THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 335/08

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Appellant
and	
GAUTENG DEVELOPMENT TRIBUNAL	First Respondent
GAUTENG DEVELOPMENT APPEAL TRIBUNAL	Second Respondent
IVORY-PALM PROPERTIES 20 CC	Third Respondent
P M VAN DER WESTHUIZEN	Fourth Respondent
E E VAN DER WESTHUIZEN	Fifth Respondent
MINISTER OF LAND AFFAIRS	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR DEVELOPMENT PLANNING AND LOCAL GOVERNMENT, GAUTENG	Seventh Respondent

Neutral citation: *City of Johannesburg v Gauteng Development Tribunal* (335/08) [2009] ZASCA 106 (22 September 2009)

Coram: MPATI P, NUGENT, LEWIS, MLAMBO JJA and GRIESEL AJA

Heard: 18 AUGUST 2009

Delivered: 22 SEPTEMBER 2009

Summary: Constitutional validity – Chapters V and VI of the Development Facilitation Act 67 of 1995 – conflict with reservation of powers to municipalities – chapters declared invalid but declaration suspended on certain terms.

ORDER

On appeal from: South Gauteng High Court (Gildenhuys J sitting as court of first instance)

A The appeal is partly upheld. The orders of the court below are set aside and the following orders are substituted:

'1 Chapters V and VI of the Development Facilitation Act 67 of 1995 are declared to be invalid.

2 This declaration of invalidity is suspended for 18 months from the date of this order subject to the following provisos:

(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.

3 Save as above the application is dismissed.'

B The appellant is directed promptly to lodge the record in this matter with the Registrar of the Constitutional Court in accordance with the rules and practices of that court.

JUDGMENT

NUGENT JA (MPATI P, LEWIS, MLAMBO JJA and GRIESEL AJA concurring)

[1] Various provincial Ordinances – the relevant Ordinance in this case is the Town-Planning and Townships Ordinance 15 of 1986 – confer upon local authorities (which I will refer to in this judgment as municipalities) the authority to regulate land use within their particular municipal areas. The Development Facilitation Act 67 of 1995 – more specifically in Chapters V and VI – purports to confer equivalent authority upon provincial development tribunals that are established under that Act. The existence of parallel authority in the hands of two separate bodies, with its potential for the two bodies to speak with different voices on the same subject matter, cannot but be disruptive to orderly planning and development within a municipal area.

[2] For some time the appellant – the City of Johannesburg Metropolitan Municipality (which I will refer to as the municipality) sought to avoid that disruption through discussions with the other levels of government but that came to nothing. It then applied to the South Gauteng High Court for, amongst other things, an order declaring the allegedly offending legislation to be constitutionally invalid. That court (Gildenhuys J) dismissed the application but granted leave to appeal to this court.[1]

[3] The relief that was initially sought in the court below was more extensive and altered from time to time as matters developed. In view of the stance now taken by the municipality I need not deal with those aspects of the judgment of the court below. The municipality also sought in the

[1] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 (4) SA 572 (W).

court below to review two decisions that were taken by the Gauteng Development Tribunal (the first respondent) in the exercise of the authority that purports to have been given to it by the Act. That relief was also refused and that refusal is also encompassed by the present appeal. The individual parties who have an interest in the outcome of those applications for review (the third, fourth and fifth respondents) have not joined in this appeal and are content to abide the decision of this court.

[4] The principal issue with which we are concerned is the constitutionality of chapters V and VI of the Act. It is convenient at the outset to expand a little on the manner in which land use is regulated under the provincial ordinances and related legislation, and the parallel powers that are given to provincial development tribunals, before turning to that issue.

[5] The authority to regulate the use of land within a municipal area is conferred upon the municipality concerned by four provincial Ordinances that survived the transition to the present constitutional regime.[2] We are concerned in this case with the Town-Planning and Townships Ordinance 15 of 1986, which was applicable in the former Transvaal province and continues to apply in the province of Gauteng.

