IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case No: 05/6181

Heard: 25 to 29 June 2007
Decided: 5 February 2008

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE: YES / NO
2) OF INTEREST TO OTHER JUDGES: YES / NO
3) REVISED: YES / NO

……..
.....
DATE

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 MARINUS VAN DER WESTHUIZEN	Fourth Respondent
ALFREDA ELIZABETH	Fifth Respondent
MINISTER OF LAND AFFAIRS	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR DEVELOPMENT PLANNING AND LOCAL GOVERNMENT, GAUTENG	Seventh Respondent
and	
MONT BLANC PROJECTS AND PROPERTIES (PTY) LTD	First *Amicus Curiae*
IMMOBILI RETAIL INVESTMENTS (PTY) LTD	Second *Amicus Curiae*

JUDGMENT

GILDENHUYS J:

INTRODUCTION

[1] This is an application by the City of Johannesburg Metropolitan Municipality. Firstly, the Municipality applies for declaratory orders relating to the powers which the Gauteng Development Tribunal and the Gauteng Development Appeals Tribunal have under the Development Facilitation Act[1] to amend town-planning schemes and to approve the establishment of townships. Secondly, the Municipality applies for the review of decisions taken by the Gauteng Development Tribunal to approve development applications for the development of two properties (known as the Roodekrans and Ruimsig properties) within the Johannesburg municipal area.

[2] Because the applicant raised a constitutional issue in the application, notice of the application had to be given to the Registrar of the Court to be placed on a notice board designed for that purpose[2]. When the case was first called, the notice had not been given. I postponed the hearing to enable the Municipality to give the requisite notice, which was duly done. At the resumed hearing, I made the following order:

---

1 Act 67 of 1995.

2 Rule 16A of the Uniform Rules of Court.

> "The initial non-compliance with Rule 16A(1)(a) is condoned. The exhibition on the Court's notice board of a notice in terms of Rule 16A(1) from 3 April to 8 May 2007 is accepted to be substantial compliance with Rule 16A(1)."

THE PARTIES

[3] The applicant is a category A metropolitan municipality as described in section 155(1)(a) of the Constitution. It has exclusive municipal legislative and executive authority within its area[3]. It is an authorised local authority under section 2(1) of Town-planning and Townships Ordinance[4]. I will refer to the applicant as "the Municipality".

[4] The first respondent is the Gauteng Development Tribunal established for the province of Gauteng under section 15(1) of the Development Facilitation Act. The second respondent is the Gauteng Development Appeals Tribunal established for the province of Gauteng under section 24(1) of the Development Facilitation Act. I will refer to them as "the Tribunals". The third respondent is the developer of portion 229 of the farm Roodekrans No 183 IQ. The fourth and fifth respondents are the developers of portion 228 of the farm Ruimsig 265IQ. The sixth respondent is the Minister of Land Affairs. The seventh respondent is the Member of the Executive Council for Development, Planning and Local Government in the Province of Gauteng. I will refer to her as "the MEC".

3 Section 155(1) of the Constitution, Act 108 of 1996.

4 Ordinance 15 of 1986 (Transvaal).

[5] The first, second, sixth and seventh respondents oppose the application. The third, fourth and fifth respondents abide the decision of the Court. Both the applicant and the four opposing respondents are organs of state: the applicant in the local sphere of government, the first, second and seventh respondents in the provincial sphere and the sixth respondent in the national sphere. Mr Grobler, who appeared for the participating respondents, emphasised that this litigation is not adversarial, but is intended by all the parties to obtain decisive pronouncements on a number of issues in dispute between them.

[6] Mont Blanc Projects and Properties (Pty) Ltd and Immobili Retail Investments (Pty) Ltd applied to be admitted to the proceedings as *amici curiae*, and were so admitted. Mont Blanc Projects and Properties (the first *amicus curiae)* presented argument to the Court. Immobili Retail Investments (the second *amicus curiae)* presented no argument, and maintained a watching presence only.

CO-OPERATIVE GOVERNMENT

[7] Chapter 3 of the Constitution deals with co-operative government. The

chapter contains two sections: 40[5] and 41[6]. An Act of Parliament as envisaged in section 41(2) of the Constitution, *viz* the Intergovernmental Relations Frameworks Act[7], provides mechanisms and procedures to facilitate the settlement of intergovernmental disputes. The Act was assented to on 10 August 2005 and commenced on 15 August 2005. It was not yet in force when the Municipality instituted these proceedings.

[8] Some negotiations took place between the parties to resolve their disputes, but without success. Although the issue of non-compliance with the procedures for settlement of intergovernmental dispute was raised in the papers before me, I was informed by counsel during argument that the alleged non-compliance is no longer in issue. In other words, I may continue to adjudicate the disputes.

---

5 Subsection 40(1) is relevant to these proceedings. It reads as follows:

> "40 (1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

6 Subsection (2), (3) and (4) are relevant to these proceedings. They provide that Act of Parliament must:

> "(*a*) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
>
> (*b*) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
>
> (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
>
> (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

7 Act 13 of 2005.

[9] Mr Marcus, who appeared on behalf of the first *amicus curiae*, drew my attention to the following statement contained in the Municipality's supplementary founding affidavit[8].

> "…it was decided by the applicant [the Municipality] to give notice that it would not recognise any decisions purportedly made under the Development Facilitation Act which purportedly have the effect of amending any of the town-planning schemes administered by the applicant, nor any decisions authorising in the establishment of townships (other than in those cases where the Development Facilitation Act is truly of application) nor any decision imposing any conditions in relation to site development plans. It was further decided that the applicant will not implement or process any such decisions nor take any action which may be necessary to bring into operation any such decision pending the determination by this honourable Court of the present application."

Mr Marcus submitted that this constitutes impermissible self-help which is fundamentally inimical to the requirement of co-operative government. He submitted that the Municipality's resort to self-help should have a bearing on any relief which I may grant.

[10] Mokgoro J intimated in *Chief Lesapo v North West Agricultural Bank and Another*[9] that an organ of state

---

8 Affidavit by Soraya Nana, record vol 3, p 1065, paragraph 32.

9 2000 (1) SA 409 (CC) at 416G-H.

> "…should be exemplary in its compliance with the fundamental constitutional principle that proscribes selfhelp. Respect for the rule of law is crucial for a defensible and sustainable democracy."

The position taken by the Municipality in refusing to recognise decisions taken under the Development Facilitation Act is regrettable[10]. However, all the organs of state participating in these proceedings want a Court decision on the disputes between them. I will therefore proceed to consider the merits of the application.

RELIEF APPLIED FOR

[11] Before dealing with the individual prayers for relief, I will briefly set forth the main submissions presented by the Municipality in support of its prayers for declaratory orders. Firstly, the Municipality contends that the impugned powers which the Tribunals profess to have do not fall within any of the functional areas listed in Schedule 4 of the Constitution, but are elements of "*local government affairs*" which it has the exclusive right to govern in terms of the Constitution. Secondly, and in the alternative, the Municipality says that the impugned powers are rudiments of "*municipal planning*" listed in part B of

---

10 The Constitutional Court in *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) cited with approval (at 291B-D) the following well-known *dictum* of Brandeis J in *Olmstead et al v United States* 277 US 438 at 485:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously … Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example … If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

Schedule 4, which it has the right to administer, and not of "*urban and rural development*" listed in part A of Schedule 4. Thirdly, and in the alternative, the Municipality suggests that there exist several areas of conflict between the Town-planning and Townships Ordinance and the Development Facilitation Act which have to be resolved in terms of section 146 of the Constitution, unless the two enactments can be interpreted in a manner which will avoid any conflict[11]. Fourthly, the Municipality submits that the Development Facilitation Act must be restrictively interpreted so that it will apply to reconstruction and development projects only. I will consider these submissions in the context of the individual prayers for declaratory relief.

[12] The submissions made by the Municipality in support of its application to review the decisions made by the Gauteng Development Tribunal in approving the Roodekrans and Ruimsig development applications are firstly that the Tribunal had no power to make the decisions and secondly that the Tribunal could not have approved the development applications because the land is situated outside the delineation of the Municipality's urban development boundary. I will similarly consider these submissions when dealing with the apposite prayers.

[13] Fundamental to the issues before me is the question which functional area of competence under the Constitution encompasses the powers given to the Tribunals under the Development Facilitation Act[12] to amend town-planning schemes and to approve the establishment of townships. The answer to this question will not only impact on the constitutional validity of the powers (which is under attack by the Municipality), but will also inform the interpretation of the Development Facilitation Act and other related legislation.

---

11 Section 150 of the Constitution.

12 The Municipality contends that it is "municipal planning".

[14] The relief applied for in the original notice of motion was amended twice. Some of the original prayers were abandoned. Mr Du Plessis, who appeared on behalf of the Municipality, handed up a explanatory note setting forth the rationale for the amendments.

[15] The present prayers, taking into account the amendments and abandonments, are (in summary) for-

1. An Order declaring that the Johannesburg Municipality is vested with the exclusive legal authority to approve the establishment of townships within the Johannesburg municipal area in accordance with the Town-Planning and Townships Ordinance[13].

2. An Order declaring that the provisions of the Development Facilitation Act do not confer authority on the Tribunals to approve the establishment of townships under the Town- Planning and Townships Ordinance[14].

---

13 This prayer originally included three sub-prayers. The first two were abandoned and only the third remained. In his explanatory note Mr Du Plessis indicated that the prayers are directed solely at "*townships established in accordance with*" the Town-Planning and Townships Ordinance. Sections 31, 33, 49 and 51 of the Development Facilitation Act authorize the approval of "*land development areas*". Such an area, so Mr Du Plessis argued, may constitute a "*township*" for other purposes, e.g. the Deeds Registries Act No 47 of 1937, but it is not a "*township*" in terms of the Ordinance.

14 This prayer is the mirror-image of prayer 1. Sub-prayers 2.1 and 2.2 of the original notice of motion were abandoned, leaving only sub-prayer 2.3.

3. In the alternative to the prayers in 1 and 2 above, and if it is found that upon a proper interpretation of s 33 of the Development Facilitation Act, the Tribunals are given the power to:

i) amend the zoning of properties under town planning schemes; and/or

ii) approve the establishment of townships for purposes of the Town-Planning and Townships Ordinance or any other purpose,

that it be declared that the provisions of s 33 of the Development Facilitation Act are to that extent unconstitutional and invalid[15];

3A.1 In the alternative to the aforegoing, an Order declaring that the provisions with regard to land development applications contained in chapters V and VI of the Development Facilitation Act apply only to the implementation of reconstruction and development programmes which require the rapid provision and development of land[16].

---

15 Mr Du Plessis explained that this prayer is based on the Constitution and that it becomes operative only if it is found that the impugned powers fall within the functional area described as "*urban and rural development*" in Schedule 4 to the Constitution.

