IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 6227/2013

DATE: 14 AUGUST 2013

In the matter between:

THE HABITAT COUNCIL	1st Applicant
EVANGELICAL LUTHERAN CHURCH, STRAND STREET	2nd Applicant
and	
PROVINCIAL MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	1st Respondent
CITY OF CAPE TOWN	2nd Respondent
CORNELIS ANDRONIKUS AUGOUSTIDES NO	3rd Respondent
MICHAEL ANDRONIKUS AUGOUSTIDES NO	4th Respondent
RAYMOND JAMES WILSON NO	5th Respondent
PANGIOTIS ZITIANELLIS NO	6th Respondent
HERITAGE WESTERN CAPE	7th Respondent
SOUTH AFRICAN HERITAGE RESOURCES AGENCY	8th Respondent
PREMIER OF THE WESTERN CAPE	9th Respondent

And

CASE NUMBER: 23061/2009

DATE: 14 AUGUST 2013

In the matter between:

CITY OF CAPE TOWN Applicant

and

MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE 1st Respondent

GORDONIA MOUNT PROPERTIES (PTY) LTD 2nd Respondent

GORDAN'S BAY RATEPAYERS ASSOCIATION 3rd Respondent

J U D G M E N T

DAVIS, J:

There are two applications that have come before this Court, which raise the same constitutional point.

Briefly, in the first (under case number 23061/09), there is an application which concerns the proposed development of a residential estate, known as the Suikerbossie Estate, on the slopes of the Hottentots Holland Mountains above Gordon's Bay. The development in this case is proposed by the second respondent ('developer') and is situated on Erf 2, Erf 1907 and

Erf 1864, Gordon's Bay.

On the 20th of February 2009 the then incumbent of the office of the first respondent, Minister Pierre Uys, granted environmental authorisation for the development in terms of the then applicable provisions of the Environment Conservation Act 73 of 1989 ('ECA').

On the 5th of May 2009, Minister Uys also considered and upheld an appeal brought by the developer in terms of section 44(1)(d) of the Land Use Planning Ordinance 15 of 1985 (LUPO), read with Regulation 18 of the Regulations which were promulgated in Provincial Notice 1050/1998 of 5 December 1998 ('The LUPO Regulations'). This appeal was considered on the basis that the applicant ('the City') failed timeously to consider an application by the developer for the required planning approval in terms of LUPO. In so doing, Minister Uys granted planning approval for the proposed development, which included the rezoning of all of the erven making up the development property in terms of section 16 of LUPO, and the subdivision of the erven into 80 single residential erven, public open space and public road space in terms of section 25 of LUPO.

Third respondent initially brought an application which sought

to review and set aside both of the environmental authorisations and planning approvals to which I have made mention. The current minister (first respondent) abided the decision of the Court in this matter.

On the 2nd of November 2009 the City brought a separate application in which it sought to review and set aside the planning approvals. In terms of an order of the 14th of June 2003, the Court was required to hear these applications on the 13th of August 2013.

On the 18th of July 2013 the City issued a notice that it intended to amend the relief it sought in its application by including an attack on the constitutionality of section 44 of LUPO, together with sections 16, 17, 18, 23, 24 and 25 of LUPO, to the extent that reference is made to 'The Administrator', together with Regulations 17 to 35 of the LUPO Regulations.

The City later indicated that it did not intend pursuing its challenges with regard to any of the provisions, save for section 44 of LUPO. The developer indicated initially it opposed the review of the planning approval, but did not oppose the review and setting aside of the environmental authorisation. On the 7th of August 2013 it withdrew all

opposition to the relief which was sought by the City.

There is no need for me to further traverse the facts of this case. I shall refer to this case as the Gordonia application.

At the same time, a further application was launched, which I shall refer to as the Habitat matter (under case number 6227/2013). It raised the same challenge to the constitutionality of section 44 of LUPO. In this case, the application concerned the proposed redevelopment of Erf 174009, Cape Town, which forms part of a block in the city centre dominated by 18th century buildings which are historically connected to the Lutheran Church. The development property is bounded by Strand, Bree and Waterkant Streets; it houses a two-storey building, which was originally built in about 1764 as a warehouse, and which is described as the Martin Melck Warehouse. The original Lutheran Church congregated in secret in the loft of this building, and it is clearly of significant historical importance to the City of Cape Town. On the Strand Street side the development property abuts a townhouse known as Parson's House or Melck House, which has been renovated and is now known as 'The Museum of Gold'. It adjoins the Lutheran Church. The Strand Street streetscape of the block is completed by another historical townhouse, known as Sexton's

House, and which currently houses the Netherlands Consulate.

