CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 184/16

In the matter between:

HENDRIK DIEDERICK PIETERSE N.O.	First Applicant
ELIZABETH BARINDINA PIETERSE N.O.	Second Applicant
and	
LEPHALALE LOCAL MUNICIPALITY	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT AND HOUSING, LIMPOPO	Second Respondent
LIMPOPO TOWNSHIPS BOARD	Third Respondent
AT SOLD PROPERTIES CC	Fourth Respondent

Neutral citation:	*Pieterse N.O. and Another v Lephalale Local Municipality and Others* [2016] ZACC 40
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J.
Judgment:	The Court
Decided on:	10 November 2016
Summary:	Section 139 of the Town-planning and Townships Ordinance 15 of 1986 — separation of powers — provision is constitutionally invalid

Local government exclusive competences — provision authorising provincial government interference — section 155 of the Constitution — all planning falling within the exclusive competence of municipalities

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ORDER

Confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of the High Court of South Africa, Gauteng Division, Pretoria declaring section 139 of the Town-planning and Townships Ordinance 15 of 1986 constitutionally invalid is confirmed.
2. The declaration of invalidity is not retrospective and does not affect finalised appeals.
3. Appeals pending in terms of section 139 continue until finalised.

JUDGMENT

THE COURT (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J):

[1] These are confirmation proceedings. On 25 May 2016, the High Court of South Africa, Gauteng Division, Pretoria[1] (High Court) declared section 139 of the Town-planning and Townships Ordinance 15 of 1986 (Ordinance) inconsistent with the Constitution and invalid. This was because the provision allows for provincial

[1] Makgoka J.

interference in a municipality's exclusive, constitutionally-enshrined domain by giving appellate powers over its planning competences to the provincial government.[2]

[2] In conformity with section 172(2)(a) of the Constitution,[3] the High Court directed its Registrar to lodge the judgment with this Court for confirmation.[4] The Registrar did so on 2 August 2016.[5] No party sought to apply for the confirmation of the order of invalidity[6] nor was any appeal lodged against it.[7] This Court has decided the confirmation without written or oral submissions. The proceedings concern only the confirmation, not the related review.

Background facts

[3] The applicants, Mr Hendrik Diederick Pieterse and Ms Elizabeth Barindina Pieterse, are trustees of the Waterkloof Family Trust (Trust), which owns farmland in the area of the first respondent, the Lephalale Local Municipality, in Limpopo (Municipality). The Trust obtained municipal permission to temporarily use a portion of the farm for a contractors' residential camp (first application).[8] But when it lodged a second application for the use of an additional portion, the Municipality declined. Aggrieved, the Trust applied to the High Court. It sought an order declaring section 139 of the Ordinance invalid to the extent that its provisions constituted

[2] *Pieterse N.O. v Lephalale Local Municipality* unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria Case No. 79281/14 (25 May 2016) (High Court judgment).

[3] Section 172(2)(a) provides:

> "Powers of courts in constitutional matters
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> . . .
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> (2)(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[4] See also section 167(5) of the Constitution, which states that it is this Court that makes the final decision whether an Act of Parliament is to be declared invalid on the ground that it is inconsistent with the Constitution.

[5] In terms of rule 16(1) of the Rules of this Court, GN R1675 in *GG* 25726, 31 October 2003.

[6] Rule 16(4) of the Rules of this Court provides that a person or organ of state entitled to do so and desirous of applying for the confirmation of an order of invalidity may lodge an application within fifteen days.

[7] Rule 16(2) of the Rules of this Court permit a person or organ of state entitled to do so and desirous of appealing to lodge a notice of appeal within fifteen days.

[8] The application was made in terms of the Lephalale Town-planning Scheme, 2005.

interference by the provincial government in municipal planning decisions. The Trust's interest arose from an exchange between it and the Municipality during which it was informed of the appellate process, and which it regarded as an unnecessary hurdle. The Trust also sought to review and set aside the Municipality's decision refusing the second application.

[4] The High Court decided the review in favour of the Trust. It also declared section 139 constitutionally invalid.

