CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 332/18

In the matter between:

ALBERT DYKEMA Applicant

and

ARTHUR PULE MALEBANE First Respondent

BELA-BELA LOCAL MUNICIPALITY Second Respondent

and

SOUTH AFRICAN ASSOCIATION OF CONSULTING PROFESSIONAL PLANNERS Amicus Curiae

Neutral citation: *Dykema v Malebane and Another* [2019] ZACC 33

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

Judgments: Froneman J (unanimous)

Heard on: 28 May 2019

Decided on: 10 September 2019

Summary: Chapters V and VI of the Development Facilitation Act 67 of 1995 — suspension of declaration of invalidity — expiration of suspension without remedial legislation being passed — legal consequences

Status of applications submitted but not finalised before the expiration of suspension — valid and "pending" in terms of the Spatial Planning and Land Use Management Act 16 of 2013 —fall to be disposed of in the manner prescribed by section 60

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside.
3. Mr Dykema's application submitted in terms of the Development Facilitation Act 67 of 1995 is declared to be "pending" under section 60(2)(a) of the Spatial Planning and Land Use Management Act 16 of 2013 and must accordingly be disposed of in the manner prescribed by section 60 of the Spatial Planning and Land Use Management Act 16 of 2013.
4. Each party is to pay its own costs, both in this Court and in respect of the litigation in the High Court and the Supreme Court of Appeal.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

[1] The best laid plans of mice and men often go awry.[1] So, sometimes, do those of courts. The unintended consequences of this Court's judgment in *Gauteng Development Tribunal* need to be unravelled here.[2]

[2] The case concerns the applicability of, and interaction between, successive legislative regimes governing municipal planning: the now repealed Development Facilitation Act (DFA)[3] and the Spatial Planning and Land Use Management Act (SPLUMA).[4] In particular, the dispute turns on the legal status of decisions and applications during the transition period between these two legislative frameworks when there was a three-year gap in the regulation of municipal planning.

[3] This gap was the direct result of Parliament's failure to enact remedial legislation to govern municipal planning before the expiry of this Court's suspension of a declaration of invalidity in *Gauteng Development Tribunal*. Indirectly, the risk of this legislative lacuna arose because this Court did not anticipate this potential failure by Parliament. It thus granted an order that did not explicitly regulate the legal consequences of that eventuality. Central to the current dispute is the proper interpretation of this Court's order in that case in light of the reasoning that was provided to justify the order.

[4] This case has unfolded against a changing legislative landscape. It is necessary to have regard to that backdrop in order to understand the legal uncertainty that prevailed at various points in the current litigation.

[1] The saying is adapted from a line in "To a Mouse" by Robert Burns: "The best laid schemes o' mice an' men / Gang aft a-gley."

[2] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Gauteng Development Tribunal*).

[3] 67 of 1995.

[4] 16 of 2013.

Legislative history

[5] Each of the four provinces existing before 1994 had an ordinance that empowered authorised local authorities to consider applications to rezone land and establish new townships within their local jurisdiction.[5] This Court noted in *Gauteng Development Tribunal* that this legislative framework was problematic for its jurisdictional fragmentation, applying only to territories that formed part of the pre-1994 provinces and not to the former "independent" homelands or self-governing territories.[6]

[6] The DFA was enacted as a temporary measure pending the enactment of comprehensive land use legislation.[7] The aim of the DFA was to speed up land development across the country.[8] Chapters V and VI of the DFA provided an important vehicle for achieving this aim by authorising Provincial Development Tribunals (Tribunals) to determine applications for the rezoning of land and the establishment of townships within their respective provincial jurisdictions.[9]

[7] In 2010, a constitutional challenge to Chapters V and VI of the DFA came before this Court. The challenge was prompted by a dispute between the City of Johannesburg (City) and the Gauteng Development Tribunal regarding their respective powers to decide applications for land developments in the municipal areas where their jurisdiction overlapped. The City complained that approvals by the Gauteng Development Tribunal failed to take into account the City's development planning instruments and was too lenient in granting applications.

[5] The Transvaal Province's Town-Planning and Townships Ordinance 15 of 1986; the Cape Province's Land Use Planning Ordinance 15 of 1985; the Orange Free State's Townships Ordinance 9 of 1969; and the Natal Province's Town Planning Ordinance 27 of 1949.

[6] *Gauteng Development Tribunal* above n 2 at para 32.

[7] Id at para 33.

[8] Id at para 35.

[9] Id at para 38.

