CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 89/09
[2010] ZACC 11

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Applicant
and	
GAUTENG DEVELOPMENT TRIBUNAL	First Respondent
GAUTENG DEVELOPMENT APPEAL TRIBUNAL	Second Respondent
IVORY-PALM PROPERTIES 20 CC	Third Respondent
PIETER MARTHINUS VAN DER WESTHUIZEN	Fourth Respondent
ELFREDA ELIZABETH VAN DER WESTHUIZEN	Fifth Respondent
MINISTER FOR LAND AFFAIRS	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR DEVELOPMENT PLANNING AND LOCAL GOVERNMENT, GAUTENG	Seventh Respondent
together with	
MEMBER OF THE EXECUTIVE COUNCIL OF KWAZULU-NATAL FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS	First Intervening Party
ETHEKWINI MUNICIPALITY	Second Intervening Party
DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION, MPUMALANGA PROVINCE	Third Intervening Party

and

SOUTH AFRICAN PROPERTY OWNERS ASSOCIATION First Amicus Curiae

SOUTH AFRICAN COUNCIL FOR CONSULTING PROFESSIONAL PLANNERS Second Amicus Curiae

Heard on : 24 February 2010

Decided on : 18 June 2010

JUDGMENT

JAFTA J:

Introduction

[1] The main issue in this case is the constitutionality of Chapters V and VI of the Development Facilitation Act 67 of 1995 (Act). These chapters authorise provincial development tribunals established in terms of the Act to determine applications for the rezoning of land and the establishment of townships. A dispute arose in the province of Gauteng between the City of Johannesburg Metropolitan Municipality (City) and the Gauteng Development Tribunal (Tribunal), a provincial organ created by the Act. This dispute is about which sphere of government is entitled, in terms of the Constitution of the Republic of South Africa, 1996 (1996 Constitution), to exercise the powers relating to the

establishment of townships and the rezoning of land within the municipal area of the City. The resolution of the dispute eluded the parties and the City instituted an application in the High Court, challenging the constitutional validity of the Act.[1] This challenge proved unsuccessful.

[2] On 22 September 2009, on appeal, the Supreme Court of Appeal granted an order that declared Chapters V and VI of the Act to be invalid but suspended the declaration of invalidity for 18 months to enable Parliament to remedy the defects identified by the Court.[2] As required by section 167(5)[3] read with section 172(2)(a)[4] of the Constitution, and Rule 16[5] of the Rules of this Court, the order of the Supreme Court of Appeal has been submitted to this Court for confirmation.

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[1] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae)* 2008 (4) SA 572 (W).

[2] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA); 2010 (2) BCLR 157 (SCA).

[3] Section 167(5) provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[4] Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[5] Rule 16(1) of the Constitutional Court Rules, 2003, provides:

> "The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order."

Parties

[3] The City seeks confirmation of the invalidity order, leave to appeal against certain ancillary orders relating to the suspension of the declaration of invalidity, and also leave to appeal against the dismissal of its appeal in relation to the review of two decisions of the Tribunal. It cites the Tribunal as the first respondent; the Gauteng Development Appeal Tribunal (Appeal Tribunal) as the second respondent; Ivory-Palm Properties 20 CC as the third respondent; Mr Pieter Marthinus van der Westhuizen and Mrs Elfreda Elizabeth van der Westhuizen, as the fourth and fifth respondents respectively; the Minister for Land Affairs (Minister), now known as the Minister for Rural Development and Land Reform, as the sixth respondent; and the Member of the Executive Council for Development Planning and Local Government, Gauteng (MEC) as the seventh respondent.

[4] The third to fifth respondents are landowners who successfully applied in terms of the Act to the Tribunal for the rezoning of two immovable properties and the establishment of a new township development on each property. They did not resist the relief sought in the High Court, as they chose to abide the decision of that Court, and have not participated in the proceedings that followed.

[5] The Tribunal, the Appeal Tribunal, the Minister and the MEC oppose the application for confirmation and appeal against the order granted by the

Supreme Court of Appeal. I will refer collectively to these parties as the respondents.

[6] The Member of the Executive Council of KwaZulu-Natal for Local Government and Traditional Affairs (MEC, KwaZulu-Natal), as will appear below, is allowed to join the proceedings as is the Department of Agriculture, Rural Development and Land Administration, Mpumalanga Province (Mpumalanga Department). These parties will be referred to in this judgment as the provincial departments. In the same way, eThekwini Municipality is granted permission to join the proceedings. It made common cause with the City and supported the application for confirmation.

[7] Lastly, the South African Property Owners Association and the South African Council for Consulting Professional Planners were admitted as amici curiae. They generally align themselves with the respondents and the provincial departments in requesting this Court not to confirm the declaration of constitutional invalidity.

[8] It is now convenient to set out the factual background relevant to the determination of the case.

Factual background

[9] As an authorised local authority under the Town-Planning and Townships Ordinance[6] (Ordinance), the City is empowered to consider applications to rezone land and to establish new townships within its area of control. It delegated these functions to its Planning Committee. Difficulties emerged from 1997 onwards as the Tribunal, empowered by the Act, began to decide applications for "land developments" (in the form of rezoning applications and applications for the establishment of townships) within the City's jurisdiction. The City says that in approving a number of these applications the Tribunal failed to take into account the City's development planning instruments and was also more lenient than its own Planning Committee. According to the City, this resulted in decisions that undermined its development planning and also allowed for "forum-shopping" which undermined the authority of the Planning Committee.

[10] The City held meetings with officials from the Gauteng Department of Development Planning and Local Government and the Gauteng Department of Finance and Economic Affairs in an attempt to resolve the impasse. These meetings failed to produce a solution and it was agreed that the City should seek a declaratory order to clarify the powers of the Tribunal and the Appeal Tribunal under the Act.

[6] 15 of 1986. In terms of section 2 of the Ordinance a local authority may be declared an "authorised local authority" for the purposes of exercising the powers contained in Chapters II, III or IV of the Ordinance.

[11] On 31 March 2005, the City launched an application in the South Gauteng High Court seeking declaratory relief relating to the disputed powers. It also sought the review of two decisions made by the Tribunal. These decisions were made pursuant to applications for development of land that fell within the City's area of jurisdiction.

[12] In November 2003, Ivory-Palm Properties 20 CC applied to the Tribunal for the establishment of a township consisting of 21 erven on portion 229 of the farm Roodekrans, 183 IQ. The application was made in terms of the Act. It was strongly opposed by the City on the basis that it was in conflict with the City's integrated development plan and its constituent parts, the relevant spatial development framework and the urban development boundary. Notwithstanding the objection, the Tribunal approved the establishment of the township and also amended the town planning scheme.

[13] In May 2004, Mr and Mrs van der Westhuizen applied to the Tribunal, as joint owners of portion 228 of the farm Ruimsig, 265 IQ, for the establishment of a township consisting of 9 erven on their property. The City also opposed that application on grounds identical to those raised in the Roodekrans matter, but the Tribunal once more approved the application.

