

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 186/17

GD CASE NO: 58705/15

In the matter between:

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

**CHAIRMAN OF THE NATIONAL BUILDING
REGULATIONS REVIEW BOARD**

First Respondent

**ATC SOUTH AFRICA WIRELESS
INFRA-STRUCTURE (PTY) LIMITED**

Second Respondent

**PJJ VAN VUUREN BELEGGINGS
(PTY) LIMITED**

Third Respondent

CARY-ANN WILLIAMSON-LOUW

Fourth Respondent

FABIAN LOUW

Fifth Respondent

CHRISTY ROUX

Sixth Respondent

WARREN ROUX

Seventh Respondent

SHIONA BLUNDELL

Eighth Respondent

KEITH KEYS

Ninth Respondent

MINISTER OF TRADE AND INDUSTRY

Tenth Respondent

**NATIONAL REGULATOR FOR
COMPULSORY SPECIFICATIONS**

Eleventh Respondent

APPLICANT'S ARGUMENT

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INTRODUCTION

1. The application is for confirmation of an order¹ of the Gauteng Division of the High Court declaring section 9 of the National Building Regulations and Buildings Standards Act, No. 103 of 1977 (the "**Buildings Standards Act**" or "**the Act**") unconstitutional and invalid. That section is quoted verbatim in the judgment of the Court *a quo*.² The section gives the Review Board, an organ of state in the national sphere of government, the power to hear appeals against decisions of municipalities with regard to the approval of building plans, the erection of buildings and the interpretation and application of building regulations. Those decisions fall within the functional areas of "*Municipal planning*" and "*Building regulations*" over which municipalities have exclusive executive authority in terms of section 156(1)(a) of the Constitution read with Schedule 4, part B thereof.

¹ Record, Vol 3, p 283

² Judgment, Record, Vol 3, pp 257-258

2. Direct provincial intervention in particular municipal planning decisions has been held to be incompatible with the Constitution's allocation of functions between local and provincial government by this Court in *Habitat*³ and *Tronox*.⁴
3. The novel aspects in the present matter are, firstly, that the appeal lies, not to a Member of the Executive Council or Provincial Minister, as in *Habitat* or *Tronox*, but to a "Review Board" in the national sphere of government and, secondly, that the functional area involved is not only "Municipal planning" but also "Building regulations".
4. It is submitted that these differences are not material and that the decision whether to confirm or not to confirm the order of the High Court is governed by the principles laid

³ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC).

⁴ *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Tribunal and Others* 2016 (3) SA 160 (CC).

down in the aforementioned judgments and the earlier *Gauteng Development Tribunal*.⁵

5. On the application of the present applicant, the City of Johannesburg Metropolitan Municipality, Justice Thobane AJ granted the order referred to above, on 29 June 2017. On 20 July 2017 the applicant lodged the present application in terms of section 172(2)(a) and (d) of the Constitution for confirmation of that order.⁶ On 6 September 2017 the Chief Justice issued the directions with regard to the further proceedings in the matter including that the record of the proceedings in the Court a quo be filed on or before 13 October 2017 and that this argument be lodged by 27 October 2017.⁷ The record was filed on 13 October 2017.

⁵ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).

⁶ Application for confirmation, Record, Vol 3, pp 250-282

⁷ Record, Vol 3, p 288

FACTUAL BACKGROUND

6. The description of the parties is as set out in the judgment of the High Court.⁸ The facts in which the application has its origin are not in dispute.⁹ They can be summarised as follows.
7. ATC South Africa Wireless Infrastructure (Pty) Limited, ("**ATC**") (the second respondent) applied to the Johannesburg Metropolitan Municipality ("**the City**") for approval of its building plans for the erection of a cellular mast on the property of the third respondent. The application was made in terms of sections 4 – 7 of the Building Standards Act read with the City's Cellular Mast Policy.¹⁰ Despite the objections of two of the neighbours, the application was granted. Thereafter the fourth to ninth respondents submitted a written "Notice of Appeal"

⁸ Judgment, Record, Vol 3, pp 225-226, para [2].

⁹ Founding affidavit, Record, Vol 1, p 11, para 16, 17; Second respondent's Answering Affidavit, Vol 2, p 114 para 10 to p 121 para 42; Tenth respondent's Answering Affidavit, Vol 2, p 140, para 2.

¹⁰ A copy of the policy is annexure "B" to annexure AN-A to the founding affidavit, Record, Vol 1, pp 57-66.

to the Review Board to have the City's decision set aside. It is annexure AN-A to the founding affidavit.¹¹ The fourth to ninth respondents attempted to base the appeal on section 9(1)(c) of the Act.

8. The City and ATC raised objections *in limine* to the appeal based on the lack of *locus standi* of "the appellants" and the lack of jurisdiction of the Review Board.¹² In a written "Decision *in limine*"¹³ the Review Board dismissed the objections, with the result that the appeal was due to proceed before the Review Board.

IN THE HIGH COURT

9. The City launched an application to the High Court for an order declaring section 9 of the Act and the Regulations¹⁴ made thereunder, to be unconstitutional and invalid, alternatively reading down the said section to limit the

¹¹ Record, Vol 1, pp 32-56.

