the papers do bear a cause of action although they have not been matched with some level of precision with the applicable provisions of PAJA.

Merits

[35] Turning to the merits of the case. It is convenient to first set out what is contained in the contentious Regulations. Regulation 3.2.4 provides, *inter alia*, as follows:

> '**3.2.4 Density Control**
>
> Subdivisions in Old Place and Leisure Island are permitted on condition that the new erf size shall not be smaller than the sizes of the erven prior to consolidation, provided further that the new erven to be created shall be consistent with the ruling erf sizes in the environment.'

[36] The relevant part of Regulation 3.2.2 states:

> '3.2.2 **Land use Restrictions**
>
> Building lines
>
> - no building or any portion thereof, except boundary walls and fences, shall be erected on a site closer than 4,5 m from the street boundary or less than 2,0 m from the lateral and rear boundaries of the site.
> - Further, a building line of 5.0 m shall apply with regard to lagoon boundary as well to the registered site boundary adjacent to the lagoon. Notwithstanding these building lines Council, may without advertisement approve the erection of an

outbuilding or second dwelling unit which exceeds a side and/or rear building line, subject to:

a) compliance with the street building line;
b) such building not exceeding a height of 5m above the natural ground level directly below a given point or portion of the building;
c) no doors or windows being permitted in any wall of such building which fronts onto the side and/or rear boundary concerned; and
d) the provision of an access way, other than through a building and at least 1 m wide, from a street to every vacant portion of the land unit concerned, other than a court-yard.'

[37] Regulation 3.2.4 plainly allows subdivision of erven based on essentially two conditions, being that the new erf size must not be smaller than the erf sizes that were in place prior to the consolidation of the erven and that the new erven is consistent with the ruling erf sizes in the environment.

[38] The Municipality's approval was stated to be in terms of s 24 of LUPO. Perhaps it is convenient to dispose of this issue first before dealing with other contentions issues raised by the applicants relating to the Regulations.

[39] It is correct that s 24 of LUPO is not a provision that empowers the granting or refusal of subdivision applications, s 25 instead is the empowering provision. Section 24 deals with applications for subdivision. For completeness the relevant sections read as follows:

'**24 Applications for subdivisions**

(1) An owner of land may apply in writing for granting of a subdivision under section 25 to the town clerk or secretary concerned, as the case may be.
(2) The said town clerk or secretary shall-
    (a) cause the said application to be advertised if in his opinion any person may be adversely affected thereby;

(b) where objections against the said application are received, submit them to the said owner for his comment;

(c) obtain the relevant comment of any person who in his opinion has an interest in the application;

(d) where his council may act under section 25 (1) –

(i) submit the application and all relevant documents to his council, and

(ii) notify the owner and the Surveyor-General concerned of his council's decision and where applicable furnish them with a copy of any conditions imposed by that council, and

(e) where the Administrator may act under section 25 (1), obtain the relevant comment of the council of the said town clerk or secretary and furnish the director with a copy thereof and with any documents required by the director.

(3) Failing observance of the provisions of subsection (2) within a period prescribed by regulation, action shall be taken in accordance with the regulations.

(4) The director shall, in relation to an application in respect of which the Administrator may act under section 25 (1)—

(*a*) obtain such comment and information as in his opinion are still required, and

(*b*) notify the applicant, the local authority concerned and the Surveyor-General concerned of the Administrator's decision thereanent and where applicable furnish them with a copy of any conditions imposed by the Administrator.

25. Granting or refusal of application

(1) Either the Administrator or, if authorised thereto by scheme regulations, a council may grant or refuse an application for the subdivision of land.

(2) In granting an application under subsection (1) either the Administrator or the council concerned, as the case may be, shall indicate relevant zonings in

relation to the subdivision concerned for the purpose of the application of section 22 (2).' (Underlined for emphasis)

[40] Reference to s 24 as the empowering provision was evidently incorrect. The Municipality also made reference to an incorrect provision in relation to its approval of the of the building line departure application. Whereas an application was brought in terms of s 15 (1) (a) (i) by the second respondent, Mr Mthembu recommended approval of the departure application in terms of s 15 (1) (a) (ii) of LUPO.