High Court

[5] The Ordinance is old-order legislation that continues to apply under the Constitution. The pre-democracy Transvaal Provincial Legislature enacted it to determine the powers and capacities of local municipalities in its jurisdiction. It reflects a typical planning law regime. This was at a time when municipalities were subordinate arms of government. They "owed their existence to and derived their powers from provincial ordinances".[9] The Ordinance does what the Constitution itself now does. It assigns the authority to introduce, exercise executive authority over and administer municipal planning to authorised municipalities. Since the advent of democracy, the Constitution reserves to municipalities executive power over, and administration of, the functional areas listed in Part B of Schedule 4. Their powers are now constitutionally recognised and protected.[10]

[6] 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". And section 41(1)(e) and 41(1)(f) requires that—

> "all spheres of government and all organs of state within each sphere must—

[9] *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality* [2007] ZASCA 1; 2007 SA (4) 276 (SCA) at para 33.

[10] *City of Cape Town v Robertson* [2004] ZACC 21; 2005 (2) SA 323 (CC) (*Robertson*) at para 60; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 26, 38 and 126.

. . .

(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."

[7] The Constitution confers on municipalities a power to govern the local government affairs of their respective areas and communities.[11] Section 156(1) of the Constitution provides:

"A municipality has executive authority in respect of, and has the right to administer—

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation."

[8] Municipal land use planning schemes are executive and administrative in nature. They are exclusively for the municipality to determine.[12] Beyond their constitutionally allocated powers of oversight and assistance, neither national nor provincial government may, by legislation or otherwise, interfere with a municipality's executive powers to administer municipal affairs.[13] Yet section 139 of the Ordinance continues to allow an appeal from a municipal planning decision to a provincially appointed and administered appellate body. It reads:

"Appeals to Board

(1) An applicant or objector who is aggrieved by—

(a) a decision of a local authority—

(i) in terms of section 20(3)(b), 48(1)(b) or 63(1)(b);

(ii) on any application in terms of—

[11] Section 151(2) confers original executive authority on municipal councils. And 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".

[12] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Gauteng Development Tribunal*) at para 56.

[13] Id at paras 59-60.

(aa) any provision of this Ordinance;

(bb) any town-planning scheme, may, within a period of 28 days from the date he has been notified in writing by such local authority of the decision, or within such further period, not exceeding 28 days, as the Board may allow;

(b) the refusal or unreasonable delay of a local authority to give a decision contemplated in paragraph (a) may, at any time, if this Ordinance does not provide for an appeal to the Administrator, a compensation court or a services appeal board, appeal through the Director to the Board by lodging with the Director a notice of appeal setting out the grounds of appeal, and he shall at the same time provide the local authority with a copy of the notice."

[9] The Ordinance was assigned to the Limpopo government to administer when the interim Constitution took effect.[14] In terms of section 1(1), "Board" means the board established for [each] province by section 3(1). The Limpopo Townships Board is the third respondent. So, it is a provincial authority and is given the power to decide appeals against a municipality's exercise of its planning rights and powers.[15]

[14] *Robertson* above n 10 at para 46; and *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC) (*Habitat Council*) at para 1.

[15] Section 3(1) provides:

"A Township Board is hereby established for each province."

And section 4(1) provides:

"Constitution of Board

(1) The Board shall constitute of the following members—

(a) a chairman appointed by the Administrator on such terms and conditions as he may determine;

(b) the Director or any person in the Public Service of the Republic authorised by him, to act on his behalf;

(c) not more than 15 other members appointed by the Administrator on such terms and conditions as he may determine, herein after referred to as appointed members, and who, in his opinion, possess qualifications necessary or useful for purposes of this Ordinance."

According to the definition in section 1(1), "Administrator" means a person vested, by each province, with the authority to administer the Ordinance.

[10] The High Court found section 139 of the Ordinance inimical to section 156(1) of the Constitution. Its judgment was succinct. It applied this Court's by now well-settled jurisprudence on provincial appellate powers over municipal planning decisions.[16] It declared the impugned section constitutionally invalid because the appeal process it created impermissibly interfered with municipalities' constitutionally recognised power to manage municipal planning.[17]

Confirmation

[11] The High Court's reasoning commands assent. The object of section 139 is clear. It is to enable one aggrieved by a decision of a local authority to appeal to a provincial appellate authority. That authority may overturn the municipality's decision. This usurps local government's power to manage "municipal planning". In *Gauteng Development Tribunal*, Jafta J found on behalf of the Court:

> "Section 40 of the Constitution defines the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and 'not assume any power or function except those conferred on [it] in terms of the Constitution'.
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> The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in

[16] *Habitat Council* above n 14.

