REPORTABLE

CASE NO: SA 26/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AUAS VALLEY RESIDENTS ASSOCIATION	**First Appellant**
HARMONY MOUNTAIN VILLAGE (PTY) LTD	**Second Appellant**
RESIDENTS OF TRANQUILLITY (PTY) LTD	**Third Appellant**

and

MINISTER OF ENVIRONMENT AND TOURISM	**First Respondent**
SQUARE FOOT DEVELOPERS	**Second Respondent**
ZIVELI (PTY) LTD	**Third Respondent**
THEOFILUS NGHITILA N.O.	**Fourth Respondent**
(in his official capacity as Environmental Commissioner)	
MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK	**Fifth Respondent**

MINISTER OF URBAN AND RURAL DEVELOPMENT **Sixth Respondent**

Coram: DAMASEB DCJ, SMUTS JA and ANGULA AJA

Heard: **20 June 2022**

Delivered: **13 July 2022**

Summary: This appeal on one hand relates to a decision taken by the Environmental Commissioner (Commissioner) to grant an environmental clearance certificate and a decision taken on appeal against the Commissioner's decision by the Minister of Environment and Tourism to uphold the Commissioner's decision. On the other hand, it concerns the decision of the High Court dismissing an appeal against the decision of the Minister of Environment and Tourism. The Commissioner granted clearance to a property developer (on behalf of Ziveli for development on Portion 8, Farm Aris) in terms of the Environmental Management Act 7 of 2007, in circumstances where the envisaged development was *ultra vires* a Town Planning Scheme applicable to the land in question. Ziveli's proposed development, on Portion 8, Farm Aris, was subject to the Aris Town Planning Scheme (Aris TPS), which is an approved scheme in terms of s 16 of the Town Planning Ordinance 18 of 1954. The approved zoning of the land in terms of the Town Planning Scheme, on which the intended development was to be undertaken, was for 'rural residential with an approved consent for a retirement village with a minimum density of 1:450m^2.' However the density stipulated in the approved conditions attached to the clearance certificate granted for the proposed development was for a minimum

density of 1:300m^2, for a retirement village and general residential, although the certificate itself made reference to a lifestyle village, which was less than the approved consent density. Whereas, to be compliant with the Aris TPS, any development had to comply with a density of 1:450m^2 and had to be a retirement village. In order to deviate from this, Ziveli was required by law first to seek approval for rezoning from the approved land use to that which it intended to undertake.

The conditions attached to the environmental clearance certificate were *ultra vires* the approved town planning scheme. In the appeal to the Minister of Environment and Tourism, the Minister dismissed the appeal, upheld the decision of the Commissioner and further ordered the parties to settle and jointly 'submit a carefully harmonized agreement'.

In the court *a quo*, in addition to challenging the *vires* of the certificate for its sanctioning of a non-compliant development, Harmony raised two preliminary issues: the competence of an order directing the parties to negotiate and settle; and vagueness of the order issued by the Minister of Environment. The High Court disposed of the matter solely on the basis of those two preliminary issues. It did not consider the question whether the proposed development was compliant with the Aris TPS and if it was not, what the effect was. The Minister upheld the Commissioner's decision. That meant that he gave his approval to an illegal scheme.

Held that, the pre-eminence of a town planning scheme is clear from s 6(3) and 29(2) of the Township and Division of Land Ordinance 11 of 1963 which, prohibit

the Minister of Regional and Local Government, and Housing (Minister of Local Government) from imposing conditions in respect of land use applications if such conditions are in conflict with an approved Town Planning Scheme.

Held that, a fortiori, a development plan which is not compliant with an approved Town Planning Scheme, and a certificate of clearance sanctioning it, are both bad in law.

Held that, should this court set aside the Minister's decision on the ground that it is vague and refer it back to the Minister for a decision afresh, that will not address the illegality of what the Minister sanctioned. Instead, this court would be inviting the Minister to reconsider the very certificate which is contrary to law. The appropriate relief is that the certificate by the Commissioner be set aside as being void *ab initio.*

The appeal succeeds.