[8] Although the City was unsuccessful in the High Court, the Supreme Court of Appeal held that Chapters V and VI of the DFA were unconstitutional. This was because the authorisation of provincial organs to approve applications for rezoning and township developments was in conflict with the executive functional area of "municipal planning" allocated to Municipalities in terms of Part B of Schedule 4 to the Constitution.[10]

[9] On 18 June 2010, this Court confirmed the Supreme Court of Appeal's order of constitutional invalidity, finding that the impugned chapters of the DFA were inconsistent with section 156 read with Part B of Schedule 4 to the Constitution. However, the remedy granted by this Court differed from the Supreme Court of Appeal's order in two important respects.

[10] First, we extended the suspension of the declaration of invalidity (the suspension) from 18 to 24 months. This extension was based on the evidence put forward by the parties, which underscored the potential disruption to progress with land development that would result from a legislative rupture. We considered this longer suspension to be a "reasonable time for Parliament to rectify the defects or enact new legislation".[11]

[11] Second, the conditions attached to this suspension were changed. Unlike the Supreme Court of Appeal, our order did not prohibit provincial Tribunals from accepting new applications during the suspension period, but rather set explicit constraints on how to decide pending applications so as to protect municipalities' interests.[12]

---

[10] *City of Johannesburg v Gauteng Development Tribunal* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 43.

[11] *Gauteng Development Tribunal* above n 2 at para 80.

[12] Id at para 95, this Court made the following order:

> "1. The Member of the Executive Council of KwaZulu-Natal for Local Government and Traditional Affairs; eThekwini Municipality; and the Department of Agriculture, Rural Development and Land Administration, Mpumalanga, are joined as the first, second and third intervening parties.

[12] On 22 March 2012, the Department of Rural Development and Land Reform (Department) announced in a policy statement that the Spatial Planning and Land Use Management Bill (SPLUMB) would soon be introduced into Parliament. However, it acknowledged that there was "genuine apprehension" that SPLUMB would not be passed before the 17 June 2012 deadline, when this Court's suspension of the declaration of invalidity in *Gauteng Development Tribunal* would expire. This policy statement promised that an application for an extension of the suspension would be made to this Court "if it is established that no other viable alternative exists to processing land applications in any part of the country except via the DFA". It assured "all interested persons and professionals involved in the land development and land use

---

2. Condonation for the late filing of written submissions is granted.

3. The application of the City of Johannesburg Metropolitan Municipality for leave to appeal in respect of the review application is dismissed.

4. The appeal by the Gauteng Development Tribunal, Gauteng Development Appeal Tribunal, the Minister of Land Affairs, and the Member of the Executive Council for Development, Planning and Local Government, Gauteng is also dismissed.

5. The order of constitutional invalidity made by the Supreme Court of Appeal in respect of Chapters V and VI of the Development Facilitation Act 67 of 1995 is confirmed.

6. Paragraph 2 of that order relating to the suspension of the order of invalidity is set aside.

7. The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defects or enact new legislation.

8. The suspension is subject to the following conditions:

   (a) Development tribunals must consider the applicable integrated development plans, including spatial development frameworks and urban development boundaries, when determining applications for the grant or alteration of land use rights.

   (b) No development tribunal established under the Act may exclude any by-law or Act of Parliament from applying to land forming the subject-matter of an application submitted to it.

   (c) No development tribunal established under the Act may accept and determine any application for the grant or alteration of land use rights within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality, after the date of this order.

   (d) The relevant development tribunals may determine applications in respect of land falling within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality only if these applications were submitted to it before the date of this order.

9. There is no order as to costs."

management fields that the Department will not allow a situation where a vacuum is allowed to exist in this regulatory environment".

[13] Notwithstanding these assurances, the policy statement sought to provide clarity on the legal status of applications pending before Tribunals at 17 June 2012, if SPLUMB was not passed in time. The Department's official position set out that all "applications received by Development Tribunals before 17 June 2012 will continue to be heard and determined by the Tribunals even after 17 June 2012 as if the Constitutional Court had not declared invalid Chapters V and VI of the DFA", but subject to substantially the same conditions contained in the Court's order.

[14] A few days later, the Department issued a postscript to the policy statement. It acknowledged that there was doubt as to the possible continued use of Chapters V and VI of the DFA after 17 June 2012 to consider and finalise applications lodged before that date. It also acknowledged that the policy statement's interpretation of the judgment in *Gauteng Development Tribunal* was "not consistent with the Order as granted by the Constitutional Court". It nevertheless reaffirmed the legal position set out in the Policy Statement, relying on section 12(2)(c) of the Interpretation Act[13] in support of its interpretation.