The development property is owned by Gera Investment Trust, ('the trust'), of which the third to sixth respondents are the current trustees. It proposes the development, which will entail the conservation and rehabilitation of the facades of the existing buildings and removal of many of the so-called 20th century intrusions. In addition, a modern, four-storey office block will be constructed, which would 'piggy-back' on top of the existing buildings, raised on eight pillars.

The use rights for the development property are regulated by LUPO and the LUPO Regulations. At all material times, the applicable zoning scheme was that promulgated in June 1990 for the then Municipality of the City of Cape Town. That municipality was disestablished, and now forms part of the geographical area of the current City. The zoning scheme, however, remained in force in parts of the City to which it applied.

In terms of section 108(1) of the zoning scheme regulations, the development property falls into an 'urban conservation area'. Accordingly, the City's Municipal Council was required to give 'its special consent' for the demolition or erection of any building or structure thereon. In this regard, section

108(1)(iii) provides that such consent should not be granted if the demolition, erection or any alteration will be detrimental to the protection and/or maintenance of the architectural, aesthetic and/or historical significance, as the case may be, of the area. The trust made an application for this special consent. The application initially served before the City's Spatial Planning, Environment and Land Use Management Committee ('SPELUM'), which had delegated powers from the City Council to consider these kinds of applications.

The matter came before SPELUM at a meeting on the 13th of April 2011. The trust's proposal was opposed by several objectors, including Ms Roux on behalf of the first applicant. Second applicant did not, at that stage, object to the application, based on its apparent misunderstanding that the 'heritage' aspects had already been decided, and the application would not revisit these aspects.

At the meeting on the 13th of April 2011, SPELUM refused to grant the requested special consent. This decision triggered an appeal by the trust against this decision, in terms of section 44 of LUPO, to the Western Cape Provincial Government, represented, as it was, by first respondent.

On the 12th of October 2012 first respondent upheld the trust's

appeal. This decision was conveyed to the trust on the 25th of October 2012. In so doing, first respondent accepted that the development property could be developed, but said he was not in a position to impose suitable conditions to guide the development at that particular stage. He recognised the role of the City and the need for its cooperation and input. Accordingly, he gave the City an opportunity to provide a set of conditions which would be incorporated into a final set of conditions. The final conditions would also include recommendations from the Provincial Planning Advisory Board ('PAB'). The City provided draft conditions, but sought several extensions before first respondent made a decision, the last of which was a request to consider a series of legal questions.

On the 28th of February 2013 first respondent refused this request, and imposed a set of conditions for the proposed development. These had to be read with his previous decision, and gave further definition to that particular decision. The conditions were imposed in terms of section 42(1) of LUPO, which, inter alia, allowed first respondent to impose conditions which he 'may think fit' when upholding the appeal.

The first applicant, which at that stage was the only applicant, launched proceedings which are now before this Court on the 24th of April 2013. It sought relief in accordance with section 8

of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), which relief was aimed at setting aside both first respondent's decision of the 12th of October 2012 and the set of conditions imposed by him on the 28th of February 2012, together with an order declaring section 44 of LUPO inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 ('The Constitution'), and invalid 'insofar as it allowed [The Minister] to finally determine municipal planning applications falling within the functional competence of [the City] as a local government'.

Pursuant to discussions between representatives for the first applicant, first respondent, the City and the trust, agreement was reached as to a draft order which would be sought before this Court.

This was also accompanied by an explanatory affidavit deposed to by first respondent. In this affidavit, first respondent explained that, based on legal advice, he accepted that section 44 of LUPO was inconsistent with the division of functional responsibilities between the local and provincial spheres of government as contained in the Constitution. For this reason, he conceded this Court must, in accordance with section 172(1)(a) of the Constitution, declare section 44 of LUPO to be inconsistent with the Constitution, and invalid.

Although there were a series of further submissions made by first respondent in his affidavit regarding questions of retrospective and prospective effects of a finding of lack of constitutionality, it is not necessary at this stage to deal with these arguments. Suffice to say they will be dealt with later in the judgment.