[41] Section 15 of LUPO states the following:

'**15 Applications for departure**

(1) (a) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be –

(i) for an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned, or

(ii) to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone.

(b) Either the Administrator or, if authorised thereto by scheme regulations, a council may grant or refuse an application referred to in paragraph (a)

(c) Either the Administrator or the council concerned, as the case may be, may, when granting an application for a departure in terms of paragraph (b) of subsection for the purposes of paragraph (a) (i) of this subsection, determine that a building on the land concerned shall, for the purposes of the Sectional Titles Act, 1971 (Ac 66 of 1971), and until such building is demolished or destroyed, be deemed to comply with the provisions of the zoning scheme concerned.

(2) The said town clerk or secretary shall –

(a) cause the said application to be advertised if in his opinion any person may be adversely affected thereby;

(b) where objections against the said applications are received, submit them to the said owner for his comment;

(c) obtain the relevant comment of any person who in his opinion has an interest in the application;

(d) where his council may act under subsection (1) (b) –

(i) submit the application and all relevant documents to his council, and

(ii) notify the owner of the council's decision and where applicable furnish him with a copy of any conditions imposed by the council, and

(e) where the Administrator may act under subsection (1) (b), obtain the relevant comment of the council of the said town clerk or secretary and furnish the director with a copy thereof and with any documents required by the director.

(3) Failing observance of the provisions of subsection (2) within a period prescribed by regulation, action shall be taken in accordance with the regulations.

(4) The director shall, in relation to an application in respect of which the Administrator may act under subsection (1) (*b*)—

(*a*) obtain such comment and information as in his opinion are still required, and

(*b*) notify the applicant and the local authority concerned of the Administrator's decision thereanent and where applicable furnish them with a copy of any conditions imposed by the Administrator.

(5) A departure in respect of which the application has been granted under this section, shall lapse if and in so far as it is not exercised within two years or within such further period as either the Administrator or, if authorised thereto by the scheme regulations concerned, the council concerned may on the application of the owner concerned determine, after the date on which the application was granted.

(6) Where a departure has lapsed wholly or partly in terms of subsection (5), the council concerned may amend the register and zoning map concerned accordingly.' (Underlined for emphasis)

[42] Once again, as can be seen from the provisions of s 15 above, s 15 (1) (a) (ii) deals with applications by owners of land to utilise land on the temporary basis for a purpose for which no provision has been made in the Regulations in respect of a particular zone. It is clear that that provision is not an empowering provision to grant or refuse an application for departure. The provision authorising such approval is s 15(1) (b).

[43] These incorrect references, both in relation to the subdivision and building line departure, were carried through to the TPD Committee which adopted them as its recommendations to the Mayoral Committee which in turn submitted them to the Council. The exact wording as formulated by Mr Mthembu was retained throughout the stages of consideration of the application until it was adopted by Council as its resolution and communicated to the relevant parties.

[44] The Municipality seems to acknowledge that reference to s 15 (1) (a) (ii) as authority for the approval was incorrect as the authority to grant a departure application emanates from s 15 (1) (b). Whilst that is so, it is not explained how these errors came about.

[45] Be that as it may, it has been held that '*the fact that a decision-maker mentions the wrong provision does not invalidate the legislative or administrative act.*' (See *Howick District Landowners Association v Umngeni Municipality and Others* 2007 (1) SA 206 (SCA) at para 19 and at paras 20, 21 and 32.

Regulation 3.2.4 and subdivision

[46] Returning to the alleged contravention of Regulation 3.2.4. It is not in dispute that the present erf 7476 had previously comprised two erven, namely 1854 and 1855 which were 649 m² and 553 m² respectively in sizes. The proposed

subdivision which was approved by the Municipality would result in Portion A being 476 m² and the Remainder of erf 7476 being 746 m².

