

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 71551/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<div style="display: flex; justify-content: space-between;"> <div> <p><u>5/10/16</u></p> <p>DATE</p> </div> <div> <p><i>[Signature]</i></p> <p>SIGNATURE</p> </div> </div>	

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED**APPLICANT**

and

PREMIER, GAUTENG PROVINCE**FIRST RESPONDENT****MEC, DEPARTMENT OF ECONOMIC DEVELOPMENT,****GAUTENG PROVINCE****SECOND RESPONDENT****GAUTENG TOWNSHIP BOARD****THIRD RESPONDENT****CITY OF TSHWANE METROPOLITAN MUNICIPALITY****FOURTH RESPONDENT****MIDSTREAM HOMEOWNERS ASSOCIATION****FIFTH RESPONDENT**

Heard: 28 July 2015

Delivered 11 October 2016

JUDGMENT

A.A.LOUW J

The parties

[1] The Applicant in this matter is Shoprite Checkers (Pty) Ltd¹. It operates a distribution centre from its property, being Erf 906 Louwlandia Extension 25 Township², situated on the corner of Olievenhoutbosch and Brakfontein Roads in Midrand within the Fourth Respondent's municipal area³ ("the subject property").

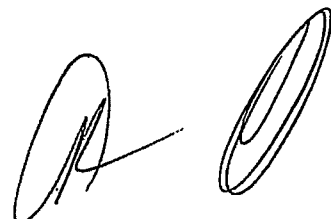
[2] The First Respondent is the Premier of the Gauteng Province⁴. The executive authority of the Gauteng Province vests in the First Respondent by virtue of the provisions of section 125 of the Constitution.

[3] The Second Respondent is the MEC for the Department of Economic Development⁵. The administration of the Town-Planning and Townships Ordinance 15 of 1986 (Transvaal, now Gauteng) ("the Ordinance") was assigned to the Second Respondent. The Second Respondent is responsible for the appointment of members of the Gauteng Townships Board ("the GTB" or "the Third Respondent") by virtue of the powers vested in the Second Respondent by section 4 of the Ordinance.

[4] The Third Respondent is the GTB, a statutory board, established for the Gauteng Province by virtue of section 3(1) of the Ordinance. The GTB gets appointed by the Second Respondent and functions under the auspices, control and directives of the

Reference will first be made to the typed page number appearing on the relevant document. The second reference, being the "[...]" will be a reference to the paginated page number as per the index.

- ¹ Founding affidavit, p 2, para 2.1 [Vol. 1, p 9]
- ² Founding affidavit, pp 7 – 8, para 6.2 [Vol. 1, pp 14 – 15]
- ³ Founding affidavit, pp 8 – 9, paras 6.4.2 - 6.4.6 [Vol. 1, pp 15 – 16]
- ⁴ Founding affidavit, p 2, para 2.2 [Vol. 1, p 9]
- ⁵ Founding affidavit, pp 2 – 3, para 2.3 [Vol. 1, pp 9 – 10]



Second Respondent⁶.

[5] The Fourth Respondent is the City of Tshwane Metropolitan Municipality ("the Municipality"). The subject property is situated within its municipal area⁷.

[6] The Fifth Respondent is the Midstream Homeowners Association ("Midstream HOA"), an association incorporated in terms of section 21 of the Companies Act 61 of 1973 ("the old Companies Act")⁸.

[7] The application is opposed by the Fifth Respondent only.

[8] Despite having filed the record in terms of Rule 53, the Third Respondent does not oppose the application.

The nature of the dispute

[9] The dispute between the parties has its genesis in the approval, on 15 September 2009⁹, by the Municipality, of an application brought by the Applicant on 15 July 2009¹⁰ in terms of clause 26(1)(c) of the Tshwane Town-Planning Scheme, 2008 ("the TTPS"), for permission to relax the height restriction stipulated in the relevant amendment scheme¹¹ ("A/S 945") in respect of buildings erected on the subject property.

⁶ Founding affidavit, p 3, para 2.4 [Vol. 1, p 10]

⁷ Founding affidavit, pp 3 – 4, para 2.5 [Vol. 1, pp 10 – 11]

⁸ Founding affidavit, p 4, para 2.6 [Vol. 1, p 11]

⁹ Founding affidavit, pp 24 – 25, para 10.5 [Vol. 1, pp 31 – 32] and Annexure "A16" [Vol. 3, p 272]

¹⁰ Founding affidavit, p 24, para 10.3 ["Vol. 1, p 31"] and Annexure "A14" [Vol. 3, pp 267 – 269]

¹¹ The phrases "amendment scheme" and "town planning scheme" will be used interchangeably since both these phrases are defined in section 18(4) of the Ordinance as "the town-planning scheme in operation"

[10] On 23 March 2010, the Applicant received notice to the effect that the Midstream HOA lodged an appeal in terms of section 139 of the Ordinance to the GTB against the Municipality's approval¹².

[11] On 16 August 2010, the GTB ruled that the Fifth Respondent had *locus standi* in the appeal before it¹³.

[12] On 22 April 2011, the GTB set aside the Municipality's approval in terms of clause 26(1)(b) of the TTPS to increase the height of the buildings on the subject property¹⁴.

Purpose of the application

[13] The purpose of this application is to seek an order declaring those provisions of the Ordinance¹⁵, which empower the GTB to set aside the Municipality's municipal planning decision, unconstitutional¹⁶.

[14] In addition thereto, and in the alternative, the application has as its goal the securing of an order reviewing and setting aside the decisions taken by the GTB¹⁷ to:

14.1 rule that the Midstream HOA had *locus standi* in the appeal before it; and

14.2 set aside and refer back to the Municipality's decision to relax the height limitation applicable to buildings on the subject property.

¹² Founding affidavit, p 25, para 10.6 [Vol. 1, p 32] and Annexure "A17" [Vol. 3, pp 273 – 281]
¹³ Founding affidavit, p 25, para 10.8 [Vol. 1, p 32] and Annexure "A19" [Vol. 3, pp 284 – 289]
¹⁴ Founding affidavit, p 45, para 15.2 [Vol. 1, p 52] and Annexure "A34" [Vol. 4, pp 380 – 402]
¹⁵ Section 139 of the Ordinance in general and section 139(6) in particular
¹⁶ Founding affidavit, p 4, para 3.1 [Vol. 1, p 11]
¹⁷ Founding affidavit, p 4, para 3.2 [Vol. 1, p 11]

[15] The relief sought by the Applicant is recorded in the notice of motion as follows:

1. *An order declaring that the City of Tshwane Metropolitan Municipality ('the Municipality') is vested with the exclusive executive authority to consider and approve applications for the relaxation of the limitation on the height of all buildings situated within its municipal area imposed by the Tshwane Town-Planning Scheme, 2008 ('Tshwane Scheme') adopted and enforced by the Municipality in terms of the provisions of the Town-Planning and Townships Ordinance 15 of 1986 ('the Ordinance');*¹⁸
2. *An order declaring the provisions of Section 139 of the Ordinance, in particular the provisions of Section 139(6), which empower the Gauteng Townships Board ('the GTB') to confirm, amend or set aside any decision of the Municipality on any application in terms of any town planning scheme and to give any decision the Municipality would have been competent to give with regards thereto, unconstitutional to the extent that the said provisions attempted to empower a provincial authority or provincial body to make decisions on appeal to it which fall within the exclusive executive authority of the Municipality;*¹⁹
3. *Consequent upon the relief sought in 1 and 2 above, an order setting aside the decisions of the GTB pursuant to an appeal filed by the Fifth Respondent ('Midstream HOA') in terms of Section 139 of the Ordinance against the decision of the Municipality approving an application made by the Applicant in terms of clause 26(1)(b) of the Tshwane Scheme ('the Municipality's decision') for the relaxation of the limitation on height on the buildings situated at Erf 906, Louwlandia*

¹⁸ Notice of motion, prayer 1 [Vol. 1, pp 1 – 2]

¹⁹ Notice of motion, prayer 2 [Vol. 1, p 2]

Extension 25 Township ('the subject property');²⁰

4. *Both in addition to and in the alternative to the relief sought in prayers 1 to 3 above, an order reviewing and setting aside the decision of the GTB that the Midstream HOA had the necessary locus standi, in terms of Section 139 of the Ordinance, to bring an appeal to it against the Municipality's decision;²¹*
5. *Both in addition to and in the alternative to the relief sought in prayers 1 to 4 above, an order reviewing and setting aside the decision of the GTB setting aside the Municipality's decision;²²*
6. *An order granting an extension of the period mentioned in Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), as is provided for in Section 9 thereof;²³*
7. *Costs against such parties opposing this application jointly and severally;²⁴*
8. *Further and/or alternative relief."²⁵*

[16] The Applicant has caused two notices to be displayed in terms of Rule 16A of the Uniform Rules of Court²⁶.

[17] No interested party has approached the Applicant for its written consent to be admitted as *animus curiae* in terms of Rules 16A(2) and (3) of the Uniform Rules of Court.

²⁰ Notice of motion, prayer 3 [Vol. 1, pp 2 – 3]

²¹ Notice of motion, prayer 4 [Vol. 1, p 3]

²² Notice of motion, prayer 5 [Vol. 1, p 3]

²³ Notice of motion, prayer 6 [Vol. 1, p 3]

²⁴ Notice of motion, prayer 7 [Vol. 1, p 3]

²⁵ Notice of motion, prayer 8 [Vol. 1, p 3]

²⁶ Founding affidavit, p 39, para 13.16 [Vol. 1, p 46]; Annexure "A31" [Vol. 4, pp 333 – 335] and [Vol. 7, pp 667 – 669]

[18] No notice for admission as *amicus curiae* as is contemplated by Rule 16A(5) of the Uniform Rules of Court was served on the Applicant either.

Origin of the ordinance

[19] The Ordinance has its origin in the pre-constitutional era. It pre-dates the Interim Constitution by some 6 years²⁷. It dates from an era during which municipalities were regarded as mere creatures of statute, otherwise moribund, save if imbued with powers by provincial or national legislation²⁸.

[20] Since the advent of the Constitution, a municipality has become an organ of state that enjoys original and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits²⁹.

[21] When regard is had to the structure of the Ordinance, it is evident that it originates from an era where the provincial authority, through the Administrator, exerted full control over municipalities and its decision-making powers. As far as municipal planning was concerned, the Administrator in fact took most municipal planning decisions himself. It is for this reason that one finds numerous references in the Ordinance to the Administrator effectively controlling the municipal planning functions of a municipality. Examples thereof are found in:

21.1 the power to declare any local authority to be "an authorised local authority" for purposes of Chapters 2, 3 or 4 of the Ordinance³⁰ by

²⁷ The Ordinance came into operation on 10 June 1987

²⁸ *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA) at para [22]

²⁹ *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) at para [60];

³⁰ *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA) at para [22] Section 2(1) of the Ordinance

- proclamation in the Provincial Gazette;
- 21.2 the Administrator appoints the members of the Township Board³¹;
 - 21.3 the Administrator removes members from the Board³²;
 - 21.4 the Townships Board reports through the Director to the Administrator on any matter which the Administrator may refer to it³³;
 - 21.5 the Administrator may direct the Board to hold further investigations or to reconsider its recommendation³⁴;
 - 21.6 the Administrator may direct a local authority to prepare a town-planning scheme in respect of all or any land situated within its area of jurisdiction³⁵;
 - 21.7 the Surveyor-General is prohibited from approving a subdivision of land before the Administrator has approved the subdivision in terms of the Ordinance³⁶;
 - 21.8 the Administrator finally approves an interim scheme³⁷;
 - 21.9 the Administrator ultimately approves applications by an owner of land for amendment of a town-planning scheme situated in the area of jurisdiction of a local authority which is not an authorised local authority³⁸;
 - 21.10 the Administrator may, on appeal, allow a further amendment of an amendment scheme³⁹;
 - 21.11 the Administrator may consent to an application brought by an owner

³¹ Section 4(1) of the Ordinance
³² Section 6 of the Ordinance
³³ Section 13(1)(b) of the Ordinance
³⁴ Section 13(2) of the Ordinance
³⁵ Section 18(1) of the Ordinance
³⁶ Section 25(1)(a)(i) of the Ordinance
³⁷ Sections 38(1) and 39 of the Ordinance
³⁸ Section 45(18) of the Ordinance
³⁹ Section 46 of the Ordinance

to repeal an amendment scheme or a provision demanding the payment of an engineering services contribution⁴⁰;

21.12 the Administrator may approve any proposal made by a local authority in order to promote the fulfilment of the purposes of its town-planning scheme⁴¹;

21.13 the Administrator may direct a local authority to review its town-planning scheme⁴²;


21.14 the Administrator functions as the appeal body for appeals against decisions of an authorised local authority in terms of section 29(2) of the Ordinance and in respect of a rezoning application contemplated in section 56(1) of the Ordinance, as well as in the instance of a refusal or unreasonable delay of an authorised local authority to give a decision on a rezoning application⁴³;

21.15 the Administrator decides appeals against a decision by a local authority not to allow a further amendment of a town-planning scheme within a period of 2 years from the date of adoption of the scheme⁴⁴;

21.16 the Administrator may exempt any person who establishes a township for the temporary housing of *bona fide* full-time employees in the service and the families of such employees from any provisions or all of the provisions of Chapter 3 of the Ordinance⁴⁵;