In the High Court

[14] The City challenged the constitutional validity of section 33 of the Act in terms of which the decisions of the Tribunal were taken.[7] It also sought the review of the Tribunal's decisions in respect of the Roodekrans and Ruimsig developments. In support of the constitutional challenge the City argued that the power to approve the rezoning of land and the establishment of townships does not fall within any of the functional areas listed in Part A of Schedule 4 of the Constitution, but constitutes local government affairs over which municipalities have exclusive authority. In the alternative, the City contended that the powers in question fall within the functional area of "municipal planning" which is a local government competence in terms of section 156(1) of the Constitution, read with Part B of Schedule 4.[8] Accordingly, it submitted that, to the extent that section 33 empowers development tribunals to rezone land and establish townships, the section is inconsistent with the Constitution and is for that reason invalid.

[15] In the review applications, the City challenged the validity of the Tribunal's decisions on the following grounds: the Tribunal lacked authority to determine the applications; it was influenced by material errors of law regarding its powers and functions under the Act; and it ignored relevant considerations placed before it by the City.

[7] The provisions of section 33 are quoted in [39] below.

[8] Section 156(1) and Part B of Schedule 4 are quoted in [45] and [46] below.

[16] Following an analysis of the relevant sections of the Constitution, the High Court held that the Constitution does not bestow exclusive executive powers on municipalities. The High Court construed "municipal planning" to be limited to the conceptualisation of plans without the power to implement them. The Court held that in the context of Schedule 4 to the Constitution, the term should be given its ordinary or literal meaning which is "forward planning". It therefore concluded that the powers to rezone land and to approve the establishment of townships fell outside the functional area of "municipal planning". It held further that those powers formed part of "urban and rural development", a functional area that falls outside of the municipalities' executive authority.

[17] Regarding the claim for review, the High Court rejected the contention that the Tribunal had no authority to determine the two applications. However, the Court found that the Tribunal may have committed an error of law by holding that it was not bound by the City's integrated development plan, but it held that the error, if any, did not invalidate the decisions as it was not a material error. This was because it had not been shown that the Tribunal would have reached a different decision had it considered itself bound by the integrated development plan and associated planning instruments, as these instruments allow for a degree of flexibility. As a result, the Court held that the approval of the

establishment of townships falling outside the City's development boundary was valid. The application was dismissed with no order as to costs. The City appealed to the Supreme Court of Appeal.

In the Supreme Court of Appeal

[18] The Supreme Court of Appeal decided the issue relating to the constitutionality of Chapters V and VI. It characterised the issue before it as essentially the determination of whether "municipal planning" encompasses the approval of rezoning and the establishment of townships. The Supreme Court of Appeal held that powers that fall within the functional area of "municipal planning" are reserved for exercise by municipalities and may not be assigned by an Act of Parliament to another sphere of government. The Court held that in the context of municipal functions, the Constitution uses the word "planning" to refer to the control and regulation of land use. On this interpretation, the Supreme Court of Appeal concluded that municipal planning includes the power to approve applications for the rezoning of land and the establishment of townships. By authorising tribunals to perform these functions, the Court held, the Act is inconsistent with the Constitution. It declared the relevant chapters invalid. As required by the Constitution, the order of the Supreme Court of Appeal was referred to this Court for confirmation. The Supreme Court of Appeal declined to reverse the refusal of

the High Court to grant the individual review applications on the basis that it could not fault the findings and conclusion of the High Court.

The issues in this Court

[19] The main issue is whether Chapters V and VI are indeed unconstitutional by reason of being inconsistent with the constitutional scheme for the allocation of functions between the national, provincial and local spheres of government. If they are, the second issue relates to the appropriate remedy. The determination of the first issue turns on the proper interpretation of the impugned chapters, section 156 of the Constitution and the functional areas of "regional planning and development", "provincial planning", "municipal planning" and "urban and rural development". But before considering these issues there are preliminary matters to be disposed of.

Condonation

[20] The City, the Mpumalanga Department and eThekwini Municipality missed deadlines for the lodging of written argument by a few days. They have submitted substantive applications in terms of which they seek condonation for the delays. A reasonable and satisfactory explanation has been furnished in each case. The delays have neither prejudiced the other parties nor have they inconvenienced the Court. Therefore condonation should be granted.

Applications for leave to intervene

[21] As mentioned earlier, the provincial departments responsible for the administration of the Act in KwaZulu-Natal and Mpumalanga, together with eThekwini Municipality, seek leave to join the proceedings. Apart from showing that they have a direct and substantial interest in the confirmation of the invalidity order, they have to satisfy the Court that their intervention is in the interests of justice. An important factor in determining whether it is in the interests of justice to grant leave to intervene is whether the information and submissions a party seeks to advance are helpful to the determination of the issues.[9]

[22] eThekwini Municipality falls in the same category of municipalities as the City. It contends that the development tribunal in KwaZulu-Natal approves applications which are in conflict with its planning instruments despite its objections. It argues that by approving applications relating to land that falls within its area of jurisdiction, the KwaZulu-Natal tribunal impermissibly encroaches on its constitutionally-mandated functions. Therefore, it supports the confirmation of the order of invalidity and makes common cause with the City.

[9] *Gory v Kolver NO and Others (Starke and Others Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at paras 11-3.

[23] The provincial departments oppose confirmation, hence making common cause with the respondents. The MEC, KwaZulu-Natal argues that the tribunals, acting in terms of the Act, provide an effective and efficient process for determining applications for development. The MEC, KwaZulu-Natal alleges that, in KwaZulu-Natal alone, the tribunal has approved applications for developments exceeding R18 billion in value. The MEC further states that applications made to municipalities are often delayed for long periods and that this stifles development. Although the municipalities dispute the allegations relating to delays, it is not necessary for present purposes to establish whether they are correct or not. Suffice it to say they constitute a small part of a large body of averments the provincial departments placed before this Court.

[24] In the case of Mpumalanga, unique facts were presented pertaining to the determination of applications for development. We were informed that the Act is the only land use legislation that applies uniformly throughout the province. This situation is occasioned by the fact that the operation of the Ordinance[10] is limited to areas that constituted the old Transvaal Province. It does not apply to former self-governing territories and "independent" homelands. As a result, some municipalities consist of a patchwork quilt of former homeland areas and former Transvaal territories which would make it impossible to manage land

[10] Each of the four provinces that existed before 1994 had an ordinance which regulated land use planning. These are the Transvaal Province's Ordinance (above n 6); the Cape Province's Land Use Planning Ordinance 15 of 1985; the Orange Free State's Townships Ordinance 9 of 1969; and the Natal Province's Town Planning Ordinance 27 of 1949.

use without the benefit of the Act. Therefore, the provincial department argued that declaring the impugned chapters invalid will create a gap in the areas where the Ordinance does not apply. It also argued that even where the Ordinance applies throughout a municipality, many municipalities lack capacity to determine applications for rezoning and the establishment of townships. All these are new facts and arguments which were not placed before the courts below.

[25] All applications for joinder were made as soon as each applicant became aware of the confirmation proceedings. None of them was opposed, nor has it been shown that the other parties would be prejudiced by their joinder. The facts and submissions they seek to advance are in my view helpful. Accordingly, I am satisfied that it is in the interests of justice to grant joinder in all applications.

Which Constitution applies?

[26] The amici argued that the 1996 Constitution cannot be invoked as a benchmark against which the constitutionality of the impugned chapters is tested. They submitted that the constitutional validity of the Act must be tested against the interim Constitution[11] which was in force at the time the Act came into operation on 22 December 1995. This is so, it was argued, because the

[11] Act 200 of 1993.