16 Mr Du Plessis explained that this prayer is also based on the Constitution and that it becomes operative only if the impugned powers fall within the functional area described as "*municipal planning*" in Schedule 4 of the Constitution.

3A.2 In the alternative to the aforegoing and to prayer 3A.1, an Order declaring that the provisions of the Town-Planning and Townships Ordinance with regard to the amendment of town-planning schemes and the establishment of townships prevail over the provisions of chapters V and VI of the Development Facilitation Act and that the latter provisions shall be inoperative for as long as the conflict remains[17].

4. An Order reviewing and setting aside the decisions of the Gauteng Development Tribunal purporting to approve the development applications for Roodekrans and Ruimsig submitted by the third, fourth and fifth respondents under the Development Facilitation Act.

5. An Order declaring that both the Roodekrans and the Ruimsig properties are zoned "*Agriculture*", that they fall outside the urban development boundary as determined by the Municipality in its spatial development framework[18], and that they may not be lawfully used for any purpose other than "*Agriculture*"[19].

---

17 Mr Du Plessis indicated that, similar to prayer 3A.1, this prayer becomes operative only if the impugned powers fall within the functional area described as "*municipal planning*".

18 The spatial development framework forms part of the Municipality's integrated development plan.

19 Mr Du Plessis stated that this prayer will become superfluous if prayer 4 is granted.

6. An Order restraining the third, fourth and fifth respondents from using the Roodekrans and Ruimsig properties for the establishment of townships, unless approval therefor has been granted under the Town-Planning and Townships Ordinance, and unless the applicable town-planning scheme and urban development boundary have been appropriately amended.

7. An Order that those respondents, who oppose the application, pay the costs thereof[20].

CONSTITUTIONAL PROVISIONS WHICH BEAR ON THE RELIEF CLAIMED

[16] Under the Constitution, the local sphere of government vests in municipalities to be established for the whole territory of the Republic[21]. The executive and legislative authority of a municipality resides in its municipal council[22]. 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[23]. The Constitution bestows

20 This prayer is no longer persisted in. See par [120] below.

21 Section 151(1) of the Constitution, which reads as follows:

"The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic."

22 Section 151(3) of the Constitution, which reads as follows:

"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."

23 Section 156(1) of the Constitution, which reads as follows:

"A municipality has executive authority in respect of, and has the right to administer-

upon a municipality executive authority in respect of, and the right to administer within its municipal area, the local government matters listed in part B of Schedule 4 and part B of Schedule 5, as well as any other matter assigned to it by national or provincial legislation[24]. One of the objects of local government is to promote social and economic development[25].

[17] In respect of provincial government, the Constitution provides that the Premier, together with the other members of the Executive Council, exercises the executive authority of a province, *inter alia* by:

- implementing provincial legislation in the province; and
- implementing all national legislation within the functional areas listed in Schedules 4 and 5, except where the Constitution or an Act of Parliament provides otherwise[26].

[18] The national government has the power to pass legislation with regard to a functional area listed in Schedule 4[27]. The national government and

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 Section 125(2) of the Constitution, which reads as follows:

"The Premier exercises the executive authority, together with the other members of the Executive Council, by-

a) implementing provincial legislation in the province;

b) implementing all national legislation within the functional areas listed in Schedule 4 and 5, except where the Constitution or an Act of Parliament provides otherwise."

25 Section 152(1)(c) of the Constitution.

26 Section 125(2)(b) of the Constitution.

27 Section 44(1)(a)(ii) of the Constitution, which reads:

"The national legislative authority as vested in Parliament-

a) confers on the National Assembly the power-

(ii) to pass legislation with regard to any matter, including a matter

provincial governments furthermore have legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5, by **regulating** the exercise by municipalities of the executive authority bestowed upon them by section 156(1) of the Constitution[28].

[19] Part B of Schedule 4 lists "*municipal planning*" as a functional area, thereby bringing it within the executive authority of municipalities. Another functional area, "*urban and rural development*", is not included in Part B but in Part A of Schedule 4. Municipalities have no original constitutional authority in respect thereof. The national government and provincial governments must, however, assign to a municipality by agreement the administration of a matter listed in part A of Schedule 4 which necessarily relates to local government if that matter would most effectively be administered locally, and the municipality has the capacity to administer it[29]. One of the main disputes in this matter is whether the functional area within which the Development Facilitation Act operates, is "*urban and rural development*" or "*municipal planning*".

RELEVANT LEGISLATION

[20] I proceed to give a short overview of the three statutes which, apart from the Constitution, are of importance for deciding the issues between the parties.

---

within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5,"

28 Section 155(7) of the Constitution, which 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 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)."

29 Section 156(4) of the Constitution, which reads:

"The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-

a) that matter would most effectively be administered locally; and

b) the municipality has the capacity to administer it."

The Town-Planning and Townships Ordinance[30]

[21] The Town-Planning and Townships Ordinance, although it is pre-constitution provincial legislation, continues to apply to local authorities in Gauteng by virtue of Item 2 of Schedule 6 of the Constitution. The Ordinance assigns various town-planning functions, including the adoption, amendment and implementation of town-planning schemes and the approval of township establishment applications, to authorised local authorities[31]. A municipality acts in terms of this Ordinance when fulfilling these functions. It should be borne in mind, however, that provincial governments (including provincial organs of state such as the Townships Board)[32] also have significant powers under the Ordinance in respect of these functions. These powers include, *inter alia*, the right to hear and decide appeals against rezoning and township establishment decisions taken by authorised local authorities[33].

[22] The term "township" is defined in the Ordinance as follows[34]:

> "'township' means any land laid out or divided into or developed as sites for residential, business or industrial purposes or similar purposes where such sites are

30 Ordinance No 15 of 1986 (T).

31 The Johannesburg Metropolitan Municipality is an authorised local authority in terms of the Ordinance.

32 Established under section 3(1) of the Ordinance.

33 See sections 59 and 104 of the Ordinance.

34 Section 1(1)(xxvi) of the Ordinance.

> arranged in such a manner as to be intersected or connected by or to abut on any street, and a site or street shall for the purposes of this definition include a right of way or any site or street which has not been surveyed or which is only notional in character."

[23] Section 65(1) of the Ordinance provides that, subject to certain exceptions which are not relevant to the issues before me, "*no person shall establish a township otherwise than in accordance with the provisions of this Ordinance*". Section 94 provides that Part C of the Ordinance shall apply to all townships established or to be established within the area of jurisdiction of an authorized local authority[35].

The Development Facilitation Act[36]

[24] The Development Facilitation Act is a national statute. It was assented to on 28 September 1995 and commenced on 22 December 1995. This is after the commencement of the *interim* Constitution but before the final Constitution. Its objects, as set forth in its long title, include *inter alia* the following:

> "To introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects

35 Sec 94 reads as follows:

> "The provisions of this Part shall apply to every township established or to be established within the area of jurisdiction of an authorized local authority".

36 Act No 67 of 1995

> in relation to land; and in so doing to lay down general principles governing land development throughout the Republic;…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…"

[25] Budlender, Latsky and Roux, in their commentary on the Development Facilitation Act published in *Juta's New Land Law*, describe[37] the rationale for enacting the Development Facilitation Act as follows:

> "There is a need to have legislation prescribing a common procedure which could be used nationally, in parallel to existing, inherited land development laws and procedures. At the same time, it is necessary to provide the country with a nationally uniform approach to reorientating spatial patterns inherited from apartheid. Development planning, including the integration of physical or land development planning into the overall planning systems of the country, needs to start somewhere, and cannot await the crafting of a complete overhaul of the country's forward planning systems. Pending the future reforms that many feel are necessary to land registration procedures, tenure types, and many other aspects of land development practice, policy and law, it was necessary on an immediate basis to 'fast track' or expedite the best features of our existing land registration and development procedures."
>
> (emphasis added)

37 At 2A-9

The Act was promulgated shortly after the advent of democracy in South Africa, at a time when there was a pressing need to fast-track developments in previously disadvantaged areas.

[26] The Development Facilitation Act requires local government bodies to establish land development objectives for their areas. The land development objectives must be approved by the provincial executive. The approval may not be refused except in limited circumstances[38].

[27] Land development objectives are circumscribed in section 28(1) of the Development Facilitation Act. They include matters such as the integration of areas settled by low-income communities, bulk infrastructure for land development, overall density of settlements, the co-ordination of land development in consultation with other authorities and land-use control[39].

---

38 Section 27(1) of the Development Facilitation Act.

39 Section 28(1), omitting objectives not relevant to this application, reads as follows:

> "(1) Land development objectives shall relate to-
>
> (b) the objectives (with reference to local circumstances, including demographic circumstances and prevailing spatial patterns) relating to urban and rural growth and form in the relevant area, including objectives in relation to-
>
> (i) the integration of areas settled by low-income communities into the relevant area as a whole;
>
> (v) the overall density of settlements, with due regard to the interests of beneficial occupiers;
>
> (vi) the co-ordination of land development in consultation with other authorities;
>
> (vii) land-use control;
>
> (d) the quantum of land development objectives in the sense of –
>
> (i) the number of housing units, sites or other facilities planned for;
>
> (ii) whether such units, sites or other facilities will be delivered by means of upgrading land or built environments, undertaking new land developments or the letting of land or buildings;"

[28] The Development Facilitation Act defines "land development" as follows[40]:

> "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, ..."

An area which is the subject of land development is known as a "*land development area*", and can include-

> "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"[41].

The Act sets forth procedures for land development applications. The Act furthermore empowers the Tribunals, when improving land development applications, to impose conditions of establishment[42].

[29] Section 29(1) of the Development Facilitation Act provides that neither the Tribunals nor any other competent authority may approve a land

---

40 Section 1 of the Development Facilitation Act.

41 Paragraph (c) of the definition of "land development area" contained in section 1 of the Act.

42 Section 33(2) of the Act.

development application under the Development Facilitation Act or under any other law, if the application is inconsistent with the land development objectives adopted under the Act[43].

[30] It is generally accepted that the Development Facilitation Act is *interim* legislation. It appears from a supplementary affidavit made by Mr Kabagambe on behalf of the Minister on 16 June 2007 that new legislation is being drafted to replace the Development Facilitation Act and other legislative instruments operating in respect of land use management. A draft of the new legislation, known as the Land Use Management Bill, was published in the Government *Gazette* on 20 July 2001. An updated version of the Bill is presently up for consideration by Cabinet.