[6] Under the Ordinance the authority to regulate the use of land is assigned in general to authorised municipalities (the appellant is such a municipality) with certain powers of oversight vested in the provincial authorities. The principal tool for regulating land use is through the introduction and enforcement by the municipality of a town planning scheme.[3] The Ordinance authorises a municipality to prepare a town-

[2]Townships Ordinance 9 of 1969 (Orange Free State), Town Planning Ordinance 27 of 1949 (Natal), Land Use Planning Ordinance 15 of 1985 (Cape), Town-Planning and Townships Ordinance 15 of 1986 (Transvaal).
[3]Provided for in Chapter II.

planning scheme for all or any land within its municipal area and thereafter to amend, to extend and to substitute the scheme. The general purpose of a town-planning scheme must be directed towards

'the coordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such development.'[4]

[7] A town planning scheme – sometimes called a 'zoning scheme' – will comprise scheme clauses, scheme maps, plans, annexures and schedules.[5] Regulation 3 of the regulations made under the Ordinance specifies at length the various matters that might be the subject of such a scheme. For present purposes it will be sufficient to set out extracts from that regulation to illustrate the breadth of control that might be asserted through a town planning scheme:

'(b) the use of land for

(i) new streets;

(ii) the widening of existing streets;

(iii) parking areas and public and private open spaces;

(iv) residential areas;

…..

(e) the zoning of land to be used for specific purposes, including agricultural purposes;

(f) the area of erven;

(g) the regulation of the erection of buildings with particular reference to –

(i) the maximum number which may be erected upon any erf or other area of land;

(ii) the maximum area of any erf or other area of land upon which buildings may be erected;

(iii) open spaces around buildings and parking areas in and around buildings;

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[4]Section 19.

[5]See regulation 2 of the Regulations made under the Ordiance and published under Administrator's Notice 858, 1987.

(iv) the position of buildings on any erf or other area of land in relation to any boundary, street or other building;

(v) the character, height, coverage, harmony, design or external appearance of buildings;

…..'

[8] An authorised municipality is also entitled to decide whether and on what conditions townships may be established within its municipal area.[6] A township means 'any land laid out or divided into or developed as sites for residential, business or industrial purposes' (if certain other features also exist that are not now relevant). The establishment of a township other than in accordance with the provisions of the Ordinance (subject to certain of its provisions) is unlawful.[7] Applications to establish townships within the municipal area of an authorised municipality are directed to the municipality and it has the authority to approve or refuse them, and to impose conditions where they are approved.[8]

[9] The Ordinance thus contemplates detailed control and regulation of land use being exercised by a municipality. Decisions as to the uses it will allow will necessarily be influenced by numerous local considerations, not least the ability of the municipality to provide the necessary infrastructure and services within the constraints of its capital budgets.

[10] While the Ordinance provides for the detail of land use management other legislation calls for it to be undertaken within the context of broader interests and objectives. Under the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) a municipal council is required to adopt a 'single, inclusive plan for the development of the municipality' (referred to as an 'Integrated Development Plan') that

[6]Provided for in chapter III.
[7]Section 66(1).
[8]Part C of chapter III.

'(a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;

(b) aligns the resources and the capacity of the municipality with the implementation of the plan;

(c) forms the policy framework and general basis on which annual budgets must be based;

(d) …

(e) is compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.'[9]

An Integrated Development Plan must have as one of its core components a 'Spatial Development Framework' that must include 'the provision of basic guidelines for a land use management system for the municipality.'[10]

[11] Section 35 of the Systems Act provides that an Integrated Development Plan adopted by a municipality

'(a) is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality;

(b) binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails;

(c) …'

Those provisions are reinforced by s 36, which provides that

'[a] municipality must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan.'

[12] It will be apparent that that comprehensive land use regime, when viewed as a whole, calls for interrelated and coordinated action on the part of the various departments and functionaries of a municipality if its objectives are to be achieved. To introduce into that ongoing process a third

[9]Section 25.
[10]Section 26(e).

party with the power to intervene and impose its own decisions that might be inconsistent with the decisions and objectives of the municipality is a recipe for chaos. That is what is purportedly authorised by chapters V and VI of the Act.

[13] The long title of the Act describes two of its purposes as being 'to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects' and 'to lay down general principles governing land development throughout the Republic'. In furtherance of the latter purpose chapter I of the Act, and in particular s 3, lays down various general principles to be observed in relation to land development. Section 2 provides that those general principles apply throughout the Republic and

'(a) shall also apply to the actions of the State and a local government body;

(b) serve to guide the administration of any physical plan, transport plan, guide plan, structure plan, zoning scheme or any like plan or scheme administered by any competent authority in terms of any law;

(c) serve as guidelines by reference to which any competent authority shall exercise any discretion or take any decision in terms of this Act or any other law dealing with land development, including any such law dealing with the subdivision, use and planning of or in respect of land;

(d) …'

[14] On the face of it there is no apparent reason why the national legislature should not be entitled to lay down planning and developmental standards to be observed by municipalities. The complaint by the municipality is directed, however, to those portions of the Act (chapters V and VI) that create and confer authority upon tribunals to approve land use applications that might be in conflict with the municipality's plans.

