CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 114/15

In the matter between:

TRONOX KZN SANDS (PTY) LIMITED	Applicant
and	
KWAZULU-NATAL PLANNING AND DEVELOPMENT APPEAL TRIBUNAL	First Respondent
MTUNZINI CONSERVANCY	Second Respondent
MTUNZINI FISH FARM (PTY) LIMITED	Third Respondent
UMLALAZI LOCAL MUNICIPALITY	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent
ETHEKWINI MUNICIPALITY	Sixth Respondent

Neutral citation:	*Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 1
Coram:	Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J
Judgment:	Van der Westhuizen J
Heard on:	9 November 2015
Decided on:	29 January 2016

Summary: KwaZulu-Natal Planning and Development Act 6 of 2008 — constitutionality of section 45 — provision is constitutionally invalid

Section 156(1) of the Constitution — local government competences — provincial government competences — municipal planning decisions lie within the exclusive competence of municipalities

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ORDER

On application for confirmation of the order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg:

1. The order of the High Court is confirmed insofar as it declares section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 constitutionally invalid.
2. Section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 is declared to be inconsistent with the Constitution and invalid.
3. The appeal is dismissed.
4. The declaration of invalidity is not retrospective and does not affect finalised appeals.
5. Paragraph (iii) of the High Court's order is not confirmed.
6. Appeals pending in terms of section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 may continue until finalised.
7. In considering all pending applications, the KwaZulu-Natal Planning and Development Appeal Tribunal must uphold the municipalities' integrated development plans, if in existence.
8. The fifth respondent, the Member of the Executive Council for Cooperative Governance and Traditional Affairs, must pay the costs

Tronox KZN Sands (Pty) Ltd incurred as a result of opposition to the confirmation application and the appeal.

JUDGMENT

VAN DER WESTHUIZEN J (Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ and Zondo J concurring):

Introduction

[1] This matter touches what many would regard as the heart of the South African constitutional dispensation, namely the distribution of power amongst the municipal, provincial and national spheres of government. It furthermore raises questions about the power of this Court to address the constitutional invalidity of legislation, as well as the consequences of a finding of invalidity.

[2] The main question is whether section 45 of the KwaZulu-Natal Planning and Development Act[1] (PDA) is constitutionally acceptable. It provides for an appeal from municipal planning decisions to the first respondent, the KwaZulu-Natal Planning and Development Appeal Tribunal (Appeal Tribunal). Section 45(1) states:

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

[1] 6 of 2008.

[3] The remainder of section 45 deals with the time limit for lodging a memorandum of appeal[2] and the consequences of failing to comply with that time limit.[3] At issue is whether section 45 constitutes provincial interference in municipalities' exclusive and constitutionally-enshrined domain.

[4] The next question is whether the whole of Chapter 10 of the PDA should be declared constitutionally invalid. Comprising of sections 100 to 134, Chapter 10 establishes the Appeal Tribunal and provides for the various aspects of its functioning. Section 102 provides for its independence.[4] In spite of this independence, section 106 gives the responsible Member of the Executive Council the power to appoint members of the Appeal Tribunal.[5]

[5] Should either section 45 or Chapter 10 as a whole be found to lack constitutional validity, the third question would be whether to suspend the invalidity for a fixed period. Lastly, and very importantly, this Court would have to decide the fate of appeals – finalised as well as pending – under the mechanism provided for in Chapter 10.

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[2] Section 45(2).

[3] Section 45(3).

[4] Section 102(1) reads:

> "The Appeal Tribunal must exercise its powers in an independent manner, free from governmental or any other outside interference or influence, and in accordance with the highest standards of integrity, impartiality, objectivity and professional ethics."

[5] Section 106(1) provides:

> "The responsible Member of the Executive Council, must appoint members for the Appeal Tribunal after consideration of—
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> (a) the applications and supporting documents received from persons in response to the call for nominations; and
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> (b) any comments that were received in regard to the proposed appointment of those persons."

Facts

[6] The applicant, Tronox KZN Sands (Pty) Ltd (Tronox), is the largest fully integrated producer of titanium ore and titanium dioxide in the world. It made significant investments in two mining areas at Hillendale and Fairbreeze in Empangeni. It commenced production at Hillendale in 2001 and – once the mine there had been exhausted – it sought to move its operation to Fairbreeze.

