CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 117/13

In the matter between:

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

and

THE HABITAT COUNCIL	First Respondent
EVANGELICAL LUTHERAN CHURCH, STRAND STREET	Second Respondent
CITY OF CAPE TOWN	Third Respondent
TRUSTEES FOR THE TIME BEING OF THE GERA INVESTMENT TRUST	Fourth to Seventh Respondents

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Amicus Curiae

And in the matter between:

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

and

CITY OF CAPE TOWN	First Respondent

GORDONIA MOUNT PROPERTIES (PTY) LTD Second Respondent

GORDON'S BAY RATEPAYERS ASSOCIATION Third Respondent

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Amicus Curiae

Neutral citation: *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] ZACC 9

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 10 February 2014

Decided on: 4 April 2014

Summary: Land Use Planning Ordinance 15 of 1985 – constitutionality of section 44 – provision is unconstitutional

Local government competences – provincial government competences – section 155 of the Constitution – all zoning and subdivision decisions, no matter how big, lie within the competence of municipalities

---

ORDER

On application for confirmation of an order of constitutional invalidity granted by the Western Cape High Court, Cape Town (Davis J):

1. Paragraph 1 of the order of the Western Cape High Court, Cape Town, declaring section 44 of the Land Use Planning Ordinance 15 of 1985 unconstitutional and invalid, is confirmed.

2. The declaration of invalidity is not retrospective and does not apply to appeals pending in terms of section 44.

3. Paragraphs 2 to 4 of the High Court's order are not confirmed.

JUDGMENT

CAMERON J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an application for confirmation of an order of the Western Cape High Court, Cape Town (High Court) declaring section 44 of the Land Use Planning Ordinance[1] (LUPO) unconstitutional and invalid. The section gives the Western Cape

[1] 15 of 1985. LUPO is old-order provincial legislation enacted by the former Cape Province. Responsibility for its administration was assigned by presidential proclamation to the Western Cape provincial government (and to the Eastern Cape and Northern Cape governments, to the extent that it applies within those provinces) in June 1994. Section 44 of LUPO is headed "Appeal to Administrator" and provides:

> "(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 section 14(1), (2), (3), (4)(d) or (5) or section 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 decision.

provincial government (Province) the power to decide appeals against municipalities' planning decisions and to replace them with its own. The question is whether direct provincial intervention in particular municipal land-use decisions is compatible with the Constitution's allocation of functions between local and provincial government. This Court recently raised but did not decide this issue in *Lagoonbay*.[2] It must now be decided.

Factual background

[2] The application arises from two planning decisions. In the first, Gordonia Mount Properties (Pty) Ltd sought approval from the local municipality, the City of Cape Town (City), to develop a residential estate on the slopes above Gordon's Bay. When the City failed to process its application timeously, the developer appealed to

---

(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 purposes 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 section 2 of LUPO, "Administrator" means the competent authority to which the administration of LUPO has been assigned by the Premier of the Western Cape, namely the applicant Provincial Minister.

[2] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; 2014 (1) SA 521 (CC) (*Lagoonbay*) at paras 30-47.

the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape (Provincial Minister) in terms of section 44(1)(d) of LUPO.[3] The Provincial Minister upheld the appeal, granting planning approval and permitting the property's rezoning and subdivision in terms of sections 16 and 25 of LUPO.[4]

[3] In the second, the Gera Investment Trust sought to redevelop a building of historical significance in the Cape Town city centre. The City's special consent was

[3] See above n 1 for the text of section 44(1)(d).

