CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 186/17

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Applicant
and	
CHAIRMAN OF THE NATIONAL BUILDING REGULATIONS REVIEW BOARD	First Respondent
ATC SOUTH AFRICA WIRELESS INFRASTRUCTURE (PTY) LIMITED	Second Respondent
PJJ VAN VUUREN BELEGGINGS (PTY) LIMITED	Third Respondent
CARY–ANN WILLIAMSON–LOUW	Fourth Respondent
FABIAN LOUX	Fifth Respondent
CHRISTY ROUX	Sixth Respondent
WARREN ROUX	Seventh Respondent
SHIONA BLUNDELL	Eighth Respondent
KEITH KEYS	Ninth Respondent
MINISTER OF TRADE AND INDUSTRY	Tenth Respondent
NATIONAL REGULATOR FOR COMPULSORY SPECIFICATIONS	Eleventh Respondent

Neutral citation: *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Review Board* [2018] ZACC 15

Coram: Mogoeng CJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse J and Theron J

Judgments: Jafta J (unanimous)

Heard on: 27 February 2018

Decided on: 7 June 2018

Summary: National Building Regulations and Building Standards Act 103 of 1997 — constitutionality of section 9 —unconstitutional — separation of powers

Local government competences — national government competences — all zoning decisions lie within the competence of the municipality — decision by municipality on approval of building plans not reviewable by National Building Regulations Review Board

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JUDGMENT

JAFTA J

Introduction

[1] This is an application by the City of Johannesburg Metropolitan Municipality (City) for confirmation of a declaration of invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court). That Court declared section 9[1] of the

[1] Section 9 of the Act provides:

"(1) Any person who—

(a) feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;

(b) feels aggrieved by any notice of prohibition referred to in section 10; or

(c) disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law,

National Building Regulations and Building Standards Act[2] (Act) invalid to the extent that it empowered the National Building Regulations Review Board (Board) to exercise appellate powers over municipal decisions. For this order to come into force, it must be confirmed by this Court.[3]

Legislative Framework

[2] The Act came into operation in September 1985. It prohibits construction of buildings within a municipal area without prior approval by the relevant municipality of the building plans. Erecting a building without municipal approval constitutes a criminal offence punishable with a fine. Consequently, a person wishing to erect a building in a municipal area is obliged to first apply for approval of building plans from the relevant municipality before commencing construction.

[3] Section 7 of the Act empowers municipalities to approve building plans if the requirements of the Act are met.[4] In determining these applications, a municipality is bound to take into account a recommendation by a building control officer appointed by every municipality.

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may, within the period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board.

(2) The review board referred to in subsection (1) shall consist of—

(a) a chairman designated by the Minister; and

(b) two persons appointed for the purpose of any particular appeal by the said chairman from persons whose names are on a list compiled in the manner prescribed by regulation."

[2] 103 of 1977.

[3] Section 172(2)(a) of the Constitution provides:

"The Supreme Court of Appeal, the High Court of South Africa 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."

[4] Section 7(1) provides that:

"If a local authority, having considered a recommendation referred to in section 6(1)(a)—

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof."

[4] The Act defines a "building" in wide terms, which include any structure used for the "convenience of human beings or animals". This definition covers the erection of cellular phone masts with which this matter is concerned.

[5] Under the Act a decision of a municipality pertaining to approval of building plans is subject to an appeal by an aggrieved person to the Board. The Board is an organ of state and is established by the Minister of Trade and Industry. It consists of three members, one of whom is designated by the Minister as the chairperson. Although the Board is established in terms of section 9 of the Act, the source of its appellate powers is Regulation 13 of the regulations made by the Minister.

[6] Regulation 13 provides:

> "(1) The decisions of the board shall be taken by majority vote.
>
> (2) Any proceedings before the board may be adjourned by the chairman to such date time and place as he may deem fit.
>
> (3) The board may at any time prior to its final decision in its discretion order any proceedings to be re-opened for the purpose of hearing or considering further evidence or arguments which, as may be directed by the board, may be either oral or written.
>
> (4) The board may—
>
> (a) dismiss the appeal and confirm the refusal or any conditional approval of the local authority; or
>
> (b) uphold the appeal in whole or in part; and
>
> (c) order the local authority to pay a successful appellant an amount equivalent to the amount paid by the appellant in terms of regulation 9(3), or any part of such amount."

[7] This regulation must be read with section 9 of the Act which affords an aggrieved person an appeal against a decision of a municipality. The Board is authorised by section 9 of the Act, read with regulation 13, to uphold or reverse a decision by the relevant municipality.