[15] The provisions of chapters V and VI need to be seen in the context of chapter III (sections 15 to 26). Section 15(1) establishes for each province what is called a 'development tribunal'. Such a tribunal comprises persons appointed from time to time by the Premier with the approval of the provincial legislature.[11] The first respondent – the Gauteng Development Tribunal – is one such tribunal. The functions of a development tribunal are described in s 16 as follows:

'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.

[16] Certain decisions of a development tribunal are subject to appeal to a development appeal tribunal established or recognised by the Premier under s 24. The second respondent is the development appeal tribunal for Gauteng province.

[11] Section 15(2).

[17] Section 31 allows for applications to be made to a development tribunal for the establishment of what is called a 'land development area'. That term is defined in sweeping terms to mean

'any area of land which is the subject of land development, including –

(a) such an area shown on a layout plan and forming the subject of land development in terms of Chapter V, or on a settlement plan and forming the subject of land development in terms of Chapter VI;

(b) any land which is not subdivided or intended to be subdivided but on which there are buildings, or on which it is intended to erect buildings or on which sites are laid out, or on which there are buildings in close proximity to each other, and which is used for any of the purposes referred to in the definition of 'land development'; and

(c) a group of pieces of land or of subdivisions of a piece of land which are combined with public places and are used mainly for those purposes or are intended to be so used and which are shown on diagrams or a general plan.'

'Land development' is defined 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'.

[18] Section 33(1) authorises the tribunal to approve or refuse such an application, and if it is approved, to impose any one or more of the conditions referred to in subsection (2). I need not recite those conditions. I think it is sufficient to say that the relevant sections of the Act have the effect of authorising a development tribunal to do everything that an authorised municipality might do when exercising its authority under the Ordinance. It is able to override any and all control that a municipality is capable of exercising over the use of the land, and to do so notwithstanding opposition by the municipality, and notwithstanding that it will conflict with the objectives and plans of the municipality. And if an application to a

municipality for an amendment to its town planning scheme, or for a special consent under such a scheme, or for the establishment of a township, is turned down, the applicant may simply repeat the application, this time in the form of an application for approval of a 'land use area', before the relevant development tribunal.

[19] Three illustrative examples of that having occurred are referred to in the affidavits of the municipality. Eleven town-planning schemes are in operation within the area of jurisdiction of the municipality, including the Johannesburg Town Planning Scheme. Under that scheme Portion 2 of erf 326 Linden is zoned as 'residential 1' meaning that it may be used only for 'dwelling houses', with certain other uses permitted with the consent of the municipality. Upon application by the owner the Gauteng Development Tribunal rezoned the land to 'residential 1 permitting restaurant and retail' so as to allow for the operation of a restaurant and a gift shop. Why an application that is quintessentially of local interest should have been considered to be appropriate to a provincial tribunal is difficult to imagine. Certainly none of the objectives of the Act as they are reflected in the long title suggest that it was aimed at deciding where to locate gift shops.

[20] The other two cases concern applications that were made to the Gauteng Development Tribunal for, in effect, the establishment of townships on land that fell within the area of the Roodepoort Town Planning Scheme and was zoned 'agricultural'. In both cases the land concerned also fell outside what is called the 'Urban Development Boundary'. The Urban Development Boundary – which is one aspect of the Spacial Development Framework forming part of the Integrated Development Plan that has been adopted by the municipality – delineates which areas may be used for urban development and which areas may not be so used. As I have pointed out earlier the Integrated Development Plan

'binds the municipality in the exercise of its executive authority' (except to the extent of any inconsistency between the integrated development plan and national or provincial legislation) and the municipality 'must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan.' Thus in the ordinary course the municipality would not have permitted the townships to be established.

[21] The first application related to Portion 229 (a portion of portion 75 of the farm Roodekrans 183 IQ). The owner of the land (the third respondent) applied to the Gauteng Development Tribunal to establish what is in effect a township, comprising 21 erven of which 19 would be zoned 'residential 1', one would be zoned 'agricultural', and one would be zoned 'special' for purposes of access to the township. The municipality opposed the granting of the application on the grounds, amongst others, that the use would be inconsistent with the town planning scheme and the Integrated Development Plan. That notwithstanding the Gauteng Development Tribunal approved the application on 4 August 2004.

[22] The second application related to portion 228 of the farm Ruimsig 265 IQ. That application was similarly, in effect, for the establishment of a residential township. That land, too, falls outside the municipality's Urban Development Boundary, and was similarly opposed by the municipality, but was granted by the tribunal during September 2004.