21.17 the Administrator considers applications for township establishment in certain instances⁴⁶;

⁴⁰ Section 48 of the Ordinance
⁴¹ Section 49 of the Ordinance
⁴² Section 53 of the Ordinance
⁴³ Section 59 of the Ordinance
⁴⁴ Section 61 of the Ordinance
⁴⁵ Section 66(2) of the Ordinance
⁴⁶ Section 69(15)(b) of the Ordinance



- 21.18 the Administrator considers divisions of townships⁴⁷;
- 21.19 the Administrator may require the fulfilment of conditions for township establishment before plans and diagrams are lodged with the Registrar of Deeds⁴⁸;
- 21.20 the Administrator may consent to the continuation of a township establishment application by a new owner⁴⁹;
- 21.21 the Administrator declares a township to be an approved township by notice in the Provincial Gazette⁵⁰;
- 21.22 the Administrator may authorise the refund of an endowment or any portion thereof to a township owner⁵¹;
- 21.23 the Administrator may approve of an application by an owner to have the boundaries of an approved township extended⁵²;
- 21.24 the Administrator approves the alteration, amendment or cancellation of general plans⁵³;
- 21.25 the Administrator publishes a notice in the Provincial Gazette declaring the alteration, amendment, total or partial cancellation of a general plan⁵⁴;
- 21.26 the Administrator observes and enforces any conditions imposed during township establishment⁵⁵;
- 21.27 the Administrator considers appeals against decisions of a local authority for the establishment of a township or a refusal or

47 Section 73 of the Ordinance
 48 Section 76 of the Ordinance
 49 Section 78 of the Ordinance
 50 Section 79 of the Ordinance
 51 Section 83 of the Ordinance
 52 Section 88 of the Ordinance
 53 Section 89 of the Ordinance
 54 Section 90 of the Ordinance
 55 Section 93 of the Ordinance

- unreasonable delay to do so⁵⁶;
- 21.28 the Administrator considers the application for the establishment of townships by local authorities⁵⁷;
- 21.29 the Administrator considers appeals of any person aggrieved by a municipality's decision as to the nature of engineering services to be installed when a township is established⁵⁸;
- 21.30 the Administrator determines the guidelines for classification of engineering services to be provided to a township⁵⁹;
- 21.31 the Administrator determines the guidelines for the contribution by a local authority to the costs of internal engineering services⁶⁰;
- 21.32 the Administrator determines the guidelines for contributions towards the costs of external engineering services that a township developer has to pay⁶¹;
- 21.33 the Administrator appoints the members of the services appeal board⁶²;
- 21.34 the Administrator publishes a notice signalling the approval or adoption of a town-planning scheme⁶³;
- 21.35 the Administrator may prescribe any provision in respect of a town-planning scheme⁶⁴;
- 21.36 the Administrator may declare a township an illegal township⁶⁵; and
- 21.37 the Administrator may levy fees in respect of any act, matter or

⁵⁶ Section 104 of the Ordinance
⁵⁷ Section 109 of the Ordinance
⁵⁸ Section 116 of the Ordinance
⁵⁹ Section 117 of the Ordinance
⁶⁰ Section 120 of the Ordinance
⁶¹ Section 121 of the Ordinance
⁶² Section 123(1) of the Ordinance
⁶³ Section 125(2) of the Ordinance
⁶⁴ Section 125(7) of the Ordinance
⁶⁵ Section 129(1) of the Ordinance

application in terms of the Ordinance and anything required to be done in terms thereof⁶⁶ and may exempt any person from the payment thereof⁶⁷.

[22] The above is not an exhaustive list of a provincial authority's involvement in municipal planning decisions. Apart from the Administrator exercising the abovementioned municipal planning functions, the Ordinance is replete with examples of the office of a provincial authority exercising municipal planning functions through the Director⁶⁸, the Townships Board and the Services Appeal Board⁶⁹. The Ordinance contains many references to the municipal planning functions being performed by the Director⁷⁰.

[23] The Ordinance, with its unlimited control and decision-making powers awarded to its provincial executive and to be exercised through the Administrator, the Director, the Townships Board and the Services Appeal Board, is an instrument of its time.

[24] After 21 years of constitutional democracy, the Ordinance still reflects this outdated state government model. Since the declaration of constitutional invalidity of Chapters V and VI of the Development Facilitation Act 67 of 1995 ("the DFA") by the Constitutional Court⁷¹, the Ordinance has become the only source of authority for municipal planning

⁶⁶ Section 135 of the Ordinance

⁶⁷ Section 137(2) of the Ordinance

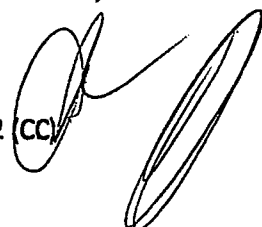
⁶⁸ The definition in section 1(1)(ix) of the Ordinance reads:

"Director", insofar as the provisions of this Ordinance is applied in or with reference to a particular province, means an officer in the provincial administration of that province designated to perform the functions entrusted by or under this Ordinance to the Director;"

⁶⁹ Established by the Administrator in terms of section 123(1) of the Ordinance

⁷⁰ Sections 32, 70, 71, 77 and 140 are but a few

⁷¹ *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC)



functions to be exercised by municipalities in the area of the old Transvaal Province .

Assignment of the ordinance

[25] With the commencement of the new constitutional era, the administration of the whole of the Ordinance was assigned to the Province of Gauteng, with effect from 31 October 1994⁷².

[26] Any reference in the Ordinance to "Administrator" means the competent authority to whom the administration of the Ordinance has been assigned under section 235(8) of the Interim Constitution⁷³.

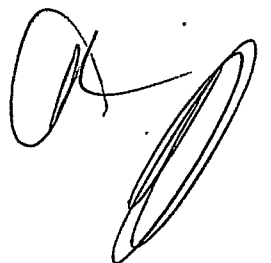
[27] The Second Respondent is the competent authority within the Gauteng Province to whom the administration of the Ordinance was assigned.

Town-planning scheme and amendment scheme defined

[28] Since the dispute between the parties has its genesis in the permission granted by the Municipality for a relaxation of the height restriction in respect of the buildings erected on the subject property, I deem it necessary to first define the concept "town-planning scheme" and to explain its statutory origin with specific reference to the Ordinance.

[29] Under the Ordinance, the authority to regulate the use of land is assigned in general to authorised municipalities. The principal tool for regulating land use is through the introduction and enforcement by the municipality of a town-planning scheme. The breadth of control that might be asserted through a town-planning scheme is illustrated by the

⁷² Proclamation R161 of 1994 published in Government Gazette 16049 of 31 October 1994
⁷³ See the definition of "Administrator" in section 1 of the Ordinance



provisions of Regulation 3, which includes the control of height.⁷⁴

[30] In essence, town-planning consists of the control over land use by the Municipality concerned so that each part of the land within the urban area can function efficiently as part of the whole in order to enhance the welfare, prosperity and progress of the community to the highest possible level⁷⁵.