[4] Section 16 is headed "Rezoning on application of owner of land" and provides:

> "(1) Either the Administrator or, if authorised thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof.
>
> (2) (a) A rezoning in respect of which the application has been granted by virtue of the provisions of subsection (1) shall lapse—
>
> (i) if the land concerned is not, within a period of two years after the date on which the application for rezoning was granted, utilised as permitted in terms of the zoning granted by the said rezoning;
>
> (ii) where it has been so granted for the purposes of section 22, if a relevant application for subdivision in accordance with the rezoning concerned is not made in terms of section 24 within a period of two years after the date on which the application for rezoning was granted, or
>
> (iii) where such application for subdivision was indeed so made, but the subdivision concerned or part thereof is not confirmed,
>
> unless either the Administrator or, if authorised thereto by the provisions of the structure plan concerned, the council extends the said period of two years, which extension may be granted at any stage.
>
> (b) Subject to the applicable provisions of section 7, 14(2), 14(4)(a) or 14(4)(b), land in respect of which a zoning has lapsed in terms of subsection (2) of this section shall be deemed to be zoned in accordance with the utilisation thereof as determined by the council concerned.
>
> (3) Where an application for rezoning is granted under subsection (1) or a rezoning has lapsed in terms of subsection (2), the local authority concerned shall as soon as practicable amend the zoning map concerned and, where applicable, a register in its possession accordingly."

Section 25 is headed "Granting or refusal of application" and provides:

> "(1) Either the Administrator or, if authorised thereto by scheme regulations, a council may grant or refuse an application for the subdivision of land.
>
> (2) In granting an application under subsection (1) either the Administrator or the council concerned, as the case may be, shall indicate relevant zonings in relation to the subdivision concerned for the purpose of the application of section 22(2)."

required in terms of the applicable zoning scheme regulations, because the property fell into an "urban conservation area".[5] The City considered the proposed development and, faced with objections from the Habitat Council,[6] refused to grant special consent. The Trust appealed in terms of section 44 to the Provincial Minister, who upheld the appeal. However, recognising that the City had a role to play in guiding the development, he gave it an opportunity to impose conditions on his approval. The City was slow in finalising the conditions, causing the Provincial Minister to impose conditions of his own in terms of section 42(1) of LUPO.[7]

In the High Court

[4] The City, unhappy with the Provincial Minister's intervention in the Gordonia matter, instituted proceedings in the High Court against the Province for an order declaring section 44 of LUPO unconstitutional and invalid. And the Habitat Council, aggrieved by the Provincial Minister's decision to permit the redevelopment of the historical site, instituted proceedings in the same Court seeking the same relief. The

[5] Section 108 of the Municipality of the City of Cape Town: Zoning Scheme: Scheme Regulations, *Provincial Gazette* 4649 of 29 June 1990, as amended.

[6] The Habitat Council is a voluntary, non-profit association that promotes conservation. The building that the Trust sought to develop was the Martin Melck Warehouse, dating from 1764, in the loft of which the Lutheran community had congregated in secret. The Evangelical Lutheran Church did not object to the development when the City was deliberating, because of a misunderstanding that the heritage aspects of the approval had already been irreversibly decided. But in the High Court it was the second applicant, alongside the Habitat Council.

[7] Section 42(1) reads:

> "When the Administrator or a council grants authorisation, exemption or an application or adjudicates upon an appeal under this Ordinance, he may do so subject to such conditions as he may think fit."

two matters were consolidated.[8] Invalidating section 44 of LUPO would mean that the Provincial Minister's decisions in both matters would fall to be set aside.

[5] The Provincial Minister conceded that section 44 of LUPO is unconstitutional. The High Court concluded that the concession was correctly made, finding that the section is "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, but also because it allows [the Provincial Minister] to replace every decision with his own decision". This, it said, was clearly at odds with the Constitution's conferral upon municipalities of authority over "municipal planning".[9] The High Court accordingly granted an order declaring section 44 of LUPO unconstitutional and invalid.

[6] But it did not follow, in the High Court's view, that the Provincial Minister has no constitutionally permissible appellate powers over municipal planning decisions. This was for two reasons. The first is the potential for overlap between municipalities' planning competence and three pertinent provincial competences, namely "regional planning and development", "urban and rural development" and "provincial planning".[10] The second is the "oversight" provinces are constitutionally

[8] The High Court judgment is reported as *Habitat Council and Another v Provincial Minister of Local Government etc, Western Cape, and Others* [2013] ZAWCHC 112; 2013 (6) SA 113 (WCC).

[9] In terms of section 156(1)(a) of the Constitution, municipalities have executive authority in respect of, and the right to administer, "the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5". Part B of Schedule 4 includes "municipal planning".