In short, the chronology for both of the applications which I have set out, together with the background, indicates that the key question for determination is the constitutionality of section 44 of LUPO, which, in both cases, has been accompanied by a concession by all the parties that the section is unconstitutional.

Of course, whatever the parties may consider to be the case, it is for this Court to apply its mind to the matter and make a reasoned determination as to whether the approach which has been adopted in both cases, is constitutionally correct. I am particularly indebted in the inquiry, with which I shall now proceed to engage, to the most excellent heads prepared by Mr Breitenbach, who appeared, together with Mr Borgstrom, on behalf of the first respondent in the Habitat matter.

<u>The constitutionality of section 44 of LUPO</u>.

Section 40(1) of the Constitution provides that government is constituted as national, provincial and local spheres of government. They are distinctive from each other, although they are interdependent and interrelated. The spheres of government, and all organs of the State within each sphere, must respect the constitutional status, institutions, powers and functions of government in the other spheres, and must not 'assume' any power or function except those conferred on them in terms of the Constitution. See sections 41(1)(e) and (f) of the Constitution.

In terms of section 156(1)(a) of the Constitution, a municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. This includes the function of 'municipal planning' (see Part B of Schedule 4).

In terms of section 104(1)(b) of the Constitution, provincial government, through the provincial legislature, has the power to pass legislation for its province with regard to, amongst other things:

(i) Any matter within the functional area listed in Schedule 4 which includes 'regional planning and

development', and 'urban and rural development' (see Part A of Schedule 4).

(ii) Any matter within a functional area listed in Schedule 5, which includes 'provincial planning' (see Part A of Schedule 5).

In terms of section 44(1)(a)(ii) of the Constitution, national government, through the National Assembly, has the power to pass legislation with regard to any matter, including a matter within the functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5.

There have been a series of cases which have sought to examine the relationship between the three tiers of government; in particular provincial and local government, and, thus the scope of the powers which are set out in Schedules 4 and 5.

It appears to me that there are two cardinal principles that have emerged from this jurisprudence, to which I wish to make reference.

In the first place, there is a principle that the different functional competences in Schedules 4 and 5 to the

Constitution should be interpreted distinctly from one another. In effect, this means that provincial planning and municipal planning must be given different content. This does not mean that the content of the word 'planning', changes meaning, but that the addition of the prefix, 'municipal' or 'provincial' holds clear legal implications.

Thus, in Johannesburg Municipality v Gauteng Development Tribunal 2010(6) SA 182 (CC), at paras 55-56, Jafta, J said the following, which dicta gives content to the principle that I have outlined:

> "It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically 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, sport and others. The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to 'provincial roads', whereas municipalities have authority over 'municipal roads'. The prefix attached to each functional area identifies the sphere to which it belongs and 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'. 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." (My emphasis.)

The second principle to which I wish to draw attention concerns the municipality's exclusive powers, which should be interpreted as applying primarily to matters which may appropriately be regulated intra-municipally, as opposed to intra-provincially.

In Ex Parte President of the RSA: Constitutionality of the Liquor Bill 2000(1) SA 732 (CC), Cameron, AJ (as he then was) said the following in this connection at para 51:

"The Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedules 4 and 5 are referred

to as being in respect of 'functional areas'. The ambit of the provinces' exclusive powers must, in my view, be determined in the light of that vision. It is significant that s104(1)(b) confers power on each province to pass legislation 'for its province' within a 'functional area'. It is thus clear from the outset that the Schedule 5 competences must be interpreted as conferring power on each province to legislate in the exclusive domain only 'for its province'. From the powers of s44(2) it is evident that the national government is entrusted with overriding powers where necessary to maintain national security, economic unity and essential national standards; to establish minimum standards required for the rendering of services; and to prevent unreasonable action by provinces which is prejudicial to the interests of another province or the country as a whole. From s146 it is evident that national legislation within the concurrent terrain of Schedule 4 that applies uniformly to the country takes precedence over the provincial powers and circumstances contemplated in s44(2) ..."

From this dictum it is evident that, where a matter requires regulation inter-provincially as opposed to intra-provincially, the Constitution ensures that national government is accorded the necessary power, either exclusively or concurrently under

Schedule 4 or through the powers of intervention accorded to it by s44(2). It appears that this principle must likewise apply to the proposition that has been outlined with regard to intra-municipal, as opposed to inter-municipal regulation.