APPEAL JUDGMENT

DAMASEB DCJ (SMUTS JA and ANGULA AJA concurring):

[1] This unopposed appeal is concerned with an environmental clearance certificate granted to a property developer (second respondent) by the Environmental Commissioner (fourth respondent), in terms of the Environmental Management Act 7 of 2007 (EMA), in circumstances where the envisaged development undertaken by the second respondent as an agent of the third

respondent was in conflict with the Aris Town Planning Scheme (Aris TPS) applicable to the land in question.

[2] The Aris TPS was approved by the Minister of Regional and Local Government, Housing and Development (the Local Government Minister) in terms of s 16 of the Town Planning Ordinance 18 of 1954.[1]

[3] The dispute intersects three pieces of legislation administered by different Ministers of state: Township and Division of Land Ordinance 11 of 1963 (the 1963 Ordinance), Town Planning Ordinance 18 of 1954 (the 1954 Ordinance) and the EMA.[2]

[4] On the one hand the appeal relates to a decision taken by the Environmental Commissioner (the Commissioner) in terms of s 7(1) of the EMA and a decision taken on appeal against the Commissioner's decision by the Minister of Environment and Tourism (Minister of Environment) in terms of s 50 of the EMA.[3]

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[1] In Government Notice 17 published in GG 3788, 15 February 2007.

[2] For a discussion of the subject and how these pieces of legislation interplay, see !Owoses-/Goagoses F. *Planning Law in Namibia* 2013. Juta.

[3] **50 Appeals to Minister**

(1) Any person aggrieved by a decision of the Environmental Commissioner in the exercise of any power in terms of this Act may appeal to the Minister against that decision.

(2) An appeal made under subsection (1), must be noted and must be dealt with in the prescribed form and manner.

(3) The Minister may consider and determine the appeal or may appoint an appeal panel consisting of persons who have knowledge of, and are experienced, in environmental matters to advise the Minister on the appeal.

(4) The Minister must consider the appeal made under subsection (1), and may confirm, set aside or vary the order or the decision or make any other appropriate order including an order that the prescribed fee paid by the appellant, or any part thereof, be refunded.

(5) Any expenditure resulting from the performance of duties by the appeal panel in terms of subsection (3) must be paid from the State Revenue Fund from moneys appropriated by Parliament for that purpose.

(6) An appeal made under subsection (1) does not suspend the operation or execution of the decision pending the decision of the Minister, unless the Minster, on the application of a party, directs otherwise.

On the other, it concerns the decision of the High Court dismissing an appeal against the decision of the Minister of Environment. The appeal to the High Court was in terms of s 51 of the EMA.[4]

[5] Ziveli (Pty) Ltd (Ziveli) is the owner of Portion 8 of the Farm Aris No: 29 in the Khomas Region (Portion 8, Farm Aris). The second appellant, Harmony Mountain Village (Pty) Ltd (Harmony), owns land adjoining Portion 8, Farm Aris.

[6] In 2012, Ziveli submitted to the Local Government Minister an application for a township development and layout in respect of Portion 8, Farm Aris. On 3 October 2012, the Local Government Minister declared Portion 8, Farm Aris as an approved township in Government Notice 268 of GG 5069. In relevant part, the Local Government Minister imposed the following conditions on the township development:

> **'2. Composition of Township**
>
> The township comprises 104 erven numbered 1 to 104 and the remainder streets as indicated on General Plan K 435.
>
> . . .
>
> **4. Conditions of title:**
>
> The following conditions shall be registered in favour of the Local Authority against the title deeds of all erven. . .
>
> (a) The erf shall only be used or occupied for purposes which are in accordance with the provisions of the Aris Town Planning Scheme approved in terms of the

[4] **51 Appeal to High Court against Minister's decision**

(1) Any person aggrieved by a decision of the Minister made in terms of section 50(4) or a decision under section 21 may appeal, on points of law only, against that decision to the High Court within the prescribed time and in the prescribed manner.

(2) The appeal must be proceeded with as if it were an appeal from a Magistrate's Court to a High Court.