[31] A town-planning scheme is the instrument or document or guide containing all town-planning controls necessary to give effect to the purpose of such a scheme.

[32] The general purpose of a town-planning scheme has been stated in section 19 of the Ordinance as follows:

"The general purpose of a town-planning scheme shall be the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such development."

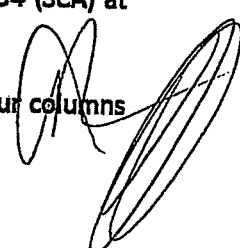
[33] The Municipality derives its power to prepare a town-planning scheme and an amendment scheme from the provisions of section 18 of the Ordinance.

[34] A town-planning scheme typically contains a schedule that has four columns or sections,⁷⁶

⁷⁴ *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) at paras [6] - [7]

⁷⁵ *Planning Law* Jeannie Van Wyk Juta Second Edition, p 280, para 7.3.7.2

⁷⁶ *Planning Law* Jeannie Van Wyk Juta Second Edition, p 280, para 7.3.7.3. *In casu*, the four columns described above appear from Annexure "A13" [Vol. 3, pp 232 - 239]



- 34.1 The first column shows the various use zones, namely residential, business etc.⁷⁷
- 34.2 The second column lists the purposes for which buildings may be erected or used within each use zone⁷⁸. These are the primary uses for each use zone, for example, dwelling houses in the case of a residential use zone and factories in the case of an industrial use zone⁷⁹.
- 34.3 The third column contains a list of purposes for which the buildings may be erected or used in each specific use zone but only with the consent of the Municipality⁸⁰. These are the uses allocated to a specific use zone which are not primary uses but which are necessary in a specific area because they provide certain conveniences⁸¹. In the case of residential use zone, such uses would be places of worship, social halls and so on⁸². Since these uses could cause inconvenience, loss of amenity and economic damage if allowed to continue unrestricted, special consent from the Municipality is required to undertake such specific developments.⁸³
- 34.4 The fourth column indicates those purposes for which buildings may not be erected and used⁸⁴ in a specific use zone. In a residential use zone, the erection of buildings for noxious industries would, for example, be prohibited⁸⁵.

⁷⁷ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁷⁸ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁷⁹ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁸⁰ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁸¹ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁸² *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁸³ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁸⁴ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3
⁸⁵ *Planning Law Jeannie Van Wyk Juta Second Edition*, p 280, para 7.3.7.3

[35] A town-planning scheme also contains provisions regulating aspects such as boundary lines, height restrictions⁸⁶ and floor area ratios ["FAR" also sometimes referred to as "floor space ratio" or "FSR"]. Such control measures are sometimes referred to as bulk and coverage⁸⁷.

[36] The permissible maximum height of buildings varies from use zone to use zone⁸⁸.

[37] Town-planning schemes also comprise scheme clauses, scheme maps, annexures and schedules⁸⁹.

[38] A town-planning scheme may empower a municipality, in its discretion and on such conditions as it may determine, to consent to the use of any land or building for a particular purpose⁹⁰.

[39] A town-planning scheme also empowers a municipality to grant exemption from the provisions of the scheme or to relax the requirements of those provisions on such conditions as it may determine⁹¹.

⁸⁶ *Steclub Investments (Pty) Ltd v Eastern Metropolitan Council and Others* [2002] 3 All SA 163 (W) at paras [18], [23]; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) [129]; *Ruck v Makana Municipality and Others* [2010] ZAECHC 111 (24 November 2010)

⁸⁷ *Planning Law* Jeannie Van Wyk Juta Second Edition, p 280, para 7.3.7.3

⁸⁸ *Planning Law* Jeannie Van Wyk Juta Second Edition, p 280, para 7.3.7.3. *In casu*, the height limitations appear on Annexure "A13" [Vol. 3, pp 249 – 254], read with A/S 945 in Annexure "A9" [Vol. 2, pp 161 – 168]

⁸⁹ *Planning Law* Jeannie Van Wyk Juta Second Edition, p 280, para 7.3.7.3; *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) at para [7]

⁹⁰ Section 20(1)(a) of the Ordinance

⁹¹ Section 20(1)(b) of the Ordinance

[40] A town-planning scheme may contain such other provisions as may be prescribed or which may relate to town-planning in general⁹².

[41] The Administrator published the Town-Planning and Townships Regulations under section 138 of the Ordinance⁹³ ("the Regulations"). The Regulations also dictate the content of a town-planning scheme.

[42] The Regulations direct that the provisions of a town-planning scheme shall consist of, *inter alia*, the provisions contained in scheme clauses⁹⁴.

[43] The Regulations further determine that scheme clauses may, in addition to any provision contemplated in section 20 of the Ordinance, contain provisions relating, *inter alia*, to the regulation of the erection of buildings with particular reference to the height thereof⁹⁵.

[44] It is therefore clear that control over the height of buildings in terms of a town-planning scheme constitutes the control and regulation of land use.

Provisions of the ordinance relevant to the powers, duties and functions of the GTB

[45] From what is to follow it is clear that the Townships Board is an organ of state which functions at the provincial level of government.

[46] In terms of section 3(1) of the Ordinance, a Township Board is established for each province.

⁹² Section 20(1)(c) of the Ordinance

⁹³ Transvaal Administrator's notice 858/1987, published in Official Gazette 4508 of 10 June 1987

⁹⁴ Regulation 2(a) of the Regulations

⁹⁵ Regulation 3(g)(v) of the Regulations

[47] In terms of section 4(1) of the Ordinance, the Townships Board consists of a Chairman appointed by the Second Respondent, a Director⁹⁶ and no more than 15 other members, also appointed by the Second Respondent.

[48] The Second Respondent is authorised by the Ordinance to:

- 48.1 determine the period of office of an appointed member, which may not exceed 5 years⁹⁷;
- 48.2 at any time, and for good and sufficient reason, remove the chairman, vice chairman or appointed member from office⁹⁸; and
- 48.3 may appoint any person instead of a member when the office of an appointed member becomes vacant⁹⁹.

[49] The control that the Second Respondent exercises over the powers and duties of the Township Board is evident from the wording of section 13 of the Ordinance. It determines:

"13. Powers and duties of Board. –

(1) The Board –

- (a) *shall exercise the powers conferred and perform the duties imposed upon it by this Ordinance;*
- (b) *shall report through the Director to the Administrator on any matter which the Administrator may refer to it;*
- (c) *may, in its discretion and in the manner contemplated in paragraph (b), report to the Administrator on any matter to*

⁹⁶ "Director" is defined in section 1(1)(ix) of the Ordinance as "An officer in the provincial administration of that province designated to perform the functions entrusted by or under this Ordinance to the Director."