[7] In October 2012 Tronox lodged an application in terms of the PDA with Umlalazi Municipality, the fourth respondent, for prospective land use rights for areas situated outside a scheme as defined in the PDA. It is common cause that the relevant area, a portion of the Fairbreeze site known as Fairbreeze C Extension, is situated outside a scheme. It was previously unzoned agricultural land. Mtunzini Conservancy, the second respondent, and Mtunzini Fish Farm (Pty) Ltd (Fish Farm), the third respondent, objected in writing to Tronox's application. Fish Farm is a licenced aquaculture operation situated in the Mtunzini area which specialises in the production of dusky kob.

[8] On 19 February 2014 Umlalazi Municipality granted Tronox's application. Mtunzini Conservancy and Fish Farm lodged appeals with the Appeal Tribunal against this decision in terms of section 45 of the PDA. These two appeals were set down for hearing on 23 and 24 July 2014 before the Appeal Tribunal.

High Court

[9] Before Fish Farm's and Conservancy's appeals were heard, Tronox had launched proceedings in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (High Court). It asked the Court to declare section 45 and the entirety of Chapter 10 of the PDA unconstitutional to the extent that the provisions constituted interference by the provincial government in municipal planning decisions. It also sought an order that the two pending appeals be declared unlawful and void *ab initio* (from the beginning).

[10] Mtunzini Conservancy, Fish Farm and Umlalazi Municipality elected to abide by the decision of the High Court. The matter was opposed by the Member of the Executive Council for Cooperative Governance and Traditional Affairs (MEC). Pending the determination of the orders sought by Tronox, the Court granted an interim order interdicting the Appeal Tribunal from hearing the two appeals.

[11] In a judgment by Lopes J the High Court held on 3 June 2015 that the constitutionally entrenched powers of municipalities in relation to "municipal planning" had been interfered with by the provincial government.[6] The Court held that Chapter 10 of the PDA provides a mechanism which *compels* municipalities to allow appeals from their decisions. Although it does not create a provincial power to overturn municipal decisions *mero motu* (of its own accord), "it subjects the municipalities to the scrutiny of an appeal in circumstances where the municipality may not have resolved that an appeal process is appropriate or desirable".[7]

[12] The High Court declared section 45 unconstitutional to the extent that it constitutes interference by the Province in municipal planning decisions by providing for an appeal from a municipal decision to an appellate body, namely the Appeal Tribunal. It refused to suspend the order. The declaration of invalidity in respect of section 45 was ordered not to have retrospective effect.

[13] The declaration would have no force unless confirmed by the Constitutional Court. Therefore, the High Court extended the interdict it had granted preventing the finalisation of the two appeals brought by Mtunzini Conservancy and Fish Farm. If the declaration were not confirmed, these appeals could go ahead. The Court ordered that, in the event that this Court confirms the declaration, these two appeals are declared unlawful and void *ab initio*. The Court made no order regarding other

[6] *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2015] ZAKZPHC 42 at para 31.

[7] Id at para 29.

appeals pending before the Appeal Tribunal, on the basis that the parties were not before the Court. Thus, the only appeals directly affected by the order were the two appeals brought by Mtunzini Conservancy and Fish Farm.

In this Court

[14] Tronox asks this Court to confirm the High Court's finding that section 45 of the PDA is constitutionally invalid. Tronox also seeks an order that, in the event of confirmation, the two pending appeals be declared unlawful and void *ab initio*. The MEC, the fifth respondent, opposes the confirmation application and appeals the High Court decision. Ethekwini Municipality intervened in this Court as the sixth respondent.

Fish Farm's affidavit

[15] Fish Farm did not give notice of its intention to appeal against the High Court's order. It indicated that it abides by the decision of this Court. Despite doing so, it proceeded to file an affidavit making factual and legal submissions. This affidavit was not properly before this Court and the attempt to file it is irregular. It is unacceptable for a party, who is not an amicus or seeking to intervene, to seek to file an affidavit in the absence of a notice to appeal.[8] Fish Farm emphasises its poverty and lack of access to resources to fight Tronox. In that case, it should have sought to obtain pro bono help, as many litigants in this Court successfully do. The affidavit cannot be admitted. It is not in the interests of justice to condone the departure from this Court's processes.

[8] Fish Farm disregarded rule 16(2) of the Uniform Rules of this Court by filing an affidavit in absence of a notice to appeal.