The Local Government: Municipal Systems Act[44]

[31] After the final Constitution commenced, the Local Governement: Municipal Systems Act was passed. The objectives of the Municipal Systems Act, as set forth in its long title, include *inter alia* the following:

> " … to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government; …"

---

43 Section 29(1) of the Act, which reads as follows:

"(1) A tribunal or any other competent authority shall not approve a land development application in terms of this Act or any other law dealing with the establishment of land development areas, if such application is inconsistent with any land development objective contemplated in this Chapter: Provided that no provision in this Chapter shall be so construed that it entails the delay of any land development application where no land development objectives have been set."
(emphasis added)

44 Act No 32 of 2000.

[32] The Municipal Systems Act enjoins a municipality to undertake "*developmentally-orientated planning*"[45]. In doing so, it must take account of the principles for land development contained in Chapter I of the Development Facilitation Act[46].

[33] In terms of the Municipal Systems Act, each municipal council must adopt a single, inclusive and strategic plan for the development of the municipality[47]. This is the so-called integrated development plan. One of the

---

45 The obligation is imposed under section 23(1) of the Municipal Systems Act, which reads as follows:

> "(1) A municipality must undertake developmentally-orientated planning so as to ensure that it-
>
> a) strives to achieve the objects of local government set out in section 152 of the Constitution;
>
> b) gives effect to its developmental duties as required by section 153 of the Constitution; and
>
> c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution."

46 Section 23(3) of the Municipal Systems Act, which reads as follows:

> "Subsection (1) [quoted in note 45 above] must be read with Chapter 1 of the Development Facilitation Act, 1995. "

47 Section 25(1) of the Municipal Systems Act, which reads as follows:

> "(1) Each municipal council must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality which-
>
> (a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;
>
> (b) aligns the resources and 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) complies with the provisions of this Chapter; and
>
> (e) is compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation."

core components of an integrated development plan is a spatial development framework[48]. The social development framework incorporates an urban development boundary as one of its components.

[34] An integrated development plan adopted by the council of a municipality is the principal strategic planning instrument which guides and informs all planning and development within the municipal area. It binds the municipality in the exercise of its executive authority[49]. The municipality's urban development boundary as contained in its spatial development framework delineates which areas within the municipality are allocated for urban development. It is a very important town-planning instrument.

[35] It is evident that there will be overlaps between a spatial development framework set in terms of the Municipal Systems Act and land development

---

48 Section 26 of the Municipal Systems Act.

49 Section 35 of the Municipal Systems Act, which reads as follows:

> "(1) An integrated development plan adopted by the council of 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; and
>
> (c) binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law.
>
> 2) A spatial development framework contained in an integrated development plan prevails over a plan as defined in section 1 of the Physical Planning Act, 1991 (Act No. 25 of 1991)."

objectives set in terms of the Development Facilitation Act in respect of the same land. Both must, however, be set by the Municipality. They may be identical[50]. This brings about dual regulation, the effect whereof I will consider later in this judgment.

MAY THE TRIBUNALS ESTABLISH TOWNSHIPS UNDER THE TOWN-PLANNING AND TOWNSHIPS ORDINANCE?
Prayers 1 and 2[51]

[36] The Town-Planning and Townships Ordinance provides that Chapter III

---

50 On 19 June 2003 the Municipality resolved to approve a spatial development framework as part of its integrated development plan. It also resolved to approve the same framework as its official land development objectives under the Development Facilitation Act. The MEC, however, did not promulgate them for reasons which I will consider later.

51 The prayers are for orders:

"1. Declaring that the applicant is vested exclusively with the legal power and authority to:

1.1 abandoned

1.2 abandoned

1.3 approve the establishment of townships in accordance with the Town-Planning and Townships Ordinance 15 of 1986 ("*the Town Planning Ordinance*")

in relation to all properties that fall within the municipal area of the applicant, including the properties described as portion 229, a portion of portion 75 of the farm Roodekrans, 183 IQ ("the Roodekrans property") and portion 228 of the farm Ruimsig, 265 IQ ("the Ruimsig property").

2. Declaring that the provisions of the Development Facilitation Act, 67 of 1995 ("the DFA"), and in particular section 33(1) and (2) thereof, do not confer upon the first or second respondent any legal power of authority to:

2.1 abandoned

2.2 abandoned

2.3 approve the establishment of any township under the Town Planning Ordinance

in relation to any property falling within the municipal area of the applicant, including the Roodekrans and Ruimsig properties."

of the Ordinance "*shall apply to every township established by an owner of land*"[52]. Chapter III sets forth procedures for the establishment of townships. The Ordinance furthermore provides that "*no person shall establish a township otherwise than in accordance with the provisions of the Ordinance*"[53].

[37] In its first prayer, the Municipality asks for an order declaring that it has the exclusive power to establish "*townships*" within its municipal area in accordance with the Town-Planning and Townships Ordinance. In its second prayer, the Municipality asks for an Order declaring that the Development Facilitation Act does not confer any legal power on the Tribunals to establish "*townships*" in accordance with the Ordinance. This is not disputed by any of the respondents. The Tribunals do not act, nor do they purport the act, in terms of the Ordinance when considering and approving land development applications. The Development Facilitation Act sets its own procedures.

[38] The Gauteng Development Tribunal has in the past approved "land development areas"[54] and called them "*townships*"[55]. This might well be an incorrect appellation. It is, however, not in dispute between the parties that the Gauteng Development Tribunal did not, by using the word "*township*",

52 Section 65(1) of the Ordinance.

53 Section 66(2) of the Ordinance.

54 A land development area includes *inter alia*, a group of pieces of land or subdivisions of a piece of land combined with public places and which are shown on diagrams or a general plan. See paragraph [28] above.

55 The term "township" is defined in section 1(1) of the Ordinance. See paragraph [14] above.

purport to act in terms of the Ordinance. In my view, there is no dispute between the parties in relation to the issues covered by the first two prayers, and no declaratory orders are warranted under them[56].

CONSTITUTIONAL CHALLENGE OF THE DEVELOPMENT FACILIATION ACT

Prayer 3[57]

[39] The Municipality contends, firstly, that the impugned powers (to approve rezonings and the establishment of townships) do not fall within any of the functions mentioned in the Schedules, but are "*local government*

---

56 *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 14F-H.

57 The prayer is for an order as follows:

> "3. In the alternative to prayers 1 and 2 above, and if it is found that upon a proper interpretation of the provisions of section 33 of the DFA the first and/or second respondent has the power to:
>
> 3.1 amend the Johannesburg and Roodepoort (and other) Town Planning Schemes;
>
> 3.2 amend the zoning for land use of properties under such schemes; and/or;
>
> 3.3 approve the establishment of townships for purposes of the Ordinance or any other purpose
>
> in relation to the municipal area of the applicant, including the Roodekrans and Ruimsig properties, it is declared that the provisions of section 33 of the DFA are to that extent unconstitutional and invalid."

affairs" over which the municipality has exclusive executive and legislative authority[58]. Secondly, and in the alternative, the Municipality submits that the impugned powers constitute "municipal planning", which is listed in part B of Schedule 4 as a municipal competence. In either case, the provisions of section 33 of the Development Facilitation Act, insofar as it permits the Tribunals to rezone land and establish townships, would be unconstitutional and invalid.

[40] The impugned subsections of section 33 of the Development Facilitation Act include the following:

> "(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;
>
> (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

[58] See sections 151(1) and (3) of the Constitution, quoted in notes 21 and 22 above.

development area;

(*j*) the question whether the provisions of—

ii) any law on physical planning;

(vi) any other law relating to land development, … 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: …

(*l*) the question whether the land in the land development area is to be subdivided in terms of this Chapter … ;

(3) A condition of establishment imposed under—

(*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."

Under which Constitutional regime must the impugned provisions be assessed?

[41] Mr Marcus, on behalf of the first *amicus curiae*, submitted that the constitutional validity of the impugned provisions of the Development Facilitation Act must be assessed under the *interim* Constitution, not under the final Constitution. The Development Facilitation Act came into operation on 22 December 1995, when the *interim* Constitution was in force. The final

Constitution commenced on 4 February 1997.

[42] In *Ynuico Ltd v Minister of Trade and Industry and Others*[59], the Constitutional Court held that challenges relating to the origin and so-called "manner and form" of legislation must be assessed according to the constitutional regime under which the challenged legislation was enacted. It had been argued in *Ynuico*[60] that a particular section of the Import and Export Control Act No 45 of 1963 constituted an impermissible delegation of legislative power, in that it allowed the Minister of Trade and Industry to prescribe a class of goods not allowed to be imported into South Africa. The Constitutional Court rejected this contention, holding that the *interim* Constitution operated prospectively and, even if the *interim* Constitution did place constraints on the power to delegate, these constraints would not apply to any delegation of power under the Export Control Act because that Act was passed before the adoption of the *interim* Constitution. Section 229 of the *interim* Constitution preserved the validity of laws which were in force prior to the *interim* Constitution. Even though, as alleged in the present case, such laws might violate the principle of separation of powers contained in the *interim* Constitution, they could not be challenged on that basis. It was, however, pointed out in *Ynuico*[61] that this does not apply to challenges based on the Bill of Rights.

---

59 1996 (3) SA 989 (CC); 1996 (6) BCLR 798

60 Paragraphs [5] - [7] of the Judgment.

61 Par [8] of the Judgment.

[43] Item 2 of Schedule 6 of the final Constitution similarly preserves the validity of prior laws[62]. The Municipality's constitutional challenge to the Development Facilitation Act is not based on the provisions of the Bill of Rights, but on the provisions relating to constitutional structures, particularly the separation of powers between different spheres of government, as contained in the final Constitution. These provisions differ from those of the *interim* Constitution.

[44] Mr Marcus submitted that the constitutional validity of the impugned provisions of the Development Facilitation Act must be assessed against the *interim* Constitution, rather than against the final Constitution. The Municipality has not brought its constitutional challenge on the basis of the *interim* Constitution, as it should have done, and for that reason alone the challenge cannot succeed. Even if it might be found that the impugned provisions violate the separation of powers enshrined of the final Constitution, so Mr Marcus argued, this would not invalidate them.

[45] I will, for purposes of this judgment, accept that the impugned provisions do not violate any provision of the *interim* Constitution. Before

---

62 Item 2(1) of Schedule 6 to the Final Constitution reads as follows:

"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.

considering whether this will make the impugned provisions immune from attack under the final Constitution, I will decide whether any of the impugned provisions are inconsistent with the final Constitution. If they are not, that will put an end to the constitutional challenge.

Does the Municipality have the exclusive power to decide applications for rezoning and the establishment of townships?

[46] The Municipality contends, in its first constitutional challenge, that the rezoning of properties and the establishment of townships constitute "*local government affairs*" over which it (and no other sphere of government) has the constitutional right to govern. This contention is premised on section 151(3) of the Constitution, which provides that:

> "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."

[47] Although it is true that a municipality's right to govern local government affairs emanate from the Constitution itself and is therefore not an assigned but an original power, the right remains circumscribed by the Constitution[63].

63 See *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) at 351B, where it was held by Moseneke J as follows:

> "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 contrained by law and only to the extent the Constitution permits."