City does not allege inconsistency with the Bill of Rights but contends that the impugned chapters infringe the sections which allocated powers to the three spheres of government. For the proposition that the interim Constitution applies, reliance was placed on *Ynuico Ltd v Minister of Trade and Industry and Others*.[12] They submitted further that under the interim Constitution the impugned chapters were valid and their constitutionality is preserved by item 2 of Schedule 6 of the 1996 Constitution.

[27] The reliance on *Ynuico* is, in my view, without merit. The authority cited does not support the proposition advanced. In *Ynuico* the single submission which was addressed by this Court was this: whether a pre-constitutional statute that assigned plenary legislative powers to a member of the executive was in violation of section 37 of the interim Constitution.[13] Section 2(1)(b) of the Import and Export Control Act 45 of 1963 empowered a Minister to issue a notice that prohibited the importation into South Africa of certain goods without a permit. On 23 December 1988, the Minister issued a prohibitory notice. Having failed to secure a permit, the applicant in that case challenged the constitutionality of the section. It contended that the old Parliament, when it enacted the Act in question (in 1963), violated section 37 of the interim Constitution, even though that Constitution came into force on 27 April 1994.

[12] [1996] ZACC 12; 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC).

[13] Section 37 of the interim Constitution provided:

> "The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution."

It argued that section 37 entrusted Parliament, and Parliament alone, with plenary legislative power which could not be surrendered to a Minister. In rejecting the constitutional challenge, this Court held that, based on the wording of section 37, the section did not apply to pre-constitutional legislation as the reference to Parliament under section 37 meant Parliament as constituted in terms of the interim Constitution and not the old order Parliament.[14] This narrow finding does not support the amici's broad contention that the validity of the Act in this case cannot be challenged under the 1996 Constitution.

[28] The submission that item 2 of Schedule 6[15] of the 1996 Constitution preserved the validity of all laws which were valid under the interim Constitution is also not accurate. It is true that the item retained the laws which were in force before the 1996 Constitution came into operation. But the item explicitly decrees that the validity of these laws is subject to them being

[14] See *Ynuico*, above n 12 at para 6, where Didcott J said:

> "The section, as I construe it, deals with the location and source of legislative power solely from the time when the Constitution began to operate, leaving untouched the state of affairs that prevailed previously. That it cannot rightly be interpreted otherwise is clear, I am satisfied, from both its text and its context. Its predominant verbs speak in the future tense and accordingly with reference to the future. It talks about Parliament, which the section immediately preceding it identifies as the Parliament consisting of 'the National Assembly and the Senate', a description that does not cover our old and defunct Legislature but fits only the reconstructed one. The setting in which all those features are seen is chap 4, a cluster of sections that refer unmistakably to the new Parliament alone when they fix its duration and regulate elections to its membership. And the power to legislate 'in accordance with this Constitution' which the section grants can hardly be attributed to an earlier Parliament that was about to die when the Constitution took effect."

[15] Item 2 of Schedule 6 provides:

> "(1) All law that was in force when the new Constitution took effect, continues in force, subject to—
>
> (a) any amendment or repeal; and
>
> (b) consistency with the new Constitution."

consistent with the Constitution. This then means that if the impugned chapters are inconsistent with the 1996 Constitution, they became invalid when it came into force. They may have been invalid also under the interim Constitution. Whether that is so is unnecessary to decide, since they were not challenged then. They are challenged now, and it is under the present Constitution that their validity must be determined.

[29] It is now convenient to set out the background to legislation regulating land use management.

Background to land use management legislation

[30] Prior to 1994, land use in South Africa was primarily governed by four provincial ordinances.[16] These pieces of old order legislation remain in force. As has been mentioned, the City exercises its powers to rezone land and to approve the establishment of townships in terms of the Ordinance. The Ordinance authorises the relevant provincial authority (referred to in the Ordinance as the "Administrator")[17] to administer the Ordinance and, in terms

[16] See above n 10.

[17] Section 1 of the Ordinance provides that the "Administrator" is the competent provincial authority to whom the administration of the Ordinance was assigned in terms of section 235(8) of the interim Constitution. In terms of section 235(8), the President published a proclamation in the *Government Gazette* (GG 16049, GN R161, 31 October 1994) assigning the administration of the Ordinance to competent provincial authorities in the provinces that incorporated territories that formed part of the old Transvaal Province.

of section 2, to declare municipalities to be "authorised local authorities" with the mandate to exercise powers contained in Chapters II, III and IV.[18]

[31] The Ordinance provides for the creation of town-planning schemes by municipalities. These schemes set out the manner in which land within the municipal area will be used ("zoning"). Authorised local authorities are empowered to consider and approve applications to amend these schemes (commonly referred to as "rezoning applications") and are also empowered to approve the establishment of townships,[19] all subject to appeals to the provincial authority. Where a local authority has not been authorised, the final decision on the approval of rezoning applications or township developments rests with the provincial authority. A similar scheme applied under the KwaZulu-Natal Town Planning Ordinance, in terms of which eThekwini Municipality exercised the contested powers. As from 1 May 2010, eThekwini Municipality now exercises these powers under the KwaZulu-Natal Planning and Development Act.[20]

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[18] Section 2 provides, in relevant part:

> "(1) The Administrator may, by proclamation in the *Provincial Gazette*, declare any local authority an authorised local authority for purposes of Chapter II, III, or IV.
>
> (2) The Administrator may, at any time, amend or cancel a proclamation contemplated in subsection (1) by like proclamation without assigning any reason therefor."

[19] A "township" is defined in section 1 of the Ordinance as "any land laid out or divided into or developed as sites for residential, business or industrial purposes".

[20] 6 of 2008. In terms of a notice published by the MEC, KwaZulu-Natal in the *Provincial Gazette* (*Provincial Gazette of KwaZulu-Natal* 424 GN 54, 22 April 2010), this Act commenced on 1 May 2010, thus repealing the bulk of the KwaZulu-Natal Ordinance. Only Chapter I of this Ordinance remains in operation. In terms of the notice, this Chapter will be repealed on 7 November 2010.

[32] As has been alluded to above, the difficulty with these ordinances is that they apply only in those territories that formed part of the old Cape, Natal, Orange Free State and Transvaal Provinces.[21] They have no application to the former "independent" homelands[22] and self-governing territories,[23] which were governed by a parallel system of planning legislation.[24] Furthermore, the creation of the nine provinces has meant that there has been further fragmentation as each province may be subject to a multiplicity of territorially-based legislative regimes.

[33] This situation cries out for legislative reform. The Act was intended to provide a temporary stop-gap, pending the enactment of comprehensive land use legislation that would rationalise the existing laws.[25] The Land Use Management Bill[26] is intended to play this role. However, its enactment has been frequently stalled. We have been informed that it has been withdrawn for reconsideration.

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[21] Item 2(2)(a) of Schedule 6 to the Constitution provides that old order legislation "does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application".

[22] Transkei, Bophuthatswana, Venda and Ciskei.

[23] Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa.

[24] See *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at paras 41-7.

[25] See Budlender et al *Juta's New Land Law* (Juta & Co Ltd, Kenwyn 1998) at 2A-9 to 2A-10.