Constitutional validity of section 45

Submissions

[16] Tronox again argues that section 45 is incompatible with the Constitution's allocation of functions between local and provincial government.[9] In support, it cites *Habitat Council*[10] and *Gauteng Development Tribunal*.[11]

[17] The MEC contends that the relevant provisions of the PDA do not offend the Constitution. This case is distinguishable from *Gauteng Development Tribunal* and *Habitat Council*. The Appeal Tribunal is an independent and impartial body staffed by experts and not provincial officials. Its members are free from provincial control and municipalities make all the original decisions. In *Habitat Council* the "appellate oversight" was exercised by the Administrator (the equivalent of the present-day Member of the Executive Council), who could decide appeals and substitute municipal decisions with her own. Moreover, in this case the Appeal Tribunal is there for the convenience of municipalities. The Province has provided a simple and inexpensive internal appeal process in the public interest. And in contrast with the *Habitat Council* and *Gauteng Development Tribunal* matters, the relevant municipality has abided this Court's decision and cannot be said to be aggrieved.

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[9] Section 40(1) of the Constitution provides that government "is constituted as national, provincial and local spheres of government which are distinctive, independent and interrelated".

Section 41(1) requires, in relevant part, that—

> "all spheres of government and all organs of state within each sphere must—
>
> . . .
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> (f) not assume any power or function except those conferred on them in terms of the Constitution."

Section 151(4) provides that "the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its power or perform its functions".

[10] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC) (*Habitat Council*).

[11] *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*).

[18] Ethekwini Municipality supports the arguments of Tronox in several respects. Not only is section 45 constitutionally invalid, but so too are the other appeal provisions in the PDA, it argues. Municipal competence is exercised subject to framework legislation such as the Local Government: Municipal Systems Act[12] (Municipal Systems Act), which requires municipalities to adopt and give effect to an integrated development plan in land use management.[13] The Municipal Systems Act reiterates that municipalities should carry out their executive and legislative decisions without improper interference.[14] The legislative scheme of the PDA dilutes municipalities' exclusive competence. It allows the Province to interfere with it without consideration of the municipalities' operations, budgets, resources and objectives.

Is section 45 constitutionally invalid?

[19] Section 156(1) of the Constitution provides:

> "A municipality has executive authority in respect of, and has the right to administer—
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> (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
>
> (b) any other matter assigned to it by national or provincial legislation."

Part B of Schedule 4 includes "municipal planning" and it was common cause throughout the proceedings that the municipal decisions caught by section 45 and relevant to this matter fell within the ambit of "municipal planning".

[20] In *Gauteng Development Tribunal* this Court struck down Chapters V and VI of the Development Facilitation Act[15] which authorised provincial development tribunals, established in terms of that Act, to determine applications for the rezoning

[12] 32 of 2000.

[13] Sections 25 and 26.

[14] Section 4(1)(b).

[15] 67 of 1995.

of land and the establishment of townships. Jafta J emphasised that "the Constitution confers different planning responsibilities on each of the three spheres of government in accordance with what is appropriate to each sphere".[16] Acknowledging that "the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments", he held that they nevertheless "remain distinct from one another" and that this is the position even in respect of functional areas that share the same wording like roads, planning, sport and others.[17] This Court affirmed the inviolability of executive municipal power and the necessity of interpreting the Constitution in a manner which respects that power. The original powers of executive authority allocated by the Constitution to the municipal sphere cannot also be allocated to the provincial sphere. This Court further held that—

> "the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities."[18]

[21] *Gauteng Development Tribunal* provided a ringing affirmation of the need for the various spheres of government to "respect the constitutional status, institutions, powers and functions of government in the other spheres" and "not assume any power or function except those conferred on them in terms of the Constitution".[19]

[22] In *Habitat Council* this Court confirmed an order of the High Court declaring section 44 of the Land Use Planning Ordinance[20] constitutionally invalid.[21] The provision allowed persons aggrieved by municipal land use decisions to appeal to the Western Cape provincial government, which was able to replace these decisions with

[16] *Gauteng Development Tribunal* above n 11 at para 53.

[17] Id at para 55.

[18] Id at para 59.

[19] Section 41(1)(e) and (f) of the Constitution above n 9.

[20] 15 of 1985.

[21] *Habitat Council* above n 10 at para 31.

its own. It was clearly constitutionally invalid, because the provincial appellate capacity usurped local government's power to manage "municipal planning".