There is no unlimited right to govern each and every matter that could be described as a local government matter. The words "as provided for in the Constitution" in section 151(3) clearly qualifies "the right to govern".

[48] Section 151(3) must be read subject to section 156 of the Constitution, which circumscribes the powers and functions of municipalities. Sections 156(1), (2) and (4) read as follows:

> "(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.
>
> (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
>
> (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-
>
> (a) that matter would most effectively be administered locally; and
>
> (b) the municipality has the capacity to administer it."

The original executive authority of municipalities is therefore limited to the functional areas listed in part B of Schedule 4 and in Part B of Schedule 5. Furthermore, as Mr Marcus correctly pointed out, it is not exclusive executive authority.

[49] It is noteworthy that some functions in respect of local government matters not listed in Part B of Schedule 4 or Part B of Schedule 5 have been allocated to the national and provincial governments. These are functions listed in Part A of Schedule 4 and in Part A of Schedule 5. Municipalities can only insist that such functions be assigned to them under the circumstances set out in section 156(4). This illustrates that section 151(1) of the Constitution does not seek to confer unlimited plenary powers on municipalities in respect of all matters relating to local government affairs. The Municipality amends town-planning schemes and approves the establishment of townships, not by virtue of its own by-laws but by virtue of powers held under the Town-planning and Townships Ordinance, which is provincial legislation. The impugned provisions of the Development Facilitation Act are therefore not unconstitutional and invalid on this ground.

Do the impugned powers fall within the functional area of "*municipal planning*"?

[50] The Municipality's second constitutional challenge relates to the meaning to be given to the term "*municipal* planning" in part B of Schedule 4. A municipality has, under section 156(1)(a) of the Constitution, executive authority to administer the matters listed in Part B of Schedule 4 and part B of Schedule 5. The functional area of "*municipal planning*" is included in part B of Schedule 4. The Constitution enables a municipality to exercise any power concerning a matter reasonably necessary for, or incidental to the effective

performance of its functions[64]. Facilitation of development, so the applicant contends, is a matter that is reasonably necessary for or incidental to the effective exercise of "*municipal planning*".

[51] According to section 125(2)(b) of the Constitution, provinces have executive powers to implement national legislation within the functional areas listed in Schedule 4 or 5[65], except where the Constitution or an Act of Parliament provides otherwise. The functional area of "*urban and rural development*" is listed in part A of Schedule 4. The powers given to the Tribunals under the Development Facilitation Act include the power to regulate development by considering and approving land development applications. This, it would seem to me, constitutes "*urban and rural development*".

[52] The national framework established by the Development Facilitation Act was recognised as being for "*development of land in urban and rural areas*" by the Constitutional Court in *Ex Parte Western Cape Provincial Government and Others: In re: DVB Behuising (Pty) Ltd v North-West Provincial Government and Another*[66]. This would indicate that the Constitutional Court has already recognised that these functions fall within the functional area of "*urban and rural development*".

[53] It is, however, argued by the Municipality that there is an overlap

---

64 Section 156(5) of the Constitution, which reads:

> "A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

65 This includes functional areas listed in both part A and part B of Schedule 4 or 5.

66 2001 (1) SA 500 (CC) at 532,paragraph [68]. The Court said:

> "The Development Facilitation Act provides a national framework for the development of land in urban and rural areas for residential purposes, and for the grant of land tenure rights. It "lay(s)" down general principles governing land development throughout the Republic."

between the functional areas of "*urban and rural development*" and "*municipal planning*". The Municipality proposes that this overlap be resolved by adopting a purposive approach[67], which is to be informed by the sphere of government where the specific function would be most appropriate. That sphere, so the Municipality says, is local government[68].

[54] The Municipality's submission is based on the premise that the consideration and approval of land development applications can be accommodated under "*municipal planning*". If it cannot, there will be no overlap. In point of fact, even if it were to be found that any or all of the disputed powers fall within the functional area of "*municipal planning*" in part B of Schedule 4, this would not entail that the Municipality could not in terms of national legislation such as the Development Facilitation Act, share executive authority in respect of this functional area. As I have said, the authority of municipalities in respect of matters listed in part B of Schedule 4 is not exclusive[69]. The executive authority held by other spheres of government in respect thereof will remain[70], except insofar as any of it may have been

67 The functional areas of competence contained in the Constitution must be purposively interpreted. See *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v Northwest Provincial Government and Another* 2001 (1) SA 500 (CC) at 511F, paragraph [17].

68 The Municipality relies for this submission on the principles of subsidiarity and developmental local government, which it seeks to derive from section 156(4) of the Constitution.

69 Section 156(1) of the Constitution, quoted in note 23 above. Where the Constitution intends to bestow exclusive authority, it does so explicitly. For example, section 125(5) of the Constitution, which deals with the implementation of provincial legislation, states:

> "Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power."

70 Section 125(2)(b) of the Constitution (quoted in note 24 above)

assigned to municipalities[71].

[55] Be that as it may, if the impugned powers cannot be accommodated under the concept of "municipal planning", that will put an end to the Municipality's second constitutional challenge. I will therefore proceed to consider whether the powers can form part of the functional area of "*municipal planning*". The word "plan" means (*inter alia*):

> "detailed proposal for doing or achieving something"
>
> "decide on or arrange in advance"[72]

Prima facie, it does not extend to the implementation of planning.

[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.

[57] The following provisions of the Constitution are relevant for the analysis:

- Section 52(1)(c), which provides that one of the objects of local

71 Section 156(4) of the Constitution, which provides for the assignation of matters listed in Part A of Schedule 4 "*which necessarily relates to local government*".

72 Concise Oxford Dictionary, 10th (revised) edition.

government is to "*promote*" social and economic development. The word "*promote*" means (*inter alia*):

"further the progress of; support or encourage"[73].

This is compatible with "*municipal planning*".

- Section 153(a), which provides that a municipality must structure and manage its administration and its budgeting and planning processes to promote the social and economic development of the community.
  This duty is also compatible with a planning function.

- Section 153(b), which provides that a municipality must participate in national and provincial development programmes. This section pre-supposes that national and provincial government have executive authority in relation to development within the area of jurisdiction of a municipality. The municipality's role is participatory.

- Part A of Schedule 4, in which "*housing*" is listed as one of the functional areas. Housing is a prime municipal activity, but was not included in part B of the Schedule. Part B contains no developmentally orientated functional areas. There is only "*municipal planning*" which,

73 Concise Oxford Dictionary, 10th (revised) edition.

when read with section 153(a), relates to forward planning.

[58] The only provision in the Constitution which requires a municipality to involve itself in development in a manner other than by planning for it, is section 153(b), which enjoins a municipality to participate in national and provincial development programmes[74]. This involves a duty. The section does not bestow any exclusive authority on a municipality in respect of development.

[59] It might well be that functional areas such as housing and urban development are most effectively administered locally and that they relate to local government. The fact of the matter is that they have been included by the drafters of the Constitution in Part A, and that is where they will remain until they are assigned to municipalities. They cannot by some feat of interpretation be turned into "*municipal planning*". Because the impugned function of considering and approving development applications (including, in particular, applications for amendments to town-planning schemes and for the establishment of townships) is not municipal planning, there is, in my view, no overlap between the functions of "*urban and rural development*" and "*municipal planning*". As I have said, the term "*municipal planning*" in

74 The section reads as follows:

"A municipality must-

(b) participate in national and provincial development programmes."

Schedule 4 envisages forward planning.

[60] I gain support for these conclusions in the unreported Transvaal Provincial Division judgment given by Rabie J in *Basson and Others v City of Johannesburg Metropolitan Municipality and Others*; *Eskom Pension and Provident Fund v City of Johannesburg Metropolitan Municipality and Others*[75]. Rabie J held as follows:

> "[40] From the above it would appear, firstly, that the DFA 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 the Provincial legislators legislating in respect of urban development. Secondly, such applications may entail an amendment to an existing zoning scheme, i.e., 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 first respondent's contention that only it has the authority to amend town planning schemes (zoning schemes), cannot be maintained. At present the first respondent adopts, amends and implements town planning schemes and approve the 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 DFA is such a piece of legislation. Since the Provincial and the National legislator can both legislate in

75 Cases nos 30770/05 and 32744/05

respect of these issues (the Provincial legislator having done so already through the Town Planning and Townships Ordinance) the provisions of the DFA can therefore not be regarded as unconstitutional. It is in fact a natural consequence of the National legislator's authority and power to also legislate in this regard."

[61] Mr Du Plessis criticised the judgment and submitted that it is clearly wrong. He pointed out that the judgment was given on an urgent application, and suggested that the legal issues were not fully ventilated. Rabie J gave leave to appeal against his judgment. I do not know whether an appeal was in fact lodged, and if so, what its outcome was. The judgment, in my view, is clearly not wrong and I am bound to follow it. I have, in my reasoning in this judgment, dealt with the points of criticism raised by Mr Du Plessis.

DOES THE DEVELOPMENT FACILITATION ACT APPLY ONLY TO URGENT RECONSTRUCTION AND DEVELOPMENT PROGRAMMES?

Prayer 3A1[76]

---

76 The prayer is for an Order, in the alternative to prayer 3:

> "3A.1 declaring in terms of section 150 of the Constitution that the provisions with regard to the procedures for land development applications in chapters V and VI of the

[62] The Municipality submits that if the impugned provisions of the Development Facilitation Act are not unconstitutional, the procedures for land development applications in Chapter V and VI of the Act are in conflict with the provisions of the Town-planning and Townships Ordinance. The conflict, so he suggested, must be resolved under section 150 of the Constitution[77] by interpreting the Development Facilitation Act in a manner that avoids the conflict. I am, firstly, not convinced that there is a conflict[78]. Secondly, I am not convinced that the interpretation of the Development Facilitation Act suggested by Mr Du Plessis is reasonable.

[63] Mr Du Plessis submitted that the alleged conflict will be avoided if the Development Facilitation Act is restrictively interpreted so as to apply only to the implementation of reconstruction and development programmes. These are programmes which require the urgent provision and development of land to accommodate people in dire need of basic accommodation[79]. The

---

Development Facilitation Act, 67 of 1995 ("the DFA") apply only to the implementation of Reconstruction and Development programmes which require the speedy provision and development of land for residential, small-scale farming or other needs and uses."

77 Section 150 reads as follows:

> "150 When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict."

78 I consider the alleged conflict in paragraphs [68] – [74] hereunder.

79 People in dire need would, in particular, include previously disadvanted communities.

opposing respondents deny that this is a reasonable interpretation of the Act[80].

[64] It may well be that the urgent need to establish reconstruction and development programmes, especially in relation to housing, triggered the promulgation of the Development Facilitation Act. That by itself is, however, no reason to interpret the Act in the restricted manner suggested by Mr Du Plessis.