[15] On 17 June 2012, the suspension of the declaration of invalidity expired without any remedial legislation in place. This was in spite of persistent intervention by the South African Association of Consulting Professional Planners (SAACPP) warning of the disruptive consequences of the impending gap, and the Department's assurance that either SPLUMB would be enacted or an extension sought. After the expiry of the suspension period, Tribunals throughout South Africa continued to process applications lodged prior to the expiry date.

[13] 33 of 1957. Section 12(2)(c) of the Interpretation Act provides that "[w]here a law repeals any other law, then unless the contrary intention appears, the repeal shall not . . . affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed".

[16] After the expiration of the suspension period, with SPLUMB still in the pipeline, the Parliamentary Portfolio Committee began to show more appreciation of the need for transitional arrangements to deal with the gap. Section 60(2) of SPLUMB was therefore amended with the purpose of addressing the legal uncertainty created.

[17] SPLUMA only came into effect some three years later, on 1 July 2015.

[18] In 2016, after SPLUMA came into effect, the Supreme Court of Appeal held in *Shelton* that the Department's policy statement was incorrect and inconsistent with this Court's declaration of invalidity in *Gauteng Development Tribunal*, which came into effect after the suspension expired.[14] The Supreme Court of Appeal accordingly held that any approval by a Tribunal after 17 June 2012 was invalid. *Shelton* was reaffirmed by the Supreme Court of Appeal in *Patmar*.[15]

Facts

[19] On 10 February 2012, four months before the expiration of the period of suspension of constitutional invalidity of Chapters V and VI of the DFA, the applicant (Mr Dykema) lodged an application with the Limpopo Development Tribunal (Limpopo Tribunal) for planning permission to set up a one-stop service station on his property. The application was brought in terms of Chapter V of the DFA, and involved a change in land use from "agricultural" and "general" to "special" under Land Use Zone 85 in terms of the Bela-Bela Land-Use Scheme.[16]

[20] On receipt of the application, the Limpopo Tribunal forwarded it to the second respondent, the Bela-Bela Local Municipality (Municipality), for comment. A process of approximately three months of internal communications between the Limpopo Tribunal and the Municipality ensued, culminating in the Municipal Manager

[14] *Shelton v Eastern Cape Development Tribunal* [2016] ZASCA 125; 2016 JDR 1787 (SCA) at paras 18-20.

[15] *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) (*Patmar*) at para 4.

[16] Bela-Bela Local Municipality Land-Use Scheme 2016.

expressing approval of the application on 7 May 2012, subject to the project complying with specified conditions.

[21] Between 13 April and 5 June 2012, the Limpopo Tribunal conducted various hearings on the land development application where evidence was led and expert reports considered. The conclusion after these hearings was to receive submissions from the legal representatives of Mr Dykema and other interested parties, before a decision would finally be reached by the Limpopo Tribunal. These heads of argument had to be filed by 16 July 2012.

[22] After argument was presented, the Limpopo Tribunal reserved its decision. On 1 November 2012, the Limpopo Tribunal approved Mr Dykema's application subject to certain conditions. However, the Municipality was unwilling to give effect to that decision when requested to do so by Mr Dykema, instead replying more than a year later informing Mr Dykema to lodge a fresh application for rezoning under alternative planning legislation to the DFA.

[23] During this time, the first respondent (Mr Malebane) decided to develop a similar service station on his property, situated roughly 19 kilometres from Mr Dykema's property. During May 2014, he applied to the Municipality for the necessary planning approvals under Transvaal's Town-Planning and Townships Ordinance.[17] During January 2015, Mr Malebane's attorneys wrote to Mr Dykema's attorney to establish the status of his application, but received no reply.

[24] In November 2015, Mr Dykema approached the High Court on an urgent basis seeking an interim interdict against the Municipality from considering Mr Malebane's land use change application from farming to that of a filling station. Appropriate undertakings were furnished, disposing of the urgent application, but the High Court still had to determine the merits of the main application.

[17] See above n 5.

Litigation History

High Court

[25] In the High Court, Mr Dykema sought a *mandamus* against the Municipality to compel it to perform the outstanding statutory functions required to finalise the vesting of his approved land use rights. In light of *Shelton*, Mr Dykema argued that even if the Limpopo Tribunal's November 2012 decision was invalid, his application nevertheless remained pending and fell to be finalised in terms of section 60 of SPLUMA. Mr Dykema relied on *Tronox*[18] to argue that the court retains a discretion to direct the Limpopo Tribunal to exercise the powers of the Municipality in finalising the application under SPLUMA, as long as it does so from the vantage point of the Municipality rather than the Province.