[23] The Court considered whether there are circumstances in which a province may permissibly veto a municipality's land use decision through procedures or approvals operating in parallel to municipalities' powers. The Provincial Minister argued that there must be some provincial surveillance over municipal planning decisions because big decisions could have extra-municipal impact. Cameron J rejected this reasoning:

> "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*. 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 co-ordinate powers to withhold or grant approvals of their own."[22] (Footnotes omitted.)

[24] The reason behind this strict allocation is that municipalities are best suited to make planning decisions as they are localised decisions which should be based on information which is readily available to them.[23]

[25] In *Lagoonbay* Mhlantla AJ summarised this Court's approach to autonomous municipal power as follows:

> "(a) [B]arring 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';

[22] Id at para 19.

[23] Id at para 14.

(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*'; and

(e) the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'."[24] (Footnotes omitted.) (Emphasis in original.)

[26] The general vision of distinct spheres of government outlined in *Gauteng Development Tribunal* and the emphatic call for municipal autonomy in *Habitat Council*, with reliance on *Lagoonbay's* guidelines, are most certainly applicable in the present case. Moreover, the finding in *Gauteng Development Tribunal* that the provincial sphere cannot, by legislation, give itself the right to *administer* municipal affairs is pertinent.[25]

[27] Section 45 impermissibly interferes with municipalities' exclusive constitutional power. The contention that the establishment of the Appeal Tribunal and the provision of an internal appeal does not involve the exercise of a provincial function or power is unconvincing. The Appeal Tribunal is established by the Province through legislation, namely the PDA, and this legislation subjects municipalities to an appeal process without their consent and regardless of whether or not they think it is appropriate.

[28] Although it is true that the Appeal Tribunal is not staffed by provincial officials[26] (and the appellate oversight is not exercised by the Administrator/MEC, as

[24] *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (*Lagoonbay*) at para 46.

[25] *Gauteng Development Tribunal* above n 11 at para 59.

[26] Section 104 of the PDA, in relevant part, reads:

"A person is disqualified from appointment as a member of the Appeal Tribunal if he or she—

. . .

(e) is a member of Parliament, the provincial legislature or a municipal council in the Province, or if that person is nominated as a member of Parliament, the provincial legislature or a municipal council."

was the case in *Habitat Council*), the *Habitat Council* decision, boiled down to its essence, establishes that local authorities have the power to manage "municipal planning". This power is autonomous and under no circumstances can it be intruded upon. Therefore, the alleged "independence" of the Appeal Tribunal does not necessarily render *Habitat Council* inapplicable. The fact that municipalities are subjected to an appeal process by the Province also intrudes upon their autonomous power. The Province's involvement in appointing persons to the Appeal Tribunal[27] and its administrative influence exacerbate the intrusion.

[29] As eThekwini Municipality argues, the appeal mechanism dilutes and erodes municipalities' exclusive competence and original power in respect of planning decisions. The Appeal Tribunal's decisions might indeed be out-of-step with a municipality's broader planning strategy and long-term vision, determined in light of resources, capacity, and sustainability concerns.

[30] The fact that the appellate authority may be there for the convenience of municipalities does not mean that their autonomous sphere of power has not been usurped. That most municipalities have not complained is also irrelevant to the constitutionality of the provision. So is the fact that it was not Umlalazi Municipality which launched the challenge.

[31] The High Court correctly held that *Habitat Council* and *Gauteng Development Tribunal* apply to this matter. Section 45 fails to preserve municipal autonomy and involves constitutionally impermissible provincial interference in the municipal sphere.

Reading-down

[32] In her written argument, the MEC contended that section 45 of the PDA is reasonably capable of being read down to render it constitutionally compliant.

[27] See [4] above.

Alternatively, if section 45 were held to be constitutionally invalid, the MEC submitted that words could be read into section 45 in order to render it constitutionally acceptable. In support of both submissions, the MEC relied on the Spatial Planning and Land Use Management Act[28] (SPLUMA), which came into force on 1 July 2015.

[33] SPLUMA attempts to provide a unified framework for spatial planning and land use management in South Africa. Chapter 6 establishes "Municipal Planning Tribunals" to which municipalities can decide to refer certain land use and land development applications. The Tribunals must consist of officials in the full-time service of a municipality (provided that they are not municipal councillors) and persons, who are not municipal officials, with knowledge and experience of spatial planning, land use management and land development.

