"FA1"

In the High Court of South Africa
KwaZulu-Natal Division, Pietermaritzburg

Case No :9645/14

In the matter between :

Tronox KZN Sands (Pty) Ltd	Applicant
and	
KwaZulu-Natal Planning and Development Appeal Tribunal	First Respondent
Mtunzini Conservancy	Second Respondent
The Mtunzini Fish Farm (Pty) Ltd	Third Respondent
Umlalazi Local Municipality	Fourth Respondent
MEC for Co-Operative Governance and Traditional Affairs	Fifth Respondent

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Judgment

Lopes J

[1] The applicant in this matter, Tronox KZN Sands (Pty) Ltd, seeks an order in the following terms from this court :

(a) declaring s 45 and Chapter 10 of the KwaZulu-Natal Planning and Development Act, 2008 ('the PDA') to be unconstitutional to the extent that s 45 and ss 100 to 134 which comprise Chapter 10, constitute interference by the provincial government in municipal planning decisions, by providing for an appeal from a municipal decision to a provincial appellate body, namely the KwaZulu-Natal Planning and Development Appeal Tribunal ('the Appeal Tribunal');

(b) two appeals which are pending before the Appeal Tribunal, and which, in terms of s 45 of the Act, were brought by Mtunzini Conservancy and the Mtunzini Fish Farm (Pty) Ltd (the second and third respondents in the application), against the decision of the Umlalazi Local Municipality (the fourth respondent) to approve the application of Tronox for land-use rights for surface mining operations on the remainder of Lot 91 and the remainder of portion 3 of Lot 91, Umlalazi 10011 registration division GU, Province of KwaZulu-Natal are declared to be unlawful and void *ab initio*;

(c) that the Appeal Tribunal and any other respondents who oppose the relief be ordered to pay the costs of Tronox.

[2] When the application was initially launched, the matter came before this court on the 21st July 2014 and an order was granted, pending the determination of the orders set out above, interdicting the Appeal Tribunal from hearing the two appeals referred to above which were set down for hearing on the 23rd and 24th of July 2014. The costs of that application were reserved for the decision of this court.

[3] The Mtunzini Conservancy and the Mtunzini Fish Farm together with the Umlalazi Municipality have elected to abide the decision of this court.

[4] In the founding affidavit in the application, Tronox is described as the largest fully integrated producer of titanium and/or titanium dioxide in the world and is a global leader in the titanium products industry. Tronox had invested considerable sums in two mining areas, namely Hillendale and Fairbreeze in the Empangeni area. Around 2001 Tronox commenced production at Hillendale and that mine has now been exhausted. It was intended that there would then be a seamless transition from the Hillendale operation to the Fairbreeze mine.

[5] Pursuant to that end, and in October of 2012, Tronox lodged an application with the Umlalazi Municipality in terms of Chapter 4 of the PDA for prospective land-use rights for areas situated outside a scheme as defined in the PDA. It is common cause that the Fairbreeze mine is in such an area, and on the 19th February 2014 the application of Tronox was granted by the Umlalazi Municipality.

[6] The Mtunzini Conservancy and the Mtunzini Fish Farm, which had been objectors to the original application by Tronox, lodged appeals with the Appeal Tribunal against the decision of the Umlalazi Municipality. The merits of those appeals are not relevant for the purpose of deciding this application.

[7] Chapter 10 of the PDA sets out in detail the procedure for the establishment and operation of the Appeal Tribunal. Various sections of the PDA allow for the referral of decisions of a municipality to the Appeal Tribunal and s 45, which is the section in issue in this application, provides :

'**45. Appeal against municipality's decision on proposed development of land situated outside the area of a scheme.** – (1) A person who applied for the development of land situated outside the area of a scheme or who has lodged written comments in response to an invitation for public comment on a proposal to develop the land, who is aggrieved by the decision of the municipality, contemplated in section 43(1), may appeal against the municipality's decision to the Appeal Tribunal.'