Background

[8] The City adopted a cellular mast policy which governs applications for approval of building plans pertaining to the erection of cellular phone masts, within its area of jurisdiction. This policy provides that applications of this kind shall be determined in terms of section 7 of the Act.[5] Apart from outlining the process which must be followed in submitting plans for approval, the policy affords owners of properties adjacent to where the proposed mast is to be erected a hearing before the decision to approve is taken. These landowners may submit their written representations to the City within 21 days of being requested to do so.

[9] In June 2012 ATC South Africa Wireless Infrastructure (Pty) Ltd (ATC) submitted to the City an application for approval of plans to erect a cellular mast on their property situated at 169 Bellairs Drive, Northriding. In compliance with its policy, the City afforded the relevant landowners an opportunity to make representations on the application. Two of them objected to the erection of the mast. Notwithstanding the objections, the City approved the plans and a mast was erected on ATC's property.

[10] Aggrieved by the approval, the objectors lodged an appeal with the Board against the City's decision in February 2013. They were joined by four other persons. In response, the City urged the Board to dismiss the appeal on two in *limine* grounds. The first was that the appellants had no standing. The second was that the Board had no jurisdiction over the matter. The City did not address the merits of the appeal. Instead it reserved its rights pending the Board's decision on the points in *limine*. The Board invited the parties to make written submissions on those points and decided the matter without an oral hearing.

[5] Clause 8.6 of the policy states:

> "Applications shall be considered in terms of the provisions of section 7(1) of the National Buildings Regulations and Building Standards Act 103 of 1977 and the guidelines as set out in paragraph (8) above."

[11] Having considered the relevant provisions and case law, the Board issued a comprehensive ruling on 31 March 2015. Both points were rejected and a decision in these terms was made:

> "17.1. First and Second Respondent's application for the dismissal of the Appeal on the basis of jurisdictional points raised in *limine* is refused;
> 17.2. Second Respondent is required to submit its Response on the factual averments and merits of the Appeal within twenty-one (21) calendar-days of date, whereafter Appellants will be provided with an opportunity to reply thereto;
> 17.3. A hearing will be convened in terms of Review Board Regulation (11)(b) at a date to be notified by the Review Board."

[12] Unhappy with the outcome, the City instituted an application in the High Court in which the validity of section 9 of the Act was challenged. The chairman of the Board; ATC; PJJ Van Vuuren Beleggings (Pty) Limited; the six appellants before the Board; the Minister; and the National Regulator for Compulsory Specifications, were all cited as respondents. But as is apparent from the record, only the Minister opposed the application. ATC supported the relief sought by the City.

[13] The relief asked for by the City was two-fold. It sought an order declaring that section 9 of the Act was invalid, to the extent that it authorised the Board to usurp a municipal function, and also asked that the Board's decision be set aside. The validity of section 9 was impugned on the ground that it empowered an organ of state in the national sphere of government to exercise powers which the Constitution reserved exclusively for municipalities. It was contended that by so doing, the section was inconsistent with the Constitution.

[14] In opposing the relief, the Minister did not argue that the provision had a different effect. Instead, he contended that the application was premature for two reasons. First, the City had not followed the intergovernmental dispute resolution

mechanisms before approaching the High Court. Second, he asserted that the Act was under revision. The Minister further submitted that the City had failed to show that the Board usurped its powers.

[15] With regard to the review of the Board's decision, the City persisted in the same points that were raised *in limine* before the Board. It asserted that the Board had no jurisdiction to entertain the appeal. But if it had jurisdiction, the appellants before it lacked standing to prosecute the appeal. As this part of the relief was unopposed, the High Court granted it.

[16] Regarding the invalidity of section 9 of the Act, the High Court construed the section as empowering the national sphere of government to exercise municipal powers. And with reference to the decisions of this Court in *Gauteng Development Tribunal*,[6] *Habitat Council*[7] and *Tronox*,[8] the High Court held that section 9 impermissibly authorised the Board to exercise planning functions of municipalities. For this reason, the High Court held that the section is inconsistent with the Constitution.

[17] The grounds of opposition advanced by the Minister were all rejected. The argument that the application was premature was dismissed as lacking merit. The Court reasoned that the matter was about the invalidity of legislation and not an intergovernmental dispute which could be resolved through mechanisms and procedures provided for the resolution of disputes by organs of state, without approaching the courts. The High Court held further that the revision process undertaken by the Minister on the Act did not preclude it from pronouncing upon the

[6] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Gauteng Development Tribunal*).

[7] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC) (*Habitat Council*).

[8] *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* [2016] ZACC 2; 2016 (3) SA 160 (CC); 2016 (4) BCLR 469 (CC) (*Tronox*).

validity of the impugned provision. The Court observed that the Minister had not given a firm undertaking to repeal the offending provision.

[18] As a result, the High Court declared that section 9 was invalid. The decision of the Board was set aside and the appeal pending before the Board was declared void *ab initio* (from the outset) on the ground that section 9 did not apply to objections to an application for approval of building plans. The Minister was ordered to pay costs.