[65] The long title to the Act[81], as well as the wide ambit of Chapters V and VI, make it abundantly clear that the Act was intended to have a much wider scope than the implementation of reconstruction and development programmes. This is also evidenced by the wide-ranging extent of the land development objectives to be formulated by local government bodies. The objectives must deal with matters such as the sustained utilisation of the environment, the provision of bulk infrastructure, the overall density of settlements, land-use control, the number of housing units, sites or other facilities to be planned for[82], and how such units, sites and other facilities will be delivered.

---

80 The Constitution requires, in section 150, that any interpretation of legislation adopted to avoid conflict, must be a reasonable interpretation.

81 See paragraph [24] above.

82 Sections 27 and 28 of the Act. Extracts from section 28(1) is quoted in note 39 above.

[66] According to Budlender, Latsky and Roux[83], the Development Facilitation Act includes the following novel features:

- "The provisions introducing of a 'mini Bill of Rights' in relation to land development on a nationally uniform basis, …;
- The establishment of administrative, non-political tribunals in each of the Provinces to implement these principles and policies;
- The introduction of land development procedures in both urban and agricultural context which will operate in parallel to and as alternatives for existing land development procedures countrywide;
- The inclusion of various measures potentially accelerating the pace of land development, …"

(emphasis added)

All of this indicates that the Act has a wide scope, extending beyond the accelerated implementation of reconstruction and development programmes.

[67] I conclude that, even if provisions of the Development Facilitation Act, are in conflict with the Town-planning and Townships Ordinance, the restrictive interpretation of the Development Facilitation Act suggested by Mr Du Plessis is not a reasonable interpretation which can be adopted to avoid the conflict. It follows that the declaratory order asked for by the Municipality in prayer 3A1 has to be dismissed.

83 *Op cit*, at 2A-3

IS THERE CONFLICT BETWEEN THE DEVELOPMENT FACILITATION ACT AND THE TOWN-PLANNING AND TOWNSHIPS ORDINANCE
Prayer 3A.2[84]

[68] The Municipality contends that under the Town-planning and Townships Ordinance it is exclusively vested with the function of amending town-planning schemes and approving the establishment of townships within the Johannesburg municipal area. I will first consider the effect of the provision in the Ordinance that no person shall establish a township otherwise than in accordance with the provisions of the Ordinance. Thereafter I will consider whether the provisions of the Ordinance with regard to the amendment of town-planning schemes and the establishment of townships prevail over the provisions of the Development Facilitation Act providing for the same functions.

[69] Section 66(1) of the Ordinance provides as follows:

> "Subject to the provisions of subsections (2), (3) and (4), no person shall establish a township otherwise than in accordance with the provisions of this

84 The prayer is for an Order:

> "3A.2 (alternatively to 3A.1) declaring in terms of section 146(5) of the Constitution that the provisions of the Town-planning and Townships Ordinance, 15 of 1986(T) with regard to the amendment of town planning schemes and the establishment of townships within areas of jurisdiction of authorised local authorities prevail over the provisions of the DFA referred to in 3A.1 above and that the said provisions of the DFA shall remain inoperative for as long as the conflict remains, as envisaged in section 149 of the Constitution."

Ordinance."[85]

The power bestowed under the Development Facilitation Act on the Tribunals to approve the establishment of townships[86] is therefore in conflict with section 66 of the Ordinance. The opposing respondents submit that an implied repeal of section 66 of the Ordinance has been effected by the Development Facilitation Act.

[70] In the case of *Government of the Republic of South Africa and Another v Government of KwaZulu and Another*[87], Rabie C J referred with approval to the following *dictum* by Kotze AAJA in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration*[88]:

> "The books tell us that a repeal by implication of an earlier statute by a later one is neither presumed nor favoured. It is only when the language used in the subsequent measure is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one."

---

85 Subsections (2), (3) and (4) allow exceptions to the general prohibition; the exceptions are not relevant for purposes of this judgment.

86 Although the power bestowed on the Tribunals is for the establishment of "*land development areas*", they fall within the definition of "*townships*" contained in section 1(1)(xxvi) of the Ordinance. A "*land development area*" is therefore a "*township*" for purposes of the Ordinance.

87 1983 (1) SA 164 (A) at 200 E-F.

88 1919 AD 367 at 400.

See also *Khumalo v Director-General of Co-Operation and Development*[89], where Van Heerden JA adopted the same approach.

[71] The Development Facilitation Act contains extensive provisions for the establishment of "*land development areas*" under the Act[90]. A "*land development area*" is for all practical purposes the same as a "*township*" under the Ordinance. It accords with the definition of "*township*"[91]. Because the prohibition in the Ordinance against the establishment of "*townships*" except in accordance with the provisions of the Ordinance, is so manifestly repugnant to the provisions of the Development Facilitation Act, the inference that section 66(1) has by implication been repealed by the Development Facilitation Act is irresistible[92]. Such a repeal is not prohibited by the *interim* Constitution, which was in force when the Development Facilitation Act was passed[93].

---

89 1991 (1) SA 158 (A) at 165 B-C.

90 The definition of "*land development area*" contained in the Development Facilitation Act is quoted in paragraph [28] above.

91 The definition of "*township*" contained in the Ordinance is quoted in paragraph [22] above.

92 See the judgment of Cameron JA in *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (A) at 291A-292A, paragraphs [43] and [44].

93 In terms of section 229 of the *interim* Constitution, all existing law (which includes the Town-planning and Townships Ordinance) in force immediately prior to the *interim* Constitution, remains in force subject to repeal or amendment thereof by a competent authority. The national and provincial legislature enjoyed concurrent legislative competence in respect of the functional areas specified in Schedule 6 of *interim* Constitution. This included the functional areas of, *inter alia*, "*regional planning and development*" and "*urban and rural development*". It follows that the national government was therefore competent to enact the Development Facilitation Act, inasmuch as it dealt with one or more of the functional areas in Schedule 6. Conflicting provisions in existing laws such as the Town-planning and

[72] I turn to the other provisions of the Ordinance and the Development Facilitation Act. Both enactments contain provisions for the amendment of town-planning schemes and for the establishment of townships. Under the Ordinance, these functions are mainly exercised by municipalities, with certain powers retained for provincial government. Under the Development Facilitation Act these functions are exercised by the development tribunals and development appeal tribunals. This duality does not mean, however, that the two enactments are inconsistent with each other.

[73] It was held by the Constitutional Court in *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996*[94] that statutory provisions are inconsistent-

> "… when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either."

[74] In my view, the Ordinance and the Development Facilitation Act

---

Townships Ordinance, could validly be amended by a law such as the Development Facilitation Act. Section 126(3) of the *interim* Constitution provides that, in the event of an inconsistency between a provincial law and a national Act dealing with a Schedule 6 functional area, either expressly or by necessary implication, a law "*… passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament…*". The Town-planning and Townships Ordinance does not, however, qualify as a provincial law, in that it was not passed by a provincial legislature under the *interim* Constitution. Section 126(3) is therefore not applicable.

94 1996 (4) SA 1098 (CC) at 1111 A-B [paragraph 24]. See also paragraph [92] hereunder.

provide alternative procedure for the amendment of town-planning schemes and the establishment of townships. Either the one or the other can be followed. This view is supported by Budlender, Latsky and Roux in *Juta's New Land Law*[95] and by Rabie J in *Basson and Others v City of Johannesburg Metropolitan Municipality and Others; Eskom Pension and Provident Fund v City of Johannesburg Metropolitan Municipality and Others*[96]. The two procedures are not in conflict with each other.

REVIEW OF THE APPROVAL OF THE ROODEKRANS AND RUIMSIG LAND DEVELOPMENT APPLICATIONS
Prayer 4[97]

[75] The main ground for the application to review and set aside the decisions of the Gauteng Development Tribunal to approve the land development applications by the third, fourth and fifth respondents in respect of the Roodekrans and Ruimsig properties, is that the Tribunal lacks the power to approve such applications. I have already concluded that the

---

95 See paragraph [25] above.

96 1996 (4) SA 1098 (CC) at 1111 A-B. See also par [92] hereunder.

97 The prayer is for an Order:

> "4 Reviewing and setting aside the following decisions of the first respondent purporting to approve the land development and/or land use applications submitted by or on behalf of the third, fourth and fifth respondents in terms of section 33(2) of the DFA:
>
> 4.1 the first respondent's decision purporting to approve the land development application submitted by the third respondent in relation to the Roodekrans property; and
>
> 4.2 the first respondent's decision purporting to approve the land development application submitted by the fourth and fifth respondents in relation to the Ruimsig property."

Tribunal does have the requisite power to amend town-planning schemes and to approve the establishment of townships. It follows that the Municipality is not entitled to have the decisions reviewed on that ground. The Municipality, however, did not restrict its attack on the Roodekrans and Ruimsig decisions to the lack of power. It also avers that relevant considerations were not taken into account and that the Tribunal did not have the power to amend or suspend the Municipality's urban development boundary. This averment is based on the further averments that the properties are situated beyond the delineation of the boundary and that the grant of the application compromised the boundary and is inconsistent with the Municipality's policy framework for development.

[76] To determine these issues, it is necessary to give a brief history of the adoption of the Municipality's land development objectives and integrated development plans. I will thereafter refer to provisions of the Municipality's spatial development framework which relate to the urban development boundary. Lastly, I will consider whether these provisions are binding on the Tribunals.

Adoption of the Municipality's land development objectives and integrated development plans

[77] During 1996 and 1998 the MEC, acting in terms of the Development Facilitation Act and the regulations published thereunder, called upon all local

government bodies in Gauteng to prepare and submit land development objectives for approval. The metropolitan local councils for the greater Johannesburg area duly did so for the years 1997 and 1998, but not for any year thereafter[98]. The latest approved land development objectives are for the year 1998. Mr Grobler submitted that the failure to update the 1998 land development objectives does not invalidate the approved objectives.

[78] The Council of the Municipality approved integrated development plans under the Municipal Systems Act (which came into operation on 1 March 2001) on 30 May 2002[99]. Various additions and updates were subsequently made. At its meeting on 19 June 2003, the Municipality resolved[100]:

> "That the proposed City of Johannesburg Spatial Development Framework be approved as official council policy and forming part of the City's Integrated Development Plan in terms of section 26(e) of the Municipal Systems Act, 32 of 2000 (the MSA).
>
> That the proposed City of Johannesburg Spatial Development Framework be approved, together with the approved Regional Spatial Development Frameworks, as official Land Development Objectives of the City in terms of the Development Facilitation Act, 67 of 1995 (the DFA).
> That the approved Land Development Objective (sic) be forwarded to the provincial MEC for Development Planning and Local Government as revised Land Development Objective (sic) of the City in terms of the Development Facilitation Act, 67 of 1995 (the DFA)."
>
> (emphasis added)

98 Replying affidavit, vol 4, p 1554, paragraph 18.2 – 18.7.

99 Annexure A, p 68 onwards.

100 Replying affidavit, vol 4, p 1558, paragraph 18.18.

[79] All these documents were duly sent to the MEC (7th respondent) for approval and promulgation as Land Development Objectives. However, at a meeting held on 17 March 2004 with representatives of the applicant, the MEC stated that in terms of the new legislation [the Systems Act] it was no longer necessary for him to approve and promulgate local integrated development plans and regional spatial development frameworks as land development objectives under the Development Facilitation Act[101].