> Town Planning Ordinance, 1954 (Ordinance No 18 of 1954), as amended.' (Emphasis Added)

[7] Portion 8, Farm Aris is designated in Table C of the Aris TPS as 'Rural Residential' and is subject to an approved consent use 'Nature Estate Retirement Village'. The primary land uses attached to the zoning are small scale agriculture, dwelling unit at a gross density of 1 unit per 5ha and ancillary dwelling unit. The consent uses which may be granted under the zoning rural residence are: ancillary dwelling unit, occupation practice, home-based business, retirement village, agricultural industry, farm stall, kiosk, intensive-feed farming, nursery, service trade, tourist establishment, holiday accommodation and a nature estate, public garage, light industry, workshop and butchery.

[8] Under consent use 'Nature Estate, the primary land uses are: wildlife estate at gross density of 1 unit per 10ha; golf estate at a gross density of 1 unit per 5ha; equestrian estate at a gross density of 1 unit per 5ha; residential estate at a gross density of 1 unit per 1ha; retirement village at a gross density of 1 unit per 450m^2. An additional requirement for a retirement village is a minimum erf size of 450m^2. The Aris TPS makes no provision for 'general residential' zoning.

[9] Ziveli could not commence development without an environmental clearance certificate. It is common ground that the developer Square Foot (on behalf of Ziveli) submitted to the Commissioner, an application for an environmental clearance certificate in respect of a proposed development on Portion 8, Farm Aris. The Commissioner thereupon issued an environmental clearance certificate to Square

Foot for the proposed development on 15 August 2017; with conditions thereto. It is necessary to point out that the clearance certificate firstly makes reference to a lifestyle village, whereas the conditions annexed thereto refer to a retirement village; and secondly, the conditions provide for a density of not less than 300m^2 for a retirement village and also refers to 300m^2 for general residential units, whilst the Aris TPS provides for a minimum density of 450m^2 and has approved zoning for only rural residential. The conditions recorded:

> '1. Approval for this development project is in accordance to the current Aris Town Planning Scheme, unless otherwise amended i.e. approved land use is Rural Residential with consentual *(sic)* approval for a retirement village at a density restriction of 1/300m^2
>
> 2. The development activities on the 'General Residential' ervens may not commence until the layout and densities have been revised to a density of not less than 1/300 m^2 and that no General Residential Unit on these would be developed with more than 2 story, or with more than 3 bedrooms each. . . .' (Emphasis added)

[10] Aggrieved by the Commissioner's decision to grant the clearance, Harmony and others approached the High Court for an interim interdict in terms of which the second respondent was interdicted from proceeding with the development on behalf of Ziveli on Portion 8, Farm Aris. The interdict was granted pending an appeal to the Minister of Environment against the Commissioner's decision.

[11] The initial appeal against the Commissioner's decision was lodged with the Minister of Environment in terms of s 50 of the Act. The Minister determined the appeal without affording the appellants an opportunity to be heard, dismissed the appeal and upheld the Commissioner's decision. Aggrieved that they were not afforded *audi,* the appellants again approached the High Court to review the decision of the Minister of Environment. Parker AJ set aside the Minister's decision and referred the matter back to the Minister for adjudication afresh. It was then that the Minister of Environment took the decision that is the subject of the present appeal.

[12] Harmony, together with other aggrieved entities, appealed to the Minister of Environment against the Commissioner's grant of the clearance certificate in respect of Ziveli's proposed development. The thrust of the complaint to the Minister of Environment was that the zoning of the land on which Ziveli intended to undertake the development is 'rural residential' with an approved consent only for a retirement village with a density of 1:450m^2. It was specifically asserted that the density stipulated in the conditions for the clearance certificate (1:300m^2) of the proposed development was not in accordance with the Aris TPS as it allowed for a less density than the approved density and was for a lifestyle village, and it could, in law, only be altered by an amendment to the Aris TPS.

[13] In a setting where the parties were represented and allowed to lead oral evidence, including that of experts, the Minister of Environment in effect dismissed Harmony's appeal and 'upheld' the Commissioner's clearance certificate.