[47] It is not disputed by the Municipality that Portion A of 476 m² would be smaller than the previous erf size that was in place prior to the consolidation of the erven. It is not controversial that such size conflicts with the first condition of Regulation 3.2.4, which I have referred to above. I say so because the Municipality has neither denied the assertion made by the applicants that a subdivision of an erf at Leisure Isle could only happen in regard to a previously consolidated erf and only if the new erf sizes are not smaller than the sizes prior to the consolidation nor has it not put up a different interpretation of this first part of the Regulation insofar as relates to the sizes of the new erven *vis* a *vis* those in place prior to consolidation, unlike Mr de Bruyn who has done so in one of his correspondences, which I shall return to in a moment. The Municipality rather asserts that the Regulation contains no absolute prohibition against subdivision that would result in a smaller size erf being created, than the size prior to consolidation. In that regard, it submits that a departure therefrom is authorised in terms of s 15 (1) (b) of LUPO.

[48] Mr de Bruyn, in his letter dated 12 March, (presumably 2014), addressed to the Municipal Manager states his understanding of the first part of Regulation 3.2.4 to be that '*the <u>total erf sizes</u> shall remain in line with the <u>total prior to consolidation</u>. This is how this rule has been applied since it was made and there are numerous examples of it being applied as such. If this application has been incorrectly applied then a departure can merely be granted on approval, to allow for this*' (Underlined for emphasis)

[49] Elsewhere he states that, the first part of Regulation 3.2.4 was interpreted to mean '*that with a subdivision the overall number of units should not increase…*'

[50] Mr de Bruyn in the same letter also acknowledges that the second part of the Regulation must be satisfied but alleges that the latest trends in density

controls in terms of national and provincial initiatives must be considered. He further states that there are approximately 35 erven on Leisure Island that are less than 500 m² in size and 5 of those are in the immediate vicinity of erf 7476. He also mentions that the proposal is in line with the ambience and atmosphere of the Leisure Island. These allegations are contested by the applicants and I do not intend to dwell much on them.

[51] The point I am trying to make is that the Municipality has not offered an interpretation different from that of the applicants as to what the first part of Regulation 3.2.4 entails.

[52] The contention that Regulation 3.2.4 is not absolute in the sense that it can be departed from by means of an approval in s 15 (1) (b) of LUPO is correct. The question however is whether there was approval of an application in terms of the relevant s 15 (1) (b) in this case.

[53] On proper reading s 15 (1) (b) states that, '…*a council may grant or refuse an application referred to in paragraph (a)* '. It is common cause in this case that there was no application by the second respondent accompanying its application for approval of subdivision in terms of s 24. In fact Mr de Bruyns' letter of 12 March to the Municipal Manager, referred to above, makes this quite clear. His interpretation of the first part of Regulation 3.2.4 implies that he saw no need to apply for departure as he did not regard the application for subdivision as being inconsistent with Regulation 3.2.4.

[54] Mr Maughan-Brown alleges that Mr Mthembu acknowledged that he erred in not realising that the notice of the application which was published and circulated did not specifically provide for a departure from the land use restriction contained in Regulation 3.2.4 of the Scheme Regulations. He refers to this as a mere oversight. The acknowledgment of an error, in my view, constitutes recognition that an application for a departure was a requirement. I must at this point mention that I find it strange that there was an oversight because Mr de Bruyn's letter as to what application was sought was quite clear. An impression

could not have been created that he also sought departure from the restriction contained in Regulation 3.2.4. To the contrary Mr de Bruyn moved from a premise that there was no infringement of Regulation 3.2.4, in response to the comments by the objectors and devoted most of the letter addressing the second requirement of the Regulation, which is the consistency of the new erven with the ruling erven. He also focused on the aspects of the impact of the subdivision to the surroundings area and properties on Leisure Island.

[55] Mr Maughan-Brown submits that Mr Mthembu's error was not material by reason of the fact that the object of s 15 (2) of LUPO, namely public participation, had been achieved in this regard as is evidenced by the very vociferous objections including those of the applicants.