[23] The powers that purport to have been conferred upon development tribunals to regulate land use within a municipal area, which were the powers exercised by the tribunal in those cases, are said by the municipality to be reserved to municipalities by the Constitution. If that is so, it was submitted, then the relevant provisions of the Act are invalid, and the

purported exercise of that authority in relation to the two townships was also invalid.

[24] The structure of government authority under the present constitutional dispensation departs markedly from that which existed under the previous constitutional regime. Under the previous regime all public power vested in Parliament and devolved upon the lower tiers of government by parliamentary legislation. Under the present regime, however, certain powers of government are conferred directly upon the lower tiers by the Constitution. To the extent that that has occurred the lower tiers exercise original constitutional powers and no other body or person may be vested with those powers.

[25] The Constitution establishes government at three levels. At national level legislative authority vests in Parliament and executive authority vests in the President (who exercises it together with other members of the Cabinet). At provincial level legislative authority vests in the provincial legislatures and executive authority vests in the provincial Premiers (who exercise that authority together with other members of the executive councils). At local level government comprises municipalities, which must be established for the whole of the territory of the Republic, and the legislative and executive authority of a municipality vests in its municipal council.

[26] National legislative authority as vested in Parliament confers on the National Assembly the authority to legislate on any matter, including a matter within a 'functional area' listed in Schedule 4, but excluding, subject to exceptions, a matter within the functional areas listed in schedule 5. Provincial legislatures, on the other hand, may legislate with regard to any matters within the functional areas listed in Schedules 4 and 5. It follows

that functional areas listed in Schedule 4 fall within the concurrent legislative authority of the national and provincial governments, and the functional areas listed in schedule 5 fall within the exclusive legislative authority of the provincial legislatures.

[27] Certain functions of government are, in the same way, reserved to municipalities by the Constitution. The material provisions of the Constitution for present purposes are s 156(1) read together with Part B of Schedule 4. Section 156(1) provides that

'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.'

[28] It will be apparent, then, that while national and provincial government may legislate in respect of the functional areas in schedule 4, including those in Part B of that schedule, the executive authority over, and administration of, those functional areas is constitutionally reserved to municipalities. Legislation, whether national or provincial, that purports to confer those powers upon a body other than a municipality will be constitutionally invalid. None of that is controversial. What is in dispute is only whether the authority that the municipality exercises at present under the Ordinance falls within the terms of one of those functional areas.

[29] The functional area in Part B of Schedule 4 that is pertinent to this case is 'municipal planning'. Other functional areas that are reserved to municipalities in that Part include 'air pollution', 'building regulations', 'electricity and gas reticulation', 'stormwater management systems in built up areas', and 'water and sanitation services' (with some limitations).

[30] The crisp question that is before us is thus whether the functional area described as 'municipal planning' includes the functions that have been and continue to be performed by municipalities in the regulation of land use as I outlined them earlier. If so, they are matters that are reserved to the executive authority and administration of municipalities and may not be assigned by legislation to another body (in this case a development tribunal).

[31] On the face of it the introduction, administration and enforcement of town planning schemes, and the determination of whether land should or should not be used for the establishment of townships, and if so, the conditions that should apply, seems to me to fit easily within the ordinary meaning of the term 'municipal planning'. The principal argument that was advanced before us by counsel for the respondents, however, was founded on a phrase that is used in Part A of Schedule 4. It will be recalled that that Part lists functional areas that fall within concurrent national and provincial legislative competence. Listed amongst those functional areas is 'urban and rural development'. Counsel submitted that the functions that I have referred to fall within the ordinary meaning of 'urban…development'. It follows, so it was submitted, that they do not constitute 'municipal planning' and may be assigned to any body of their choosing by the national or provincial legislatures. That has been done, so the argument went, by assigning them to municipalities under the provincial Ordinances, and to development tribunals under the Act.

[32] The question that immediately comes to mind on that submission is what remains within the functional area of 'municipal planning' once those functions are excised? In answer to that question counsel for the respondents submitted that the term is restricted to what he called 'forward planning'. Expanding upon that he submitted that it is confined to

conceiving and preparing long-term plans but not implementing those plans.

[33] It was along those lines that the court below decided the matter in favour of the respondents. Referring to a dictionary meaning of the word 'plan' – 'detailed proposal for doing something; decide on or arrange in advance' – it said that prima facie the word 'does not extend to the implementation of planning'. Fortified by reference to various provisions of the Constitution the court below went on to say the following (at par 56):

'An analysis of the Constitution indicates that development is primarily a national and provincial competence, and that municipal involvement therein is, in the absence of any assignment under section 156(4), limited to planning for it, promoting it and participating therein.'