[26] In the High Court, Cassim AJ dismissed the application for a *mandamus* because it presupposed that the planning application had been validly approved.[19] On the basis of *Shelton*, he held that the November 2012 decision was a nullity.[20] *Oudekraal*[21] and *Kirland*[22] did not sustain Mr Dykema's argument that it should be treated as valid until set aside.[23] However, he did accede to Mr Dykema's request for declaratory relief to the effect that his application was pending and must be dealt with in terms of section 60(2)(a) of SPLUMA.[24] He held that this accorded a sensible and businesslike approach to the meaning of section 60(2)(a) and should prompt the Municipality to deal expeditiously and fairly with the application.[25]

---

[18] *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*).

[19] *Dykema v Bela Bela Local Municipality* 2017 JDR 1024 (GP) (High Court judgment) at para 28.

[20] Id at paras 16, 27 and 30.

[21] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

[22] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

[23] High Court judgment above n 19 at para 30.

[24] Id at para 32.

[25] Id.

Supreme Court of Appeal

[27] Mr Malebane appealed against the High Court's declaratory order, and Mr Dykema cross-appealed against the adverse costs order. In a majority judgment penned by Wallis JA, the Supreme Court of Appeal upheld the appeal and dismissed the cross-appeal.[26] First, the majority interpreted this Court's judgment in *Gauteng Development Tribunal* as affording powers to Tribunals only during the period of suspension and not after that.[27] Once the period of suspension expired, the order of constitutional invalidity came into effect. Accordingly, from 17 June 2012 the Limpopo Tribunal lacked any power to make an order on Mr Dykema's application and any decision to this effect was thus invalid.

[28] Having established that the approval in November 2012 was not valid, the majority considered whether there was nevertheless a valid application that remained pending after the expiry of the suspension period. In this regard it held that a matter is pending only for so long as the court or tribunal, before which it was brought, is capable of making an order in relation to it.[28] The majority rejected the argument that this approach would render section 60(2)(a) of SPLUMA superfluous,[29] because entirely apart from applications under Chapters V and VI of the DFA, there was undoubtedly scope for other kinds of applications, appeals or other matters to have been pending before a Tribunal during the transition period.[30]

[29] In a dissent, Mothle AJA held that either the application was still pending when SPLUMA came into operation in 2015 or the enactment of SPLUMA must be accepted as having "resuscitated" the applications pending under section 15 of the DFA and

[26] *Malebane v Dykema* [2018] ZASCA 174; 2018 JDR 2116 (SCA) (Supreme Court of Appeal judgment) at para 30.

[27] Id at para 11.

[28] Id at paras 15-7.

[29] Id at para 18.

[30] Id at para 25.

given them a lifeline.[31] While affirming that *Shelton* and *Patmar* were correct that decisions after 17 June 2012 were invalid,[32] Mothle AJA held that applications lodged but not finalised in terms of the DFA neither lapsed nor became nullified on expiry of the suspension period.[33]

[30] A noteworthy aspect of this was Mothle AJA's explicit characterisation of Mr Dykema's application as—

> "an exercise of his right to just administrative action, as provided for in section 33 of the Constitution. He had a legitimate and justified expectation that his application would be considered and decided upon."[34]

The pending application was therefore held to be the object of Mr Dykema's right to just administrative action, in contrast to the majority's dismissal of this approach on the basis that Mr Dykema had never complained that this right had been infringed.[35] In conclusion, the minority found that the interests of justice support the relief granted in the High Court, as its order ensured lawful, reasonable and procedurally fair administrative action between the parties.[36]

In this Court

Applicant's submissions

[31] Mr Dykema argued that the Supreme Court of Appeal was incorrect to conclude that applications submitted, but not finalised, during the period of suspension of this Court's declaration of invalidity in *Gauteng Development Tribunal*, were invalidated

[31] Id at para 57.

[32] Id at para 60.

[33] Id at para 31.

[34] Id at para 43.

[35] Compare id at para 43 with para 28.

[36] Id at para 61.

upon expiration of the suspension period. Relying on *My Vote Counts*,[37] he contended that the rationale for a suspension is not simply to allow time for the defect to be corrected, but also to prevent a detrimental effect on rights or interests that would otherwise flow from a declaration of invalidity.[38]

[32] Bringing this rationale for suspended declarations of invalidity to bear on this Court's order in *Gauteng Development Tribunal*, Mr Dykema argued that the suspension sought to ensure applications could continue to be processed during the suspension period. In contrast to the Supreme Court of Appeal, this Court allowed Tribunals to continue to accept applications during the suspension. This distinction, so his argument goes, must mean that this Court envisaged such pending applications to remain valid after the suspension period expired. The alternative, namely that applications validly submitted during the suspension suddenly cease to be valid after the expiration date, is an unbusinesslike and absurd interpretation of the order in *Gauteng Development Tribunal*, which the Supreme Court of Appeal warned against in *Endumeni.*[39]

[33] However, regarding the validity of decisions made by the Tribunal after the expiration of the suspension period in respect of applications lodged during the suspension period, Mr Dykema persisted with his argument that those approvals should be regarded as valid.