[26] A first draft of the Bill was published in *Government Gazette* 22473 GN 1658, 20 July 2001. An explanatory summary of a revised version of the Bill was published in *Government Gazette* 30979 GN 472, 15 April 2008.

[34] With this background in mind, it is now possible to consider the relevant provisions of the Act.

The Development Facilitation Act

[35] As mentioned earlier, the Act was passed before the 1996 Constitution came into force. It was designed to apply throughout the country to speed up land development. Its primary objects are, as the long title proclaims: to facilitate and expedite the implementation of the reconstruction and development programmes and projects by introducing extraordinary measures; to lay down general principles regulating all land developments, irrespective of whether the development is undertaken in terms of the Act or some other law;[27] and to establish, in all provinces, development tribunals with powers to determine land development applications.

[36] In Chapter III, the Act establishes, for each province, a development tribunal consisting of members appointed by the Premier subject to approval by the provincial legislature.[28] The Act requires that tribunals should have, as some of their members, representatives of local government.[29] However, during the hearing we were informed that in the Western Cape Province

[27] See section 2 of the Act.

[28] Section 15(2) of the Act.

[29] Section 15(4)(a) of the Act.

members of the tribunal have not been appointed and, as a result, the municipalities exercise the contested powers in terms of the relevant ordinance.

[37] The powers and functions of the development tribunals are set out in section 16 which provides:

"A tribunal—

(a) shall deal with any matter brought before it in terms of section 30(1), 33, 34, 40, 42, 51, 48(1), 57 or 61 or any matter arising therefrom;

(b) in dealing with any matter referred to in paragraph (a), (c) or (d) may—

(i) grant urgent interim relief pending the making of a final order by the tribunal;

(ii) give final decisions or grant or decline final orders;

(iii) refer any matter to mediation as contemplated in section 22;

(iv) conduct any necessary investigation;

(v) give directions relevant to its functions to any person in the service of a provincial administration or a local government body;

(vi) grant or decline approval, or impose conditions to its approval, of any application made to it in terms of this Act;

(vii) determine any time period within which any act in relation to land development is to be performed by a person;

(viii) decide any question concerning its own jurisdiction;

(c) shall deal with any other matter with which it is required to deal in terms of this Act;

(d) may generally deal with all matters necessary or incidental to the performance of its functions in terms of or under this Act."

[38] Chapter V consists of sections 30 to 47. It defines the process that must be followed in submitting applications to a development tribunal and outlines some of the powers and functions of the tribunals referred to in section 16. Section 30 empowers tribunals to grant exemptions from the provisions of this chapter on terms and conditions deemed necessary by them. Section 31 identifies the parties who may apply for land development and sets out the procedure to be followed in submitting an application to a designated officer. The applicant is required to give notice of its application to prescribed parties[30]

[30] Regulation 21(6) of the Regulations and Rules in Terms of the Development Facilitation Act, 1995 (GG 20775 GN R1, 7 January 2000) provides that "prescribed parties" include:

> "(a) any owner or lessee of land in or adjoining the proposed land development area whose interests may in the opinion of the designated officer be adversely affected by the land development application;
>
> (b) every holder of limited real rights or mineral rights in respect of the land forming the subject of the application;
>
> (c) every relevant local government body;
>
> (d) every other interested party as directed by the designated officer which, without detracting from the generality of the aforegoing, may include any or all of the following:
>
> (i) Any national government department which in the opinion of the designated officer may be affected by the application and in particular any national government department which is responsible for the administration of any law the operation of which the land development applicant will request the tribunal to suspend under section 33(2)(j) or 51(2)(d), of the Act, as the case may be;
>
> (ii) any provincial road department, environmental affairs department, education department, agriculture department, health department, regional land claims commissioner, or any other department or division of the relevant provincial administration which, in the opinion of the designated officer, may have an interest in the application and in particular any provincial government department which is responsible for the administration of any law the operation of which the land development applicant will request the tribunal to suspend under section 33(2)(j) or 51(2)(d), of the Act as the case may be;
>
> (iii) any authority or other body which will provide engineering services contemplated in Chapter V of the Act to the proposed land development area; and
>
> (iv) residents of the proposed land development area, communities or persons who may have an interest in the land or identifiable persons likely to settle on the land."

who are permitted to make comments on or lodge objections against the application. Then the applicant is afforded the opportunity to reply. Once all representations are submitted, the designated officer compiles a report which he or she submits, together with the documents received from the parties, to the tribunal.[31] The key section is section 33 which regulates the determination of land development applications by tribunals and also entrusts them with wide ranging powers. This includes the power to override municipal instruments governing land administration and the power to exclude the operation of laws – including Acts of Parliament – in relation to land forming the subject-matter of a land development application.

[39] Section 33 provides:

"(1) After receipt of the documents referred to in section 32 and on the date referred to in section 31(4)(b), a tribunal shall consider and may approve or refuse the land development application in whole or in part or postpone its decision thereon and may in approving the land development application impose one or more of the conditions contemplated in subsection (2).

(2) In approving a land development application a tribunal may, either of it its own accord or in response to that application, impose any condition of establishment relating to—

(a) the provision of engineering services;

(b) the provision or transfer of land to any competent authority for use as a public open space, or the payment of a sum of money in lieu thereof;

(c) the provision of streets, parks and other open spaces;

[31] Section 32 of the Act.

(d) the suspension of restrictive conditions or servitudes affecting the land on which a land development area is to be established;

(e) the registration of additional servitudes affecting the land on which a land development area is to be established;

(f) the question whether any building standards laid down in regulations made under the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977), or in any zoning scheme, regulation or bylaw of a local authority under any law, are to apply in respect of the erection of buildings or any class of buildings on a land development area;

(g) the question whether it is nevertheless necessary for building plans to be submitted to and approved by the competent authority prior to the erection of buildings in the case where a condition is imposed to the effect that the building standards contemplated in paragraph (f) will not apply in respect of a land development area;

(h) the question whether the use of land in a land development area is to be regulated by—

(i) a zoning scheme or other measure under any law governing land development or land-use planning in the area concerned;

(ii) general provisions relating to land use which have been prescribed; or

(iii) specific provisions relating to special or strategic projects which have been prescribed;

(i) any amendment to a zoning scheme, other measure or provision referred to in paragraph (h), for the purpose of applying it to a land development area;

(j) the question whether the provisions of—

(i) sections 9A and 11 of the Advertising on Roads and Ribbon Development Act, 1940 (Act No. 21 of 1940);

(ii) any law on physical planning;

(iii) section 12 of the National Roads Act, 1971 (Act No. 54 of 1971);

(iv) any law requiring the approval of an authority for the subdivision of land;

(v) any law requiring the issuing of a receipt, certificate or any other document by a local government body, public revenue officer or other competent authority, as a prerequisite to the transfer of land in a land development area; or

(vi) any other law relating to land development, but not the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), which in the opinion of the tribunal may have a dilatory effect on the development of a land development area or the settlement of persons therein,

shall apply in respect of a land development area in question: Provided that a decision to suspend the application of a law shall be taken after the tribunal has afforded the authority, if any, which is responsible for the administration of the law, and any other interested person or body an opportunity to provide the tribunal with its views on the expedience of such a decision in the circumstances;

(k) the provision of educational and other community facilities;

(l) the question whether the land in the land development area is to be subdivided in terms of this Chapter and if not, whether any other provisions of this Chapter will apply;

(m) the ownership of the land forming the subject of a land development application and the administration of the settlement of persons on such land by any person, trust, body of persons or juristic person with due regard to the wishes of the community concerned and subject to the provisions of any law;

(n) the environment or environmental evaluations;

(o) the manner in which members of any community residing in a settlement shall be consulted during the process of land development whenever land development takes the form of the upgrading of an existing settlement;

(p) the manner in which the interests of any beneficial occupier of the land development area are to be accommodated whenever land development takes the form of the upgrading of an existing settlement; and

(q) any other matter considered necessary by the tribunal.