[34] In terms of section 51(1) of SPLUMA, a person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal by giving written notice to the municipal manager within 21 days of being notified of the decision. The municipal manager must submit the appeal to the executive authority of the municipality as the appeal authority.[29] The executive authority is the executive committee or executive mayor of the municipality or, if no executive committee or mayor exists, it is a committee of councillors appointed by the Municipal Council. Section 51(6), however, reads:

> "A municipality may, in the place of its executive authority, authorise that a body or institution outside of the municipality or in a manner regulated in terms of a provincial legislation, assume the obligations of an appeal authority in terms of this section."

[35] The MEC argued that in the context of section 51(6), the Appeal Tribunal established by the PDA is "the most appropriate appellate tribunal". She contended that section 45 of the PDA was reasonably capable of being interpreted to mean:

[28] 16 of 2013.

[29] Section 51(2).

> "A person who applied for the development of land situated outside the area of a scheme or has lodged written comments in response to an invitation for public comment on a proposal to develop the land, who is aggrieved by the decision of the municipality contemplated in section 43(1) may, *subject to the provisions of section 51 of the Spatial Planning and Land Use Management Act 16 of 2013*, appeal against the municipality's decision to the Appeal Tribunal *as the municipality's appeal authority contemplated in section 51 aforesaid*." (Emphasis in the source.)

This would allow the municipality the option of authorising the Appeal Tribunal as its appeal authority in terms of SPLUMA which, she contended, might be particularly useful for smaller municipalities facing capacity problems.

[36] Ethekwini Municipality pointed to several linguistic ambiguities in the MEC's proposed formulation. First, it might mean that municipalities should be taken to have appointed the Appeal Tribunal as the appeal authority under SPLUMA in relation to all appeals pending *before* SPLUMA came into force. Second, it could mean that *the person appealing* could choose between the tribunal and the executive authority. Ethekwini Municipality submitted that neither of these interpretations would be constitutionally permissible. The only acceptable interpretation would be as follows: the right to appeal to the Appeal Tribunal only exists where the relevant municipality has appointed it as its external appeal authority in terms of SPLUMA. The proposed reading-down or reading-in should therefore make this clear, by inserting the following additional words at the end: "*if so appointed by the municipality in accordance with section 51(6)*".

[37] During the hearing, counsel for the MEC accepted that eThekwini Municipality's proposed wording was preferable. The MEC therefore endorsed the addition of these words in respect of both its proposed reading-down and reading-in.

[38] There may be some confusion about the "remedies" generally referred to as *reading-down* and *reading-in*. The first is an interpretive tool. It is a way to save a

statutory provision from constitutional invalidity by giving it a meaning – on its wording – that is constitutionally compliant.[30] The second is a remedy and is more invasive. It is invoked after a provision has been found constitutionally invalid.[31] Rather than to burden the Legislature with a change that may be needed, a court reads the constitutionally required words into the provision or phrase by adding them.[32]

[39] It is well-settled that our courts should interpret legislation in a manner which accords with the Constitution, so long as the legislation is reasonably capable of being interpreted in this manner.[33] The interpretation must not be unduly strained.[34] It is inconceivable that section 45 of the PDA could be given a construction which incorporates section 51 of SPLUMA in the manner suggested by the MEC. This interpretation would be more than "strained" – it would depart entirely from the language of the statute. SPLUMA was passed several years after section 45 of the PDA and the MEC's submission is therefore unsustainable.

[40] The MEC's reading-down proposal is not acceptable. It follows that section 45 is constitutionally invalid.

Chapter 10 and sections 15, 28, 57 and 67

[41] Tronox asked the High Court to declare Chapter 10 of the PDA (i.e. the provisions making up the Appeal Tribunal) constitutionally invalid. However, the High Court decided only to consider the constitutionality of section 45. Tronox did

[30] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition for Gay and Lesbian Equality*) at para 24.

[31] Id.

[32] For examples of cases where this Court has ordered a reading-in, see *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC); *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC); and *National Coalition for Gay and Lesbian Equality* above n 30.

[33] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[34] Id.

not cross-appeal this aspect of the judgment and it no longer requests an order of invalidity in respect of Chapter 10. Ethekwini Municipality, meanwhile, draws attention to other "appeal provisions" in the Act – sections 15, 28, 57 and 67[35] – and asks this Court to widen the scope of its enquiry to declare them constitutionally invalid too.