[56] Mr Maughan-Brown also suggests that Mr Mthembu's oversight did not affect the recommendation of the TPD Committee in that had they been aware that there was no application for departure in the notice of application, they would have simply requested the second respondent to re-advertise the application to ensure strict compliance with s 15 (1) (a) (i), which would have resulted in the same recommendation and the same decision by Council. Furthermore there is no evidence that objections would have been any different to those already submitted.

[57] It has been held that '*a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2) (d) of [PAJA] permits administrative action to be reviewed and set aside only where it is "materially influenced by an error of law". An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision, despite the error of law*." *(*See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at para 91). In *Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others* 2005 (3) SA 69 (C), at para 48, Van Reenen J

also observed that '*an error of law is not material or relevant if the decision is justifiable on the facts despite such error*.'

[58] Mr Maughan-Brown alleges that TPD Committee dealt with the subdivision application as if it contained the departure application. My first difficulty with that proposition is that there could not have been approval of an application that was not before the decision-makers. The application brought and considered by the TPD Committee and eventually by the Council in relation to the subdivision of erf 7476, was an application for subdivision in terms of s 24 of LUPO and not a departure application in terms of s 15 (1) (a) (i). It therefore cannot be argued that the TPD Committee considered and recommended an approval of an application for departure that was not before it. In other words if there was no application for departure from the land restrictions contained in Regulation 3.2.4, how could it be said that there was an approval exercised in terms of s 15 (1) (b)? There could not have been approval of an application that did not exist.

[59] There is further no evidence to support the contention that the TPD Committee treated the subdivision application as if it contained a departure application. If that was the case the TPD Committee would have said so in its recommendation to the Mayoral Committee which eventually went to the Council. Alternatively, if it sought to recommend condonation of non-compliance with s 15 (1) (a) (i) and 15 (2) of LUPO it should have said so in its recommendation.

[60] Mr Mthembu's error permeated through to the stage of the approval of the recommendation by Council. At no stage was it ever considered that the subdivision application also included departure. There are no facts to support such a proposition. Mr Mthembu himself makes no mention of approval being sought for departure on the subdivision aspect.

[61] The issue raised by the applicants that Council members were not alerted to the fact that the subdivision sought was in conflict with Regulation 3.2.4 is

important. It is common cause that Mr Mthembu did not specifically mention Regulation 3.2.4 in his recommendation as the offending provision. Under the section dealing with '*Zoning Scheme Regulations*' he merely stated that: '*The application offends the zoning scheme regulations in as far as it contravenes building lines*.'

[62] The Municipality dismisses this attack by stating that Mr Mthembu's document makes it quite clear elsewhere in the document that the subdivision would result in an erf size smaller than the erven prior to consolidation. It cannot be stated with absolute confidence, in my view, that members of the Council knew from reading Mr Mthembu's recommendation and other documentation that the difference in sizes between the new and previous erven offended Regulation 3.2.4, without that being specifically brought to their attention. I say this because the context in which the size of the newly created erven was raised in Mr Mthembu's document was in relation to its consistency with other erven sizes, its impact on the character of the other erven in the vicinity and the surrounding area. There was no particular mention that the newly created erven infringed the first part of Regulation 3.2.4 and because of that the Council was required to invoke its powers in terms of s 15 (1) (b). That Council exercised its powers in terms of s 15 (1) (b) could not be assumed to have to have existed without being backed up by evidence. The position that Council would have taken, having been alerted to the inconsistency between the application for subdivision and the first part of Regulation 3.2.4 is not known.

[63] The second issue I have with the Municipality's argument is that s 15 (2) contains, inter-alia, a pre-condition that the town clerk or secretary shall cause the application in terms of s 15 (1) (a) to be advertised if in his opinion any person may be adversely affected thereby. I do not accept the 'no-difference to the outcome' argument advanced by Mr Maughan-Brown. Firstly, Mr Maughan-Brown cannot speak on behalf of the entire TPD Committee on an issue that was not determined by the TPD Committee. It is possible that, if the TPD Committee

having picked up that the application for subdivision offended Regulation 3.2.4 and was not accompanied by an application for departure in terms of s 15 (1) (a), it might have refused to recommend the application for subdivision, or it might have called for an amended application from the second respondent or it might have recommended condonation for non-compliance with ss 15 (1) (a) (i) and 15 (2) and its subsequent approval.