(3) A condition of establishment imposed under—

(a) subsection (2)(d), has the effect that the restrictive condition or servitude concerned is suspended, subject to section 34;

(b) subsection (2)(f) or (g)—

(i) has effect despite any provision to the contrary contained in the National Building Regulations and Building Standards Act, 1977, or any law authorising a local government body to make building regulations or bylaws;

(ii) does not prevent any owner or prospective owner of land in a land development area from submitting building plans to the competent authority for its approval prior to the erection of the building concerned or complying with any national building regulation, zoning scheme, regulation or bylaw contemplated in that subsection;

(c) subsection (2)(h) or (i) has effect despite any provision to the contrary in any other law governing land development or land-use planning or zoning schemes;

(d) subsection 2(j) relating to the suspension of the application of any law referred to in that subsection, has the effect of suspending the application of such a law.

(4) A condition of establishment referred to in subsection (3) comes into operation upon notice of the condition being given by the designated officer in the *Provincial Gazette*, or if a later date is stated in the notice, from such later date.

(5) A condition imposed under subsection (2) according to which a land development applicant shall perform any act, shall state by which stage in the course of the establishment of the land development area such act shall be performed.

(6) The designated officer shall inform the registrar of the approval of a land development application."

[40] The reach of this section is so wide that it covers almost all land in the country. It applies to all land development applications irrespective of where the land is located and regardless of whether some other law governs development on it. The term "land development application" is defined as an application lodged in terms of section 31(2) or section 49(2) and must be construed with reference to "land development" which is defined in the widest terms to mean—

"any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes, including such a procedure in terms of Chapter V, VI or VII, but excluding such a procedure in terms of any other law relating exclusively to prospecting or mining".[32]

[41] The provisions of Chapter VI are couched in terms identical to those of Chapter V analysed above. Chapter VI consists of sections 48 to 60 and governs applications for development relating to small-scale farming. Section

[32] Section 1 of the Act.

51 of Chapter VI is the equivalent of section 33 of Chapter V. As mentioned earlier, the scope of the two chapters is so wide that they cover all land developments excluding only developments that relate to prospecting and mining. There can be no doubt, therefore, that these chapters authorise development tribunals to determine applications for rezoning and the establishment of townships.

[42] The question that needs consideration is whether, by conferring the powers concerned on development tribunals, these chapters are consistent with the provisions of the Constitution regulating the allocation of powers and functions to municipalities. I proceed to consider and interpret the relevant provisions of the Constitution.

The constitutional scheme

[43] Section 40 of the Constitution defines the model of government contemplated in the Constitution.[33] In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to

[33] Section 40 provides:

> "(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
>
> (2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides."

exercise its powers and perform its functions within the parameters of its defined space.[34] Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and "not assume any power or function except those conferred on [it] in terms of the Constitution".[35]

[44] The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.

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[34] In the context of local government, this Court has stressed that the local government sphere is given autonomy within its sphere, subject to the requirements of co-operative governance, and the limits imposed by the Constitution, or national and provincial legislation. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 373-4; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 126; and *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC); 2005 (3) BCLR 199 (CC) at paras 59-60.

[35] Section 41(1) provides, in relevant part:

> "All spheres of government and all organs of state within each sphere must—
>
> . . . .
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> (f) not assume any power or function except those conferred on them in terms of the Constitution".

[45] The starting point in assessing the powers of the local government sphere is section 156(1) which affords municipalities original constitutional powers. It reads:

> "(1) A municipality has executive authority in respect of, and has the right to administer—
>
> (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
>
> (b) any other matter assigned to it by national or provincial legislation."

[46] Part B of Schedule 4 includes the following functional areas:

> "The following local government matters to the extent set out in section 155(6)(a) and (7):
>
> Air pollution
> Building regulations
> Child care facilities
> Electricity and gas reticulation
> Firefighting services
> Local tourism
> Municipal airports
> Municipal planning
> Municipal health services
> Municipal public transport. . .".

The functional areas listed in Part B of Schedule 5 are not material to the present enquiry. Part B of Schedule 4 and Part B of Schedule 5 itemise the functional areas assigned to

municipalities, and these functions may be regulated by the national and provincial spheres of government to the extent defined in section 155(6)(a) and (7).

[47] Section 155(6)(a) obliges each provincial government to establish municipalities within its province and once established, to provide for their monitoring and support. Furthermore, section 155(7) imposes an obligation on national and provincial governments to "see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)." The effect of these provisions is that, except to the extent set out above, the executive authority over, or the power to administer, matters listed in Part B of Schedules 4 and 5 is vested in municipalities.

[48] The functional area material to the determination of whether Chapters V and VI of the Act are inconsistent with the Constitution is "municipal planning". It is necessary to construe this term so as to determine whether it includes the power to authorise land rezoning and the establishment of townships. For if it does, the contested powers fall within the executive authority of municipalities.

Meaning of "municipal planning"

[49] In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*[36] this Court reiterated that the Constitution must be interpreted purposively. In the context of the Schedule 4 and 5 functional areas, this Court has held that the purposive interpretation must be conducted in a manner that will allow the spheres of government to exercise their powers "fully and effectively."[37]

[50] The purpose of these schedules is to itemise the powers and functions allocated to each sphere of government. As stated earlier, our Constitution contemplates some degree of autonomy for each sphere.[38] This autonomy cannot be achieved if the functional areas itemised in the schedules are construed in a manner that fails to give effect to the constitutional vision of distinct spheres of government.

[51] The respondents argued that "municipal planning" means the "forward planning" of all the powers and functions allocated to municipalities by section 156 of the Constitution. Invoking the rule of interpretation that where a word appears more than once in a statute it must be construed consistently, they argued that the meaning ascribed to the term "planning" by the Supreme Court of Appeal was incorrect because the same meaning cannot be given to

[36] [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 51.

[37] *DVB Behuising* above n 24 at para 17.

[38] See [43] above.

"planning" in the functional areas of "regional planning and development" and "provincial planning".

[52] It is true that the legislature is presumed to use language consistently but this is a presumption which can be rebutted by the clear intention of the legislature as evinced by the context in which a particular word appears in different parts of a statute. Different contexts in which a word is used may warrant different meanings to be ascribed to it. In *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*[39] Moseneke DCJ affirmed the application of the presumption in the following terms:

> "[P]recepts of statutory interpretation suggest that the word 'function' should have the same meaning wherever it occurs in the statute, since there is 'a reasonable supposition, if not a presumption' that 'the same words in the same statute bear the same meaning' throughout the statute." (Footnote omitted.)