¹² Founding Affidavit, Record, Vol 1, pp 22-23, para 43.

¹³ Annexure AN-C, Record, Vol 1 pp 68-86.

¹⁴ Review Board Regulations of 13 September 1985, annexure B to the founding affidavit in the present application, Vol 3, pp 269-275

Review Board's power as well as relief based on the judicial review of the Review Board's decision dismissing the objection *in limine*.¹⁵

10. ATC supported the application to the extent that it constituted judicial review. The Minister of Trade and Industry, the tenth respondent ("**the Minister**") opposed only the constitutional relief on three grounds, namely –

- 10.1. that the applicant should have used available inter-governmental dispute resolution mechanisms;

- 10.2. that the application was premature because the Building Standards Act was being revised and that the Review Board had not yet taken a decision; and

- 10.3. that the applicant had not shown that the Review Board in the past made orders that, as a matter of fact, usurped the functions of the municipalities.¹⁶

¹⁵

Notice of Motion, Record, Vol 1 pp 2-3

11. The High Court ordered as follows (insofar as it is relevant):
- "1. It is declared that section 9 of National Building Regulations and Building Standards Act, No. 103 of 1977, to the extent that it empowers the National Building Regulations Review Board to exercise appellate power over decisions of a municipality, is unconstitutional and therefore invalid."
- "4. The Tenth Respondent is directed to pay the costs which shall include costs consequent upon the employment of two counsel."¹⁷
12. Probably as a result of an oversight, the High Court did not declare the Review Board Regulations invalid, although that was part of the relief claimed. The applicant is in the process of applying to the judge a quo in terms of Rule 42 of the High Court to correct the error.¹⁸

¹⁶ Tenth Respondent's Answering Affidavit, Record, Vol 2, p 142, paras 7.1-7.3
¹⁷ Order, Record, Vol 3, pp 282-283.
¹⁸ Founding Affidavit in the confirmation application, Record, Vol 3, p 258 para 24.

13. The relief with regard to the review and setting aside of the decision of the Review Board was granted but is not relevant in the present proceedings.¹⁹

BEFORE THIS COURT

14. ATC, who filed an affidavit in the High Court in which it supported the City's application²⁰ is not participating in this Court. The Minister has also notified the City that it does not oppose the application for confirmation²¹. His contentions before the High Court therefore fall away. Insofar as this Court might raise the alleged non-compliance with the requirements of cooperative governance in section 41 (3) and (4) of the Constitution (as raised by the Minister in paragraphs 10.1 to 10.3 of his affidavit)²², it is submitted that the dispute is not an "*inter-governmental dispute*" as defined in section 1 of the

¹⁹ Order, Record, Vol 3, p 284 para 3.

²⁰ Second Respondent's Answering Affidavit, Record, Vol 2, p 113, para 5.

²¹ Record, Vol 3, p 291.

²² Record, Vol 2, pp 144-146 para 9.1 – 9.11; 147-148 para 10.1 – 10.4.

Intergovernmental Relations Framework Act, No. 13 of 2005 ("**IRF Act**") for at least the following two reasons –

14.1. A settlement could not resolve the unconstitutionality of the impugned provisions;²³

14.2. It is not a "dispute" concerning a matter arising from a statutory power or function assigned to any of the parties or a matter arising from an agreement between the parties regarding the implementation of a statutory power or function.²⁴

15. The only issues before this Court are therefore –

15.1. the unconstitutionality of section 9;

15.2. the relief.

THE UNCONSTITUTIONALITY OF SECTION 9

²³ *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC), para [35].

²⁴ IRF Act, section 1(1)(a).

16. The unconstitutionality of section 9 lies, in essence, in the creation of the right of appeal to the Review Board against the decisions of a municipality listed in sections 9(1)(a) – (c) of the Act. Implied in the appeal is the power of the Review Board to decide the appeal and replace the decision of a municipality with one of its own. Two aspects need to be highlighted. The first concerns the decisions appealed against and the second concerns the decisions by the Review Board on appeal to it.

17. **The decisions appealed against**

17.1. A decision of a municipality referred to in section 9(1)(a) of the Act, namely a decision "to grant approval referred to in section 7 in respect of the erection of a building" is a decision involving "Municipal planning" and "Building regulations" for the following reasons. The requirements of section

7 have been summarised by this Court in *Walele*²⁵ as follows:

"[54] The language employed in s 7 reveals four key issues relating to the process of exercising the power to approve building plans. First, the decision-maker must consider the Building Control Officer's recommendation made in terms of section 6. Secondly, if he or she is satisfied that the application for approval complies with the requirements of the Building Standards Act and other applicable law, he or she must grant the approval unless he or she is also satisfied that the erection of the building to which the plans apply will trigger one of the disqualifying factors in section 7(1)(b)(ii). Thirdly, if the decision-maker is satisfied that the disqualifying factors will be triggered, he or she "shall refuse to grant [his or her] approval in respect thereof and give written reasons for such refusal". Lastly, if the decision-maker is not satisfied that the application complies with the necessary requirements, he or she shall refuse to grant approval and give reasons for the refusal."