[14] The Ministers' decision sought to be set aside said:

> **'DECISION**
> It is on the above basis that I make the following orders in terms of section 50(4) of the Act:
>
> a) The decision of the Environmental Commissioner to grant the environmental clearance certificate to Square foot developments (*sic*) is upheld with amended conditions reflecting the issues in paragraphs 50, 51 and 56 above.
>
> b) The Appellants and the Respondent (Square Foot Developments) are ordered to jointly submit, to the Environmental Commissioner, on or before 20 February 2019 a carefully harmonized agreement which reflects a compromise of the proposal submitted by the appellants ***(Exhibit B)*** as well as those inputs forwarded to me by the Respondent, as their ***responding statement*** to the first appeal, in a letter dated 27th October 2017.
>
> c) I further ordered that the suspended operation and/or execution of the Ziveli lifestyle village on portion 8 (of farm Aris No. 29, Khomas region be lifted immediately as from the 21 February 2019 and the Environmental Commissioner is hereby directed to facilitate this order.
>
> d) This order binds all parties directly and indirectly affected.'

[15] Dissatisfied by this decision, again confirming the grant of the environmental clearance, the appellants appealed to the High Court to have that decision set aside.

[16] In the proceedings before the Minister of Environment the following was common cause between the parties: Ziveli's proposed development, on Portion 8, Farm Aris, was subject to the Aris TPS. Therefore, to be compliant with the Aris TPS that development had to comply with a density of 1:450m^2 and had to be a

retirement village. In order to deviate from the Aris TPS, Ziveli was required by law to seek approval for rezoning from the approved land use to that which it intended to undertake: a density of 1:300m^2, a lifestyle village and general residential use, amongst others.

[17] At the hearing of the appeal both parties called expert witnesses. Those of Harmony made clear that under the current legislative scheme (a) the only way Ziveli could revise the approved density stipulation was by amending the Aris TPS and that the development could not start without such amendment; (b) it is not a formality to bring about amendment to a town planning scheme by adding new zones and densities as those affected would have to be afforded the opportunity to object; (c) 'a lifestyle village would have different social impacts on amongst others noise, visual sense of place and traffic.'

[18] The Aris TPS provides for a minimum density of 1:450m^2 per unit. The clearance certificate allows for a minimum density of 1:300m^2. The consequence is that with a reduced minimum density (as shown in para [19] below) the developer is permitted to build considerably more units than would be the case if the density allowed by the Aris TPS is adhered to. That would in essence alter the character of the township from that envisaged in the Aris TPS.

[19] The witnesses for Ziveli did not dispute: (a) that the proposed development was not in accordance with the Aris TPS, (b) but took the view that the extent of the deviation could be rectified by negotiation between Ziveli and the appellants and that the Local Government Minister could effect changes to the Aris TPS by

imposing ‘new land use zones and activities at sites in terms of the Town Planning Ordinance of 1954’, (c) they accepted the allegation by Harmony’s counsel that the proposed development included increase in the number of housing units ‘from 190 to over 300 and to increase the density’; (d) but that ‘it was at the discretion of the Ministry of Urban and Rural Development to assess and decide’ the deviation; (e) that the proposed development could commence even if not in compliance with the Aris TPS and could be regularised later.

The Ministers’ Decision

[20] In his reasons for confirming the Commissioner’s clearance certificate, the Minister of Environment accepted as proven Harmony’s factual allegation for its appeal under s 50 of the EMA: i.e. the content and terms of the Aris TPS and the dissonance between it and Ziveli’s proposed development as demonstrated by the brief summary of the evidence of the parties’ experts.

[21] The legal question that arose on that factual matrix was whether Ziveli was entitled to proceed with the development and regularise it subsequently or whether it was required to seek rezoning approval before commencing the development. The latter issue, being a question of law, required the Minister of Environment to comply with the strictures of the law. However, the Minister incorrectly approached the issue before him as one of mere factual disagreement[5] between Ziveli and Harmony which could be resolved through negotiation and settlement.

[5] See: !Owoses-/Goagoses supra at paras 3.4.3 p 41-43. The author correctly argues that the details of a town planning scheme are questions of mixed fact and law. In my view, however, what the scheme provides is to be distinguished from its effect once it is established what it comprises. Once the content of the town planning scheme is established, as here, the effect is that compliance is mandatory because it amounts to legislation. See para [26] - [28] below.

[22] As the Minister of Environment recorded in respect of the density dispute:

> '. . . Therefore the clearance certificate conditions could be amended to approve a density of not less than (sic) 1:450 m^2 or state that the lifestyle will have a density of 1:450 m^2 as provided for in the Aris Town Planning Scheme for retirement villages.'