[17] High Court judgment above n 2 at para 12.

> compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed."[18]

[12] This Court has found provisions of this kind, both old-order[19] and Constitution-era,[20] invalid. In *Lagoonbay*, Mhlantla AJ pointed out on behalf of the Court:

> "This Court's jurisprudence 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; [and] (c) while the Constitution confers municipal planning responsibilities on each of the spheres of government, those are different planning responsibilities based on what is appropriate to each sphere."[21]

[13] Local authorities have a constitutionally entrenched power to manage municipal planning. "This power is autonomous and under no circumstances can it be intruded upon."[22] The functional areas conferred on provinces, whether concurrently or exclusively, cannot be construed to include components of municipal planning. That would run counter to the scheme of the Constitution, particularly its provisions that safeguard the autonomy of municipalities and insulate them from interference by the other spheres. So any mechanism that subjects municipalities' planning decisions to a provincial appeal process intrudes into constitutionally prohibited terrain.

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[18] *Gauteng Development Tribunal* above n 12 at paras 43-4.

[19] Id; *Habitat Council* above n 14; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (*Lagoonbay*).

[20] *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* [2016] ZACC 2; 2016 (3) SA 160 (CC); 2016 (4) BCLR 469 (CC) (*Tronox*).

[21] *Lagoonbay* above n 19 at para 46, citing *Gauteng Development Tribunal* above n 12 at paras 44, 50, 53 and 55-6.

[22] *Tronox* above n 20 at para 28.

[14] In *Habitat Council*, Cameron J on behalf of the Court held that "municipalities are responsible for zoning and subdivision decisions, and provinces are not".[23] So matters relating to land planning are best left for municipal determination. The Court went on to say:

> "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."[24]

[15] In short, section 139 allows for a parallel or concurrent authority at provincial level to countermand the Municipality in an area of competence assigned exclusively to it. In this, it fails to observe municipal autonomy. And it constitutes constitutionally impermissible provincial interference. The High Court was correct to declare the provision inconsistent with the Constitution and invalid.

Suspension

[16] The High Court refused to suspend the order of invalidity. It also ordered that the declaration of invalidity operate prospectively only. This fully accords with this Court's approach in *Habitat Council*[25] and other recent cases. For much the same reasons as this Court proffered in *Habitat Council*, it is not in the interests of justice to suspend the order of invalidity.

[23] *Habitat Council* above n 14 at para 13, at para 14 the Court said municipalities are best suited to make planning decisions because they are localised decisions which should be based on information which is readily accessible to the municipalities.

[24] Id at para 19.

[25] Id at para 27.

Retrospectivity

[17] The High Court gave a non-retrospective order. This preserved the validity of all pending appeals, and those that had taken place, up to the date of the order. This approach was also consonant with both *Habitat Council*[26] and *Gauteng Development Tribunal*.[27] To avoid disruption and prejudice to third parties, whose appeals were disposed of by the Limpopo Townships Board, as well as those whose appeals are still pending; it would not be just and equitable for the order to operate retrospectively.[28]

[18] However to attenuate any possibility of prejudice in conserving an unconstitutional mechanism, it would be apt, as we did in *Tronox*, to enjoin the Limpopo Townships Board, when it disposes of pending appeals, to take into account the Municipality's norms and standards, and policies.[29]

Order

[19] The following order is made:

1. The order of the High Court of South Africa, Gauteng Division, Pretoria declaring section 139 of the Town-planning and Townships Ordinance 15 of 1986 constitutionally invalid is confirmed.
2. The declaration of invalidity is not retrospective and does not affect finalised appeals.
3. Appeals pending in terms of section 139 continue until finalised.

[26] Id at para 29.

[27] *Gauteng Development Tribunal* above n 12 at paras 82 and 85.

[28] *Habitat Council* above n 14 at para 28. See also section 172(1)(b) of the Constitution.

[29] See *Tronox* above n 20 at paras 53-9.