The remainder of that section then deals with the time limit for lodging the appeal, and the consequences of not complying with it.

[8] The complaint of Tronox is that the establishment of the Appeal Tribunal is unconstitutional, because its functions constitute provincial intervention in municipal land-use decisions, which is incompatible with the Constitution's allocation of functions between local and provincial government. This requires a consideration of both the constitutional provisions relating to the allocation of governmental powers as well as the provisions of the PDA.

[9] S 40(1) of the Constitution provides that government 'is constituted as national, provincial and local spheres of government which are distinctive, inter-dependant and interrelated.' Sub-s 41(1) provides that :

'All spheres of government and all organs of state within each sphere must –

...

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;'

[10] The powers of municipalities are set out in Chapter 7 of the Constitution, where sub-s 156(1) provides :

'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.'

Part B of Schedule 4 includes 'municipal planning'. There is no dispute that the decision of the Umlalazi Local Municipality which is appealed against fell within the ambit of 'municipal planning'.

[11] Ms *Gabriel*, who appeared for Tronox together with Ms *Pudifin-Jones*, submitted that it was decided in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) that national and provincial governments cannot, by legislation, arrogate to themselves the power to exercise executive municipal powers or the right to administer municipal affairs. That case dealt with the provisions of Chapters V and VI of the Development Facilitation Act of 1995, which authorised Provincial Development Tribunals to determine applications

for the re-zoning of land and the establishment of townships. The court held those provisions to be inconsistent with the provisions of s 156 of the Constitution.

[12] At paragraphs 43 and 44 of *Gauteng Development Tribunal*, Jafta J set out the constitutional distinction between the three spheres of government, emphasising that each sphere has to respect the status, powers and functions of government in the other spheres, and not to interfere with them except as provided by the Constitution – i.e. ss 100 and 139 of the Constitution. He stated :

'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 procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.'

[13] The court examined the provisions of the Development Facilitation Act and found that the Supreme Court of Appeal had correctly declared Chapters V and VI to be unconstitutional. This was because in granting applications for re-zoning or the establishment of townships, the development tribunals established in terms of the Development Facilitation Act encroached on the functional area of 'municipal planning'. The impermissible interference was that those chapters of the Development Facilitation Act were concerned with establishing institutions with adjudicatory powers to determine land development applications – i.e. provincial government usurped the executive decision making authority of municipalities in certain areas.

[14] Ms *Gabriel* also relied on the authority contained in *Minister of Local Government, Environment Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) where the Constitutional Court confirmed that s 44 of the Land Use Planning Ordinance, 1985 is unconstitutional and invalid. That section created a provincial appeal for affected persons against the land-use decisions of a municipality. Section 44 of that Act provided that parties to a municipal application could appeal to the Administrator of the Province in the prescribed manner.

[15] In *Habitat* the provincial government sought to ensure that its veto power was preserved pending the enactment of a new and comprehensive statutory scheme for the re-zoning of properties. The province tried to persuade the court that provincial, legislative and executive surveillance was required over municipal planning decisions, and without such oversight a province would be powerless to stop large developments that may possibly have ruinous effects on the province as a whole. At page 477, paragraph 19 of the judgment Cameron J stated :

'This bogey must be slain. All municipal planning decisions that encompass zoning and subdivisions, no matter how big, lie within the competence of municipalities. This follows from this court's analysis of "municipal planning" in *Gauteng Development Tribunal.* Provincial and national governments undoubtedly also have power over decisions so big, but their powers do not lie in vetoing zoning and subdivision decisions, or subjecting them to appeal. Instead, the provinces have co-ordinate powers to withhold or grant approvals of their own. It is therefore wrong to fear that the province would be powerless to stop the development of a "Sasol 4". That development would depend on myriad approvals, some of them provincial, some of them national.'