[34] Support for that view was also found in the views expressed by Rabie J in the North Gauteng High Court (*Basson v City of Johannesburg Metropolitan Municipality; Eskom Pension and Provident Fund v Johannesburg Metropolitan Municipality*[12]) in which the learned judge, confronting the same question, said the following:

'[40] From the above it would appear, firstly, that the [Development Facilitation Act] envisages a situation where land development can occur under the auspices of more than one body and in terms of different legislation. This notion fits in with the provisions of the Constitution referred to above which allows for both the National and Provincial [legislatures] legislating in respect of urban development. Secondly, such applications may entail an amendment to an existing zoning scheme, ie, a town planning scheme administered by a municipality. Thirdly, such an amendment to a zoning scheme has legal effect above any provision to the contrary in any other law governing land development or land-use planning or zoning schemes.

[41] In the result the [municipality's] contention that only it has the authority to amend town planning schemes (zoning schemes), cannot be maintained. At present the [municipality] adopts, amends and implements town planning schemes and approve the

[12]Cited at [2007] JOL 19304 (T).

establishment of townships in terms of the Town Planning and Townships Ordinance, which is a Provincial piece of legislation. It does not do so in terms of its own by-laws. The Constitution provides for concurrent National legislative jurisdiction in respect of the same area of competence and the [Development Facilitation Act] is such a piece of legislation. Since the Provincial and the National [legislature] can both legislate in respect of these issues (the Provincial [legislature] having done so already through the Town Planning and Townships Ordinance) the provisions of the [Development Facilitation Act] can therefore not be regarded as unconstitutional. It is in fact a natural consequence of the National [legislature's] authority and power to also legislate in this regard.'

[35] The construction that was adopted by the court below and by Rabie J, and that was advanced before us by counsel for the respondents, all proceed by inferential reasoning from the proposition that the functions with which we are now concerned are embraced by the concept of 'development' (a functional area that falls within the concurrent legislative authority of national and provincial government) and thus, by inference, fall to be excluded from the functional area 'municipal planning'. That line of reasoning seems to me to approach the matter the wrong way round.

[36] It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as the starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government.

[37] That seems to me to be demonstrated by considering the other functional areas that are reserved to municipalities in Part B of Schedule 4.

On the approach adopted by the court below the term 'development' – a term with the widest of meanings – is capable of including all the functional areas listed in Part B of Schedule 4, and in particular the functional areas of 'air pollution', 'building regulations', 'electricity and gas reticulation', 'stormwater management systems in built up areas', and 'water and sanitation services'. To approach the matter along the lines adopted by the court below, and that which was advanced before us by counsel, seems to me to denude all the functional areas that purport to have been vested in municipalities of any content at all.

[38] I cannot accept that the Constitution was framed so as to confine the powers of a municipality to conceiving and preparing plans in the abstract, with no power to implement them. Preparing plans in the abstract would seem to me to be an altogether useless enterprise. It is suggested in the judgment of the court below that abstract planning of that kind (without implementation) might have a use in enabling a municipality to assist and participate in development that is undertaken by (or at the behest of) provincial and national government. I fail to see what purpose would be served by reserving power to local government merely to assist or participate in the exercise of powers by another tier of government.

[39] It is true, as pointed out by the court below, that a dictionary meaning of 'plan', when used in other contexts, signifies that it is confined to conceptualisation and does not extend to implementation. But as pointed out by Hefer JA in *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer*:[13]

'Recourse to authoritative dictionaries is, of course, a permissible and often helpful method available to the Courts to ascertain the ordinary meaning of words (*Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another* 1980 (2) SA 636 (A) at 660F-G). But judicial interpretation cannot be undertaken, as Schreiner JA observed in *Jaga v Dönges NO and Another; Bhana v*

[13] 1997 (1) SA 710 (A) at 72H-727A.

Donges NO and Another 1950 (4) SA 653 (A) at 664H, by "excessive peering at the language to be interpreted without sufficient attention to the contextual scene". The task of the interpreter is, after all, to ascertain the meaning of the word or expression in the particular context of the statute in which it appears (*Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G *ad fin*). As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however it is not.'