[23] The Minister went on to record in respect of the lifestyle/retirement dispute:

> '. . . The application for environmental clearance is clearly for a lifestyle village although the EIA does make continued reference to a retirement village and a retirement village is also referred in the conditions of the existing clearance certificate. The respondent (Ziveli) argued that its initial application to the Township Board was for a lifestyle village (this needs to be verified).'

[24] It is clear that in coming to his decision as he did, the Minister of Environment was swayed by the evidence of the witnesses for Ziveli that the non-compliance of the proposed development with the Aris TPS could be cured subsequent to the commencement of the development and that it was perfectly legal for the development to commence even if it deviated from the Aris TPS.

[25] Apparently satisfied that the dispute between Ziveli and Harmony was of the nature that could be resolved by negotiation and settlement, the Minister of Environment considered that the answer was to require the disputants to negotiate and ordered the parties to jointly submit 'a carefully harmonized agreement which reflects a compromise. . .' In so doing, the Minister of Environment lost focus on the legal question he was asked to resolve: Was the Ziveli development compliant with

the Aris TPS? And could it commence with the development without an amendment to the Aris TPS?

Discussion

[26] Had the Minister of Environment considered the legal question he was faced with, he would have upheld the appeal and set aside the Commissioner's clearance certificate. That is so because once approved, conditions of establishment and conditions of title under which a township is approved assume force of law;[6] it constitutes legislation by a local authority and restricts land use to the stated (approved) purpose.[7]

[27] A town planning scheme exists to bring about orderly, coordinated and harmonious development of a local authority area.[8] To that end, it imposes restrictions on the 'powers and rights of owners of immoveable property in the interest of owners of land within a geographical community'.[9] 'Zoning', which is at the core of a town planning scheme, 'is the creation and retention of the specific character of an area. Such purpose would be frustrated if a use were allowed for which no provision is made in the town planning scheme or if a person uses land contrary to the purpose for which it is zoned'.[10] Therefore, affected neighbours have a right to enforce the scheme against an errant owner of immoveable property.

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[6] *Malan and another v Ardconnel Investments (Pty)* Ltd 1988 (2) SA 12 (A); *Peri-Urban Areas Health Board v Breet NO and another* 1958 (3) SA 783 (T) at 787A-B.

[7] *Falcon Investments Ltd v CD of Birnam (Suburban) (Pty) Ltd and Others* 1973 (4) SA 384 (A) p 403; *Olthaver & List Finance & Trading Corporation and others v Minister of Regional and Local Government and Housing and Others* 1996 NR 213 (SC) 217C.

[8] Section 1(1), Town Planning Ordinance 18 of 1954.

[9] *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W); *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) p 131.

[10] *Power Road Taxi Developers (Pty) Ltd v MEC Local Government and Housing, Free State Province and Others* (R215/2005) [2007] ZAFSHC 9 (8 February 2007) at [59].

[28] The pre-eminence of a town planning scheme is clear from ss 6(3) and 29(2) of the 1963 Ordinance which, in almost identically worded provisos to those provisions, prohibit the Minister of Local Government from imposing conditions in respect of land use applications if such conditions are in conflict with an approved TPS. *A fortiori*, a development plan (such as Ziveli's) which is not compliant with an approved TPS, and a certificate of clearance sanctioning it, are both bad in law.

[29] When the matter came on appeal to the High Court, in addition to challenging the *vires* of the certificate for its sanctioning of a non-compliant development, Harmony raised two preliminary issues: the competence of an order directing the parties to negotiate and settle; and vagueness of the order issued by the Minister of Environment. The High Court disposed of the matter solely on the basis of those two preliminary issues. It did not consider the question whether the proposed development was compliant with the Aris TPS and if it was not, what the effect is.

[30] On appeal, Mr Heathcote argued that this court need only decide two issues. First, whether it was competent for the Minister of Environment to order the parties to settle and, secondly, whether Ziveli had a right to commence the proposed development with the expectation to, in the future, apply for and to be granted rezoning permission to legalise its development.