First respondent's submissions

[34] Mr Malebane, argued that Mr Dykema's argument on the question whether Tribunal decisions are valid if made after the expiration of the suspension period, falls

[37] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) (*My Vote Counts*).

[38] See further *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC) (*Habitat Council*) and *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa* [2000] ZACC 9; 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC) (*FNB*).

[39] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

outside the scope of this appeal. This is because Mr Dykema did not appeal against the High Court's dismissal of this relief.

[35] Regarding the proper interpretation of this Court's order in *Gauteng Development Tribunal*, Mr Malebane drew attention to the distinction between this Court's power to limit the effect of an order of invalidity (through suspension) and its power to limit the retrospectivity of the order. In that case, this Court limited the retrospectivity of the declaration of invalidity but, in terms of its prospective application, the order was only suspended for 24 months. The default after the expiration of this suspension period is thus invalidity. Without any express or implied order by this Court that pending (undecided) applications would *not* lapse or become nullified, the default is that subsequent decisions are invalid.

[36] Regarding the question whether the applications remained valid and pending after the expiration date, Mr Malebane supported the reasoning of the majority of the Supreme Court of Appeal.

[37] Finally, Mr Malebane criticised Mothle AJA's finding that the approval given by the Municipal Manager on 7 May 2012 gave rise to a substantive administrative law right. He contended that no right to just administrative action was in existence because Chapters V and VI of the DFA were invalid and there was no pending application.

Amicus curiae's submissions

[38] The SAACPP, a voluntary association of professional town and regional planners in terms of the Planning Professions Act,[40] was admitted as amicus curiae (a friend of the court). It argued that the correct approach to resolving the current dispute is to first undertake an independent investigation into the proper interpretation of section 60(2) of SPLUMA, and only then, on the basis of this interpretation, determine the effect of DFA approvals after the expiration of the suspension.

[40] 36 of 2002.

[39] Before the expiry date, the focus of the Legislature was directed at securing the enactment of SPLUMA before 17 June 2012. The expiry date was anticipated as also being the date for the enactment of SPLUMA. Earlier versions of SPLUMB during this period were concerned with the effect that the repeal of the DFA by SPLUMA would have on pending applications. These drafts of SPLUMB were aimed at keeping Tribunals alive to continue to consider and decide pending applications until a new cut-off date was determined by the Minister for the finalisation of such pending applications.

[40] The SAACPP accordingly rejected the approach taken by the majority of the Supreme Court of Appeal in adopting the dictionary meaning of "pending", which ignores the factual matrix that gave rise to section 60(2)(a) and leads to an unbusinesslike result.

Issues

[41] The issues to be addressed are—

(a) whether leave to appeal should be granted;

(b) the effect of this Court's decision in *Gauteng Development Tribunal* on whether—

(i) decisions of Tribunals made after the expiration of the suspension of the order of constitutional invalidity are valid; and

(ii) applications which were submitted, but not finalised, during the period of suspension are pending applications capable of determination; and

(c) whether these applications, if held to be valid and pending, fall to be decided under section 60(2)(a) of SPLUMA.

Jurisdiction and leave to appeal

[42] This matter concerns the correct interpretation of this Court's order in *Gauteng Development Tribunal* and of section 60(2)(a) of SPLUMA in the context of Mr Dykema's right to just administrative action. It thus involves constitutional matters and raises an arguable point of law of general public importance which ought to be considered by this Court.[41]

[43] Clarifying the legal consequences of this Court's suspension of the declaration of invalidity made in *Gauteng Development Tribunal* involves legality issues and the constitutional right to just administrative action. This is because Parliament's failure to pass SPLUMA before the expiration of the suspension impacts the fate of applications submitted, but not finalised, before the expiration date.

[44] The matter also raises legal questions of administrative law and statutory interpretation which have general public importance. The question whether Mr Dykema's application is "pending" under section 60(2)(a) of SPLUMA engages a broader question about the dependence of an application for its validity on the continued availability of a competent decision-maker. The further question of whether his application, if pending, falls to be determined in terms of section 60(2)(a) of SPLUMA calls not only for interpretive clarity on this provision, but invites consideration as to what sources of legislative drafting history may appropriately be considered by this Court in statutory interpretation.