[10] Section 104(1)(b) of the Constitution gives provinces legislative competence in respect of the functional areas listed in Schedules 4 and 5. Part A of Schedule 4 lists "Functional areas of concurrent national and provincial legislative competence" and includes "regional planning and development" and "urban and rural development".

enjoined to exercise over municipalities.[11] The High Court reasoned that appeals to the Province are legitimate to the extent that they engage the Province's overlapping competences or are necessary for the Province to exercise its powers of oversight. In the former case, the Province may legitimately substitute a municipality's decision with its own. In the latter, it may not. All that it may do is set the decision aside, giving reasons, and invite the municipality to reconsider the application. The High Court crafted its interim order in accordance with this approach.

[7] The High Court suspended its declaration of invalidity for 24 months to give the Province an opportunity to enact a new regime. In the interim, it adopted an extensive reading in. This keeps the Provincial Minister's appellate powers alive to the extent that they are, in the High Court's view, constitutionally permissible.[12] To

---

Part A of Schedule 5 lists "Functional areas of exclusive provincial legislative competence" and includes "provincial planning".

[11] Section 155 of the Constitution provides in relevant part:

> "(6) Each provincial government . . . , by legislative or other measures, must—
>
> (a) provide for the monitoring and support of local government in the province; and
>
> (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
>
> (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

[12] Paragraph 3 of the High Court order reads:

> "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:

avoid the chaos that would otherwise result, it limited the retrospective effect of its order so that it would apply solely to appeals not yet finally determined. In their case, the provisions of LUPO as read in under the Court's order applied.[13] In all these respects, the High Court was confirming the draft order to which the parties had agreed.

This Court

[8] Before this Court, the Provincial Minister urged us to confirm the High Court's order in its entirety. None of the respondents appeared. However, the City of Johannesburg Metropolitan Municipality (City of Johannesburg) was admitted as a friend of the court (amicus curiae). Although LUPO, a Cape Ordinance, does not apply to the City of Johannesburg, it has an interest in this Court's interpretation of the

---

> (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], 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.'"

[13] The High Court also crafted an exception to the non-retrospectivity of its order by reviewing and setting aside the decisions in the Gordonia and Habitat Council matters, so that the applicants would get effective relief. Section 172(2) of the Constitution does not require this Court to confirm that order. It is not discussed further.

Constitution's division of functional competences, since this will apply throughout the country.

[9] The City of Johannesburg's stance was that provinces should not be allowed to intervene in functions that the Constitution reserves for municipalities. This would be in direct conflict with this Court's jurisprudence. It contended that neither the provinces' planning competences nor their powers of oversight entitle them to intervene at the level of individual municipal decisions. The provinces' powers are exercised at a different level, it argued, through separate statutory mechanisms. These include the adoption of spatial development frameworks, which guide municipalities in their decision-making, and consultation during national government's establishment of minimum standards.[14] There is therefore no justification for a provincial power to overturn municipalities' land-use decisions.

Issues

[10] The questions are these:

(a) Are the provincial appellate powers in LUPO constitutionally invalid?

(b) If so, what is the appropriate remedy?

[14] These powers are discussed further below at n 24.

Constitutional validity of section 44 of LUPO

[11] As he had done in the High Court, the Provincial Minister conceded before us that section 44 of LUPO is unconstitutional. That concession was correctly made. As Moseneke J stated in *Robertson*—

> "[t]he Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, 'inviolable and possesses the constitutional latitude within which to define and express its unique character' subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits."[15] (Footnotes omitted.)

[12] That constitutional vision of robust municipal powers has been expanded in the jurisprudence of this Court, and succinctly summarised by Mhlantla AJ in *Lagoonbay*:

> "This Court's jurisprudence quite clearly establishes 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'; (d) '"planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning *which includes the zoning of land and the establishment of townships*' (emphasis added); and (e) the provincial competence for 'urban and rural

[15] *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC) (*Robertson*) at para 60. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 26 and 38 and *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* [2007] ZASCA 1; 2007 (4) SA 276 (SCA) at paras 37-40.

> development' is not wide enough to include powers that form part of 'municipal planning'."[16] (Footnotes omitted.)