⁹⁷ Section 5(1) of the Ordinance

⁹⁸ Section 6 of the Ordinance

⁹⁹ Section 7 of the Ordinance

which this Ordinance relates.

(2) *Where the Board has, in terms of any provisions of this Ordinance, made a recommendation to the Administrator in respect of an application, town-planning scheme or appeal, the Administrator may, before giving his decision on the application, scheme or appeal and if he deems it expedient, direct the Board –*

(a) *to hold a further inspection or hearing or institute a further investigation;*

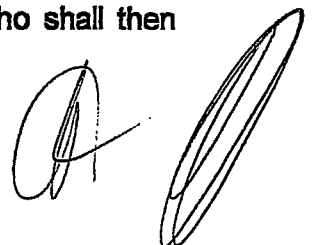
(b) *to reconsider its recommendation."*

[50] Section 139(1) of the Ordinance affords an applicant or an objector who is aggrieved by a decision of a local authority on any application in terms of any provision of the Ordinance or any town-planning scheme, the opportunity to appeal through the Director to the Townships Board within a period of 28 days from the date he has been notified in writing of the relevant decision.

[51] Once an appeal has been lodged, the Townships Board affords a third person or the person who has lodged an objection, an opportunity to oppose the appeal.

[52] In terms of section 139(2) of the Ordinance, a "third person" is defined as that person in whose favour a local authority has made a decision which is appealed against by any person who is aggrieved thereby.

[53] After the provisions of subsections 139(1), (2) and (3) of the Ordinance have been complied with, the Director submits the appeal to the Townships Board, who shall then



determine a date, time and place for the hearing of the appeal¹⁰⁰.

[54] At a hearing before the Townships Board, the local authority and any other party to the appeal¹⁰¹ may state its case¹⁰².

[55] After the hearing, the Townships Board may:

- 55.1 confirm, amend or set aside the decision appealed against¹⁰³;
- 55.2 give any decision which the local authority would have been competent to give¹⁰⁴; and
- 55.3 thereafter the Townships Board shall notify every party to the appeal in writing of its decision and the reasons therefor¹⁰⁵.

Defences raised by the fifth respondent

[56] The Fifth Respondent has summarised its defences to the application as follows:

"313. A/S 945 is the town planning scheme in operation inv (sic) respect of the applicant's property and column 6 thereof which regulates the height of all structures on the applicant's property amends the general provisions of the TTPS and immediately triggers clause 16(6) of the TTPS (because the Schedule to A/S 945 operates as an Annexure T in the TTPS).

314. The incorrect procedure was followed by the Municipality in having

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Section 139(4) of the Ordinance

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Section 139(3) of the Ordinance determines that any other person than the local authority who is a party to the appeal shall, within a period of 30 days from the date on which he became a party to the appeal, deposit with the Director such amount of money as may be prescribed as security for the payment of the expenses contemplated in subsection (7), and if he fails so to deposit the amount he shall cease to be a party to the appeal

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Section 139(5) of the Ordinance

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Section 139(6)(a) of the Ordinance

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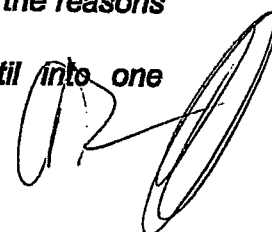
Section 139(6)(b) of the Ordinance

105

Section 139(6) of the Ordinance

permitted the applicant to apply for the increase in height (or height relaxation) without having complied with clause 16 of the TTPS (see paragraph 300.1 supra).

315. *Whilst the Municipality is authorised to waive this requirement it may only do so, on the written request by the applicant, in circumstances where, objectively, it is of the opinion that another way of giving the notice as prescribed by the Municipality, will inform the public in a better way, or that such non-compliance is not of such a material nature that it is likely to affect anyone detrimentally (clause 16(9)).*
316. *The Municipality did not comply with clause 16(9).*
317. *The fifth respondent objected to the application prior to it being considered by the Municipality.*
318. *Despite the fifth respondent's objection the Municipality failed to consider the objection and approved the application.*
319. *The fifth respondent appealed the decision, which appeal was upheld.*
320. *The GTB considered in depth all evidence adduced at the appeal hearing (over many days) and having considered same as well as sound town planning principles, upheld the appeal and set aside the decision of the Municipality.*
321. *The GTB is authorised to set aside the decision of the Municipality in terms of the powers conferred upon it in terms of section 139 of the Ordinance.*
322. *The Board acted with the powers conferred upon it in terms of its enabling legislation.*
323. *Section 139 of the Ordinance is not unconstitutional for all the reasons described above, which reasons are too vast to distil into one*



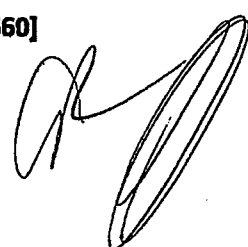
sentence.

324. *If the Honourable Court declares section 139 unconstitutional, the Courts will be flooded with applications in which they are compelled to undertake town planning work. This will not only further congest the Court roll but it will require each judge of each division to become an expert in town planning matters (in addition to their current expertise).*
325. *The applicant was not entitled to exercise the permission granted (clause 16(9) of the TTPS).*
326. *Despite this prohibition and despite having been advised at all material times by a body of experts. (sic) The (sic) applicant chose simply to ignore such prohibition and continued with construction in order to attempt to coerce a decision from the GTB 'in its favour'.¹⁰⁶*

[57] The Fifth Respondent advances the following arguments for its contention that section 139 of the Ordinance is not inconsistent with the Constitution:

- 57.1 The Second Respondent ("MEC") is the competent authority in terms of section 235(8) of the Interim Constitution to whom the administration and performance of the functions and powers in terms of the Ordinance have been assigned¹⁰⁷;
- 57.2 In a section 139 appeal, the GTB makes the final decision, but it may refer the matter to the MEC¹⁰⁸;
- 57.3 The GTB has not trammelled any executive authority vested in the Municipality¹⁰⁹;
- 57.4 The GTB has not trammelled any integrated development plans

¹⁰⁶ Fifth Respondent's answering affidavit, paras 315 – 326, pp 140 – 143 [Vol. 6, pp 557 – 560]
¹⁰⁷ Fifth Respondent's answering affidavit, p 5, para 10.1 [Vol. 5, p 423]
¹⁰⁸ Fifth Respondent's answering affidavit, p 10, para 15.2 [Vol. 5, p 428]
¹⁰⁹ Fifth Respondent's answering affidavit, p 11, para 18.1 [Vol. 5, p 429]



adopted by the Municipality¹¹⁰;