[80] The relevant portions of the Municipality's current integrated development plan is annexed to the founding affidavit[102]. Chapter 8 thereof contains the spatial development framework. The urban development boundary forms part thereof, and is shown on figure 8.4[103].

[81] The spatial development framework contains a section devoted to the urban development boundary. The following extract indicate that the boundary is not intended to be cast in stone, and that development beyond delineation of the boundary may be approved in deserving cases.

> "Two perceptions appear to have been created since the City adopted the Urban Development Boundary via the SDF:
>
> The first would suggest that 'anything goes' within the Boundary and the second, that NO development is permitted beyond the Boundary. These perceptions are wholly incorrect and in both instances criteria are applied to assess the appropriateness and

101 Replying affidavit, vol 4, p 1559, paragraph 18.20.

102 Annexure A, p 68 onwards.

103 Page 300 of the Integrated Development Plan, record vol 1 page 169.

acceptability of development proposals and applications. Applications for a change of land use or division of land beyond the UDB are often submitted with a motivation that agricultural potential/operations have diminished and/or there are security issues associated with relatively large portions of land. While these issues cannot be ignored and each proposal/application must be considered on individual merit, the bigger picture of the desired city form and the potential precedent (if approved) must also be considered in assessing applications and proposals.

A number of Development Tribunals and appeal bodies operate within the City. The decisions they make can impact positively or negatively on the SDF and its inherent components, such as the UDB.

Amending the UDB, each time an application is approved beyond its delineation, would be impractical. Similarly, a scattered series of properties bounded by individual boundaries is not desirable.

Where rights beyond the UDB have been historically approved or are newly approved by Council, these rights are not prejudiced by a development's location 'beyond the line'. Accordingly, adhoc approvals of rights beyond the boundary – while undesirable from a policy perspective – will NOT necessitate a formal amendment to the UDB, unless deemed prudent by the Executive Director: Development Planning, Transportation and Environment (e.g. where large portions of land are involved and/or a cluster of properties forms a logical extension of the UDB). ANY re-alignment of the UDB, post approval of rights, may ONLY be considered via an IDP/SDF/RSDF review cycle on an annual basis[104]."

[82] It is of significance that the extract from the spatial development framework contains a reference to "*Development Tribunals*" operating within

104 Pages 295 of the Integrated Development Plan, pages 164-165 of the record.

the city. These would presumably include the Gauteng Development Tribunal and the Gauteng Development Appeals Tribunal. Their authority to make decisions on development applications seems to have been recognised[105].

Is the Municipality's integrated development plan binding on the Tribunal?

[83] The status of integrated development plans are dealt with in section 35 of the Municipal Systems Act. Section 35 provides that an integrated development plan adopted by the council of a municipality is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard thereto in the municipality[106]. It binds the municipality in the exercise of its executive authority[107]. This poses the question whether the Tribunals are also bound to the provisions of an integrated development plan (including any urban development boundary contained in its spatial development framework).

[84] The chairperson of the Gauteng Development Tribunal, in his answering affidavit, takes the following position[108]:

"In terms of Section 35(1)(a) of the Systems Act, it is provided that an IDP constitutes

105 See also the Municipality's resolutions quoted in paragraph [78] above.

106 Section 35(1)(a) of the Municipal Systems Act, quoted in note 49 above.

107 Section 35(1)(b) of the Municipal Systems Act, quoted in note 49 above.

108 Answering affidavit by Prince Dudla, record, vol 3, p 1363, paragraphs 66 and 67.

a policy document and a planning instrument for a municipality. Consequently, I submit that the delineation of an urban development boundary is a matter to be taken into consideration in a land development application; it remains a policy which guides a decision relating to land development; and where a just cause exists to deviate therefrom, such a deviation is permissible.

I submit further that a proper exercise by the designated chairperson of the First Respondent in hearing land development applications would entail that a municipality's urban development boundary would not per se constitute a barrier, alternatively, a prohibition for a land development application in respect of property falling within a municipality's area of jurisdiction, where it may be justifiable to deviate from such urban development boundary."

[85] The Development Facilitation Act, which was promulgated before the final Constitution commenced, awarded municipalities the planning function of setting land development objectives[109]. Subsequently, municipalities were given a similar function under the Municipal Systems Act, *viz* to prepare integrated development plans[110]. Although integrated development plans have a much wider ambit than land development objectives, its spatial development framework must incorporate planning details which are similar to those required for land development objectives.

[86] There can be little doubt that the legislature, when passing the Municipal Systems Act, intended spatial development frameworks to be

109 Sec 27(1)(a) of the Development Facilitation Act.

110 Sec 25 of the Municipal Systems Act.

consonant with land development objectives, if not to replace them altogether. The Act explicitly enjoins municipalities to have regard to Chapter 1 of the Development Facilitation Act in its planning[111]. The only logical reason why the duplication of two planning instruments has not been removed by the legislature, might be that the Development Facilitation Act is regarded as *interim* legislation, due to be repealed when the Land Use Management Bill becomes law[112].

[87] Section 35(1) of the Municipal Systems Act stipulates that an integrated development plan is the principal strategic planning instrument which guides and informs all decisions with regard to planning and development within a municipality. I cannot imagine that the legislature would have intended the words "all decisions" to refer only to decisions by the Municipality, and exclude decisions by other competent authorities holding concurrent powers to approve developments within the municipal area. I also cannot imagine that the legislature, which is deemed to have been aware of the provisions of the Development Facilitation Act when passing the Municipal Systems Act, would have intended development tribunals to have the power to suspend a municipality's integrated development plan or any component thereof (particularly the urban development boundary). This would negate the status of integrated development plans as principal planning instruments.

[88] The statement by the MEC that it was no longer necessary for municipalities to submit land development objectives for approval, indicates that the MEC in all likelihood held the view that the Tribunals would in future be bound by a municipality's integrated development plan (including its spatial development framework).

[89] Since integrated development plans became the principal planning

111 Sec 23(2) of the Municipal Systems Act.

112 This is the view expressed by Budlender, Latsky and Roux in *Juta's New Land Law* at 2A-9. *See* paragraph [25] above.

instruments to guide and inform all planning and development decisions within municipalities, what then is the status of land development objectives? It might well be that the Municipal Systems Act tacitly revoked the provisions of the Development Facilitation Act relating to the adoption of land development objectives as planning instruments. Implied revocation of statutory provisions is governed by the rule *lex posterior priori derogat*[113]. There will be an implied revocation if it can be shown that the new enactment is intended to cover the whole subject to which it relates, thereby repealing all prior enactments on the same subject[114]. An implied amendment will, however, not be readily inferred[115].

[90] Even if there is no implied revocation of the provisions of the Development Facilitation Act relating to land development objectives as planning instruments, the reason for their continued existence might well have fallen away. Mr Du Plessis submitted that they became superfluous and outdated[116]. Their role has been taken over by integrated development plans. According to the rule *cessante ratione legis cessat ipsa lex*, the

---

113 LM du Plessis "Statute Law and Interpretation" in 25r (part 1) *The Law of South Africa* (Joubert ed) paragraph [293] page 263.

114 *Khumalo v Director-General of Co-operation and Development* and Others 1991 (1) SA 158 (A) at 165C-F; *Durban Corporation and Another v Rex* 1946 NPD 109 at 114; Kellaway, *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) at 368.

115 It was stated by Hancke J in *United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad en Andere*, 2003 (2) SA 269 (O) at 274 G-H:

> "Die herroeping van 'n vroeëre Wet deur 'n latere Wet by implikasie word nie vermoed, veronderstel of ligtelik bevind nie."

116 See par [25] above.

provisions relating to land development objectives may no longer have effect. Wessels JA said in *Labuschagne v Labuschagne*; *Labuschagne v Minister of Justisie*[117]

> "Die bewoording van die stelreël dui daarop dat die Hof die *ratio* van die wetsbepaling verneem en dit dan in verband bring met die omstandighede van 'n bepaalde geval ten einde vas te stel of die ratio in die besondere geval nog aanwesig is of ontbreek. Waar dit ontbreek kan die Hof besluit dat die wetsbepaling nie geld nie omdat die Wetgewer nie bedoel het dat dit van toepassing moet wees in gevalle waar die *ratio* ontbreek nie. Dit volg dus dat die aanwendingsgebied van die stelreël beperk is tot gevalle waar die *ratio* in word sy geheel vasgestel word en die omstandighede van 'n geval duidelik daarop dui dat daardie *ratio* nie bestaan nie."

[91] It is not necessary, for purposes of this judgment, to decide whether the provisions concerning land development objectives in the Development Facilitation Act have been tacitly revoked or have ceased to be of effect. I have already concluded that a municipality's integrated development plan must guide and inform the decisions of all planning authorities (including the Tribunal). This is so irrespective of whether there are land development objectives in place or not.

[92] It is theoretically possible for the provisions of land development objectives to be in conflict with the provisions of an integrated development

---

117 1967 (2) SA 575 (A) at 587 E-G.

plan[118]. In practice, a conflict would hardly occur, because both planning instruments must be prepared by the same municipality. In the case before me, it was not shown that the integrated development plan and the land development objectives cannot stand together.

The Roodekrans Development application

[93] During November 2003, the third respondent, as the owner of portion 329 of the farm Roodekrans No 183 IQ, applied to the Gauteng Development Tribunal under the Development Facilitation Act[119] for the establishment of a "land development area", *viz* a township to be known as Poortview Extension 19, consisting of 21 erven. Of these, 19 were proposed to be "residential", one "agricultural" (containing a guesthouse) and one "special" for purposes of access. At the time when the application was lodged, the land was zoned "agricultural" under the applicable town-planning scheme. That zoning did not allow residential development or township establishment. The property also fell outside the Municipality's urban development boundary.

[94] The application to the Gauteng Development Tribunal involved:

---

118 See the test set forth in *Ex Parte Speaker of the KwaZulu Natal Province Legislature: In re Certification of the Constitution of the Province of KwaZulu Natal Province Legislature* 1996 (4) SA 1098 (CC) at 1111 A-B [par 24] for assessing when two legislative instruments are in conflict with each other.