[42] This Court has expressed its reluctance to decide on the constitutional validity of a statute or provision where the issue has not been pleaded or ventilated in the lower courts.[36] This is partly to ensure that opposing parties are aware of the case they are required to meet from the outset so that they can present appropriate factual information and legal argument. The views of the lower courts are also highly valued and benefit the jurisprudence of appellate courts, which are primarily supposed to evaluate whether and how the court below erred.[37] In any given case, however, the overriding question is whether considerations of justice and fairness dictate a departure from the normal approach.[38]

[43] In this case, the alleged constitutional invalidity of Chapter 10 was pleaded by Tronox in the High Court. The High Court decided not to reach this question. That decision was not appealed. In my view, caution in relation to declaring the whole of Chapter 10 invalid is demanded.

[44] The argument that Chapter 10 is problematic in its entirety may well have merit, but was not canvassed in detail before us or in the High Court. The problematic nature of *particular* provisions has not been identified. Chapter 10 is closely bound up with the rest of the statute. If this Court were to strike down Chapter 10, the effect

[35] All these sections provide for an appeal to the Appeal Tribunal against municipalities' decisions on the: adoption, replacement or amendment of a scheme or failure to decide on the amendment of a scheme (section 15); proposed subdivision or consolidation of land (section 28); proposed phasing or cancellation of approved layout plans (section 57); and proposed alteration, suspension or deletion of restrictions relating to land (section 67).

[36] See the various authorities detailed in *Lagoonbay* above n 24 at paras 36-9.

[37] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34 at para 62.

[38] *Lagoonbay* above n 24 at para 35.

would be the same as declaring sections 15, 28, 57 and 67 constitutionally invalid. The bite of these provisions depends on Chapter 10 because without it, the Appeal Tribunal contemplated in sections 15, 28, 57 and 67 would be a nullity. Although eThekwini Municipality also asks this Court to scrutinise these provisions, their alleged constitutional invalidity was not pleaded by Tronox before the High Court. To render them inoperative, without full argument and the provision of an opportunity for other affected parties to come forward, would be undesirable.

[45] In spite of the doubt raised about the constitutional validity of other parts of the PDA, it is preferable that the Legislature carefully consider and remedy such a multi-faceted and integrated problem, rather than for this Court to take on that task. The separation of powers requires the Legislature, rather than a court, to act. This Court's decision in relation to section 45 will hopefully spur the KwaZulu-Natal Legislature to consider and rectify other possible deficiencies in the PDA. It should be allowed to do so on its own terms. For these reasons, I resist reaching Chapter 10 and the other provisions, which eThekwini Municipality have placed under attack.

Remedy

[46] Having decided that section 45 is unconstitutional, it is this Court's duty to fashion a remedy which is just and equitable and takes into account the interests of all affected parties.[39] This entails the exercise of a broad equitable discretion.

Reading-in

[47] The MEC contended that, in the event that this Court were to find section 45 to be constitutionally invalid, the order of invalidity should be suspended for 24 months. Furthermore, she submitted that a reading-in should be ordered as an interim measure to operate during the period of suspension. Counsel clarified during the hearing that

[39] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> . . .
>
> (b) may make any order that is just and equitable."

the proposed reading-in was identical to the wording of the proposed reading-down. Again, the MEC accepted the addition suggested by eThekwini Municipality. The reading-in sought was therefore as stated above.[40]

[48] Should this Court embrace the proposed reading-in? I do not think so. The suggestion is rather drastic. The quasi-legislative role which the MEC invites this Court to take raises separation of powers concerns. Moreover, section 51(6) of SPLUMA, which allows municipalities to delegate their final say in planning and land use matters to an external body, could itself face a constitutional challenge one day. Unless the relevant provisions of SPLUMA were authoritatively held by this Court to pass constitutional muster, it would be inappropriate to read in words that refer to section 51 of SPLUMA in order to cure section 45 of its constitutional invalidity.

Suspension

[49] In the event that this Court confirms the declaration of invalidity in respect of section 45, the MEC requested that it be suspended for a period of two years. Both Tronox and eThekwini Municipality contended that the order should not be suspended.

[50] Section 172(1)(b)(ii) of the Constitution provides that when deciding constitutional matters, a court may make any order that is just and equitable, including "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect". The purpose of a suspension order is to give time to the responsible legislature to rectify the defect in issue.

[51] In *Mistry* this Court held that the party seeking suspension bears the responsibility of placing reliable information before the Court which justifies such an

[40] See [36]-[37] above.

order.[41] Tronox is correct in stating that the MEC's submissions in this regard are inadequate. The MEC, in both written and oral argument, has not discharged the burden of showing why suspension would be appropriate. We must re-emphasise what this Court said in *Habitat Council*, namely that local government capacity problems do not in themselves justify an unconstitutional appellate oversight being allowed to proceed as an interim measure.[42] The order of invalidity should not be suspended.