From these principles, it follows that the correct approach to be adopted in determining where apparently overlapping functional areas of respective spheres commence and end, in the first place, requires the determination of what powers are vested in the municipalities, secondly, to determine the powers vested in provincial government, and, finally, to determine those powers vested in the national government.

In Johannesburg Municipality v Gauteng Development Tribunal 2010(2) SA 554 (SCA), Nugent, JA, at para 35 ff gave content to this particular approach:

> "The construction that was adopted by the court below...and that was advanced before us by counsel for the respondents, all proceed by inferential reasoning from the proposition that the functions with which we are now concerned are embraced by the concept of 'development' (a functional area that falls within the concurrent legislative authority of national and provincial government) and thus, by inference, fall to be excluded

from the functional area 'municipal planning'. That line of reasoning seems to me to approach the matter the wrong way around.

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

It follows that the meaning of the functional areas in local government matters must be determined by a consideration of the relevant legislation at the time that the Constitution was enacted, because one of the main purposes of the schedules to which I have made reference, was to allocate the existing business of government to the three defined spheres of government.

The present applications

With this framework in mind, I can turn to deal with the more specific questions which were raised in this court. The 'municipal planning' local government matter in Schedule 4B to the Constitution comprises forward planning and land use control. Municipal forward planning entails laying down detailed guidelines for the future spatial development of the municipal area. Municipal land use control entails the control and regulation of the use of land in the municipal area and detailed through the zoning of land (that is, the making, amending and replacing of the zoning schemes, rezoning particular land, and the granting of departures from the provision of zoning schemes or consent uses in relation to particular land), as well as to the establishment of townships (that is controlling and regulating the consolidation, and particularly the subdivision of land units to create new urban areas, or for urban renewal).

In addition, 'regional planning and development', and 'urban and rural development' functional areas set out in Schedule 4A to the Constitution, and the 'provincial planning' functional area in Schedule 5A to the Constitution, inevitably constitute forward planning and land use control. Regional and provincial forward planning, however, entail laying down broader guidelines for areas encompassing the whole or parts of more than a single local or metropolitan municipality.

Control of land use entails the provincial government taking decisions concerning zoning and the establishment of townships, which, because of the nature and scale of land use to which they relate, have substantial regional or provincial planning effects.

When exercising this power, the provincial government must confine itself to the regional provincial effects; that is it is not at large to reject a proposal because it approves of a feature which has only intra-municipal effects. Recall Nugent JA's dicta in the GDT case at paras 35 to 37, namely that the enquiry commences with an examination of the narrowest form of power, and moves upwards, rather than the other way round. This approach permits a clear demarcation between municipal and provincial government.

The purposes of forward planning and land use control under 'municipal planning', 'regional planning and development', 'urban and rural development', and 'provincial planning' exist to promote order of the area, whether it be the municipal area, the region or the province, and the general welfare of the community concerned through a coordinated and harmonious development of the area.

The provincial government may enact, maintain in force and

enforce legislation and take and implement executive decisions which regulate or broadly manage or control the exercise by municipalities over the executive authority in relation to municipal planning.

This promotes the aim of ensuring effective performance by municipalities of the functions which they have been granted under the rubric of municipal planning (see section 155(7) of the Constitution), as well as promotes the development of their capacity to perform their functions and manage their own affairs (see section 155(6)(b) of the Constitution).

To this end, it must follow that provincial government may regulate the manner in which municipalities exercise their executive authority, which entails a 'broad managing or controlling rather than a direct authorisation function' (see in this connection Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996(4) S 744 (CC) at para 377).

Accordingly, within the context of the present dispute, provincial government may also assess the outcome of the municipal planning processes. Provincial government may require that the decision be reconsidered by a municipality if the manner in which it was taken, the justification for the

decision, or the nature and effect, or likely effect of the decision undermines the effective performance by the municipality of its forward planning and land use control functions. This constitutes an approach which harmonises the relationship between the two levels of government, rather than being destructive of local government powers and their conflation with provincial powers.

Other provincial functional areas set out in Schedule 4A and 5A to the Constitution require forward planning by the provincial government, and entitle the provincial government to control the use of land by others. As an example, a provincial government may lay down provincial environmental norms and standards related to land use and change of land use, require organs of State and other land users in the province to adopt and implement environmental management plans, and require provincial authorisation for activities involving land which may adversely affect the environment or other provincial functional areas, such as agriculture.