[31] For the reasons I have given, the conclusion I come to, as correctly argued by Mr Heathcote, is that the Commissioner sanctioned a development which violated the law. That offends the rule of law and the principle of legality. Put

another way, what was before the Minister of Environment is a certificate that is bad in law. The Commissioner could not sanction an illegality. Thus approached, Harmony's grievance that the Minister of Environment had no power to order the parties to settle becomes moot. The Minister of Environment could not, as he purported to do, 'uphold' an unlawful certificate when it was impermissible in law for Ziveli to commence development on Portion 8, Farm Aris without it having applied for and having been granted rezoning permission.

Appropriate relief

[32] The order Harmony seeks in the event that the appeal succeeds is that the matter be referred back to the Minister of Environment with an appropriate direction. I have appreciation for the reason advanced by counsel for seeking relief in that form. Because of the separation of powers, courts are loath to assume power otherwise bestowed upon an administrative functionary.[11]

[33] The distinguishing feature though is that the illegality of the Commissioner's certificate was squarely before the Minister. What the court *a quo* in its judgement referred to as the 'merits'[12] but elected not to deal with because of the approach it adopted of dealing with the preliminary objections raised by the appellants. Since the merits were squarely raised before the Minister and the High Court, this court is at large to deal with it.

[34] In the grounds of appeal to the High Court, Harmony stated:

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[11] *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC).
[12] *Vide* para 58 of the High Court judgment.

> '4.11. Finally, the Minister in making his decisions contravened the provisions of the Township and Division of Land Ordinance, 11 of 1963, which pertinently prohibits the development. Section 6(3) of such Ordinance determines that any condition contained in a Town Planning Scheme (including the Aris Town Planning Scheme in this case) shall be paramount. In other words, not even the Ministry of Urban and Rural Development can impose conditions which are in conflict with any existing provision of the Aris Town Planning Scheme. Yet, the Minister in this case (the first respondent) phrased his decision in a manner which, objectively speaking, transgresses the provisions of the Aris Town Planning Scheme.'

[35] In Harmony's heads of argument amplifying the grounds of appeal, Mr Heathcote had submitted as follows as regards the real issue that was before both the Minister and the High court:

> 'The court a quo also failed to enforce the clear provisions of sections 6(3) and 29(2) of the Township and Division of Land Ordinance, 11 of 1963. We respectfully submit that this court should now, once and for all, put this issue to rest. Sections 6(3) and 29(2) of the latter Ordinance make plain that neither an approval of a development, nor an Environmental Clearance Certificate, may be given on condition that developments commence, provided that the necessary amendments to a Town Planning Scheme be obtained later.'

[36] The Minister of Environment stated that he upheld the Commissioner's decision. In other words, he gave his approval to an illegal scheme. Should we set aside the Minister's decision on the ground that it is vague and refer it back to the Minister for a decision afresh, that will not address the illegality of what the Minister sanctioned. We will be inviting him to reconsider the self-same certificate which is contrary to law. The appropriate relief is that the certificate by the Commissioner be set aside as being void *ab initio.*

Costs

[37] None of the respondents have opposed the appeal. In fact, they had filed notices stating that they abide the decision of the court.

Order

[38] The appeal succeeds and the court *a quo's* judgment and order are set aside and substituted with the following:

> '1. The appeal from the Minister of Environment to this Court succeeds with costs, such costs to be paid by the first and second respondent, to the appellants, jointly and severally the one paying the other to be absolved, and which costs shall include the costs of one instructing and two instructed counsel;
>
> 2. The Minister's decisions (a), (b), (c) and (d) in his order dated 24 January 2019 are set aside, and substituted with the following:
>
> 3. The first, second and third appellants' appeal to the Minister lodged against the granting by the Environmental Commissioner of the Environmental Clearance Certificate dated 15 August 2017 succeeds;
>
> 4. The decision made by the Environmental Commissioner to grant an environmental clearance certificate dated 15 August 2017 to 2nd Respondent (Square Foot Developers) is set aside and declared null and void.'

[39] There is no order of costs in the appeal.

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DAMASEB DCJ

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SMUTS JA

_____

ANGULA AJA

APPEARANCES

APPELLANTS:	Mr R Heathcote
	with him Mr G Dicks
	Instructed by Engling Stritter & Partners
RESPONDENTS:	Unopposed