57.5 The GTB has not made any decision repugnant to any integrated development plan adopted by the Municipality¹¹¹;

57.6 The GTB has merely exercised the powers conferred upon it in terms of section 13, read with section 139 of the Ordinance¹¹²;

57.7 The GTB does not consider itself to be an audience of first instance in respect of town planning applications, as an alternative to the Municipality¹¹³;

57.8 The GTB is the only competent authority in terms of law to which the Fifth Respondent could turn to address its dissatisfaction with the decision taken by the Municipality¹¹⁴;

57.9 The GTB functions as the only domestic or internal appeal mechanism intended by Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") that has to be exhausted in terms of section 7(2) of PAJA prior to approaching the Court, since section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") is not available to an objector¹¹⁵;

57.10 If the GTB does not remain as an appeal mechanism, Courts will be inundated with review applications calling upon them to do planning work and to make planning decisions, consequently disregarding the considerable experience the GTB has in town planning matters¹¹⁶;

57.11 The GTB represents the independent and impartial tribunal or forum

¹¹⁰ Fifth Respondent's answering affidavit, p 11, para 18.2 [Vol. 5, p 429]

¹¹¹ Fifth Respondent's answering affidavit, p 11, para 18.3 [Vol. 5, p 429]

¹¹² Fifth Respondent's answering affidavit, p 12, para 18.4 [Vol. 5, p 430]

¹¹³ Fifth Respondent's answering affidavit, p 12, para 18.5 [Vol. 5, p 430]

¹¹⁴ Fifth Respondent's answering affidavit, p 12, para 18.7 [Vol. 5, p 430]

¹¹⁵ Fifth Respondent's answering affidavit, pp 12 – 17, paras 18.7 – 25.6 [Vol. 5, pp 430 – 435]

¹¹⁶ Fifth Respondent's answering affidavit, p 17, para 26 [Vol. 5, p 435]

intended in section 34 of the Constitution¹¹⁷;

57.12 The Ordinance which creates the GTB is provincial legislation as intended in section 104 of the Constitution¹¹⁸;

57.13 Section 114(2) of the Constitution enjoins the provincial legislature to provide for mechanisms to ensure that all provincial executive organs of State in the province are accountable to it and to oversee the exercise of provincial executive authority in the province¹¹⁹;

57.14 Section 125 of the Constitution permits the Premier to implement provincial legislation, thereby exercising executive authority¹²⁰;

57.15 The GTB considers all evidence placed before it and bases its decision on long-established, sound town planning principles, with due consideration of integrated plans adopted by the Municipality and can therefore not be accused of a flagrant usurpation of or disregard for the functions of the Municipality¹²¹;

57.16 The functional area of municipal planning in Part B of Schedule 4 is limited by sections 155(6) and 155(7) of the Constitution¹²²;

57.17 The exercising of an appeal function by the GTB constitutes the contemplated regulation of the exercise of the Municipality's executive authority in respect of municipal planning by the provincial executive, being permitted in terms of section 155(7) of the Constitution¹²³;

57.18 Applications to increase the existing permissible height of structures does not constitute "municipal planning" for purposes of Part B of

¹¹⁷ Fifth Respondent's answering affidavit, p 17, para 25.6 [Vol. 5, p 435]

¹¹⁸ Fifth Respondent's answering affidavit, p 22, para 39 [Vol. 5, p 440]

¹¹⁹ Fifth Respondent's answering affidavit, p 23, para 39.3 [Vol. 5, p 441]

¹²⁰ Fifth Respondent's answering affidavit, p 23, para 39.4 [Vol. 5, p 441]

¹²¹ Fifth Respondent's answering affidavit, pp 25 – 27, paras 49 – 52 [Vol. 5, pp 443 – 444]

¹²² Fifth Respondent's answering affidavit, p 27, para 53 [Vol. 5, p 445]

¹²³ Fifth Respondent's answering affidavit, p 27, para 54 [Vol. 5, p 445]

Schedule 4 to the Constitution, but forms part of the provincial competence of "urban and rural development" of Part A of Schedule 4 to the Constitution, which is a provincial legislative competence¹²⁴; and

57.19 Section 139 of the Ordinance constitutes a limitation contemplated by section 155(7) of the Constitution¹²⁵.

[58] These arguments by the fifth respondent will be dealt with hereunder in the light of the fact that the Constitutional Court has on no less than 3 occasions already dealt with the constitutional scheme relevant to the functional area of "municipal planning". It has by now become settled law that a provincial authority may not set aside "municipal planning" decisions taken by a municipality.

The Constitutional scheme within which Local Government operates

[59] The constitutional scheme within which municipalities operate was summarised by Jafta J in *Johannesburg Municipality v Gauteng Development Tribunal and Others*¹²⁶ as follows:

"[43] Section 40 of the Constitution defines the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere

¹²⁴ Fifth Respondent's answering affidavit, p 28, para 58 – 59 [Vol. 5, p 446]
¹²⁵ Fifth Respondent's answering affidavit, p 29, para 61 [Vol. 5, p 447]
¹²⁶ 2010 (6) SA 182 (CC) at para [43] – [48]



must respect the status, powers and functions of government in the other spheres and 'not assume any power or function except those conferred on [it] in terms of the Constitution'.

[44] *The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by ss 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures¹²⁷. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.*

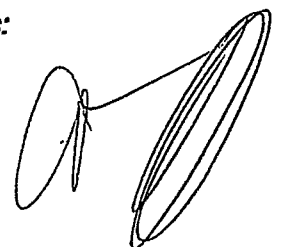
[45] *The starting point in assessing the powers of the local-government sphere is s156(1) which affords municipalities original constitutional powers. It reads:*

'(1) A municipality has executive authority in respect of, and has the right to administer –

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation.'

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



'The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Firefighting services

Local tourism

Municipal airports

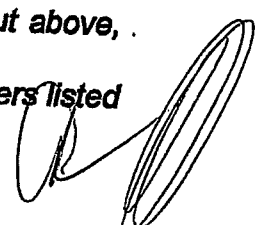
Municipal planning

Municipal health services

Municipal public transport. ...'

The functional areas listed in Part B of Schedule 5 are not material to the present enquiry. Part B of Schedule 4 and Part B of Schedule 5 itemise the functional areas assigned to municipalities, and these functions may be regulated by the national and provincial spheres of government to the extent defined in s 155(6)(a) and (7).

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



in Part B of A Schedules 4 and 5 is vested in municipalities.

[48] *The functional area material to the determination of whether Chs V and VI of the Act¹²⁸ are inconsistent with the Constitution is 'municipal planning'. It is necessary to construe this term so as to determine whether it includes the power to authorise land-rezoning and the establishment of townships. For if it does, the contested powers fall within the executive authority of municipalities."*

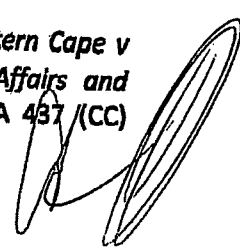
[60] Although the term "municipal planning" as it appears in Part B of Schedule 4, is not defined in the Constitution, it is commonly used to define the control and regulation of the use of land¹²⁹.