---

[41] Section 167 of the Constitution sets out these two bases for engaging this Court's jurisdiction in the following terms:

> "(3) The Constitutional Court—
>
> …
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[45] All these aspects are of relevance beyond this particular dispute. As we shall see, there are also reasonable prospects of success.

[46] Jurisdiction is thus established and it is also in the interests of justice to grant leave to appeal.

Gauteng Development Tribunal

[47] The order made in *Gauteng Development Tribunal* must be read in light of the reasoning in the judgment.[42] This logically precedes an analysis of the legal consequences of the expiration of the suspension period.

[48] This Court's decision not only to grant the suspension, but to extend the period of extension from 18 months to 24 months was a response to the evidence put forward by the amici and provincial departments warning that if this Court did not allow sufficient opportunity for the Legislature to pass remedial legislation, the order would "create a vacuum and bring development to a complete halt in some municipalities".[43] This vacuum would arise because the Ordinances were confined in their application to areas which formed part of the old Transvaal, Free State, Cape and Natal Provinces and, even in areas where the Ordinances did apply, most municipalities lacked the capacity to exercise their powers.[44] Reflecting on the legislative regime constituted by these Ordinances, this Court observed that "[t]here can be no doubt that this situation is undesirable".[45]

[42] *Gauteng Development Tribunal* above n 2 at paras 71-85. On interpretation generally, see *Endumeni* above n 39 at paras 18-20. These general principles of interpretation apply to the construction of court orders. See, to that effect, *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29 and *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-H.

[43] *Gauteng Development Tribunal* above n 2 at para 75.

[44] Id at para 79.

[45] Id at para 78.

[49] The rationale for suspension was to avoid "serious disruptions or dislocations in state administration that would ensue if the order of invalidity takes immediate effect"[46] and to prevent prejudice to prospective land developers in the affected areas.[47] These two main justifications for the suspensions – avoiding administrative disruption and preserving rights – are in keeping with this Court's jurisprudence in relation to suspension orders.[48]

[50] In crafting just and equitable relief, the Court also had to balance the interests of Municipalities (particularly the City and eThekwini given the facts of the case) as against the interests of land developers.[49] The regulation of Tribunals' decision-making powers during the suspension was structured as follows:

(a) The relevant Tribunals were barred from considering new development applications in the jurisdiction of the City and eThekwini Municipality, such that their decision-making power in these specific municipal jurisdictions was limited to finalising pending applications;[50]

(b) Tribunals could continue to accept, process and finalise development applications in respect of all other municipal jurisdictions, but these decision-making powers were made conditional upon—

(i) upholding the municipalities' integrated development plans; and

(ii) a prohibition against the exercise of their authority to exclude certain laws and by-laws in terms of sections 33(2) and 51(2) of the DFA.[51]

[46] Id at para 73.

[47] Id at para 80.

[48] *My Vote Counts* above n 37; *Habitat Council* above n 38; and *FNB* above n 38.

[49] *Gauteng Development Tribunal* above n 2 at para 81.

[50] Id at para 8(c)-(d) of the order read with para 82.

[51] Id at para 8(a)-(b) of the order read with paras 83-4.

[51] The only explicit statement about the legal consequences of the expiry regards the non-retrospectivity of the declaration of invalidity:

> "Finally, a necessary feature of this suspended declaration of invalidity is that it should not have retrospective effect if the period of suspension expires without the defects in the Act having been corrected. In exercising their powers under the impugned chapters, development tribunals have approved countless land developments across the country. It would not be just and equitable for these decisions to be invalidated if the declaration of invalidity comes into force."[52]

[52] Neither the order nor the judgment provided a backstop moderating the legal consequences should the suspension expire without remedial legislation being in place. This is, most obviously, because the Court anticipated diligent and expeditious compliance with court orders as required by section 165(4) and (5) of the Constitution. Indeed, the failure by the Legislature to pass remedial legislation in time is an inexcusable breach of its constitutional duty to comply with this Court's order. This failure is only aggravated by the Department's misleading policy statement issued in March 2012 directing Tribunals to continue finalising development applications after the expiration date, in conflict with the *Gauteng Development Tribunal* order. In spite of explicitly recognising this potential conflict, no attempt was made to approach this Court for clarification of the legal consequences of its order.

[53] The problem that nevertheless remains is that when the period of suspension ended, the second justification for the suspension – preserving rights – remained, but was not catered for specifically in the suspended order. That is the conundrum we now find ourselves in – our own best laid plan that has gone awry.