[16] Ms *Gabriel* submitted that the 'bogey' Cameron J required to be slain was that provincial governments interfere with the executive functioning of municipalities in any way. Ms *Gabriel* submitted that the very enactment of the appeal process contained in Chapter 10 of the PDA constituted such a constitutional intrusion and was impermissible. She posed the example of a body constituting, for example, retired judges to hear such appeals, and submitted that any appeal structure, of whatever form, could not be imposed upon a municipality by a provincial government. To do so constituted interference with the municipalities' legislative powers, and it matters not that the body created by provincial legislation purports to be constituted of independent experts.

[17] Ms *Gabriel* submitted that there was no conceivable difference between the appeal structure in s 44 of the Land Use Planning Ordinance referred to in *Habitat* and the provisions of Chapter 10 of the PDA. The fact that the 'Administrator' referred to in the Ordinance turned out to be the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape, was coincidental. What was significant was that the power was placed into the hands of the provincial government. In the same way, the provisions of Chapter 10 of the PDA interfere with the original constitutional municipal power to deal with 'municipal planning'.

[18] I was referred to the preamble to the PDA which records :

'WHEREAS planning and development decisions must be taken by local government, with appeals being resolved by an independent tribunal of experts appointed by the responsible Minister of the Executive Council in consultation with the Executive Council of the Province;'

This indicated that the default position of the Constitution was the making of decisions by local government.

[19] Ms *Gabriel* queried how a provincially appointed body of unelected persons could have the power to override the decision of a municipality, which it was entitled to make in terms of the Constitution. She submitted that s 46 of the PDA, which provides for the coming into effect of a decision relating to the development of land situated outside the area of a scheme, restricts the decision of the municipality from the outset. In those circumstances the Province was interfering with the decision of the municipality in precisely the same way that interference occurred in *Habitat.* In addition, the provisions of sub-s 121(5) and 121(6) of the PDA regulate the powers of the municipality to make decisions in an unconstitutional manner. This is the very bogey which was slain by the Constitutional Court in *Habitat*- i.e. interference by the Province in the executive functions of a municipality.

[20] Mr *Dickson* SC, who appeared for the MEC for Co-operative Governance and Traditional Affairs submitted that the PDA was introduced as a successor to the former provincial ordinances and was provided as a vehicle to facilitate development. He submitted that this was not a clear case as was dealt with in *Gauteng Development Tribunal.*

[21] Mr *Dickson* submitted that *Habitat* dealt with old order legislation which gave a member of the executive of the provincial government the power to make an appeal decision in an area which was the exclusive ambit of the municipality. Indeed, in the *Habitat* case it was the view of the Cape Town Municipality that its powers had been usurped by the appellate function vesting in the provincial government. No such suggestion is made by the Umlalazi Local Municipality in the present case. The complaint of Tronox in this case appears to be based on the assumption that the provincial government has constructed an independent body with the ulterior motive of interfering with the executive functions of the municipality. This is not the case.

[22] Mr *Dickson* submitted that the facility provided for by Chapter 10 of the PDA is for the benefit of all municipalities and is essentially an internal appeal mechanism for them. The test to be applied by the Appeal Tribunal in deciding appeals is an appropriate one and provides an excellent filter for cases which would otherwise have to be heard in the High Court. This provides parties with a cost-effective and appropriate mechanism to enable them to deal efficiently with objections. None of the municipalities in KwaZulu-Natal have complained about the appeal structure because it is a necessary tool in the decision-making process, and provides the public with an assurance that small municipalities that are unable to afford to put such an appeal structure into place themselves, are equipped with a facility for the hearing of appeals. Mr *Dickson* emphasised that the municipal government is not in any way able to use the provisions of Chapter 10 of the PDA to frustrate the aims and objects of a municipality, and as none of the municipalities in KwaZulu-Natal had complained of the appeal system, it would be inappropriate to visit Chapter 10 with a ruling that it was unconstitutional.

[23] The decision to be made in this case is whether the appellate structure provided for in Chapter 10 operates as an impermissible interference with the constitutionally enshrined independence of the municipalities. Are those provisions to be viewed in the same light as the provisions of the Land Use Planning Ordinance declared unconstitutional is *Habitat* ?