[13] This Court in *Lagoonbay* concluded, without deciding, that "[a]t the very least there is therefore a strong case" for holding that it is constitutionally impermissible for the Province to refuse rezoning and subdivision applications under LUPO.[17] That strong case must be given effect here. Section 44 of LUPO does not withstand constitutional scrutiny. This is for all the reasons the *Lagoonbay* synopsis sets out. The provincial appellate capability impermissibly usurps the power of local authorities to manage "municipal planning",[18] intrudes on the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere. This is because, as Jafta J said in *Gauteng Development Tribunal*, the planning competence that the Constitution ascribes to municipalities "includes the zoning of land and the establishment of townships".[19] So the Provincial Minister was correct to concede that section 44's general appellate power is unconstitutional. Municipalities are responsible for zoning and subdivision decisions, and provinces are not.

---

[16] *Lagoonbay* above n 2 at para 46.

[17] Id.

[18] On the meaning of "municipal planning" see *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Gauteng Development Tribunal*) at paras 49-57.

[19] Id at para 57. The Court there affirmed the decision of the Supreme Court of Appeal, reported as *Johannesburg Municipality v Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA); 2010 (2) BCLR 157 (SCA), in which Nugent JA at para 36 illuminated the proper approach to the Constitution's allocation of governmental powers:

> "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 the 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."

[14] This makes sense, given that municipalities are best suited to make those decisions.[20] 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 zoning and subdivision. For these entail localised decisions, and should be based on information that is readily accessible to municipalities. The decision-maker must consider whether services – that 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.

[15] So section 44 of LUPO, which allows the Province to interfere in all municipal land-use decisions and substitute its decisions for those of the municipality, is clearly unconstitutional and invalid. But that leaves a question. Are there any circumstances in which a province may permissibly hear appeals against a municipality's land-use decisions? The High Court, holding that there are, adopted a reading in to preserve some appellate powers.

[16] The first broad circumstance the High Court identified is where the development that is the subject of the appeal engages the Province's competences. In his original written submissions, the Provincial Minister contended that the High

[20] *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) (*Liquor Bill*) at para 51, cited in *Gauteng Development Tribunal* above n 18 at para 53, held that the Constitution's allocation of governmental powers proceeds "from a functional vision of what was appropriate to each sphere".

Court's reading in was fully constitutionally compliant. But, after *Lagoonbay* was handed down and the City of Johannesburg filed its submissions, the Provincial Minister acknowledged that his position had "evolved". In further written submissions, he conceded that the portion of the High Court's reading in[21] that seeks warrant in the Province's overlapping competences is not constitutionally compliant. This is because the reading in envisages a "full-blown appellate function" for the Province in relation to land-use decisions that, in terms of the Constitution, must be decided by municipalities alone.

[17] Nevertheless, the Provincial Minister urged this Court to confirm the High Court's reading in. It should, he said, be tolerated as an interim mechanism. Taking up a point from the City of Johannesburg, he reasoned that there can be no objection to provinces exercising their constitutional competences through procedures or approvals operating in parallel to municipalities' powers. Those parallel procedures afford provinces an effective veto over developments a municipality has approved. In that respect, he suggested, they do not differ from full-blown appellate powers. Therefore, although affording the Province appellate powers during the reading-in period is not wholly constitutionally compliant, the powers are a good approximation of constitutionality.

[18] And it is essential, the Provincial Minister urged, that the Province's veto power be preserved pending the enactment of a new, comprehensive statutory scheme.

[21] Subsection (3)(a) of the reading in, set out in n 12 above.

Here, counsel for the Provincial Minister presented a bogey. There must, he urged, be some provincial legislative and executive surveillance over municipal planning decisions, because big municipal zoning and subdivision decisions could have extra-municipal effects. Without oversight the Province will be powerless to stop even very large developments that may have ruinous effects on the Province as a whole. Here he instanced the possible approval by a municipality of a major new town, for example, "Sasol 4",[22] which would have profound province-wide effects.