Within this framework, Mr Breitenbach made three interrelated submissions. He contended that the vast majority of the decisions taken by municipalities under LUPO and/zoning scheme regulations, will solely involve 'municipal planning matters'. His justification for this submission was because

these decisions will only have an intra-municipal effect, and the approval relates to issues of relevance only to the municipality. Again, recall the approach adopted by Nugent JA in GDT, supra, that one starts at the lowest form of government and tries to carve out a distinct governmental regime for local government accordingly. This conclusion is supported by the manner in which the Constitution does not detail exclusive national competence but carves out distinct areas for provinces and municipalities, leaving the balance, which is unspecified, to national government.

The decision involved in the Habitat case, made in terms of section 108(1) of the zoning scheme, in Mr Breitenbach's view, fell within this category. Provincial interest in the conservation of the heritage of a particular area of the city, or of particular buildings, are dealt with in terms of specific heritage legislation. The purpose of section 108(1) of the zoning scheme and the impact of the current development do not have extra-municipal effects of the kind which would implicate a provincial interest under its powers to control 'regional planning and development', 'urban and rural development', or 'provincial planning'. The fact that the province cannot take the initial decision in relation to municipal planning matters which do not have such extra-municipal effect, does not mean it cannot make provision for and consider appeals aimed at

ensuring the effective performance by municipalities of their municipal planning competences. Viewed in this way, the relationship between municipal and the provincial powers becomes all the more clear.

With these broad principles, which govern the relationship between provincial and municipal powers, in mind, I turn to deal with the section under attack, namely section 44, LUPO.

S44 of LUPO

In Maccsand v City of Cape Town 2012(4) SA 181 (CC) at para 15-16, Jafta J described LUPO thus:

> "[15] LUPO is a pre-Constitution legislation which came into force in July 1986. It constitutes provincial legislation that was enacted by the Provincial Council of the former Cape of Good Hope. The interim Constitution permitted it to continue in force subject to amendment or repeal by the competent authority. Later the President assigned its administration to the provincial government of the Western Cape.
>
> [16] LUPO authorises municipalities to prepare structure plans which are submitted to the provincial government for approval. The purpose of the structure plan is to lay

down guidelines for future spatial development. It may also authorise rezoning of land by a municipality. In Chapter 2 LUPO empowers the provincial government to make scheme regulations which determine the use to which land may be put in accordance with the zoning applicable to the land. The main object of scheme regulations is to control zoning."

Since the Constitution commenced on the 4th of February 1997, the Western Cape Parliament has amended LUPO, most recently in terms of Western Cape Land Use Planning Ordinance Second Amendment Act 3 of 2011.

As it stands, section 44 reads thus:

"(1)(a) An applicant in respect of an application to a council in terms of this Ordinance, and a person who has objected to the granting of such application in terms of this Ordinance, may appeal to the Administrator, in such manner and within such period as may be prescribed by regulation, against the refusal or granting or conditional granting of such application.

(b) A person aggrieved by a decision of a council in terms of sections 14(1), (2), (3), (4)(d) or (5), or sections 16(2)(b) or 40(4)(c) may appeal to the Administrator in such manner and within such period as may be prescribed by regulation, against such a decision.

(c) A person aggrieved by a decision of a council in the application of section 18 may similarly appeal to the Administrator against such decision.

(d) For the purposes of sections 15(3), 17(3) and 24(3), provision may be made by regulation therein referred to for a right of appeal to the Administrator in the manner prescribed by such regulation.

(2) The Administrator may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated in subsection (1)(a), (b), (c) or (d) or uphold it wholly or in part or make a decision in relation thereto which the council concerned could have made.

(3) For the purpose of this Ordinance:

(a) An application referred to in subsection (1)(a) shall be deemed to have been granted or conditionally granted or refused by the council concerned in accordance with action taken by the Administrator under the provisions of subsection (2);

(b) A decision referred to in subsection (1)(b) or (c) shall be deemed to be a decision of the council concerned in accordance with action taken by the Administrator under the provisions of subsection (2); and

(c) A decision made by the Administrator under the provisions of subsection (2) shall be deemed to have been made by the council concerned."