However, in this case we are concerned with the interpretation of the Constitution and not a statute. But, likewise, if a word is used more than once in the Constitution, it is presumed to carry the same meaning unless there is a clear indication to the contrary.

[39] [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 70. See also *More v Minister of Co-operation and Development and Another* 1986 (1) 102 (A) at 115B-D and *Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) SA 395 (A) at 404D-E.

[53] The constitutional scheme referred to earlier, together with the different contexts in which the term "planning" is used, indicate clearly, in my view, that the term has different meanings. The Constitution confers different planning responsibilities on each of the three spheres of government in accordance with what is appropriate to each sphere. In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*[40] this Court said:

> "The Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedules 4 and 5 are referred to as being in respect of 'functional areas'. The ambit of the provinces' exclusive powers must, in my view, be determined in the light of that vision."

[54] The Constitution confers "planning" on all spheres of government by allocating "regional planning and development" concurrently to the national and provincial spheres, "provincial planning" exclusively to the provincial sphere, and executive authority over, and the right to administer "municipal planning" to the local sphere. The first functional area mentioned also indicates the close link between planning and development. Indeed it is difficult to conceive of any development that can take place without planning.

[55] It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that

[40] [1999] ZACC 15; 2000 (1) SA 732 (CC) at para 51; 2000 (1) BCLR 1 (CC) at para 52.

notwithstanding, they remain distinct from one another. This is the position even in respect of functional areas that share the same wording like roads, planning, sport and others. The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to "provincial roads" whereas municipalities have authority over "municipal roads". The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of "provincial roads" does not include "municipal roads". In the same vein, "provincial planning" and "regional planning and development" do not include "municipal planning".

[56] The constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise. Of course, the constitutionally mandated interventions in terms of sections 100 (national interventions in the provincial sphere) and 139 (provincial interventions in the municipal sphere) constitute an exception to the principle of relative and limited autonomy of the spheres of government.

[57] Returning to the meaning of "municipal planning", the term is not defined in the Constitution. But "planning" in the context of municipal affairs is a term

which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use "planning" in the municipal context, they were aware of its common meaning. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs "planning" in its commonly understood sense. As a result I find that the contested powers form part of "municipal planning".

Does the Constitution allocate the same powers to the provincial sphere?

[58] The question that arises is whether the same powers are also part of "urban and rural development" under Part A of Schedule 4, as contended for by the respondents. To construe any of the functional areas allocated to provinces as encompassing the contested powers will not only be inconsistent with the constitutional scheme as revealed in the schedules, but also with sections 41,[41]

[41] Section 41, titled "Principles of co-operative government and intergovernmental relations", provides in relevant part:

> "(1) All spheres of government and all organs of state within each sphere must—
>
> . . . .
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> (f) not assume any power or function except those conferred on them in terms of the Constitution;

151[42] and 155[43] of the Constitution. Section 41(1)(e)-(g) establishes the principles of co-operative government and intergovernmental relations. As mentioned above, it specifically requires the spheres of government to respect the functions of other spheres, not to assume any functions or powers not conferred on them by the Constitution and not to encroach upon the functional integrity of other spheres. This is amplified by section 151(4) which precludes the other spheres from impeding or compromising a municipality's ability or right to exercise its powers or perform its functions.

[59] The legislative authority in respect of matters listed in Part B of Schedule 4 vests in the national and provincial spheres concurrently, while the legislative authority over matters listed in Part B of Schedule 5 vests in the provincial sphere exclusively. But the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities.

[60] The respondents argued that provincial development tribunals cannot be taken to be impeding or compromising municipalities when they exercise the contested powers simply because they would be exercising powers falling within the functional area of "urban and rural development". This functional

area is conferred on both the national and provincial spheres. It was then submitted that there can be no breach of section 151(4) when the provinces exercise powers rightly allocated to them by the Constitution. This submission is based on the assumption that the term "urban and rural development" ought to be given its ordinary, wide meaning.

[61] I have already defined the context in which all functional areas must be construed. The wide import of "urban and rural development" stands at odds with the approach outlined above. It is the duty of this Court, and indeed the other courts as well, to construe the sections of the Constitution in a manner that strikes harmony between them and gives effect to each and every section.

In *United Democratic Movement v President of the Republic of South Africa*

and Others (No 2),[44] this Court stated:

"A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give effect to all of them."

[62] The purposive construction of the schedules requires, in the present context, that a restrictive meaning be ascribed to "development" so as to enable each sphere to exercise its powers without interference by the other spheres. This restrictive approach coheres with the functional scheme of the schedules which vests specific powers in municipalities.

[63] For present purposes it is not necessary, in my view, to define exactly the scope of the functional area of "urban and rural development". It is sufficient to say simply that it is not broad enough to include powers forming part of "municipal planning". It follows that the expansive interpretation contended for by the respondents must be rejected.

[64] The amici argued that since the national and provincial spheres have legislative power to regulate the exercise by municipalities of their executive powers, the provinces have executive powers in relation to municipal matters.

For this proposition reliance was placed on the *First Certification*[45] judgment where this Court said:

> "To the extent that provincial legislative powers may have been diminished or at least circumscribed in the manner described above, it follows that there would be a concomitant diminution or circumscription of provincial executive powers in relation to [local government]. In terms of [section] 144(2) [of the interim Constitution], a province has executive authority over all matters in respect of which such province has exercised its legislative competence. Thus, to the extent that provinces currently enjoy broad and undefined legislative powers under . . . chap 10 [of the interim Constitution], they are vested with broad and undefined executive powers. In the [1996 Constitution], the legislative and executive frameworks also coincide. [Sections] 154(1) and 155 [of the 1996 Constitution] indicate that where national or provincial legislative powers can be exercised in relation to [local government], executive powers follow. Thus, to the extent that provincial legislative powers have been diminished or increased in respect of [local government], there would be a corresponding diminution or increase in respect of executive powers."

[65] The dictum quoted above does not support the proposition contended for, and the meaning sought to be ascribed to the passage is incorrect. The principle that can be distilled from the dictum is that where there is a diminution of provincial legislative powers in relation to local government, there would be a corresponding diminution of executive powers too. This does

not mean that the provinces have the power to exercise the executive powers of

municipalities outside the purview of section 139 of the Constitution.[46]

[66] Section 139 empowers the provinces to intervene where a municipality cannot or does not fulfil an executive obligation in terms of the Constitution. If it intervenes, the provincial government may take appropriate steps to ensure that the obligation in question is fulfilled. The steps taken may include the provincial government itself assuming the responsibility for the obligation or even dissolving a municipal council and replacing it with an administrator. The intervention is, however, subject to various conditions tabulated in the section.

[67] It was also argued that the other spheres of government have concurrent authority to exercise powers similar to those of municipalities. The amici

submitted that in *Wary Holdings*[47] this Court recognised concurrency of powers between the national and local governments. In that case Kroon AJ, writing for the majority, said:

> "I am not persuaded, however, that the enhanced status of municipalities and the fact that they have such powers is a ground for ascribing to the legislature the intention that national control over 'agricultural land' through the Agricultural Land Act, effectively be a thing of the past. There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of 'agricultural land', the one may in effect veto the decision of the other." (Footnote omitted.)