Confirmation

[19] What needs to be confirmed is the order declaring section 9 of the Act to be invalid. Orders of the High Court and the Supreme Court of Appeal that declare Acts of Parliament constitutionally invalid have no force and effect unless confirmed by this Court. However, before confirming these orders, this Court must first satisfy itself that the impugned Act is indeed inconsistent with the Constitution. Therefore, the issue that arises here is whether section 9 of the Act is inconsistent with the Constitution on the ground that it mandates the Board to exercise appellate powers over decisions of a municipality on matters that fall within the exclusive domain of municipalities.

[20] A good place at which to commence this enquiry is the Constitution against which the validity of section 9 must be tested. The Constitution establishes a government that consists of three spheres: the national; provincial and the local sphere. While these spheres are distinct from one another, they are also interdependent and interrelated.[9] But each sphere enjoys a degree of autonomy to exercise its powers and perform its functions within its defined space. Each sphere must respect the status, powers and functions of the other spheres and may not exercise functions of these spheres, except where the Constitution itself permits.[10]

[9] Section 40(1) of the Constitution reads:

> "In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated."

[10] *Gauteng Development Tribunal* above n 5 at para 43.

[21] This constitutional scheme gives effect to the principle of separation of powers among the spheres of government. In addition, this scheme abolishes the notion that municipalities are creatures of statute entrusted to provincial councils to administer.[11] On the contrary the Constitution establishes and entrenches the status and autonomy of municipalities which constitutes the local sphere of government. It confers on them original constitutional powers that are exercised exclusively by municipalities.

[22] In *Robertson* this Court declared:

> "The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, 'inviolable and possesses the constitutional latitude within which to define and express its unique character' subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits."[12]

[23] Section 156(1) of the Constitution confers specified powers on municipalities. It reads:

> "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."

[24] Part B of Schedule 4 of the Constitution lists functional areas that fall within the executive authority of municipalities. These include building regulations and municipal planning. This means that matters relating to these two functional areas are

[11] *City of Cape Town v Robertson* [2004] ZACC 21; 2005 (2) SA 323 (CC); [2005] JOL 13397 (CC) (*Robertson*) at para 53.

[12] Id at para 60.

subject to the exclusive executive power of municipalities. This is so because section 156 read with Part B of Schedule 4 vests the powers over those matters on municipalities.

[25] Here it cannot be gainsaid that when the City approved ATC's building plans to erect a cellular phone mast on its property, the City was exercising its constitutional powers pertaining to building regulations and municipal planning. The question that arises for determination is whether the Constitution empowers the national sphere of government to exercise those powers on appeal.

[26] While the national and provincial spheres enjoy legislative authority over matters entrusted to the local sphere, the Constitution does not empower these spheres to exercise the executive authority of municipalities. The role played by the national sphere in municipal affairs is restricted to regulating the exercise of power by municipalities. There is no constitutional provision that allows a member of Cabinet to intervene in the exercise of constitutional powers by municipalities. This intervention is at odds with the separation of powers created by the constitutional scheme mentioned earlier.

[27] The only interference permissible in the exercise of municipal executive authority is the one contemplated in section 139 of the Constitution. That provision authorises the provincial sphere to intervene under certain expressly defined circumstances only. Here we are not concerned with an intervention of that kind. Instead, we are dealing with interference by the Minister and the Board who belong to the national sphere of government.

[28] But the real complaint here is that the source of authority of the Minister and the Board is section 9 of the Act. It is this provision which empowers the Minister to facilitate the establishment of a three-member board to determine an appeal against a decision of a municipality.

Meaning of section 9

[29] Section 9 of the Act provides:

> "(1) Any person who—
>
> (a) feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;
>
> (b) feels aggrieved by any notice of prohibition referred to in section 10; or
>
> (c) disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law,
>
> may, within the period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board.
>
> (2) The review board referred to in subsection (1) shall consist of—
>
> (a) a chairman designated by the Minister; and
>
> (b) two persons appointed for the purpose of any particular appeal by the said chairman from persons whose names are on a list compiled in the manner prescribed by regulation."

[30] It is apparent from the text of this provision that it establishes a review board with appellate power over decisions of a municipality relating to sections 7 and 10 of the Act. In terms of section 9(1)(c), an appeal against a municipality's interpretation or application of a building regulation also lies to the review board.

[31] In terms of the scheme created by the section, the Minister designates the chairperson of the review board. Whenever an appeal is lodged, the chairperson must appoint two additional members of the board from a list of names compiled in terms of the regulations. It appears that a board is convened to determine a particular appeal. Each board must consist of three members including the chairperson.