In terms of the proclamation assigning LUPO to the Western Cape Provincial Government, reference to 'the Administrator' must now be read as a reference to the competent authority determined by the Premier. First respondent has been determined as the competent authority.

With this in mind, I turn to the question of the planning powers and its consequences for LUPO.

In a limited number of cases in which a proposed development raises matters falling within the functional areas of 'regional planning and development', 'urban and rural development' or 'provincial planning', there can be no justifiable objection if a matter serves before the Province as an appellate body. It follows that the Province will, in these cases, be exercising its own constitutionally mandated powers, as I have indicated above. If first respondent then oversteps the bounds of the defined provincial powers in a particular case, that decision can be reviewed in terms of section 6(2)(a)(i) of PAJA.

In the majority of cases, which clearly involve only municipal planning, first respondent may legitimately consider appeals against decisions made by municipalities to see that the effective performance by municipalities of their functions in respect of municipal planning is carried out, and to promote the development of their capacity to perform their functions and manage their own affairs (see sections 155(6)(b) and 155(7) of the Constitution).

Correctly, Mr Breitenbach submitted, in the light of the legal analysis which has been set out, that this power of 'oversight' permits first respondent to assess the procedure and outcomes of municipal planning processes, such as spatial development

frameworks, zoning schemes, specific land use decisions, and municipalities' justifications for these particular decisions. First respondent may require that a decision be reconsidered by a municipality if the manner in which it is taken, the justification for the decision, or the nature and effect or likely effect of the decision, undermines the effective performance by the municipality of its specific forward planning and land use control functions. In the exercise of this power, first respondent remits a decision to a municipality with comments for consideration, the municipality may then have to decide whether to alter or amend its decision.

Section 44 of LUPO is thus manifestly inconsistent with the Constitution to the extent that it not only permits appeals to the Province against every decision made by a municipality in terms of LUPO, and also because it allows first respondent to replace every decision with his own decision, even where the development in question patently affects only 'municipal planning'. It must, therefore, follow that by a conflation of the provincial and the municipal powers, LUPO, insofar as its section 44 is concerned, is over-broad. It effectively guts the powers of a municipality which are relevant to municipal planning, and gives first respondent powers which would, therefore, be subversive of the constitutional scheme and the principles which have been outlined in this judgment.

It follows, therefore, that section 44 of LUPO is inconsistent with the Constitution, and that the parties, in general, and first respondent, in particular, were correct to accept this particular approach.

Retrospectivity

The usual consequence of a finding of unconstitutionality of a legislative provision is that it is set aside with retrospective effect, which, in the case of legislation such as LUPO, which predates the commencement of the Constitution, means from the date of such commencement, 4 February 1997. Hence all decisions taken under the provision in the period from 4 February 1997, would be set aside as a consequence of this finding. This result only has to be stated to realise that this finding would have chaotic consequences for planning in the City, and, indeed, beyond.

The clearest category of cases will be those in which the municipality has refused a development, and which first respondent has later permitted on appeal. In these cases, the developers would have relied on this approval as the basis for further plans for the development, to apply for other statutory approvals, to apply for a commitment to finance, to commence

construction, to sell property or subdivided portions of a property. Others may also have relied on the approval when acquiring a property or a subdivided portion of a property. The polycentric consequences are too numerous to predict, but they clearly exist as a result of a declaration of unconstitutionality.

Accordingly, a finding that section 44 of LUPO is unconstitutional and invalid, without any limitation on the retrospective effects of this finding, would give rise to a full-blown form of retrospectivity, and thus have the consequences that, in certain cases, construction, either which has commenced or completed, would also be rendered unlawful. Further construction would be unlawful and sales and transfers would be rendered unlawful and invalid.

As a result, the parties proposed in a draft order, which has been made available to this Court, that an order include a situation which, as a default position, all existing decisions made in terms of section 44 of LUPO in the period since the Constitution commenced, would remain valid.

On its own, this will not preclude an interested person from seeking judicial review of a decision on any basis in terms of section 6(2) of PAJA, provided the application is brought within

the time period specified in section 7(1) of PAJA, or such further time period as the parties may agree or the Court may permit in the interests of justice as set out in section 9 of PAJA.