Retrospectivity

[52] Both the MEC and eThekwini Municipality asked this Court to limit the retrospective effect of the declaration of invalidity. In order to avoid the chaos likely to occur, it would not be just and equitable for the order to have retrospective effect.[43] Thus, finalised appeals should be left untouched.

Pending appeals

[53] Three positions have been advanced in regard to the fate of the appeals pending in terms of section 45 of the PDA. Tronox contended that, following a declaration that section 45 is constitutionally invalid, an effective remedy would be to confirm the order of the High Court and declare only Fish Farm's and Mtunzini Conservancy's pending appeals void *ab initio.* Any other finding would leave Tronox, as a successful litigant, without appropriate relief.[44] Ethekwini Municipality went further and asked for *all* pending appeals under section 45 of the PDA to be declared null and void *ab initio.* In response to questions from the bench, counsel for Tronox agreed with this proposal.

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[41] *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) (*Mistry*) at para 37.

[42] *Habitat Council* above n 10 at para 27.

[43] See section 172(1)(b) of the Constitution above n 39.

[44] In *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69, this Court stated that "an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced".

[54] In the MEC's view, all pending appeals should be treated in the same way and be completed in terms of the PDA. Moreover, she argued that members of the public had an expectation that municipal processes were legitimate and that an internal appeal would be available and not changed or disrupted for pending processes. The appeals pending in terms of section 45 should therefore go ahead.

[55] In my view, justice and equity require treating all pending appeals equally. There are no plausible reasons in policy or in law for treating Fish Farm's and Mtunzini Conservancy's appeals differently from the other pending appeals. Either all the pending appeals should go ahead or all should be nullified.

[56] Extinguishing all the pending appeals has the advantage of terminating an unconstitutional appeal process. In terms of the doctrine of objective constitutional invalidity, section 45 has been invalid since its inception.[45] All appeals conducted under it were contaminated by the unconstitutional nature of the provision. Whereas it is just and equitable to leave finalised appeals untouched, it might well seem awkward to proceed with pending appeals in terms of a constitutionally invalid dispensation.

[57] Furthermore, the Constitution allocates exclusive power to municipalities for a reason. They are more likely to be sensitive to their own integrated planning strategies and are thus often better placed to make decisions concerning land use and development. It is also true that, in general, successful litigants should obtain the relief they seek. Tronox receives little relief unless Mtunzini Conservancy's[46] and Fish Farm's appeals are struck down.

[45] For an explanation of the doctrine of objective constitutional invalidity, see *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC) at paras 13-20.

[46] On 6 November 2015 Tronox filed further written submissions informing this Court that it had entered into a settlement agreement with Mtunzini Conservancy on 3 November 2015. It stated that if this Court does not confirm the High Court's declaration of invalidity or if it makes some other ruling which results in Mtunzini Conservancy's appeal not being set aside, Mtunzini Conservancy has undertaken to withdraw its appeal within seven days of this Court's judgment. It stated that there was therefore no longer a live dispute between Tronox and Mtunzini Conservancy. These submissions should be treated cautiously, however, as no copy of the agreement was annexed and Mtunzini Conservancy did not confirm the veracity of the submissions.

[58] However, I think appeals already pending in terms of section 45 should be allowed to proceed. Tronox's submission that it has a "right" to be granted effective relief is overstated. In *Bhulwana* this Court held that it is only when the interests of good government outweigh the interests of individual litigants that successful litigants will not be granted relief.[47] This is an example of such a case. Courts have generally been reluctant to strike down pending appeals for reasons of legal certainty and fairness to parties who have acted upon the assumption that they would have an appeal.[48] In *Habitat Council* this Court ordered that all pending appeals be exempted from the declaration of invalidity.[49] Similarly, in *Gauteng Development Tribunal* this Court allowed the provincial development tribunals in certain jurisdictions to finalise all pending applications, on the basis that it would facilitate a speedy determination of matters and avoid a disruption.[50] The Court pointed out that section 172(1) of the Constitution "confers a wide discretion on a court making a declaration of invalidity to formulate an order which is just and equitable *not only to the litigants before it but also to those affected by the order*".[51]

[59] Furthermore, the drawbacks of allowing an unconstitutional body to process outstanding appeals can be tempered by an order that requires the Appeal Tribunal, in deciding pending appeals, to uphold municipalities' integrated development plans. This Court took that approach in *Gauteng Development Tribunal*.[52] This lessens the damage of allowing an unconstitutional process to go ahead, by forcing the provincial tribunal to take into account the municipal government considerations presumably

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[47] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) (*Bhulwana*) at para 32.