[40] In this case the word is not used in relation to, for example, plans that are prepared by an engineer for a mechanical device that is to be constructed, or an architect's plan for a structure, or a plan that is prepared by a land surveyor. It is used in the context of municipal activities. And in that context it has become commonplace throughout the English speaking world to use the word 'planning' to describe the regulation and control of land use. It has been so used in legislation in this country for many years. In England, we are told by Stroud's Judicial Dictionary, terms like 'planning permission' and 'planning scheme' are used in English statutes that deal with the regulation of land use. Black's Law Dictionary tells us that in the United States a 'planning board' is understood to mean 'a local government body responsible for approving or rejecting proposed building projects'. Butterworth's Australian Legal Dictionary refers to 'planning' as 'a term which implies a scheme for the future incorporating some systematic plan for the development of a town intended to subject the development of localities or areas of land to direction and restraint', it describes a 'planning instrument' as an 'instrument made under a law … that relates to town planning or use of land', it refers to 'planning standards' as 'regulatory or prescriptive standards relating to development projects, mainly in respect of the quantifiable aspects of site development' and it notes that 'planning standards … are imposed by local government in conjunction with zoning restrictions, and cover such matters as residential density, car parking, visual privacy, provision of amenity, restriction on

building heights, access to public transport, safety and security, and building construction.' In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[14] Yacoob J had no difficulty understanding the word to convey that meaning when he said the following:

'The zoning of land and the question whether subdivision should be allowed in relation to any land is essentially a planning function in terms of Schedule 4 and Schedule 5 to the Constitution. Previously, the Minister was afforded a planning function in relation to agricultural land situated in areas where local government structures were absent. Our Constitution requires municipal planning to be undertaken by municipalities. To continue to accord this planning function to the national Minister of Agriculture and Land Affairs in relation to agricultural land would be at odds with the Constitution in two respects. First, it would negate the municipal planning function conferred upon all municipalities. Secondly, it may well trespass into the sphere of the exclusive provincial competence of provincial planning. I may add that legislation concerning zoning and subdivision of land was regarded as planning legislation even before the new Constitution came into operation.' (At para 131.)

[41] It is clear that the word 'planning', when used in the context of municipal affairs, is commonly understood to refer to the control and regulation of land use, and I have no doubt that it was used in the Constitution with that common usage in mind. The prefix 'municipal' does no more than to confine it to municipal affairs. That construction, which gives meaningful effect to the term, has the effect of leaving in the hands of national and provincial government the authority to legislate in the functional area of 'urban … development', but reserving to municipalities the authority to micro-manage the use of land for any such development. On that construction the functional area of 'urban development' retains considerable scope for national and provincial legislation. One thinks immediately, for example, of the establishment of financing schemes for development, the creation of bodies to undertake housing schemes or to

[14]2009 (1) SA 337 (CC), [2008] ZACC 12; 2008 (11) BCLR 1123 (CC).

build urban infrastructure, the setting of development standards to be applied by municipalities, and so on.

[42] There was some debate in the course of argument, initiated from the bench, as to whether the Act is capable of being construed restrictively – confining the powers that are conferred upon development tribunals to a limited range of land projects for reconstruction and development purposes – so as to avoid unconstitutionality. Neither counsel showed enthusiasm for such a construction and correctly so. The Act expresses itself in such wide terms that any such construction would be artificial and would amount not to interpretation but to re-writing the Act. The difficulty would in any event remain that the reservation of 'municipal planning' in Part B of Schedule 4 is not capable of being construed as reserving those functions to municipalities in some circumstances but not in others, no matter how limited those circumstances might be.

[43] In my view the term 'municipal planning' as it is used in Part B of Schedule 4 includes the various functions that are assigned to municipalities under the Ordinance, and accordingly they may not be assigned to other bodies by legislation. Both counsel were agreed that, bearing in mind the broad terms in which they are framed, the provisions of chapters V and VI are not capable of being brought into line with the Constitution by declaring invalid only specific words or phrases or sections, and that if our finding were to be as I have stated it, the whole of those chapters falls to be declared invalid.

[44] A declaration of invalidity ordinarily has the effect that the relevant legislation has been invalid from inception in the absence of a contrary order under the authority given by s 172(1)(b). That section permits a court, when declaring a statute to be invalid, to

'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.'

[45] Clearly that result would cause considerable disruption, bearing in mind that development tribunals will have made many decisions affecting rights in the course of their existence. The municipality asked us to declare the legislation to be invalid with effect from 16 August 2005, the date upon which it informed the Gauteng Development Tribunal that its conduct was unlawful and would not be recognised by the municipality. I think it needs to be borne in mind that a declaration of invalidity will affect not only the Gauteng Development Tribunal but other tribunals as well. Moreover, it will affect parties who might have acted in ignorance of the notice given by the municipality. It seems to me in the circumstances that a declaration of invalidity having even limited retrospective effect would not be just and equitable.