[64] Furthermore, whether the objectors or other interested persons may have submitted different or further objections in an attempt to persuade the Council not to grant the departure application is something that is unknown. Even if the objections and the recommendations would have been the same, the public should have been given an opportunity to comment on an application or notice that included a departure from the applicable land restrictions because such would have been premised on different provisions of LUPO, namely, ss 15 (1) (a) and 15 (2) and not merely s 24.

[65] To sum up on this point, the TPD Committee, the Mayoral Committee and Council of the Municipality should have been told that the application offended Regulation 3.2.4 of the Scheme Regulations and advised as to what was recommended to do to deal with that issue. It cannot be assumed that Council members who may not be experts in town planning and development matters would know that a conflict existed between the application and the Regulations simply by reading the recommendation and the accompanying documents.

[66] I therefore reject the trivialisation of non-compliance with the statutory requirements by the Municipality. Apart from that, land owners should be encouraged to comply with the law and the Regulations. As I have already noted, to suggest that the subdivision application was treated as if it included departure, when that was not even the intention of the owner of the land as gleaned from Mr de Bruyns' letter, is to imply that the departure application was not necessary for the approval. If Mr Mthembu intended, departure from restrictions to be granted he should have said so. As things stand and from the reading of his recommendation, approval was only sought for and granted for subdivision.

[67] This is not to suggest that the Municipality is not empowered by s 15 (1) (b) to approve the subdivision notwithstanding the land use restriction. Such powers however must be exercised in a manner that is consistent with the object and purport of the relevant provisions of s 15 (1) (a) (i) read with s 15 (2). This is to ensure that the public and particularly those that would be affected by the proposed application are given a fair opportunity to comment on the correct application. The error by the Municipality or its non-compliance with the law, is in my view, material enough to warrant the review and setting aside of the subdivision approval. In view of my findings in that regard, I need not deal with the issues relating to the resultant extent of the erf size in relation to other erven in the area, the desirability of the proposal and its impact on the surrounding properties and the general public.

[68] Something must be said about the numerous errors that characterise the Municipality's decision. Starting with references to incorrect statutory provisions of LUPO to more serious errors of not picking up that there was no departure application. It is concerning that these errors carried on from Mr Mthembu's recommendations through to various Committees up to the Council without being picked up. This gives one an impression that very little attention was paid in processing the second respondent's application.

Building line point

[69] As regards the issue of the building line. s 15 (1) (a) (ii) does not authorise the Council of the Municipality to grant the departure as I have already stated. The empowering provision is s 15 (1) (b). Whilst it is accepted that reference to an incorrect provision does not vitiate the decision, the Municipality does not explain how such an error arose. An issue was raised that to the extent that a departure may be granted such only relates to an outbuilding or second dwelling not the main dwelling and that such outbuilding or second dwelling may not have doors or windows in any wall which fronts onto the side. The manner in which the Municipality has dealt with these allegations is unsatisfactorily scant.

[70] Be that as it may, it seems sensible to me that in view of the building line departure being interrelated to the subdivision that the entire application be sent back to the Municipality for reconsideration. This would also take care of the allegations that the plan KE7475j was never provided to the objectors to enable them to comment on.

Allegations of misconduct

[71] Serious allegations of collusion, fraud and dishonesty have been levelled against members of the Municipality. These allegations are, in my view far-fetched and baseless as they are not supported by evidence.

[72] Omissions and errors by Mr Mthembu cannot be elevated to misrepresentations. There is also no evidence to support conclusions that the applicants seek this Court to draw that Mr Mthembu colluded with Mr de Bruyn. Mr Mthembu may have erred in how he formulated his recommendations but that does not mean that he must be found to be dishonest. If Mr Mthembu is found to be dishonest that would also imply that members of the TPD Committee are also dishonest as Mr Mthembu made documents that he based his recommendations on available to them. He placed a set of facts to the TPD Committee for its members to form its own views on the application.