[48] This echoes section 12(2)(c) of the Interpretation Act 33 of 1957 which provides:

> "Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not—
>
> . . .
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed."

[49] *Habitat Council* above n 10 at para 29.

[50] *Gauteng Development Tribunal* above n 11 at para 82.

[51] Id at para 72 (emphasis added).

[52] Id at para 83.

contemplated by the Constitution when it confers exclusive power on municipalities.[53] Pending appeals may go ahead.

Costs

[60] Tronox needed to approach this Court in any event to have the High Court's order confirmed; the MEC did not bring Tronox to this Court. However, the MEC must pay the costs incurred by Tronox as a result of the MEC's appeal and opposition to the confirmation application.

High Court Order

[61] The High Court ordered the following:

> "(i) Section 45 of the KwaZulu-Natal Planning and Development Act, 2008 is hereby declared to be unconstitutional to the extent that it constitutes interference by the province in municipal planning decisions by providing for an appeal from a municipal decision to an appellate body, namely the KwaZulu-Natal Planning and Development Appeal Tribunal, created by the provisions of Chapter 10 of the Act.
>
> (ii) Pending the confirmation by the Constitutional Court in terms of section 172(2)(a) of the Constitution of the Republic of South Africa 1996 of (i) above, the hearing of the appeals pending in terms of section 45 by the Mtunzini Conservancy and the Mtunzini Fish Farm (Pty) Ltd in respect of the decision of the Umlalazi Municipality to approve the land use rights for surface mining operations on the Remainder of Lot 91 and the Remainder or Portion 3 of Lot 91, Umlalazi 1011 Registration Division GU, Province of KwaZulu-Natal, are suspended.
>
> (iii) In the event of the Constitutional Court confirming the declaration of invalidity in terms of paragraph (i) above, the two appeals referred to in (ii) above are declared to be unlawful and void *ab initio*.
>
> (iv) Paragraph (i) above shall not be applicable to any final decisions of the KwaZulu-Natal Planning and Development Appeal Tribunal made prior to the date of this order.

[53] See section 156(1) and Part B of Schedule 4 of the Constitution.

> (v) The [Member of the Executive Council for Cooperative Governance and Traditional Affairs] is directed to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel, and on that basis the costs reserved for decision of this court by Madondo J on the 21 July 2014."

[62] By ruling that section 45 was unconstitutional *to the extent that* it constituted interference by the Province in municipal planning decisions, the High Court ordered a notional severance of section 45. It also included the reason for the constitutional invalidity of section 45 in the order. Tronox asked this Court to confirm the High Court's "striking down" of section 45. Although the High Court arguably did not in fact strike the section down in its entirety, in my view a striking down order is indeed appropriate. For this reason, paragraph 1 of this Court's order confirms the High Court's finding that section 45 is constitutionally invalid, but paragraph 2 goes further by striking the section down.

Order

[63] The following order is made:

1. The order of the High Court is confirmed insofar as it declares section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 constitutionally invalid.
2. Section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 is declared to be inconsistent with the Constitution and invalid.
3. The appeal is dismissed.
4. The declaration of invalidity is not retrospective and does not affect finalised appeals.
5. Paragraph (iii) of the High Court's order is not confirmed.
6. Appeals pending in terms of section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 may continue until finalised.

7. In considering all pending applications, the KwaZulu-Natal Planning and Development Appeal Tribunal must uphold the municipalities' integrated development plans, if in existence.
8. The fifth respondent, the Member of the Executive Council for Cooperative Governance and Traditional Affairs, must pay the costs Tronox KZN Sands (Pty) Ltd incurred as a result of opposition to the confirmation application and the appeal.

For the Applicant:	A A Gabriel SC and S Pudifin-Jones instructed by Shepstone and Wylie Attorneys
For the Fifth Respondent:	A Katz SC and M Mazibuko instructed by PKX Attorneys
For the Sixth Respondent:	A Annandale SC and S Mahabeer instructed by Livingstone Leandy Attorneys