The draft order which has been available to this Court does have some retrospective application. In the first place, it is agreed that the decisions under review in both the Habitat and Gordonia cases must be set aside. This will ensure that the applicants in both cases are granted effective relief, and that is a logical consequence. This accords, too, with the Constitutional Court's approach that, in cases in which an applicant establishes a constitutional breach, it must be granted effective relief. See, for example, Fose v Minister of Safety and Security 1997(3) SA 786 (CC) at para 69; Gory v Kolver NO and Others (Starke and Others Intervening) 2007(4) SA 97 (CC) at para 40.

Further, the order proposes that appeals which were currently before first respondent but which have not, as yet, been decided, will be dealt with in accordance with the provisions of section 44(2) and (3) of LUPO in a varied form, which shall apply prospectively.

In Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v

Chairman, National Transport Commission and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and Others 1999 (4) SA 1 (SCA) at para 19, the Court dealt with a situation in which an administrative application was made in terms of a particular legal regime which was subsequently amended before the application was considered. In such cases, the Court stated:

> "The rule is that unless a contrary intention appears from the amending legislation, existing (old) procedure remains intact." (See also Sicgau v President of the Republic of South Africa [2013] ZACC 18 at para 20-21 for a similar approach.)

The proposed order deviates from this position and it proposes that pending appeals will not be dealt with in terms of section 44 of LUPO as it stood when the appeals were filed, that is the unconstitutionally over-broad provision, but rather in accordance with the varied version which this Court would have to approve. The reason for this element of retrospectivity, so Mr Breitenbach contends, is that it would be wrong for first respondent to decide appeals which are before him, based on a legal regime which he has acknowledged to be unconstitutional, while new appeals would be dealt with on a different basis.

Prospective regulation

In relation to prospective regulation, the draft order also envisages that the finding that section 44 of LUPO is invalid will be suspended for a period of 24 months, to allow the Western Cape Provincial Parliament to amend or replace it; and that, during this period of suspension, alternative wording of sections 44(2) and (3) of LUPO be read in.

According to the explanatory affidavit of first respondent, this approach is necessary in the circumstances, and he sets out the reasons for the length of time required to ensure a comprehensive overall regime. During the period of suspension, section 44(1) of LUPO will remain unaltered. The section will allow appeals to be made to the competent authority in certain circumstances. Mr Breitenbach submitted that there is no constitutional difficulty with first respondent considering such appeals, irrespective of whether the issues raised by the appeal relate to municipal planning matters, or regional planning and development, urban and rural development, or provincial planning functional areas.

Sections 44(2) and (3) of LUPO, however, will be significantly altered to ensure that the appeals brought before first

respondent are dealt with in a manner which, in a sense, is in accordance with the constitutional division of powers which I havealready outlined.

Two separate categories are covered. In the first case, there are those in which an appeal is made to the province, and in which the particular development only raises issues relevant to 'municipal planning'. These appeals will be dealt with in terms of section 44(3)(a) of LUPO in an altered form, which is provided for in the draft order.

The second category concerns those cases in which the development raises issues of 'regional planning and development', 'urban and rural planning' or 'provincial planning', which will be dealt with in section 44(3)(b) of LUPO in an altered form, envisaged in the draft order.

I am satisfied that, in terms of the powers granted to this Court in terms of section 172(1)(b) of the Constitution, these arrangements, and the justifications therefore, are, indeed, sufficiently in accordance, with justice, and indeed with common sense, that they should be approved.

When first respondent takes the Court into his confidence, and avers that a relatively long suspension period is required to

ensure that LUPO be replaced properly, some deference is required. He states that in 1999 the Western Cape Planning and Development Act of 1999 was passed but never commenced operation, principally because of a difference between the province and municipalities regarding the ambit of their respective planning powers.

The province more recently again recognised the need for legislative reform and sought comment on a draft Land Use Planning Bill. The draft bill was published for comment on the 17th of February 2012, and, after considering the comments received, an amended bill was formally published in the Provincial Gazette on the 18th of January 2013. Numerous comments were received on the later version. They are currently being considered. Many of the comments relate to the division of powers between the province and local spheres of government.

Given the importance and widespread public interest in the draft bill and the consultation requirements in terms of section 154(2) of the Constitution, first respondent informs the Court that he anticipates it will take up to 24 months to enact and bring into operation the comprehensive replacement for LUPO. He informs the Court that a further reason for the need for a 24-month period are that the bill will have to be accompanied

by extensive regulations before it can be put into operation. Much of the groundwork which is currently covered in LUPO, will have to be dealt with in terms of by-laws adopted by municipalities across the Western Cape Province.