[61] The Constitutional Court recently had an opportunity to give meaning to the "municipal planning" functional area, where it found¹³⁰:

"[13] ... *Municipalities are responsible for zonings and subdivision decisions, and provinces are not.*

[14] *This makes sense, given that municipalities are best suited to make those decisions. Municipalities face citizens insistent on delivery of governmental services, since they are the frontiers of service delivery, it is appropriate that they should be responsible for rezoning and subdivision. For these entail localised decisions, and should be based on information that is readily available to municipalities. The decision-*

¹²⁸ Being a reference to the Development Facilitation Act 67 of 1995 ("the DFA")
¹²⁹ *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at para [57]
¹³⁰ *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) ("Habitat" or "the Habitat matter")



*maker must consider whether services – they are provided primarily by municipalities – will be available for the proposed development. And it must consider matters like building density and wall heights. These are best left for municipal determination.”*¹³¹

[62] It is common cause between the parties that a municipality utilises mainly four town planning controls in order to regulate and control land use within its jurisdictional area, being height, coverage, FAR and density¹³².

[63] These controls form the essence of all town-planning schemes.

[64] Without these four town-planning controls, a town-planning scheme cannot function properly. Town-planning schemes are the product of the Ordinance as a mechanism by which municipalities can regulate spatial planning in its area.

[65] The question that has to be answered is whether the setting aside of the Municipality's permission to relax the height limitation applicable to buildings on the subject property by the GTB constitutes an impermissible usurpation of the Municipality's power to manage “municipal planning” and whether it intrudes on the autonomous sphere of authority that the Constitution accords to municipalities and consequently fails to recognise the distinctiveness of the municipal sphere¹³³.

131

Own emphasis

132

Fifth Respondents answering affidavit, p 58, para 127 [Vol. 5, p 476]

133

This is similar to the question which was posed in the *Habitat* matter at para [13]

[66] In the *Habitat* matter¹³⁴, the Constitutional Court had no difficulty in finding that legislation which allows a provincial authority to interfere in a municipality's land-use decisions by substituting its decisions for those of the Municipality, is clearly unconstitutional and invalid¹³⁵.

[67] The functional area of "urban and rural development" in Part A of Schedule 4 of the Constitution cannot be interpreted in a way that includes those powers associated with the functional area of "municipal planning" in Part B of Schedule 4 of the Constitution. Such an interpretation would infringe upon the principles of co-operative governance which provide that each sphere of government must respect the functions of the other spheres and must not assume any functions or powers not conferred upon them by the Constitution or encroach on the functional integrity of the other spheres¹³⁶.

[68] The functional area of "urban and rural development" should be interpreted narrowly so that each sphere of government could exercise its powers without interference by another sphere of government¹³⁷.

[69] The functional area "urban and rural development" is not wide enough to include the powers that form part of "municipal planning"¹³⁸.

¹³⁴ *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) ("Habitat" or "Habitat matter")

¹³⁵ *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC).

¹³⁶ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at paras [58] and [61]

¹³⁷ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at para [62]

¹³⁸ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at para [63]

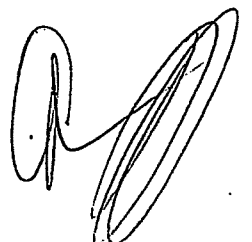


[70] Not only must the functional areas listed in Schedule 4 of the Constitution be interpreted as being distinct from the functional areas listed in Schedule 5, but the functional areas within the same Schedule, i.e. Schedule 4, must also be interpreted as being distinct from one another to avoid the ostensible overlapping of functional areas.

[71] "Urban and rural development" must therefore be given a different context from "municipal planning". In this regard, the Constitutional Court stated that:

"[55] It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermitically sealed compartments. But that notwithstanding, they remain distinct from one another. This is the position, even in respect of functional areas that share the same wording, like roads, planning, sports and others. Their distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to 'provincial roads' where municipalities have authority over 'municipal roads'. The prefix attached to each functional area identifies the sphere to which it belongs and it distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of 'provincial roads' does not include 'municipal roads'. In the same vein 'provincial planning' and 'regional planning and development' do not include 'municipal planning'.

[56] The constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone



*is entitled to exercise.*¹³⁹

[72] Section 156(5) of the Constitution provides that a municipality has the right to exercise any power concerning a matter that is reasonably necessary for, or incidental to, the effective performance of its functions. Such an incidental power, although it does not confer new functional areas on a municipality, does confer on a municipality the power to adopt measures that will enhance the effective administration of its existing functional areas¹⁴⁰.

[73] It makes no sense whatsoever for one of the four town planning controls, being height, to resort under provincial authority's competence, whilst the other three town-planning controls, i.e. coverage, density and floor space ratio, resort under the Municipality's competence.

[74] The imposition of a height limitation and the power to relax such a limitation ought to be considered as being inextricably linked to or incidental to a municipality's competence to regulate the zoning of all property in its area as part of its municipal planning function. Such an interpretation will enhance the effective administration of the said municipal function.

[75] The control and relaxation of height limitations on buildings must at the very least be considered to be reasonably incidental to the effective performance of the municipal planning function of that municipality, as it represents one of the four planning controls which are vital components of the control over zoning of properties.

¹³⁹

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 (6) SA 182 (CC) at paras [55] and [56]

¹⁴⁰

Steytler and De Visser *Local Government Law*, LexisNexis 2012 at 5-6 to 5-8



[76] The word "planning" in the functional area of "municipal planning" refers to the control and regulation of land use and the prefix "municipal" confines it to municipal affairs¹⁴¹.

[77] In the context of this matter, the exercising of control over the height of buildings in a municipal area by a municipality forms part of a municipality's exclusive "municipal planning" function, being the strict reserve of the Municipality in terms of section 156(1) of the Constitution.

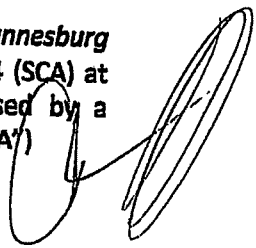
[78] The setting aside by a provincial tribunal of the Municipality's decision to relax a height limitation on a building, thereby imposing its own decision which is inconsistent with the decision and objectives of the Municipality, must be regarded as a recipe for chaos¹⁴² and is clearly inconsistent with section 156(1) of the Constitution.

[79] Applying the *Johannesburg Metropolitan Municipality* and *Habitat* authorities, there is no merit in the Fifth Respondent's defences founded on a strained interpretation of section 235(18) of the Interim Constitution, sections 104, 114(2), 125, 155(6) and 155(7) of the Constitution and section 7(2) of PAJA.