119 The application was brought in terms of section 31 of the Development Facilitation Act

- The amendment of the applicable town-planning scheme by rezoning the property in order to allow for township development; and

- The suspension of the Municipality's urban development boundary in the area where the property is situated.

[95] The Municipality (through its directorate of Development Management) opposed the application, mainly on the basis that it is inconsistent with and compromises the applicable town-planning scheme, the integrated development plan, the applicable spatial development frameworks and the urban development boundary. Notwithstanding the objections, the Gauteng Development Tribunal approved the application on 4 August 2004 in terms of section 33 of the Development Facilitation Act.

[96] The decision of the Gauteng Development Tribunal[120] is as follows[121]:

> "1.1 Having considered submissions made by all parties, the Gauteng Development Tribunal **approve in terms of section 33 of the DFA**, the establishment of the Land Development Area in respect of POORTVIEW EXTENSION 19 ON PORTION 229 ROODEKRANS 183 IQ PROVINCE OF GAUTENG.

120 The decision was signed by the Chairperson of the Tribunal on 4 August 2004 and by the Registrar on 12 August 2004.

121 A copy of the decision was handed up during argument.

(emphasis added)

1.2 The decision of the Tribunal includes the approval of the following:

1.2.1 The Conditions of Establishment, issued terms of Section 33 of the Development Facilitation Act, 1995 marked as annexure 'A';

1.2.2 The amendment of the Roodepoort Town Planning Scheme as shown on the proposed amendment scheme, marked as annexure 'B';

1.2.3 The Engineering Services Agreement, marked as annexure 'C';

1.2.4 The Township layout PLAN NO: M 245 (6), marked as annexure 'D'."

[97] On 20 September 2004 the Gauteng Development Tribunal, in a document under the heading of "CONSIDERATIONS AND FINDINGS BY THE TRIBUNAL", motivated its decision as follows[122]:

"1.1 STATUS OF THE LAND DEVELOPMENT OBJECTIVES, THE INTEGRATED DEVELOPMENT PLAN AND THE REGIONAL STRATEGIC DEVELOPMENT FRAMEWORK (RSDF)

The applicant argued that the Integrated Development Plan and the RSDF of 2003/2004 adopted by the City of Johannesburg on 19 June 2003 was done in terms of the Municipal Systems Act 32 of 2000 whose effect is determined by sections 35 and 3 of the Act. These sections indicate that an IDP is a principle strategic planning instrument which guides and informs all planning and development that binds the municipality in the exercise of its executive authority to which the municipality must give effect and conduct itself in a manner consistent with it.

122 The document forms annexure I to the Municipality's founding affidavit, vol 2 of the record, pp 848-852.

It was argued that in the light of these provisions, the IDP together with the RSDF does not have statutory binding authority on applications and decisions regarding planning and development but "guides" and "informs" such decisions. It was further argued that the Land Development Objectives of 1998 are still in force in respect of the subject property and will remain in operation until withdrawn by the MEC. The Tribunal is of the view that the IDP of 2003/2004 is a *de facto* policy document currently in use by the City of Johannesburg to which the City has allocated resources for development, including provision of infrastructure and therefore should be considered together with any other relevant policy in arriving at an informed decision.

APPLICABILITY OF THE URBAN DEVELOPMENT EDGE

On COJ's argument the Tribunals concern about the current alignment of the urban edge is on two fronts, namely:

(i) The alignment along an activity spine (Doreen Road) where water and electricity infrastructure are on the side of the subject property which is considered to be outside the urban edge. Further, the Tribunal is of the view that an edge would have been better defined around properties and not use a road as a road traverses properties with different characteristics.

(ii) The urban edge of Mogale City that abuts COJ's municipal boundary results in the formation of a strip of land between the urban edges of Mogale City and that of COJ. This strip of land is under constant pressure for urban development.

The Tribunal is of the view that the affected municipalities did not discuss their urban edges as required by the provincial and national policy. Had the

municipalities discussed their respective urban development boundaries the current situation would have been avoided where Mogale City develops to the boundary of COJ. The Tribunal found that the alignment of the urban edge defies any planning logic and therefore is not considered in this application."

[98] The Municipality refused to recognise or implement the decision of the Gauteng Development Tribunal. Instead, it launched this application to have it reviewed and set aside on grounds set forth in sections 6(2)(a), (d), (e), (f), (h) and (i) of the Promotion of Administrative Justice Act[123].

The Ruimsig Development Application

[99] On 17 May 2004 the fourth and fifth respondents, as the registered owners of portion 228 of the farm Ruimsig No 265 IQ, submitted an application in terms of section 31 of the Development Facilitation Act for the establishment of a "*land development area*", *viz* a township to be known as Ruimsig Extension 59. The proposed township would consist of nine erven, of which eight were proposed to be residential and one "special", to be used for purposes of access.

[100] At the time when the application was lodged and considered, the property was zoned "*agricultural*". This zoning does not allow the establishment of a township or residential use in the form of a township. The

123 Act 3 of 2000 ("PAJA").

property is situated outside the Municipality's urban development boundary[124].

[101] In view of the zoning and the fact that the property falls outside the Municipality's urban development boundary, the fourth and fifth respondents sought *inter alia*:

- An amendment by the Gauteng Development Tribunal of the applicable town-planning scheme, by rezoning the property to allow for township development thereon; and

- A suspension of the municipality's urban development boundary, insofar as the area in which the property is situated falls outside its delineation.

[102] The Municipality, through its Directorate of Development Management, commented upon and objected to the application. In essence, the objections were similar to those raised in respect of the Roodekrans property[125]. Notwithstanding the objections the Gauteng Development Tribunal, acting in terms of section 33 of the Development Facilitation Act, approved the

---

124 The property also falls outside the Gauteng Urban Edge, which is a boundary contained in a policy statement by the Gauteng provincial government. It defines the edge of permissible urban development. The policy, however, is not legally binding. See paragraph 63 of the founding affidavit, record vol 1 p 47.

125 See par [97] above.

application on 15 September 2004[126]. Included in the decision was an amendment to the applicable town-planning scheme to allow the establishment of the envisaged township. Furthermore, by approving the application, the Gauteng Development Tribunal effectively negated the Municipality's urban development boundary.

[103] It would appear that the application for the suspension of the Municipality's urban development boundary was not considered by the Tribunal. Apparently it was not persisted with. Mr Dacomb, the designated chairperson for the particular hearing, explained it as follows[127]:

> "The reason why the application for the suspension of the Applicant's urban development boundary was not persisted with was the result of a common understanding between the parties that in fact, as at that time, the 1998 LDOs were applicable in respect of the Ruimsig property and accordingly such application was not necessary. It was consequently not pursued any further."

---

126 Record, vol 2 p 1016. The relevant provisions of the approval reads as follows:

"1. The Application for the establishment of a land development area, to be known as Ruimsig Extension 59, is hereby approved by the Gauteng Development Tribunal in terms of the provisions of the Development Facilitation Act, 1995, subject to the Conditions of Establishment attached hereto as **Annexure A**.

2. This decision of the Tribunal includes the approval of the following:

2.2 With reference to Section 33(2)(d) of the Act the suspension of the following conditions of title;
Conditions a, c1 up to and including c6, cB up to and including c20 from the Deed Transfer pertaining to Portion 228 of the farm Ruimsig 265 IQ.

2.3 With reference to Section 33(2)(i) of the Act, the amendment of the Roodepoort Town Planning Scheme, 1987 as shown in the maps and annexures attached hereto as **Annexure C**."

127 Confirmatory affidavit by P J Dacomb, vol 3, p 1468, paragraph 18.

[104] The land also falls outside the development edge determined by the Gauteng Provincial Government in its urban edge policy. The deviation from the policy is justified as follows in the reasons given by the Tribunal for its decision[128]:

> "The Tribunal noted that the Urban Edge Policy, as documented in the final report from the then Department of Development Planning and Local Government (Gauteng), dated February 2002, was based largely on the assumption that all decisions on land use change in Gauteng would be taken by the various responsible local authorities in the context of the new Gauteng Planning and Development Act, 2003. The Urban Edge Policy appears to ignore the possibility that various land development applications will serve before the Gauteng Development Tribunal in the context of the Development Facilitation Act, 1995 and as such, the mechanisms created in the Urban Edge Policy to deviate from the policy, do not appear to be appropriate in the context of the Development Facilitation Act, 1995 and the responsibilities of the Gauteng Development Tribunal."

[105] The Municipality did not accept the validity of the decision. It submits that the decision is not authorised by the Development Facilitation Act and is therefore *ultra vires*. It violates the fundamental requirement of legality, and undermines and usurps the town-planning powers and functions of the Municipality[129]. Accordingly, so the Municipality argues, it falls to be

---

128 Annexure PJD1 to the answering affidavit by Prince Dludla , record p 1480, paragraph 4.3.

129 Paragraphs [75] to [78] of the founding affidavit.

reviewed and set aside under the Promotion of Administrative Justice Act[130].

Are the provisions of the Municipality's spatial development framework (including the urban development boundary) binding on the Tribunals?

[106] The Gauteng Development Tribunal considers itself entitled to deviate from the delineation of the Municipality's urban development boundary when approving land development applications, if circumstances justify the deviation. In both the Roodekrans and the Ruimsig applications the Tribunal approved developments beyond the boundary. It seems to have regarded the integrated development plan wherein the boundary was imposed as no more than a *de facto* policy document used by the Municipality[131].

[107] The Development Facilitation Act entitles a tribunal to determine whether the provisions of any law relating to land development is to be suspended insofar as it applies to a proposed development[132]. A condition of

130 Act 3 of 2000, sections 6(2)(a), (d), (e), (f), (h) and (i).

131 See paragraph [97] above.

132 Section 33(2)(j)(vi) of the Development Facilitation Act reads as follows:

> "(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—
>
> (*j*) the question whether the provisions of—
>
> (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…"

establishment to the effect that such a law be suspended, has the effect of suspending its application[133]. The Gauteng Development Tribunal did not, however, in so many words suspend the urban development boundary when it approved the Roodekrans and Ruimsig development applications.

[108] The Municipality submits, for reasons which I will evaluate later in this judgment, that the Tribunal's approval of the applications for the development of land beyond the delineation of the urban development boundary is unlawful. The Municipality (and also the other parties) has a constitutional right to lawful administrative action. Prof Yvonne Burns, in *The Law of South Africa*[134], states:

> "This constitutional right to lawful administrative action encompasses all the requirements for valid administrative action – lawfulness in the wide sense. In this wide sense lawfulness is an umbrella concept encompassing all the requirements for valid administrative action: the administrator's action may not contravene constitutional provisions, the enabling statute, subordinate legislation other relevant legislation, or the common law. If it does, the action is (*ultra vires*) and subject to judicial review."

---

133 Section 33(3)(d) of the Development Facilitation Act reads as follows:

> "(3) A condition of establishment imposed under—
>
> (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."