[32] The issue that arises for determination on this aspect of the case is whether it is permissible for the national sphere to pass legislation that gives it power to exercise the executive authority of a municipality. Section 155 of the Constitution empowers Parliament to pass legislation that defines different types of municipalities which may be established.[13] In terms of section 155(5) a Provincial Legislature must enact legislation which determines different types of municipality to be established in the province under its jurisdiction.[14] Municipalities in each province are established by the relevant provincial government in terms of national legislation referred to in section 155(2) and (3).[15]

[33] Section 155(7) goes further to confer legislative authority upon the national and provincial spheres. It reads:

> "The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by

[13] Section 155(2) and (3) of the Constitution provides:

> "(2) National legislation must define the different types of municipality that may be established within each category.
>
> (3) National legislation must—
>
> (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
>
> (b) establish criteria and procedure for determination of municipal boundaries by an independent authority; and
>
> (c) subject to section 229, make provision for an appropriate division of powers and functions between municipality when an area has municipalities of both category B and C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality."

[14] Section 155(5) of the Constitution provides:

> "Provincial legislation must determine the different types of municipality to be established in the province."

[15] Section 155(6) of the Constitution provides:

> "Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must-
>
> (a) provide for the monitoring and support of local government in the province; and
>
> (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs."

> 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)."

[34] At first blush this provision may be read as authorising the national and provincial spheres to exercise the executive authority of municipalities. But when carefully read it does not. What section 155(7) means is that the national and provincial spheres may exercise their legislative and executive powers to enable municipalities to exercise their own powers and perform their own functions. Therefore, the exercise of legislative and executive authority by these spheres is limited to capacitating municipalities to manage their own affairs and regulating how this must be done. It does not mean that the national sphere may itself take over and exercise the executive authority of a municipality.

[35] The legislative power that the national and provincial spheres exercise over functional areas allocated to the local spheres does not include the power to arrogate to themselves executive powers vested in the local sphere by the Constitution. The exercise of the executive authority of municipalities is the sole preserve of municipalities. In *Gauteng Development Tribunal* we said:

> "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."[16]

[36] The fact that section 9 of the Act empowers the Minister and the Board to intervene on appeal does not change the position to a constitutionally compliant one.

[16] *Gauteng Development Tribunal* above n 5 at para 59.

And certainly what is authorised by the impugned provision goes beyond the power of regulating the exercise by municipalities of their executive authority referred to in section 156(1). The Board may reverse the decision of a municipality. This override is not a decision of a municipality but of the Board.

[37] The argument that the provincial sphere may exercise appellate power as part of regulating the executive authority of municipalities was rejected by this Court in *Habitat Council*. In that case we stated:

> "It follows that 'regulating' in section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order 'to see to the effective performance by municipalities of their functions'. The constitutional scheme does not envisage the province employing appellate power over municipalities' exercise of their planning functions. This is so even where the zoning, subdivision or land-use permission has province-wide implications."[17]

[38] It follows that the High Court here was right in concluding that section 9 of the Act is inconsistent with the Constitution. The declaration of invalidity made by that Court must be confirmed.

Remedy

[39] The City urged us not to suspend the declaration of invalidity but direct that it shall operate prospectively. With regard to pending appeals, the City suggested that they should be processed in terms of section 62 of the Local Governance: Municipal Systems Act (Systems Act).[18] The Minister did not participate in proceedings before this Court. Consequently, we do not have information on the impact the declaration of invalidity would have on the administration of the Act.

[17] *Habitat Council* above n 6 at para 22.

[18] 32 of 2000.

[40] The City's suggestion that the order of invalidity should operate prospectively and that it should not affect pending appeals, appears to be sensible in the present circumstances. It must be embraced. The processing of pending appeals must not be disrupted. They should be finalised without delay by a review board constituted in terms of section 9 of the Act.

[41] However, I do not think that these appeals must be processed in terms of section 62 of the Systems Act. This section is simply not suitable. Decisions to which section 9 of the Act applied are those which were taken by a municipality. Under section 62(4) of the Systems Act, a municipal council is the highest appeal authority. Therefore, if section 62 were to apply, a municipality would sit on appeal against its own decision. This would be an untenable situation.

[42] Consequently, it is just and equitable to have pending appeals processed in terms of section 9 of the Act. But this process must exclude the appeal lodged in the present matter. The High Court declared that appeal to have been void and its order was not challenged before this Court.

Order

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

1. The order of the Gauteng Division of the High Court declaring that section 9 of the National Building Regulations and Building Standards Act 103 of 1977 is invalid, to the extent that it empowers the National Building Regulations Board to exercise appellate powers over decisions of a municipality, is confirmed.
2. The declaration of invalidity will operate prospectively from the date of this order.
3. The National Building Regulations Review Board must finalise without delay all appeals lodged with it before the date of this order, excluding the appeal in the present matter.

4. There shall be no order as to costs.

For the Applicant:	Adv SJ Du Plessis SC and Adv E Sithole instructed by Moodie and Robertson.