The Limpopo Tribunal decision

[54] Upon the expiry of the suspension period, Chapters V and VI of the DFA were invalidated, although the rest of the DFA remained valid. Tribunals, however,

[52] Id at para 85.

continued to exist after the expiration date, being established in terms of Chapter III of the DFA. They were legally abolished only in 2015, when SPLUMA repealed the DFA in its entirety.

[55] In the High Court, urgent relief was sought and obtained in the form of an interdict restraining the Municipality from processing Mr Malebane's application, and a *mandamus* was sought directing the Municipality to give effect to the Tribunal's decision. The Municipality neither opposed the relief sought by Mr Dykema in the High Court nor brought an application to set aside the Tribunal's decision.

[56] The validity of the Tribunal's decision was challenged by Mr Malebane only reactively because his competing application was the target of the interdict Mr Dykema initially sought. He was not an objector or party to proceedings before the Tribunal (as in *Shelton* and *Patmar*) but rather, "in loose parlance, a competitor seeking to convert his property from agricultural use to that of a more commercially viable value".[53]

[57] The legality of the Tribunal's decision was thus squarely before the High Court, not in the form of a review, but as a collateral challenge. But because Mr Dykema has not sought to cross-appeal against this part of the High Court order, the validity of that decision is not before us. The High Court described it as a "nullity" and the only caution that needs to be made is that this description may be misleading. A decision cannot be disregarded and treated by an organ of state as a nullity until it is set aside by a court.[54]

---

[53] High Court judgment above n 19 at para 9.

[54] In *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*) at para 32, this Court confirmed that "the remedies of review and collateral challenge differ distinctively in object, application and scope".

As first explained by the Supreme Court of Appeal in *Oudekraal* above n 21 at para 36, and subsequently affirmed by this Court in *Merafong* at para 32 and even more recently in *Aquila Steel (Pty) Limited v Minister of Mineral Resources* [2019] ZACC 5; 2019 (3) SA 621 (CC); 2019 (4) BCLR 429 (CC) at para 97, when a court is asked to set aside an invalid administrative act in proceedings for review, it has a discretion whether to grant or withhold the remedy. It is in this context of a court exercising its discretion in deciding whether or not to set aside an invalid act that the *Oudekraal* paradox arises – that an unlawful act exists in fact and may produce legally effective consequences. For rule of law reasons, the *Oudekraal* / *Kirland* doctrine requires that unlawful acts cannot be ignored as a nullity, but must be treated as valid until set aside in review proceedings. The court's remedial discretion to set aside unlawful administrative acts in review proceedings is necessary to ensure relief provides "a

Status of Mr Dykema's application

[58] In clarifying the status of Mr Dykema's application, it is important to proceed from the premise explicitly affirmed in *Gauteng Development Tribunal* that "[t]he effect of the suspension is that the invalid law continues to operate with full force and effect".[55] Mr Dykema's application was validly submitted and the Limpopo Tribunal was competent to accept the application and process it.

[59] Clearly, an application lodged with a Tribunal after the suspension expired would be invalid. But to hold that applications submitted, but not finalised, before the expiration date are invalid would fly in the face of the rationale for the suspension granted in *Gauteng Development Tribunal*. The purpose of the suspension was to avoid a disruption to land development by expressly allowing Tribunals to continue to accept and process applications. Ordinarily, the right to a decision arises from a validly submitted application.[56] To find that these applications were invalidated, and Mr Dykema's rights to just administrative action were extinguished by the expiration of the suspension, would run counter to the rationale for the suspension in preserving rights and preventing prejudice to land developers.

[60] It would also lead to arbitrary results in making an applicant's right to a decision dependent on how quickly the Tribunal processed the application. It would mean that two validly submitted applications could have different fates for arbitrary reasons

---

pragmatic blend of logic and experience", as this Court put it in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 85.

By contrast, where the validity of an administrative act is challenged collaterally, a court has no discretion to allow or disallow the raising of the defence of invalidity. This absence of discretion is due to the fact that "the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows" (*Oudekraal* at para 36, affirmed in *Merafong* at para 32).

The *Oudekraal* / *Kirland* doctrine is not at issue here because the legality of the Tribunal's decision (an initial act) is being collaterally challenged by a private party rather than a subsequent act whose validity may depend on the Tribunal's decision and would thus require the review of the Tribunal's decision.

[55] *Gauteng Development Tribunal* above n 2 at para 73.