[24] Section 45 of the PDA essentially provides that an aggrieved party 'may appeal against the municipality's decision to the Appeal Tribunal'. Thus an 'internal remedy' is created with which a party wishing to appeal a decision of the municipality would have to comply.

[25] Chapter 10 of PDA provides for the establishment of the Appeal Tribunal. Sub-s 102(1) provides that the Appeal Tribunal 'must exercise its powers in an independent manner, free from governmental or any other outside interference or influence, and in accordance with the highest standards of integrity, impartiality, objectivity and professional ethics'. Sub-s 2 provides that 'No person, municipality or organ of State may interfere with the functioning of the Appeal Tribunal.' Sub-s 3 enjoins organs of State and municipalities to assist and co-operate with the Appeal Tribunal to ensure its effectiveness.

[26] The membership of the Appeal Tribunal is determined by s 103 which provides that it must consist of at least three legally qualified members, three

registered planner members and members with other technical expertise in various areas relating to municipal planning. It also provides that members of the Appeal Tribunal may be appointed from the private sector or the public sector. The procedure for the appointment of members of the Appeal Tribunal is set out in ss 105 and 106 and provides for a public process to be initiated by publishing a request for nominations. The appointment of members is done by a member of the Executive Council after consideration of the applications and supporting documents as well as comments received in regard to the proposed appointment of the nominated persons. The names of those appointed is then published in the Gazette and by a newspaper circulating in the province. The appointment process is thus a public one which is open to scrutiny and challenge.

[27] Significantly, the provisions of s 104 set out the list of those persons disqualified from membership of the Appeal Tribunal. They include in sub-s 104(e) a person who 'is a member of Parliament, the provincial legislature or a municipal council in the Province, or, if that person is nominated as a member of Parliament, the provincial legislature or a municipal council'.

[28] The remaining sections of Chapter 10 deal with the administration of the Appeal Tribunal including the administrative support to be given to it by the province. It also deals with the lodging of appeals, and the powers of the Appeal Tribunal.

[29] It is suggested that the provisions of Chapter 10 envisage a completely independent appeal procedure in which the government of the province has no part in any decision relating to any appeal, and which does not purport to usurp the executive function of the municipality. However, in *Habitat* Cameron J stated at paragraph 9 :

'There is therefore no justification for a provincial power to overturn municipalities' land-use decisions.'

Whilst the procedure envisaged in Chapter 10 does not envisage a provincial power *mero motu,* to overturn municipal decisions, it subjects the municipalities to the scrutiny of an appeal in circumstances where the municipality may not have resolved that an appeal process is appropriate or desirable.

[30] In my view, when Cameron J referred in paragraph 19 of *Habitat* to provincial governments not having the power to subject a municipality's veto of a zoning application to an appeal, this is what he had in mind. He did not qualify that statement by suggesting that he referred to provincial governments taking decisions of first instance, or just overruling decisions of municipalities. At paragraph 11 of *Habitat*, the Constitutional Court quoted with approval the dicta of Moseneke J in *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) where the learned judge referred to a municipality under the Constitution not being a mere creature of statute imbued with power by provincial or national legislation. He continued :

'A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may qualified or constrained by law and only to the extent the Constitution permits.'

[31] In this case the original constitutionally entrenched powers of the municipality have been interfered with by the provincial government. What Chapter 10 does is provide a mechanism which compels municipalities to allow appeals, and which will operate as an internal appeal procedure. The fact that the appointment of the persons fulfilling the functions of the Appeal Tribunal, by their very definition, exclude members of the provincial government, does not mean that the creation of the appeal procedure did not constitute provincial government interference with 'municipal planning'.