[68] *Wary Holdings* is distinguishable from the present case. There the Court was not directly confronted with the question of interpreting the Constitution and its schedules. The Court was concerned with the interpretation of an Act of Parliament which empowered the Minister for Agriculture to exercise certain powers relating to agricultural land. The statement quoted above must be read in that context. The Court did not pronounce on whether the Constitution permits the concurrent exercise of powers between the national and local spheres of government. I therefore do not read *Wary Holdings* as suggesting that the national sphere has executive powers in the municipal sphere that extend beyond its constitutionally prescribed roles of regulating the exercise of

municipal powers by municipalities themselves[48] and strengthening their

capacity to manage their own affairs.[49]

[69] It was further submitted that Chapters V and VI of the Act were not concerned with planning but that they have permissibly established institutions with adjudicatory powers to determine land development applications. I have pointed out already that in granting applications for rezoning or the establishment of townships the development tribunals encroach on the functional area of "municipal planning". The form that such encroachment takes matters not.

[70] It follows, therefore, that the impugned chapters are inconsistent with section 156 of the Constitution read with Part B of Schedule 4.

Remedy

[71] The finding that the impugned chapters are inconsistent with the Constitution leads inevitably to the confirmation of the order of invalidity granted by the Supreme Court of Appeal. The question that arises in this regard is whether the remaining part of that order is just and equitable in all the

circumstances of the present case.[50] The starting point in an enquiry of this nature is section 172(1) of the Constitution. It provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[72] The section confers a wide discretion on a court making a declaration of invalidity to formulate an order which is just and equitable not only to the

litigants before it but also to those affected by the order.[51] Orders issued in constitutional litigation may also affect parties who were not involved in the particular litigation. The section also empowers a court, in express terms, to decide whether the retrospective effect of the declaration of invalidity should be limited and, if so, to what extent. Ordinarily the declaration of invalidity has retrospective effect to the date on which the Constitution came into force, in respect of pre-Constitution legislation, or the date on which the impugned provision came into operation, in relation to post-Constitution legislation.

[73] In circumstances where serious disruptions or dislocations in state administration would ensue if the order of invalidity takes immediate effect, section 172 explicitly authorises a court to suspend the order for a period

determined by that court.[52] The effect of the suspension is that the invalid law continues to operate with full force and effect.

[74] In addition, the section authorises a court to impose any conditions it deems necessary to regulate the temporary arrangement of allowing the invalid law to continue to apply while the competent authority corrects the defects. It was against this background that the Supreme Court of Appeal issued the following order:

> "2 This declaration of invalidity is suspended for 18 months from the date of this order subject to the following:
>
> (a) No development tribunal established under the Act may accept for consideration or consider any application for the grant or alteration of land use rights in a municipal area.
>
> (b) No development tribunal established under the Act may on its own initiative amend any measure that regulates or controls land use within a municipal area."

[75] In the Supreme Court of Appeal the respondents urged the Court to suspend the declaration of invalidity. They motivated their request by stating that an order that became effective immediately would seriously undermine the "legitimate objectives of reconstruction and development" in this country. They also said that many municipalities in the Gauteng Province rely on the Tribunal and the Act to determine applications for rezoning and the establishment of townships because these municipalities do not have the

capacity to follow procedures set out in the Ordinance. An order with immediate effect would, they contended, create a vacuum and bring development to a complete halt in some municipalities.

[76] In the light of the additional information placed before this Court by the amici and the provincial departments in KwaZulu-Natal and Mpumalanga, the order quoted above must be reconsidered and if necessary must be replaced with an order that takes into account all the circumstances of the case. I must point out that this additional information was not placed before the Supreme Court of Appeal when it considered the matter.

[77] In this Court, the amici and the provincial departments gave evidence to the following effect. The provincial ordinances which regulate land zoning and the establishment of townships have a limited application confined to areas which formed part of the old Transvaal, Natal, Orange Free State and Cape Provinces. These areas excluded the so-called "independent" states of Transkei, Bophuthatswana, Venda and Ciskei. They also excluded the self-governing homelands which were located in Natal, the Transvaal and the Orange Free State. When the provinces were reconfigured under the interim Constitution, the so-called "independent" states and self-governing homelands became part of the new provinces.

[78] In terms of the transitional provisions of section 229 of the interim Constitution, these areas were reincorporated together with their different laws regulating land administration. The consequence of this is that where a municipality's geographical area consists of areas that fell, for example, under the old Transvaal Province and a former "independent" state or a self-governing homeland, different pieces of legislation may apply in these municipalities. There can be no doubt that this situation is undesirable. It seems that the Act was designed to address this problem, among other matters. The difficulty, however, is that the Act is inconsistent with the Constitution which came into force subsequent to it.

[79] The other evidence placed before us is that, in areas where the ordinances apply, most municipalities lack capacity to exercise these powers. This situation is aggravated by the fact that the Constitution decrees wall-to-wall

municipalities and as a result municipalities are established for the territory of

the entire country.[53]

[80] In view of the matters referred to above, it was argued that if the order of invalidity takes immediate effect land development will come to a complete halt in most areas. This undoubtedly will not be in the interest of the administration of land use and good governance. Most significantly, prospective land developers in the affected areas will be prejudiced. This may also have a negative impact on the economic growth of the country. Both the City and eThekwini Municipality accept that the suspension of the order of invalidity is necessary in this matter. The parties submitted that the invalidity order should be suspended for periods ranging from 18 months to 36 months. I am satisfied that it would be just and equitable to suspend the invalidity order for a period of 24 months as this will be a reasonable time for Parliament to rectify the defects or to enact new legislation.

[81] In the circumstances of the case the determination of a just and equitable order must also involve a consideration of the interests of the City and eThekwini Municipality, on the one hand, and on the other, the interests of land developers in whose benefit the contested powers are exercised. A proper balance between these interests may be achieved by allowing the tribunals to continue exercising those powers during the period of suspension, but their authority must not extend to land falling within the jurisdiction of the City and

eThekwini Municipality. These municipalities have capacity, and are authorised in terms of the relevant legislation, to exercise the contested powers. The interests of land developers will not be unduly prejudiced by an order prohibiting tribunals from exercising the powers in question within the two municipalities' jurisdictions. It is indeed just and equitable to protect the municipalities' right to perform their functions and exercise their powers without interference from the tribunals. While I am mindful that there may be other municipalities in a similar position to the City and eThekwini Municipality, the Court cannot extend the reach of the order to include these municipalities because the facts and circumstances of land use in these municipalities have not been placed before this Court.

[82] While the relevant provincial tribunals are to be barred from considering new development applications in the jurisdiction of the City and eThekwini Municipality, it is necessary for these tribunals to finalise all applications pending before them. This will not only avoid a disruption but will also facilitate a speedy determination of the matters concerned. It must be remembered that the municipalities and the tribunals are part of the government which is under a constitutional obligation to respond promptly to the people's

needs.[54] Disputes between the spheres of government should, as far as possible, not adversely affect government's ability to deliver on these obligations.

[83] In considering all pending applications, the tribunals must uphold the municipalities' integrated development plans. The role played by these plans in the administration of land is important. They provide for, among other things, the alignment of resources utilised to supply basic services to local communities. There can be no doubt that any development undertaken within a municipal area affects the budget of the municipality concerned, particularly in the supply of services.