[19] This bogey must be slain. All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities. This follows from this Court's analysis of "municipal planning" in *Gauteng Development Tribunal*.[23] Provincial and national government 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 coordinate powers to withhold or grant approvals of their own.[24] It is therefore wrong

[22] This was a reference to a large coal-to-oil plant that energy and chemical company Sasol Limited proposes to build, and to the town it is anticipated will spring up around it. It would follow the three refineries already built: one near Sasolburg, Free State; and two near Secunda, Mpumalanga.

[23] Above n 18.

[24] For instance, Chapter III of the Physical Planning Act 125 of 1991 empowers provinces to issue urban structure plans which "consist of guidelines for the future physical development" of the area to which they relate. In terms of section 27, any development must be consistent with that structure plan. Provinces have the power, in terms of sections 18 and 19, to grant or refuse applications for the amendment of the structure plan, and thereby to decide whether a proposed development may go ahead. (The developer in *Lagoonbay* above n 2 had to secure a structure-plan amendment in addition to zoning and subdivision permissions.) Similarly, the Spatial Planning and Land Use Management Act 16 of 2013, which was promulgated on 5 August 2013 but has not yet been brought into operation, requires the preparation of spatial development frameworks by the national and provincial government. These serve to "guide planning and development decisions" by all spheres of government (section 12(1)(d)), including municipalities, and "must guide and inform the exercise" of any decision relating to land use and development (section 12(2)(b)). Finally, section 24 of the National Environmental Management Act 107 of 1998 entitles every province, with the concurrence of the national government, to identify activities which, because of their environmental and other effects, may not be commenced without the prior authorisation of the national or provincial government. (This permission was also required by the developer in *Lagoonbay* above n 2. And it was at issue in *Maccsand (Pty) Ltd v City of Cape*

to fear that a 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.

[20] The second broad circumstance the High Court embodied in its reading in is when a provincial appellate power is necessary in the exercise of its powers of "oversight" over municipalities. The Constitution expressly envisages that national and provincial governments have legislative and executive authority to see to the effective performance by municipalities of their planning functions.[25] This, the other two spheres of government can achieve by "regulating the exercise by municipalities of their executive authority" in relation to municipal planning.[26]

[21] But the powers in section 155(7), this Court has held, are "hands-off". In the *First Certification* case, the Court described those powers thus:

> "In its various textual forms 'monitor' corresponds to 'observe', 'keep under review' and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control [local government] affairs, but has reference to other, broader powers of supervision and control. . . .
>
> We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of [local government], beyond perhaps the power to measure or test at intervals [local government] compliance with national and

Town and Others [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC), which dealt with the interplay between LUPO approvals granted by municipalities and statutory approvals granted by the other spheres of government.) Needless to say, the constitutional validity of the powers in these various Acts is not at issue in this litigation.

[25] See section 155(7), set out above at n 11.

[26] Id.

> provincial legislative directives or with the [Constitution] itself. What the [Constitution] seeks hereby to realise is a structure for [local government] that, on the one hand, reveals a concern for the autonomy and integrity of [local government] and *prescribes a hands-off relationship* between [local government] and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor [local government] functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy."[27] (Emphasis added.)

[22] It follows that "regulating" in section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order "to see to the effective performance by municipalities of their functions". The constitutional scheme does not envisage the province employing appellate power over municipalities' exercise of their planning functions. This is so even where the zoning, subdivision or land-use permission has province-wide implications.

[23] The Provincial Minister also urged us to accept that good government requires that it should be able to "safeguard provincial and regional interests" while the Province's Land Use and Planning Bill is enacted and made ready for implementation.[28] This, it urged, was because, if municipalities alone consider zoning and subdivision applications, "parochial municipal interests" will triumph. The contention cannot be sustained. The Constitution envisages, subject only to the

[27] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 372-3.

[28] The Western Cape Land Use Planning Bill was gazetted on 4 February 2014 in *Provincial Gazette Extraordinary* 7225.

oversight and support role of national and provincial government, and to the planning powers vested in them, that parochial interests should prevail in subdivision and zoning decisions.