[32] In *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) 521 (CC) a provincial minister had refused a rezoning and subdivision application made by Lagoonbay for the purpose of a large-scale property development. The Constitutional Court held that provincial authorities are not competent to decide sub-division applications. Mhlantla J pointed out at paragraph 46 that the jurisprudence of the Constitution Court clearly established that :

(a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government;

(b) the constitutional vision of autonomous spheres of government must be preserved;

(c) while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities based on 'what is appropriate to each sphere'.

[33] The operation of s 45 and Chapter 10, in my view, usurps the functions of a municipality. It does not preserve the autonomy of municipalities, and constitutes provincial government interference with the sphere of the municipality's constitutional empowerment to make decisions relating to municipal planning. I am accordingly of the view that *Habitat* is indistinguishable from the circumstances of this matter. In my view the provisions of s 45 and Chapter 10 of the PDA cannot be viewed as a step taken by the provincial government pursuant to the provisions of sub-s 154(1) and sub-s 155(6)(b) of the Constitution which respectively provide :

'The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.'

and

'Each provincial government ... by legislative or other measures, must –

...

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.'

[34] As was pointed out by Cameron J in *Habitat* at paragraph 27, these subsections '... cannot entail appellate oversight of zoning and subdivision decisions.' The decisions made by the Umlalazi Local Municipality which are dealt with in this application fall, in my view, into the same category of 'municipal planning'.

[35] Sub-s 172(1)(a) of the Constitution provides that a court declaring any law to be invalid must do so to the extent of its inconsistency with the Constitution. In the draft order prayed Tronox seeks an order declaring s 45 to be unconstitutional to the extent that it constitutes interference by the Province in municipal planning decisions by providing for an appeal from a municipal decision to a provincial appellate body - i.e. the Appeal Tribunal.

[36] With regard to the unconstitutionality of the sections of the PDA compromising Chapter 10 (sections 100 to 134), Mr *Dickson* submits that these sections, of themselves, are constitutional because a municipality may well resolve that it wishes to adopt and use the procedure laid out there. This may be particularly useful to those municipalities wishing to incorporate an appeal procedure, but unable to do so. That a municipality, of its own volition, refers a 'municipal planning' decision to an independent body on appeal, may, however, in itself be unconstitutional because the municipality is enjoined to deal with these matters itself.

[37] I was referred to the fact that ss 15, 28, 57 and 67 of the PDA, which all provide for appeals to the Appeal Tribunal, will also be affected if I were to make a declaration of constitutional invalidity of s 45. That may well be so, but these sections do not form part of the relief sought by Tronox, and it would be inappropriate for me to deal with their constitutionality. For that reason as well I regard it as inappropriate for me to decide upon the constitutionality of those sections comprising Chapter 10 of the PDA.

[38] I was not requested by either party to consider a reading-in which could save the provisions of s 45 from a declaration of unconstitutionality (for example where municipalities have resolved to adopt the provisions of the PDA as an appeal procedure). I accordingly decline to do so.

[39] S 172(2)(a) of the Constitution provides that any declaration of constitutional invalidity which I make has no force unless it is confirmed by the Constitutional Court. Accordingly, it is necessary for me to extend the interdict already granted by this court preventing the finalisation of the two appeals by the Mtunzini Conservancy and the Mtunzini Fish Farm I do so because if my declaration of constitutional invalidity is incorrect then the Mtunzini Conservancy and the Mtunzini Fish Farm will be entitled to continue with their appeals. If I am correct then the appeals will be void *ab initio*.

[40] Mr *Dickson* submitted that in the event that I make a declaration of invalidity, in terms of sub-s 172(1)(b)(ii) I should suspend the declaration of invalidity for a period of two years. The only reason advanced by the Province for this request is :

'This period will ensure a seamless transition of legality (as oppose (sic) to chaos) and provide the KwaZulu-Natal Legislature with an opportunity to correct any defects in the 2014 PDB, so that it may be constitutionally compliant and consistent with SPLUMA.'

The reference to the "2014 PDB' refers to the KwaZulu-Natal Planning and Development Bill which will apparently soon be ready for submission to the MEC.