[73] The fact that Mr Mthembu omitted to take note of the fact that the second respondent did not apply for departure and alerted the TPD Committee thereto or that he did not mention the applicability of Regulation 3.2.4 specifically does not make him dishonest neither does it point to any collusion between him and other members of the or those of the second respondent. No facts have been placed before this Court to support such conclusions. Having regard to the seriousness of these allegations, I am of the view that the Municipality was justified in defending this application.

[74] As to the question of substitution. Since I have found no fraud or dishonesty on part of the members of the Municipality (which was the basis for the substitution relief, I find no exceptional circumstances warranting substitution.

I would in the circumstances show judicial deference and allow the Municipality to reconsider the second respondent's application appropriately, taking into account issues raised in this judgment.

Costs

[75] That takes me to the question of costs. Both parties sought costs against each other on a scale as between attorney and client or own client. For the applicants, the reasons advanced related to the Municipality's alleged misconduct and that the Municipality had opposed this application on spurious grounds. I have already found that such allegations have no basis.

[76] The Municipality on the other hand sought costs on the punitive scale on the basis that the Court must censure the accusations of fraud and dishonesty which are baseless, even if it were to be unsuccessful. In the alternative it suggested that each party should pay its own costs should it be unsuccessful.

[77] It weighs heavily on my mind that the Municipality sought to settle the matter by offering that the decisions be set aside and the application be considered afresh by the Council, which offer was rejected by the applicants. The Municipality felt obliged to oppose the application purely because of what it viewed as scurrilous accusations of fraud and dishonesty made against its members. The allegations against the Municipality were indeed serious and warranted opposition. I am of the view that the Municipality having offered to agree to an order reviewing and setting aside the decision, there was no basis for the applicants to persist with the application. To that end, it seems unjust to award costs against the Municipality.

[78] I also do not find it appropriate to award costs against the applicants in view of my findings on the merits which are in their favour. It is therefore just and appropriate for each party to pay its own costs.

[79] In the result the following order is made:

1. The decision by the first respondent to grant approval for the subdivision of erf 7476, Knysna, into two portions, namely Portion A (476 m²) and Remainder erf 7476 (726 m²), in terms of s 24 of the Land Use Planning Ordinance, No. 15 of 1985 as indicated on the plan of subdivision number KE7476H drawn by Mark de Bruyn dated June 2013 on 31 July 2014 is reviewed as set aside.
2. The decision by the first respondent to grant approval in terms of s 15 (1) (a) (ii) of Land Use Planning Ordinance, No. 15 of 1985 for a departure to allow a building line of 1,57m in lieu of 2m between a portion of the existing dwelling house and the proposed new subdivision boundary on the proposed Remainder erf 7476, Knysna, as indicated on the plan of subdivision number KE7476j drawn by Mark de Bruyn dated May 2014 on 31 July 2014 is reviewed and set aside.
3. The second respondent's application in terms of s 24 of Land Use Planning Ordinance, No. 15 of 1985 for the sub-division of erf 7476, Knysna, into two portions, namely Portion A (476 m²) and Remainder erf 7476 (726 m²), Knysna, as indicated on the plan of subdivision No. KE7476H drawn by Mark de Bruyn dated June 2013 and in terms of s 15 (1) (a) (ii) of Land Use Planning Ordinance, No. 15 of 1985 for a departure to allow a building line of 1,57m in lieu of 2m between a portion of the existing dwelling house and the proposed subdivision boundary on the proposed Remainder Erf 7476, Knysna, as indicated on the Plan of subdivision No. KE7476j drawn by Mark de Bruyn dated May 2014, is remitted back to the first respondent for reconsideration.
4. Each party is to pay its own costs.

_____

N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicants	: Adv. E C D Bruwer
Instructed by	: De Beer Joubert Attorneys c/o Van der Spuy, Cape Town
For the First Respondent	: Adv. P P J Van der Berg
Instructed by	: Mosdell Pama & Cox Inc. c/o Sohn and Wood Attorneys, Cape Town