[24] That is enough to deal with the main issue. But both the Provincial Minister and the City of Johannesburg urged the Court to use the opportunity to give greater content in this judgment to the constitutional competence of "provincial planning". This, the parties said, was to afford guidance to municipalities and provincial authorities as they review and reform the existing legislative framework for planning. This invitation is enticing. But it must be declined. Legislation that deals with municipal planning, both provincial and national, is pending.[29] The Constitution offers mechanisms by which the President and provincial Premiers, or legislators, can secure this Court's determination of the constitutional validity of both Bills and statutes.[30] Outside these mechanisms, the Court should not pronounce on intricate matters with which legislatures are dealing. Practically, this means the Court should do no more here than is necessary to decide the sole question before it, namely the constitutional validity of the Province's appellate powers over zoning and land-use decisions. That is judicial economy.[31]

[29] See the Spatial Planning and Land Use Management Act, discussed above n 24, and the Western Cape Land Use Planning Bill, above n 28.

[30] In terms of section 121 of the Constitution, a provincial Premier who has reservations about the constitutionality of a Bill may, in certain circumstances, refer it to the Court for a decision on its constitutionality. And, in terms of section 122, a provincial legislature may apply to this Court to declare a provincial Act unconstitutional if at least one-fifth of the members of the legislature support that application. See *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government, and Others* [2011] ZACC 25; 2011 (6) SA 396 (CC); 2011 (11) BCLR 1181 (CC). The national counterparts of these provisions are sections 79 and 80. See *Liquor Bill* above n 20.

[31] See *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 82.

Remedy

[25] It follows that the reading in the High Court ordered, with the consent of both the Provincial Minister and the other parties before it, cannot be confirmed. That reading in gives the Province interim appellate powers that are incompatible with the competence the Constitution affords municipalities over "municipal planning". The Constitution grants the Province no direct decisional oversight over the exercise of these functions, and nothing in the evidence placed before us indicates that powers of this sort should be afforded as an interim measure.

[26] For the same reasons, 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 by flooding the courts with review applications.

[27] The contention that some local authorities lack planning capacity deserves serious consideration. But it does not justify suspending the declaration of invalidity. It cannot entail more than this: that the Province must, as the Constitution envisages, "promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs".[32] It cannot entail appellate oversight of zoning and subdivision decisions. And local government capacity problems do not justify this oversight being afforded on an interim basis. Instead, the Province is obliged to use its constitutional powers, which are not insubstantial, to assist municipalities to make planning decisions properly. That it can do by helping them increase their capacity. What legislative and other means the Province may use to do this is not before us and it is not necessary to express any view on it.

[28] Finally, the Provincial Minister asked this Court to limit the retrospective effect of the declaration of invalidity, as the High Court had done. He noted, in particular, the chaos that would result if even finalised approvals granted by the Province on appeal were rendered invalid. Similar difficulties would arise, he said, if approvals granted by a municipality and overturned on appeal were now resuscitated.

[29] Those practical difficulties cannot be gainsaid. The retrospective effect of the declaration of invalidity will be limited accordingly. At the end of all this, as emerged during argument, the Provincial Minister can have no real complaint about an order of

[32] Section 155(6)(b), set out above at n 11.

invalidity that takes effect immediately, subject only to pending appeals being exempted from it.

Costs

[30] Since only the Provincial Minister and the City of Johannesburg, as amicus, appeared before us, a costs order would be redundant.[33]

Order

[31] It is ordered as follows:

1. Paragraph 1 of the order of the Western Cape High Court, Cape Town, declaring section 44 of the Land Use Planning Ordinance 15 of 1985 unconstitutional and invalid, is confirmed.
2. The declaration of invalidity is not retrospective and does not apply to appeals pending in terms of section 44.
3. Paragraphs 2 to 4 of the High Court's order are not confirmed.

[33] In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 67 the Court stated that "it is unusual and indeed it will rarely be appropriate for costs to be awarded in favour of an amicus curiae".

For the Applicant:	Advocate A Breitenbach SC, Advocate D Borgström and Advocate L Dzai instructed by the State Attorney.
For the Amicus Curiae:	Advocate S du Plessis SC and Advocate P Verveen instructed by Moodie & Robertson Attorneys.