²⁵

Walele v City of Cape Town and Others 2008 (6) SA 129 (CC) para [54].

- 17.2. The requirements of "this Act and any other applicable law" include the national building regulations made by the Minister in terms of section 17 and include the provisions of a town planning scheme with the force of law as well as planning by-laws.²⁶ A town planning scheme lies at the heart of municipal planning.
- 17.3. The aspects mentioned in the previous paragraph and the "disqualifying factors" referred to in section 7(1)(b) all arise from town-planning considerations or building regulations.
- 17.4. A decision envisaged in section 9(1)(b) of the Act to issue a notice in terms of section 10 prohibiting the erection of a building or earthwork is based on any one or more of the considerations in section 10(1)(a) or (b).²⁷ Some of these are a repetition of

²⁶ *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA) paras 66 and 67.

²⁷ Section 10(1) provides as follows:

the "disqualifying factors" referred to in section 7 whilst others (such as health/hygiene and the danger of flooding) are additional. As diverse as they may be in nature, all fall within the functional areas of municipal planning and/or building regulations. The decision to issue such notice of prohibition is a decision in connection with town-planning and/or building regulations.

10. Erection of building in certain circumstances subject to prohibition or conditions

- (1) If any building or earthwork -
 - (a) in the opinion of the local authority in question is being or is to be erected in such manner that it-
 - (i) will not be in the interest of good health or hygiene;
 - (ii) will be unsightly or objectionable;
 - (iii) will probably or in fact be a nuisance to the occupiers of adjoining or neighbouring properties;
 - (iv) will probably or in fact derogate from the value of adjoining or neighbouring properties;
 - (b) is being or is to be erected on a site which is subject to flooding or on a site which or any portion of which in the opinion of the local authority in question does not drain properly or is filled up or covered with refuse or material impregnated with matter liable to decomposition,
- such local authority may by notice in writing, served by post or delivered, prohibit the person erecting such building or earthwork or causing such building or earthwork to be erected from commencing or proceeding with the erection thereof or from so commencing or proceeding except on such conditions as such local authority may determine from time to time.

17.5. The interpretation or application by a municipality of a building regulation or by-law referred to in section 9(1)(c) clearly falls within the functional area of building regulations. This municipal function is not restricted in Schedule 4, Part B to municipal building regulations but applies to the administration of all building regulations including national building regulations made by the Minister in terms of section 17 of the Act. The Constitution therefore clearly leaves the interpretation and application of all building regulations in the hands of municipalities even though that may result in differences in approach between municipalities.

18. The decisions by the Review Board

18.1. The Review Board is an organ of state in the national governmental sphere by reason of the

way in which it is constituted as set out in paragraphs 28 – 33.11 of the founding affidavit.²⁸

18.2. Although section 9 simply provides for "an appeal" the implication is that the Review Board can substitute the original decision with its own decision. Its powers are further regulated in the Review Board Regulations. An example of how wide the Review Board's powers are, is provided by the case of *Pellencin v City of Tshwane Metropolitan Municipality* (an unreported judgment in the then North Gauteng High Court under case no. 47233/11 of 28 June 2012 by Vorster AJ)²⁹. It was therein held that section 9 of the Act empowered the Review Board to set aside a decision of the municipality and to replace it with its own decision without any "limiting provisions" in the empowering legislation.³⁰

²⁸ Record, Vol 1, pp 14-18.

²⁹ Record, Vol 3, pp 276-282. (This judgment was attached to the original founding affidavit, Record, Vol 1 p 26 para 52.

³⁰ Record, Vol 3, pp 279, para [4].

On that basis the High Court issued a mandamus against the municipality.

18.3. Section 9 cannot be saved by reading down the power of the Review Board to a power of setting aside and referring back. This solution was originally included as alternative relief in the notice of motion in the High Court.³¹ In light of the judgments of this Court, especially *Habitat*,³² and *Tronox*³³ reading down is not a solution. It is clear that the mere existence of an appeal tribunal in the national sphere subjects municipalities to an appeal process without their consent and regardless of whether or not they think it is appropriate. Reading down does not eliminate the unconstitutional usurpation of the administration of municipal planning and building

³¹ Record, Vol 1, p 2 para 2.

³² *Minister of Local Government, WC v Habitat Council* 2014 (4) DSA 437 (CC) paras [6] and [22].

³³ *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Tribunal and Others* 2016 (3) SA 160 (CC) para [27].

regulations by an organ of state in the national sphere of government.

THE RELIEF

19. Section 9 should be declared to be inconsistent with the Constitution and the order of the High Court should be confirmed.
20. There should be no retrospective effect of the declaration of invalidity.
21. In the absence of a request by the Minister for time to amend the Act, there seems to be no need for a suspension of the declaration of invalidity save that appeals pending as at the date of the order of this Court should be processed and finalised as appeals in terms of section 62 of the Local Government : Municipal Systems Act, No. 32 of 2000.
22. No order as to costs is claimed.

S J DU PLESSIS SC

Applicant's counsel

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