134 2nd ed, vol 1, page 116 paragraph[135].

[109] This Court has the power under the Promotion of Administrative Justice Act ["PAJA"][135] to judicially review decisions of the Gauteng Development Tribunal if the decisions are unlawful. The Court may not, however, review the decisions unless any internal remedy contained in the authorising statute (*in casu*, the Development Facilitation Act) has first been exhausted[136], unless exceptional circumstances are present and the Court deems it to be in the interest of justice[137].

[110] The Development Facilitation Act provides an internal remedy in the form of an appeal to the Gauteng Development Appeal Tribunal[138]. Mr Du Plessis submitted that exceptional circumstances are present, and that it is in the interest of justice that this Court hears the review. Mr Grobler raised no objection. Mr Marcus did not express any view. I am persuaded that exceptional circumstances do exist. I will therefore entertain the review application.

[111] Although the Municipality, in the papers before the Court, based its review application on many of the subsections of section 6(2) of PAJA[139], only the following can be applicable:

---

135 Act 3 of 2000.

136 Section 7(2)(a) of PAJA.

137 Section7(2)(c) of PAJA.

138 Section 23(1) of the Development Facilitation Act.

139 Founding affidavit, vol 1, p46, paragraph 61.

"6(2) A court or tribunal has the power to judicially review an administrative action if-

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(f) the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or…"

[112] Mr Du Plessis' submissions in support of the Municipality's second ground for claiming a review of the Gauteng Development Tribunal's approval of the Roodekrans and Ruimsig development applications, centered on the location of the properties beyond the delineation of the Municipality's urban development boundary[140]. His heads of argument contain the following submission:

"The UDB is not simply a line on a map which can be read in isolation. It has to be seen and evaluated in the context of the full IDP and SDF and the principles contained therein. Moving the UDB or '*suspending it*' in respect of one particular development involves more than simply enquiring whether services are available to the particular site. The impact of the '*suspension*' of the UDB on the application of all the relevant IDP principles in the whole area within the boundary should be analysed. This is a problem with polycentric issues which entails the co-

140 I have already concluded that the Tribunals do have the power to consider and approve development applications in respect of land situated within the Municipality's area of jurisdiction. This conclusion disposed of the Municipality's first ground for review. See paragraph [77] above.

> ordination of mutual interacting variables, a task for which the GDT is not equipped and for which the hearing of an opposed township application before the GDT is not appropriate venue."[141]

This eloquent submission cannot be considered in isolation. Several important facts come into play. I proceed to consider them.

[113] The Municipality's spatial development framework indicates that applications for a change of land use beyond the delineation of the urban development boundary may be considered, not only by the Municipality but also by other planning authorities. The authorities may allow deviations from the boundary, not because the boundary (being a component of the integrated development plan) is not binding on them, but because the spatial development framework permits deviations in special cases[142].

[114] The Gauteng Development Tribunal did consider the delineation of the *urban development edge* in the Roodekrans application[143]. It concluded that, in the area, where the Roodekrans property is situated, "*the alignment of the urban edge defies any planning logic*". The Tribunal therefore did not follow the delineation. In the Ruimsig application, the urban development boundary was not considered due to an alleged common understanding between the

---

141 Paragraph 171.11.

142 See paragraph [81] above.

143 It would appear from the reasons given by the Tribunal that the words "*urban development edge*" refers to the Municipality's "*urban development boundary*".

parties that the planning instrument to be followed is the Municipality's 1998 *land development objectives*. The Tribunal did, however, consider the provincial urban edge policy, which probably does not differ too much (if it differs at all) from the Municipality's urban development boundary.

[115] The Gauteng Development Tribunal might well have been under the erroneous impression that the Municipality's integrated development plan (including the spatial development frameworks and the urban development boundary forming part thereof) was not legally binding on it when it approved the Roodekrans and Ruimsig applications. This Court has the power to judicially review a decision of the Tribunal if it was "*materially influenced by an error of law*"[144]. It was held by Corbett CJ in *Hira and Another v Booysen and Another*[145] that, in cases where the interpretation of a statutory provision is not left to the exclusive jurisdiction of the tribunal concerned, the question whether an erroneous interpretation of the provision renders the decision invalid-

> "… depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference."

It was not established that, had the Gauteng Development Tribunal realised

144 Section 6(2)(d) of PAJA.

145 1992 (4) SA 69 (A) at 93 G-H.

that the urban development boundary is more than a policy document, and must "*guide and inform*" all decisions on development applications, the outcome of the two applications might have been different. The spatial development framework of the Municipality does not rule out developments beyond the delineation of its urban development boundary. Any error of law on the part of the Tribunal, if there was an error, would in my view not have had a material influence on its decisions in the Roodekrans and Ruimsig applications.

[116] It was also not shown that the Gauteng Development Tribunal approved the Roodekrans and Ruimsig applications in bad faith, arbitrarily or capriciously, or that there is no rational basis for the approvals. A Court must show defence to decisions taken by administrative agencies which have been specifically tasked to take the decisions. As suggested by Cora Hoexter[146], such deference should take the form of judicial willingness-

> "… to appreciate the constitutionally-ordained province of administrative agencies; to acknowledge the expertise of those agencies in policy-laden or polycentric issues; to give their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they have to operate."

[117] My conclusions on the prayers for review are reiterated hereunder. The Gauteng Development Tribunal does have the power to approve

146 *The New Constitutional and Administrative Law*, vol 2 at 83.

development applications involving rezonings and the establishment of townships. In doing so, it must be guided and informed by the Municipality's integrated development plan (including its urban development boundary). It may, in special cases, approve developments on land which lies beyond the delineation of the urban development boundary. The Municipality's spatial development framework does not preclude such approvals, provided the existence of the boundary received due consideration. The Tribunal might not have been entitled to approve the development of land beyond the boundary, had the spatial development framework contained an absolute prohibition against such development. I need not, however, decide this question, because in the case before me is no absolute prohibition. It follows that the approval of the Roodekrans and Ruimsig development applications cannot be set aside on the ground that they relate to land beyond the boundary. The remaining grounds of review were not substantiated or pursued with any degree of vigour; none of them can support an order setting aside the approvals.

THE PRESENT STATUS AND FUTURE USE OF THE ROODEKRANS AND RUIMSIG PROPERTIES

Prayers 5[147] *and 6*[148]

[118] Because the Municipality's application for review of the approval of the two land development applications by the Gauteng Development Tribunal was unsuccessful, they will not remain zoned "a*griculture*" and they may be used for the establishment of townships. They will, however, remain outside the present urban development boundary as determined by the Municipality in its integrated development plan. This is not contested. A declaratory order to that effect will be unnecessary and inappropriate[149].

---

147 Prayer 5 is for an order that-

"5.1 "they remain zoned for "Agricultural" purposes in terms of the Roodepoort Town Planning Scheme;

5.2 they fall outside the Urban Development Boundary as determined by the applicant in its Integrated Development Plan;

5.3 they may not lawfully be used for any purpose other than "*Agricultural*" and in particular they may not be used for the establishment of a township."

148 Prayer 6 is for an order that-

"6. Interdicting the third, fourth and fifth respondents, any person acting on their behalf and their successor(s) in title, from using the Roodekrans or the Ruimsig property for the establishment of a township purportedly under authority of the first respondent's decisions referred to above, save in the event that such use may be permitted where

6.1 a lawful amendment is effected by the applicant to the applicable town planning scheme or the zoning for land use permitted in terms of that scheme;

6.2 approval is granted by the applicant for the establishment of a township in terms of the Town-Planning Ordinance; and

6.3 an appropriate amendment is effected by the applicant to the Urban Development Boundary provided for in its Integrated Development Plan to permit the change of use of such property from agricultural to residential use for purposes of establishing a township."

149 *Ex Parte Nell*, 1963 (1) SA 754 (A) at 760 A-C.

[119] The Municipality furthermore prays for an Order interdicting the third, fourth and fifth respondents from using the Roodekrans and Ruimsig properties for the establishment of townships or, in the parlance of the Development Facilitation Act, for land development areas under the authority of approvals granted by the Gauteng Development Tribunal. The Municipality contests the legality of the approvals. I have already concluded that the grounds on which it is contested are not valid grounds. The interdict can therefore not be granted.

COSTS
Prayer 7

[120] I come to the issue of costs. It is trite law that the award of costs – unless expressly otherwise enacted – is in the discretion of the Judge[150]. In this case, all of the parties who presented argument in Court are organs of state. The issues between the parties are by and large constitutional issues. The general rule in constitutional litigation is that an unsuccessful litigant ought not to be to be mulcted in costs[151]. The municipality was unsuccessful in its application. Mr Du Plessis suggested that each party should pay its own costs. Mr Grobler (on behalf of the participating respondents) did not ask for costs. I will therefore make no order for costs.

---

150 *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69.

151 *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at 297 A-B.

CONCLUSION

[121] A synopsis of my conclusions follows hereunder. The provisions of the Development Facilitation Act which empowers the Tribunals to rezone land by amending town-planning schemes and by approving the establishment of townships, are not unconstitutional and invalid. These provisions cannot be interpreted to restrict its application only to the implementation of reconstruction and development programmes which require the rapid provision and development of land. They operate in parallel to and as an alternative process for land development procedures established by other legislation. Save for one provision in the Town-planning and Townships Ordinance which has been tacitly repealed, there is no conflict between the Ordinance and the Development Facilitation Act. The Municipality's integrated development plan (incorporating its spatial development framework and urban development boundary) adopted under the Municipal Systems Act must guide and inform the decisions of all planning authorities (including the Tribunals). The Municipality's spatial development framework (as it exists at present) sets the urban development boundary as a planning criterion, but recognises that it does not prelude the approval of developments beyond its delineation.

[122] For the reasons set out above, I make the following order:

1. No order is made in terms of prayers 1, 2, 5.2 and 7;

2. Prayers 3, 3A, 3A.1, 4, 5.1, 5.3 and 6 are dismissed.

_____

A Gildenhuys
Judge of the High Court

Appearances:
For the applicant:
Mr SJ du Plessis SC
with him
Mr K Hopkins
instructed by
Moodie, Robertson, Braamfontein

For the first, second, sixth and seventh respondents
Mr SJ Grobler SC
with him
Mr LT Sibeko SC
instructed by
the State Attorney, Johannesburg

For the first *amicus curiae*
Mr GJ Marcus SC
with him
Mr AD Stein and Mr CF van der Merwe
instructed by
Hooyberg Attorneys, Bedfordview

Attorneys for parties who abide the decision of the Court

For the third respondent
Herman van der Merwe & Dunbar

For the fourth and fifth respondent
Schickerling, Bowen & Hesselink Inc

For the second *amicus curiae*
Brian Kahn Inc