[84] For a proper exercise of the contested powers the tribunals do not, however, need the authority conferred on them by sections 33(2) and 51(2) of the Act to exclude the operation of certain laws and by-laws in respect of land which is

the subject-matter of an application submitted to a tribunal.[55] These powers entitle tribunals to intrude unnecessarily into the domain of the legislature. It is therefore essential to include, as a further condition of suspension, a prohibition against the exercise of this authority.

[85] Finally, a necessary feature of this suspended declaration of invalidity is that it should not have retrospective effect if the period of suspension expires without the defects in the Act having been corrected. In exercising their powers under the impugned chapters, development tribunals have approved countless land developments across the country. It would not be just and equitable for these decisions to be invalidated if the declaration of invalidity comes into force.

[86] For all these reasons, the order of the Supreme Court of Appeal declaring Chapters V and VI unconstitutional must be confirmed. The confirmation of this order leads unavoidably to the dismissal of the respondents' appeal.

The City's application for leave to appeal

[87] The City seeks leave to appeal against the order of the Supreme Court of Appeal dismissing its appeal in relation to the claim for the review of the Tribunal's decisions. The issue that calls for consideration here is whether it is in the interests of justice to grant leave. As observed by this Court in a number

of cases,[56] the determination of where the interests of justice lie involves a careful balancing of all factors relevant to the application. One of the important factors being the prospects of success on appeal.

[88] The City argued that, if the impugned chapters are declared invalid, the Tribunal lacked authority to approve the applications in respect of both the Roodekrans and Ruimsig properties. The suspension of the invalidity order, coupled with the limitation of its retrospective effect should it come into force, puts this argument to rest. The effect of the suspension is to preserve, albeit

temporarily, the validity of the chapters in question. In *Ferreira v Levin NO*

and Others[57] the effect of a suspension was described thus:

"A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of s 98(5) of the Constitution to postpone the operation of invalidity and, in terms of s 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of s 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity."

[89] The City submitted further that the Supreme Court of Appeal should have upheld the appeal in respect of the claim for review on the ground that the Tribunal committed a material error of law by holding that it was not bound by the City's integrated development plan and its constituent components, the spatial development framework and the urban development boundary.

[90] The High Court correctly held that the Tribunal was bound to consider the City's integrated development plan and its relevant components. This flows

from section 35(1)(a) of the Local Government: Municipal Systems Act[58] which provides that an integrated development plan "guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality". The unqualified terms of this provision entail that the integrated development plan must be considered by any government body carrying out planning or development in a municipality, including the Tribunal. The Tribunal's belief that it was not bound to consider this document was therefore an error of law.

[91] However, a mere error of law is not sufficient for an administrative act to

be set aside. Section 6(2)(d) of the Promotion of Administrative Justice Act[59] 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.[60] This occurs if, on the facts, the decision-maker would have reached the same decision despite the error of law.

[92] In this case, the High Court held that the error had not influenced the impugned decisions because the urban development boundary permitted approval for development, under certain circumstances, beyond the delineated area. The Court held further that, on the facts before it, the City had failed to establish the materiality of the error in that it did not show that the decisions would have been different had the urban development boundary been considered by the Tribunal. The record reveals that the urban development boundary's criteria for development outside the boundary were met in both applications. The Supreme Court of Appeal was satisfied that the review claim was dismissed for sound reasons by the High Court. I am not persuaded that the Supreme Court of Appeal was wrong in its finding.

[93] It follows that the applicant has no prospects of success on the merits of the appeal. This is not the sort of case where, notwithstanding the absence of prospects, there are other considerations weighing in favour of granting leave. The application for leave to appeal against certain ancillary orders relating to the suspension of the invalidity order also bears no prospects of success.

Costs

[94] Wisely so, none of the parties have asked for costs. Excluding the amici curiae, all parties that took part in the hearing of this matter are organs of state. In addition the matter raises constitutional issues of some considerable importance. Therefore, there should be no order as to costs.

Order

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

1. The Member of the Executive Council of KwaZulu-Natal for Local Government and Traditional Affairs, eThekwini Municipality and the Department of Agriculture, Rural Development and Land Administration, Mpumalanga are joined as the first, second and third intervening parties.
2. Condonation for the late filing of written submissions is granted.
3. The application of the City of Johannesburg Metropolitan Municipality for leave to appeal in respect of the review application is dismissed.
4. The appeal by the Gauteng Development Tribunal, Gauteng Development Appeal Tribunal, the Minister of Land Affairs, and the Member of the Executive Council for Development, Planning and Local Government, Gauteng is also dismissed.
5. The order of constitutional invalidity made by the Supreme Court of Appeal in respect of Chapters V and VI of the Development Facilitation Act 67 of 1995 is confirmed.

6. Paragraph 2 of that order relating to the suspension of the order of invalidity is set aside.
7. The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defects or enact new legislation.
8. The suspension is subject to the following conditions:
    (a) Development tribunals must consider the applicable integrated development plans, including spatial development frameworks and urban development boundaries, when determining applications for the grant or alteration of land use rights.
    (b) No development tribunal established under the Act may exclude any by-law or Act of Parliament from applying to land forming the subject-matter of an application submitted to it.
    (c) No development tribunal established under the Act may accept and determine any application for the grant or alteration of land use rights within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality, after the date of this order.
    (d) The relevant development tribunals may determine applications in respect of land falling within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality

only if these applications were submitted to it before the date of this order.

9. There is no order as to costs.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Jafta J.

For the Applicant:

For the Second Intervening Party:

For the First, Second, Sixth and Seventh Respondents:

For the Third Intervening Party:

For the First Intervening Party:

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. . .".

[42] Sections 151(3) and (4) provide:

"(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[43] Section 155(7) provides:

"The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

[44] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 83.

[45] Above n 34 at para 379.

[46] Section 139(1) provides:

"When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to—

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For the Amici Curiae:

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maintain essential national standards or meet

established minimum standards for the rend

Advocate SJ Grobler SC and Advocate LT Sibeko SC instructed by the State Attorney, Johannesburg.

Advocate AJ Dickson SC instructed by PKX Attorneys.

Advocate SJ du Plessis SC and Advocate LB Van Wyk SC instructed by Moodie & Robertson.

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ering of a service;

(ii) prevent that Municipal Council from taking unreasonable action t

Advocate AM Stewart SC and Advocate M du Plessis instructed by Naidoo Maharaj Attorneys.

Advocate IV Maleka SC, Advocate T Hutamo and Advocate S Yacoob instructed by the State Attorney, Pretoria.

Advocate A Liversage, Advocate KS McLean and Advocate AD Stein instructed by Ivan Pauw & Partners.

hat is prejudicial to the interests of another

her municipality or to the province as a wh

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(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step."

[47] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 80.

[48] Section 155(7) of the Constitution.

[49] Section 154(1) of the Constitution provides:

> "The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."

[50] The order is quoted at [74] below.

[51] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 43.

[52] See *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at paras 49-50.

[53] Section 151(1) provides that the "local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic."

[54] Section 195(1)(e) of the Constitution. See also *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 26.

[55] See generally [38], [39] and [41] above.

[56] *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 16; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 31; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; and *Fraser v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

[57] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 28.

[58] 32 of 2000.

[59] 3 of 2000.

[60] See *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93G-H.