It appears to me that not only are these plausible justifications, but an element of deference must be given to the executive arm of government when it sets out a reasoned basis by which a time limit is required in order for new legislation to be developed. It further follows that, if this is the time which is required, a form of interim relief must be granted, pursuant to section 172(2)(b).

In President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as *amici curiae*) 2003(1) SA 472 (CC) at para 32:

> "... (b) A High Court has jurisdiction to grant interim relief designed to maintain the *status quo*, or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or through action it is reasonably feared might cause irreparable harm of a serious nature."

The Court continued:

> "(c) Such interim relief should only be granted where it is strictly necessary in the interests of justice ... [and] (e) ... should be strictly tailored to interfere as little as possible with the operation of the legislation ...".

In summary, Mr Breitenbach submitted, that interim relief was sought for the following reasons:

Once this Court makes an order declaring that section 44 of LUPO violates the Constitution, first respondent cannot exercise the power under the provisions dealing with appeals as if there was nothing constitutionally incorrect with section 44 as it presently stands. At the same time, it will be undesirable for the processing and determination of appeals to stop, pending a decision of the Constitutional Court in confirmation proceedings, which are required by section 172(2)(a) of the Constitution.

The consequence of an omission by this Court to exercise its jurisdiction to grant interim relief, would give rise to an increased backlog. Apparently, there are already 380 pending appeals, and each week, I am informed approximately seven new appeals are lodged. Further, any proposed development,

no matter how desirable, will be unable to proceed for as long as a pending appeal remains undetermined. It is manifest that this consequence would have a significant and adverse impact on economic development and employment creation within the province and the City, and therefore hold significant detrimental financial consequences for the community at large.

In my view, the consequence of declaring section 44 of LUPO to be unconstitutional, must allow this Court to exercise a discretion and grant the interim relief which is set out very carefully and commendably in the draft order which has been made available to this Court.

In setting aside decisions, this Court also has a power, in terms of section 8(1) of PAJA, to make an order which is 'just and equitable'. In the Habitat matter: in order to avoid injustice to the trust as a result of the relief which has been granted, additional relief is included in the draft order to allow the trust an option to launch a fresh section 62 appeal. This again, in my view, is a sensible approach to the practical problems which have been created as a result of this application.

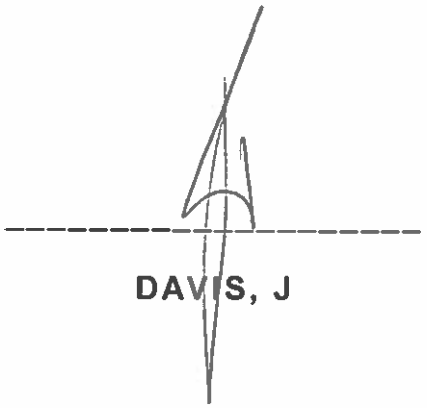
When confronted with a decision of SPELUM, refusing the application of special consent, the trust had a choice whether

to pursue an appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ('MSA') before appealing under LUPO, or to pursue an appeal directly to first respondent under section 44 of LUPO. Had the trust known that an appeal under section 44 was not lawfully open to it, it would have been able to launch a section 62 MSA appeal. This provision applies as SPELUM, which originally refused the application is a committee of councillors, exercising delegated power pursuant to a system of delegations in terms of section 59 of the MSA, and the trust was the applicant for consent. Accordingly, an internal appeal lay either to the City Council itself, or to a committee of councillors constituted in terms of section 62(4)(c)(ii) of the MSA. The trust would ordinarily not be able to pursue a section 62 MSA appeal at this stage, as this appeal should have to have been made within 21 days of SPELUM's decision, in terms of section 62(1) of the Systems Act.

In conjunction with the City, therefore, I accept that the sensible approach as proposed in the draft order, provides that this time period only commence from the date that this Court makes its order.

The analysis undertaken in this judgment is equally applicable to both the Gordonia and Habitat matters.

In the circumstances, the draft orders which have been proposed, both in the Gordonia and the Habitat cases, are correct. Accordingly, I propose to grant these orders in the terms proposed by the parties in both applications and which will therefore be attached to this written judgment.



DAVIS, J