[80] On the authority of the *Johannesburg Metropolitan Municipality* and *Habitat* matters, the GTB's setting aside of the Municipality's decision to relax the height limitation on the subject property offends the constitutional scheme and in particular section 156 of the Constitution.

¹⁴¹ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at para [38]

¹⁴² See in this regard the expression by the Supreme Court of Appeal in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) at para [33] where this statement was made in connection with the powers exercised by a development tribunal established by the Development Facilitation Act 67 of 1995 ("the DFA")



Main ground for the setting aside of the GTB's decision – Constitutional invalidity

[81] It is evident from the structure of the Applicant's notice of motion that it seeks the setting aside of the GTB's decisions on the ground that the decision-making powers of the GTB appears inconsistent with the Constitution.

[82] The Applicant's notice of motion further informs that the Applicant, in addition to this first mentioned ground for review, also seeks the setting aside of the GTB's decision on other grounds.

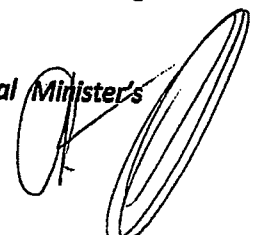
[83] As the powers exercised by the GTB in terms of section 139 of the Ordinance are inconsistent with the Constitution, the decisions taken by the GTB ought to be set aside for this reason alone. There is no need to consider the alternative grounds for review relied upon by the Applicant in setting the GTB's decisions aside.

[84] In *Habitat*, the Constitutional Court did exactly that. It had set aside the impugned decision taken by a provincial tribunal on appeal by reason only of having found the empowering provisions relied upon by that body to be inconsistent with the provisions of the Constitution¹⁴³.

¹⁴³

Minister of Local Government, Environmental Affairs and Development Planning Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning Western Cape v City of Cape Town and Others 2014 (4) SA 437 (CC). The Constitutional Court, at para [4] thereof, succinctly summarised the appropriate relief by having stated:

"[4] ... Invalidating section 44 of LUPO would mean that the Provincial Minister's decision in both matters would fall to be set aside."



[85] In a proper case, a decision by an Administrator that is unconstitutional, can be set aside on review in terms of section 6(2)(i) of PAJA¹⁴⁴.

Application in terms of section 9 of PAJA

[86] By virtue of the provisions of section 9(2) of PAJA I am empowered to extend the 180 days referred to in section 7(1) of PAJA, in the absence of an agreement between the parties, where the interests of justice so require.

[87] The Applicant's attorney received notice of the GTB's decision on 13 April 2011¹⁴⁵.


[88] This application was issued by the Registrar of this Honourable Court on 14 December 2011, being some 2 months outside of the 180-day period mentioned in section 7(1) of PAJA.

[89] In the Applicant's application in terms of section 7(1) of PAJA, it advances the following reasons why it submits that it will be in the interest of justice to extend the said period, namely:

89.1 The Fifth Respondent can show no prejudice as a consequence of the delay in having issued this application earlier¹⁴⁶;

89.2 The Fifth Respondent has done nothing to enforce the decision of the GTB. It has not sought orders for demolition or the like and there is no pending litigation by the Fifth Respondent in this regard of which the Applicant is aware¹⁴⁷;

¹⁴⁴ *Rapulo Investments CC v Minister of Agriculture, Forestry and Fisheries and Another* (65007/2012) [2014] ZAGPPHC 443 (7 February 2014), para [18]
¹⁴⁵ Founding affidavit, p 45, para 15.2 [Vol. 1, p 52]; Annexure "A35", [Vol. 4, pp 403 – 404]
¹⁴⁶ Founding affidavit, p 51, para 16.2.1 [Vol. 1, p 58]
¹⁴⁷ Founding affidavit, p 51, para 16.2.2 [Vol. 1, p 58]



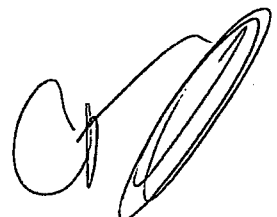
- 89.3 This application in effect represents a supplementation and substitution of the Applicant's earlier review application, which was brought within the time periods prescribed by section 7(1) of PAJA¹⁴⁸;
- 89.4 The merits of the application favour the Applicant¹⁴⁹; and
- 89.5 The Applicant calls for an interpretation of an extremely important constitutional principle which has to be vindicated¹⁵⁰.

Order

[90] I make the following order:

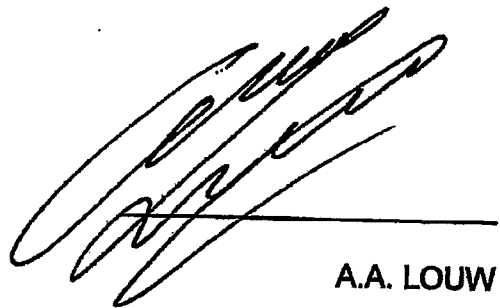
1. It is declared that the City of Tshwane Metropolitan Municipality ("the Municipality") is vested with the exclusive executive authority to consider and approve applications for the relaxation of height limitations of all buildings situated within its municipal area imposed by the Tshwane Town-planning Scheme, 2008 ("Tshwane Scheme") adopted and enforced by the Municipality in terms of the provisions of the Town-planning and Townships Ordinance, 15 of 1986 ("the Ordinance").
2. It is declared that the provisions of section 139 of the Ordinance, which seek to empower the Gauteng Townships Board ("the GTB") to confirm, amend or set aside any decision of the Municipality on any application in terms of any Town-planning Scheme and to give any decision the Municipality would have been competent to give with regards thereto are unconstitutional and invalid, to the extent that the said provisions attempt to empower a provincial authority or provincial

¹⁴⁸ Founding affidavit, p 52, para 16.2.3 [Vol. 1, p 59]
¹⁴⁹ Founding affidavit, p 52, para 16.2.4 [Vol. 1, p 59]
¹⁵⁰ Founding affidavit, p 52, para 16.2.5 [Vol. 1, p 59]



body to make decisions on appeal which fall within the exclusive executive authority of the Municipality.

3. The decision of the GBT, setting aside the Municipality's decision to approve an application made by the applicant in terms of clause 26(1)(b) of the Tshwane Scheme ("the Municipality's decision") for the relaxation of the limitation on height on the buildings situated at Erf 906, Louwlandia Ext 25 Township ("the subject property"), is reviewed and set aside.
4. An extension of the period mentioned in section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), as is provided for in section 9 thereof, is granted to the date of service of the application on the respondents.
5. The fifth respondent is ordered to pay costs of this application occasioned by its opposition thereto.



A.A. LOUW

Judge of the High Court

