

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

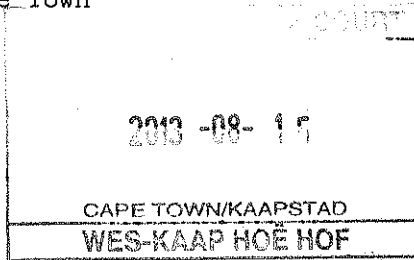
Case no: 6227/2013

Before the Honourable Mr. Justice Davis
On Wednesday, 14 August 2013 at Cape Town

In the matter between:

THE HABITAT COUNCIL

EVANGELICAL LUTHERAN CHURCH, STRAND STREET



First Applicant

Second Applicant

and

**PROVINCIAL MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL
AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE**

First Respondent

THE CITY OF CAPE TOWN

Second Respondent

**CORNELIS ANDRONIKUS AUGOUSTIDES N.O.
MICHAEL ANDRONIKUS AUGOUSTIDES N.O.
RAYMOND JAMES WILSON N.O.
PANGIOTIS ZITIANELLIS N.O.**

Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

(in their capacities as the trustees for the time being
of the **GERA INVESTMENT TRUST, IT 3449/2007**)

HERITAGE WESTERN CAPE

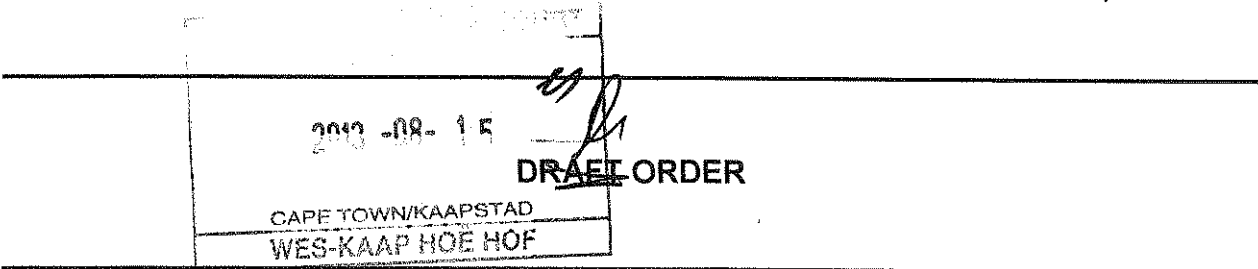
Seventh Respondent

SOUTH AFRICAN HERITAGE RESOURCES AGENCY

Eighth Respondent

PREMIER OF THE WESTERN CAPE

Ninth Respondent



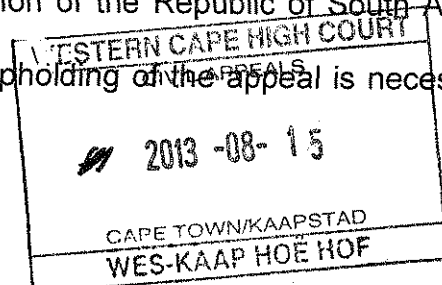
BY AGREEMENT between the Applicants and the First to Sixth and Ninth Respondents, (the Second Applicant abiding the decision of this Honourable Court in respect of paragraph 3 of the Order); the Seventh and Eighth Respondents having abided the decision of this Honourable Court; the following order is made:

1. Section 44 of the Land Use Planning Ordinance 15 of 1985 (Cape) ("LUPO") is declared unconstitutional and invalid.
2. Subject to paragraphs 3, 4 and 5 below, the declaration of invalidity in paragraph 1 is suspended for a period of 24 months to afford the legislature an opportunity to amend section 44 of LUPO, alternatively to replace same, so as to make it constitutionally valid.
3. During the period of suspension or until such sooner date when the amendment as contemplated in paragraph 2 comes into force, section 44(2) and (3) of LUPO will be deemed to read as follows:

"(2) The Administrator may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated in subsection (1) or, subject to subsection (3), uphold it wholly or in part.

(3) The Administrator:

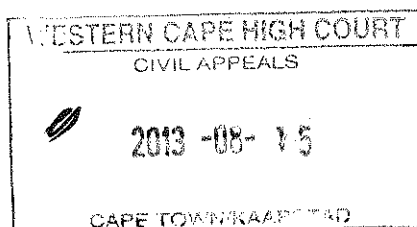
- (a) may uphold, wholly or in part, an appeal contemplated in subsection (1) concerning a municipal planning local government matter referred to in Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), only if the upholding of the appeal is necessary



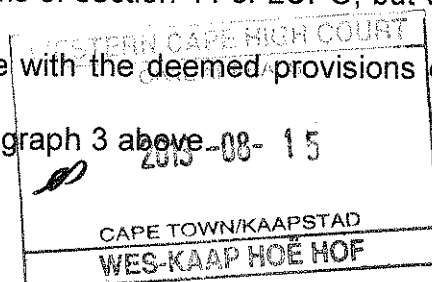
for the exercise by the Government of the Western Cape Province of its authority to see to the effective performance by the municipality concerned of its functions in respect of such local government matter, in which event the Administrator shall set aside the decision or part of the decision of the council and refer the matter back to the council for reconsideration together with a statement of reasons for his decision; provided that no further appeal shall lie to the Administrator in terms of this paragraph against any decision made by the council after considering a matter referred back to it by the Administrator; and

(b) may uphold, wholly or in part, an appeal contemplated in subsection (1) to the extent that it concerns the functional area of concurrent national and provincial competence of regional planning and development or urban and rural development in Part A of Schedule 4 to the Constitution or the functional area of exclusive provincial legislative competence of provincial planning in Part A of Schedule 5 to the Constitution, if, in the Administrator's opinion, the decision of the council is incorrect, in which event the Administrator shall substitute his decision for the decision of the council.'

4. The finding in paragraph 1 above does not have retrospective effect, save that all appeals made to the First Respondent in terms of section 44 of LUPO which have been delivered to the First Respondent's offices as at the date hereof, but have as yet not been determined by him, shall be decided in accordance with sections 44(2) and (3) of LUPO as deemed to be read in paragraph 3 above.



5. The decisions of the First Respondent referred to in paragraph 1 of the First Applicant's notice of motion are reviewed and set aside, provided that, for the purposes of an appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"):
 - 5.1. The date of this order shall be deemed to be the date of the Second Respondent's decision refusing consent in terms of section 108 of the Zoning Scheme;
 - 5.2. The said appeal in terms of section 62 of the Systems Act shall be an appeal in the wide sense, in which the First and Second Applicants will be entitled to participate and will not be limited to the record on appeal (subject to the right of the body considering the appeal to regulate the procedure for and rule on the admission of evidence or submissions).
6. Paragraphs 1 to 4 of this order are referred to the Constitutional Court for confirmation of the order of constitutional invalidity.
7. The First Respondent shall, within 15 days, give notice of this Order to all municipalities in the Province of the Western Cape and to the Premiers of the Provinces of the Eastern Cape and Northern Cape.
8. Pending the finding of the Constitutional Court in the confirmation proceedings referred to in paragraph 6 above, the First Respondent must deal with appeals which have been lodged with him in terms of section 44 of LUPO, but which have not as yet been decided, in accordance with the deemed provisions of sections 44(2) and (3) of LUPO contained in paragraph 3 above



9. The First Respondent shall pay the First Applicant's, Second Applicant's and Third to Sixth Respondents' costs of suit, including the costs of two counsel where employed.

BY ORDER OF COURT



COURT ~~THE~~ REGISTRAR OF THE COURT
The State Attorney (Mr J Benkenstein)

319 Raymond McCreath Inc.
SOMERSET WEST

/avz