[46] It needs also to be recognised that the functions of development tribunals are not confined to those functions that are reserved to municipalities. To declare the legislation to be invalid with immediate effect will deprive development tribunals of the power to perform other functions that are legitimately conferred upon them by the Act.

[47] It seems to me in the circumstances that the appropriate order should be designed, first, so as to protect the validity of decisions that have until now been given by development tribunals, secondly, to enable development tribunals to continue to perform their legitimate functions until such time as Parliament replaces the offending legislation, and thirdly, to ensure that development tribunals meanwhile restrict their activities to those legitimate

functions. Needless to say, the declaration of invalidity has no force unless and until it is confirmed by the Constitutional Court.[15] To avoid any uncertainty I should make it clear that the ancillary orders that I intend making (reflected in paras A2(a) and (b) of the order) are dependent upon that confirmation.

[48] That leaves the two applications for review of the approval by the Gauteng Development Tribunal of the establishment of the two townships I have referred to. On the approach that I take to the invalidity of the legislation it cannot be said that the tribunal lacked the power to grant the approvals. Other grounds were also advanced by the municipality in support of its contention that the decisions of the tribunal ought to be set aside, principally that it failed to properly take account of their conflict with the Urban Development Boundary. I do not think it is necessary to deal with those contentions in this judgment. It is sufficient to say that they were fully considered by the court below and I see no reason to interfere with its considered reasons for rejecting them. In those circumstances the appeal against the decision to dismiss the applications for review must fail.

[49] There remains the question of costs. This matter has not been approached by the parties strictly as adversaries, but instead to establish with certainty their respective powers. The litigation has thus been conducted for the public benefit and I do not think it is appropriate for any order of costs to be made.

[50] For those reasons the following orders are made:

A The appeal is partly upheld. The orders of the court below are set aside and the following orders are substituted:

[15] Section 167(5) of the Constitution.

'1 Chapters V and VI of the Development Facilitation Act 67 of 1995 are declared to be invalid.

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.

3 Save as above the application is dismissed.'

B The appellant is directed promptly to lodge the record in this matter with the Registrar of the Constitutional Court in accordance with the rules and practices of that court.

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R.W. NUGENT
JUDGE OF APPEAL

LEWIS JA (MPATI P, NUGENT, MLAMBO JJA and GRIESEL AJA concurring)

[51] I have had the privilege of reading my colleague Nugent's lucid and compelling judgment, with which I concur. I write separately, however, because I think it necessary to say more fully why it is not possible to construe chapters V and VI of the Development Facilitation Act 67 of 1995 in such a way as to render their provisions constitutional.

[52] It is now trite that where the constitutionality of legislation is in issue, the provisions in question should be read in such a way as to render them consonant with the Constitution if possible. There are numerous cases where courts have interpreted legislative provisions restrictively so as to render them constitutional. The principle underlying this approach was put thus by Langa J in *Investigating Directorate: Serious Economic Offences v Hyundai motor Distributors (Pty) Ltd*:[16]

'[J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.

Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'.

[53] It followed, said the learned judge, that

'where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance'.[17]

[54] It is correct that neither counsel for the parties in this matter suggested that Chapters V and VI of the Act should be interpreted in such a way as to make them comply with the Constitution. The appellant argued that that was not possible for the reasons given by Nugent JA. The

[16]2000 (2) SACR 349 (CC) paras 23 and 24, referring to *De Lange v Smuts NO* 1998 (3) SA 785 (CC) and to *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC). See also *S v Dzukuda; S v Tshilo* 2000 (4) SA 1078 (CC) para 37, and *National Director of Public Prosecutions v Mohamed NO* 2002 (4) SA 843 (CC) para 26 ff.

[17]Para 26.

respondent argued that there was nothing unconstitutional about the provisions: the powers given to a development tribunal fell within the functional area of a province – urban development – and were different from municipal planning. Gildenhuys J, in the court below, concluded that it was not necessary to restrict the application of the provisions of chapters V and VI, and that the procedures created by them, and the application of the Town Planning Ordinance, could operate in parallel. That conclusion is, as Nugent JA has stated, a recipe for chaos.

[55] But I think it necessary to consider, albeit briefly, why the restrictive interpretation is not possible, for, as the authorities cited indicate, we should not lightly strike down as unconstitutional legislation that has in fact been in operation, and implemented, for over a decade.

