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SCRAPPING OF SECTION 44 OF LUPO RELIEVES PROVINCES OF THEIR APPELLATE POWERS

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LEGAL BRIEF
JULY 2014

Parties aggrieved by municipal land use decisions are no longer able to appeal such decisions at provincial level through the mechanism of section 44 of the Land Use Planning Ordinance 15 of 1985 ("LUPO"). The Constitutional Court, in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning (CCT 117/13),* confirmed the order of the Western Cape High Court declaring section 44 unconstitutional and invalid.

INTRODUCTION

Section 44 of LUPO, enacted by the former Cape Province and applicable to the Western Cape, Eastern Cape and the North West, had previously regulated the appeal process for parties objecting to municipal council decisions, affording them a right of recourse to the *"Administrator"* i.e. a relevant provincial authority. The result was that municipal planning decisions could then be replaced with a decision by a provincial authority.

The Constitutional Court emphatically confirmed the autonomy of municipal powers set out in section 156(1)(a) of the Constitution, which endows them with *"executive authority"* and the *"right to administer"* local government matters listed in Part B of Schedule 4 (which includes municipal planning) and Part B of Schedule 5.

The Western Cape High Court decided on the issue of constitutional invalidity in two matters. In the first, the City of Cape Town ("the City") was apparently not expeditious enough in processing the rezoning and subdivision application of Gordonia Mount Properties (Pty) Ltd, which then appealed in terms of section 44(1)(d) of LUPO to the Minister for Local Government, Environmental and Development Planning of the Western Cape ("the minister"). The minister subsequently granted the planning approvals.

THE GERA MATTER

In the second matter, the City refused the Gera Investment Trust special consent to redevelop a historically significant building in that part of the Cape Town city centre that had been designated an urban conservation area. Gera appealed the decision to the minister, who upheld the appeal.

The City thereafter launched proceedings to have section 44 declared unconstitutional in the Western High Court in respect of the Gordonia Properties matter. The Habitat Council, which objected to the redevelopment of the historical site, also launched proceedings in the same court, and sought the same relief. The two matters were consolidated.

The minister agreed that section 44 was indeed unconstitutional. The High Court considered this to be correct as section 44 conflicted with the provisions of section 156(1)(a) of the Constitution, which affords municipalities executive authority over municipal planning matters. Despite this, the High Court still held that the minister had appellate powers over municipal planning decisions which were constitutionally permissible because of the potential for overlap between municipal planning powers and the provincial legislative competencies of "regional planning and development", "urban and rural development" and "provincial planning". These provincial legislative competencies are listed in Part A of Schedule 4 (where the national and provincial spheres have *concurrent* national and provincial legislative competence) and Part A of Schedule 5 (where provinces have exclusive legislative competence).

The High Court furthermore took the view that section 155(7) of the Constitution grants provinces certain powers of oversight over municipalities, providing that national and 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)".*

Thus the High Court held that where there were overlapping powers, then the province should be able to substitute a municipality's decision with its own. Where a province merely had powers of oversight, it could only set the decision aside to enable the municipality to reconsider the application.

"BOGEY WHICH MUST BE SLAIN"

On 13 August 2013, the High Court suspended the declaration of invalidity for 24 months to enable a new regime to be enacted. It also held that the retrospective effect of the order would apply solely to appeals not yet finally determined, but that the provisions of LUPO as read in by the High Court would apply. Thus the High Court kept the province's appellate powers alive to the extent that they were constitutionally permissible.

The Constitutional Court would not however countenance such a reading-in. Referring to the submission of the minister that provinces needed to retain some surveillance over municipal planning decisions, Cameron J in no uncertain terms described this view as a *"bogey which must be slain",* holding that *"provinces have coordinate powers to withhold or grant approvals of their own",* such as the power to issue urban structure plans with which development would need to be consistent.

DEFINING PLANNING RESPONSIBILITIES

The Constitutional Court held that preserving the interim appellate powers of the province was incompatible with the competence the Constitution afforded municipalities over municipal planning. Quoting Mhlantla AJ in *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others [2013] ZACC 39; 2014 (1) SA 521 (CC),* Cameron J emphasised that, barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government, and that while the Constitution does confer planning responsibilities on each sphere of government, these are different planning responsibilities;

and furthermore that 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 and... the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'".*

The Constitutional Court also refused to suspend the declaration of invalidity on the basis that preserving the province's appellate power would be unconstitutional. This despite the minister's contention that provinces have traditionally had large and experienced planning departments - more so than many municipalities - and would be better placed to have ultimate responsibility for planning decisions. The province submitted that provinces should retain their appellate powers until municipalities are able to build their capacity, enabling municipal decisions to be corrected internally rather than through the courts via review applications.

CONCLUSION

Thus the Constitutional Court did not accept the reading-in measure of the High Court but held that the declaration of invalidity would not be retrospective but would not apply to appeals pending in terms of section 44 of LUPO. The declaration of invalidity thus took effect immediately, subject only to pending appeals.

For the rest, anyone intending to appeal a decision made in terms of LUPO, after exhausting a municipality's internal remedies, will now have to approach the courts for relief.

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Jyoti Narshi joined Werksmans Attorneys as a senior associate in 2011, working in the firm's Dispute Resolution practice.

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Jyoti holds a BA, a BA Hons and an MLitt, all from the University of Cape Town, as well as an LLB from the University of South Africa.

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