The reference to SPLUMA is a reference to the Spatial Planning and Land-Use Management Act, 2013 which was assented to on the 2nd August 2013, but which is not yet in operation.

[41] In dealing with the suspension of a declaration of invalidity, Cameron J stated in *Habitat* paragraphs 26 and 27 :

'... if we suspend the declaration of invalidity, we will temporarily preserve an appellate power that is unconstitutional in its entirety. The provincial minister nevertheless urged us, for practical reasons, to suspend the declaration, as this court often does in the exercise of its just and equitable remedial powers. He argued that, historically, provinces have borne ultimate responsibility for planning decisions. Accordingly they have large and experienced planning departments. By contrast, municipalities, especially the smaller ones, do not yet have the capacity and expertise to assume ultimate responsibility over all planning decisions. Provinces should retain their appellate powers while municipalities build capacity. This will, the provincial minister argued, have the additional benefit that faulty municipal decisions can be corrected by internal means rather than flooding the courts with review applications.

The contention that some local authorities lack planning capacity deserves serious consideration. But it does not justify suspending the declaration of the invalidity.'

[42] I note the warning in *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 112 7 (CC) at paragraph 37 that detailed information is required to be presented to a court in order to justify a suspension of invalidity.

[43] In my view the reasons proffered for the suspension of the order I propose do not outweigh the considerations expressed by Cameron J as referred to above. I accordingly decline to suspend the operation of my declaration of invalidity.

[44] The province also records in its opposing affidavit that there are presently twenty appeals pending before the Appeal Tribunal as well as the appeals of the Mtunzini Conservancy and the Mtunzini Fish Farm. Eleven of those appeals have not yet been set down for hearing, and it is submitted that it would be in the interests of justice and legal continuity if all the pending appeals were finalised. On the basis that a retrospective order would result in chaos because finalised appeals would be undone and successful appeals would be overturned, I have made provision in my order that it not operate retrospectively. The only appeals which will directly be affected by my order are those of the Mtunzini Conservancy and the Mtunzini Fish Farm. Those appeals will be dealt with as set out above. With regard to pending appeals, the parties to those appeals are not before me, and I make no order in respect of them.

[45] In the circumstances I make the following order :

(i) Section 45 of the KwaZulu-Natal Planning and Development Act, 2008 is hereby declared to be unconstitutional to the extent that it constitutes interference by the province in municipal planning decisions by providing for an appeal from a municipal decision to an appellate body, namely the KwaZulu-Natal Planning and Development Appeal Tribunal, created by the provisions of Chapter 10 of the Act.

(ii) Pending the confirmation by the Constitutional Court in terms of Section 172(2)(a) of the Constitution of the Republic of South Africa 1996 of (i) above, the hearing of the appeals pending in terms of section 45 by the Mtunzini Conservancy and the Mtunzini Fish Farm (Pty) Ltd in respect of the decision of the Umlalazi Municipality to approve the land-use rights for surface mining operations on the Remainder of Lot 91 and the Remainder or Portion 3 of Lot 91, Umlalazi 1011 Registration Division GU, Province of KwaZulu-Natal, are suspended .

(iii) In the event of the Constitutional Court confirming the declaration of invalidity in terms of paragraph (i) above, the two appeals referred to in (ii) above are declared to be unlawful and void *ab initio*.

(iv) Paragraph (i) above shall not be applicable to any final decisions of the KwaZulu-Natal Planning and Development Appeal Tribunal made prior to the date of this order.

(v) The Fifth Respondent is directed to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel, and on that basis the costs reserved for decision of this court by Madondo J on the 21st July 2014.

Date of hearing : 4th May 2015

Date of judgment : 3rd June 2015

Counsel for the Applicant : Ms A Gabriel SC with Ms Pudifin-Jones (instructed by Shepstone and Wylie).

For the Second Respondent : Norman Brauteseth and Associates.

Counsel for the Fifth Respondent : A J Dickson SC (instructed by PKX Attorneys).