[56] The basis for attempting to interpret the provisions of the Act, and particularly ss 31, 32 and 33, so as to allow for planning functions to be given to the tribunal is that the Act itself was not ever intended to supplant municipal planning schemes then in place or passed subsequently pursuant to the ordinances mentioned by Nugent JA. It was intended to provide a quick mechanism for establishing urban development for reconstruction and development purposes, in terms of government policy then in place. We must read the Act purposively.

[57] For not only are courts required to read legislation in such a way as to make it constitutionally compliant, but we are also enjoined to interpret legislation to give effect to its purpose. See in this regard, recently, *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*[18] and the authorities cited there, which deal with 'remedial legislation umbilically

[18]2007 (10) BCLR 1027 (CC) paras 51-55.

linked to the Constitution'. It is helpful, said Moseneke DCJ, 'to pay due attention to the social and historical background of the legislation'.[19]

[58] The Act's purpose is to be found in the long title to the Act which I quote in full:

'To introduce *extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land*; and in so doing to lay down general principles governing land development throughout the Republic; to provide for the establishment of a Development and Planning Commission for the purpose of advising the government on policy and laws concerning land development at national and provincial levels; to provide for the establishment in the provinces of development tribunals which have the power to make decisions and resolve conflicts in respect of land development projects; to facilitate the formulation and implementation of land development objectives by reference to which the performance of local government bodies in achieving such objectives may be measured; to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses; to promote security of tenure while ensuring that end-user finance in the form of subsidies and loans becomes available as early as possible during the land development process; and to provide for matters connected therewith' (my emphasis).

[59] The long title tells us that the Act is meant not for municipal planning in the strict sense. Its purpose is to redress inequalities left by a policy of separate development, where people of different races were physically divided and whose housing and property were vastly unequal. Hence the need for reconstruction and development at a pace that might not be accommodated within the framework of ordinances regulating normal municipal planning. The purpose, it seems to me, was not to supplant the existing procedures for town planning but to provide alternative means for

[19]Para 53.

developing land so as to make provision for low cost housing and facilities for those previously impoverished.

[60] Having regard to these two principles of interpretation, that a court must interpret legislation purposively, and so as to render it constitutionally permissible, it may be arguable that chapters V and VI should be interpreted so that they regulate only reconstruction and development projects. They would be constitutional only to that extent. The speedy mechanisms envisaged for development applications would be available only for extraordinary schemes – not for run of the mill applications to amend town planning schemes or to start new township developments that are not designed for reconstruction and development purposes. Following on that argument, the applications in issue in this appeal would not have served properly before the development tribunal. Nor would the other applications for minor amendments to a town planning scheme, mentioned in the appellant's papers, have been dealt with appropriately by the tribunal. They were applications that did not call for extraordinary measures, and should have been dealt with by the municipality in terms of the Ordinance.

[61] There are three difficulties with the argument. The first is that what is effectively municipal planning is reserved for municipalities by the Constitution, such that even special developments, falling within the ambit of municipal planning, even if they do have reconstruction and development aspects, cannot be dealt with, constitutionally, by any body other than a municipality.

[62] Secondly, the provisions of the Act discussed by Nugent JA are so widely drawn that there is no sensible way in which one can whittle them down to suit the purpose for which they were intended. One would have to

'read in' many words to narrow down the definitions of 'land development', 'land development areas', and 'land development application', among others, in order to limit the application of the Act to special developments.

[63] Thirdly, it would be impossible to draw the line between applications for the development of a township that should fall within the sphere of the Act, as apparently intended by the legislature, and those applications that belong only in a municipality, such as the ones in issue.

[64] It is the first reason that is decisive however. The Constitution does not permit provincial bodies to take on the function of municipal planning, and that is precisely what the Act purports to allow and what the respondents argue for.

[65] For these reasons, although it seems at first blush attractive to consider a very narrow reading of the Act so as to make it fit its purposes, it is not possible without an infringement of the Constitution and I accordingly concur in the order made by Nugent JA.

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CAROLE LEWIS
JUDGE OF APPEAL

Appearances:

For Appellant:	S J du Plessis SC L B van Wyk SC
	Instructed by: Moodie & Robertson, Johannesburg Claude Reid, Bloemfontein
For Respondent: (1st, 2nd, 6th & 7th)	S J Grobler SC L T Sibeko SC
	Instructed by: The State Attorney, Johannesburg The State Attorney, Bloemfontein
For 4th Respondent:	None
	Instructed by: Rooth Wessels Maluleke, Pretoria c/o Hooyberg Attorneys, Johannesburg Rossouws Inc, Bloemfontein