[56] See section 6(2)(g) read with section 6(3) of the Promotion of Administrative Justice Act 3 of 2000.

beyond the applicant's control. Perhaps the application lodged earlier might be neglected and thus not be finalised before the expiry date, while the application submitted much later might have been quickly processed and thus only require post-approval implementation after the expiration date. We cannot countenance such incongruous results without a clear indication from the *Gauteng Development Tribunal* judgment itself that this was the intended legal consequence of the suspension expiring without remedial legislation being in place. The Court's rationale for the suspension points in the opposite direction by seeking to preserve rights and prevent such administrative disruption.[57]

[61] Reinforcing the strength of this approach is that it was anticipated that remedial legislation would be in place by the expiration date to deal with any pending applications. Taken together, the rights-preserving rationale of the suspension and the constitutional imperative of remedial legislation support the view that applications submitted, but not finalised, before the expiration date remained valid as pending applications when the suspension period ended on 17 June 2012.[58]

[62] It remains to be seen whether the remedial legislation implies that these applications were left hanging out to dry and eventually wither away, or whether they are capable of being treated as "pending" under section 60(2)(a).

Section 60(2)(a) of SPLUMA

[63] Section 60(2)(a) of SPLUMA reads as follows:

> "All applications, appeals or other matters pending before a tribunal in terms of section 15 of the Development Facilitation Act, 1995 . . . at the commencement of this Act that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act."

[57] *Gauteng Development Tribunal* above n 2 at para 81.

[58] Id.

[64] The majority of the Supreme Court of Appeal was emphatic in holding that the application was not pending in terms of the section:

> "The question for decision is whether Mr Dykema's application was pending before the Tribunal on 1 July 2015, notwithstanding that on 17 June 2012 the Tribunal had ceased to have any authority to determine it. The short answer is 'No'. The Concise Oxford Dictionary defines 'pending' as meaning 'awaiting decision or settlement'. The rather longer definition in the Shorter Oxford English Dictionary is 'remaining undecided, awaiting settlement; orig of a lawsuit'. The Collins English Dictionary says that 'if something such as a legal procedure is pending, it is waiting to be dealt with or settled'. The position is no different in American English. The Merriam-Webster dictionary gives as the definition of pending in its adjectival sense 'not yet decided: being in continuance'. Black's Legal Dictionary has 'Remaining undecided; awaiting decision <a pending case>'. Implicit in each of these definitions is that what is pending is still capable of being determined, which had ceased to be the case with Mr Dykema's application."[59]

[65] In support of the proposition that what must still be determined can only be done by the body before which the application was launched, it stated:

> "That a legal suit, or an application to an administrative tribunal, such as Mr Dykema's to the Tribunal, is only pending if the court or administrative tribunal still has the power to hear and dispose of it appears clearly from two cases, the one from Canada and the other from New Zealand. In *Garnham v Tessier* it was said: ''Litigation pending', as here used means any legal proceeding, suit or action remaining undecided or awaiting decision or settlement.' The following statement appears in *National Bank of New Zealand Ltd v Chapman*:
>
> > 'A legal proceeding can be said to be 'pending' as soon as it has been commenced and it remains pending until it has been concluded, that is, *so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein.*'
>
> I am satisfied that these statements correctly reflect the meaning of pending in the present context."[60]

[59] Supreme Court of Appeal judgment above n 26 at para 14.

[60] Id at para 16.

[66] The dictionary meaning of pending includes the minimal one of merely "awaiting decision or settlement".[61] The implication of it being capable of being determined only by the body where the matter originated is not necessitated by this ordinary meaning. The Supreme Court of Appeal's more demanding interpretation of "pending", in tying the fate of an application to the continued competence of the same decision-maker, is not a logical necessity. Textually then, there is no obstacle to the present application being one "pending" to be continued and disposed of in terms of SPLUMA before another competent authority, not the Tribunal.[62]

[67] Further, the legislative history of the enactment of SPLUMA does not support the majority of the Supreme Court of Appeal's view that it could not have been the intention of the Legislature to cover any lacuna through retrospective effect, since the gap did not exist at the time of the publication of SPLUMB. The pre-expiration version of SPLUMB underwent significant changes. We do not need to delve deeply or at all into the correspondence and detailed account of the drafting debates provided by the SAACPP to reach this interpretation.[63] Instead, we simply need to consider the evolving versions of SPLUMB combined with the timeline of SPLUMA's enactment.[64]

---

[61] Id at para 14.

[62] See the formulation of section 60(2)(a) of SPLUMA as quoted above at [63].

[63] There has traditionally been some reluctance by our courts to rely on *travaux préparatoires* (drafting histories) in statutory interpretation, such that the admissibility of extrinsic material of this kind has been uncertain. See, in this regard, *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* [1998] ZASCA 59; 1998 (4) SA 860 (SCA) at 870H-871B. This traditional scepticism seems to be subsiding, with this Court having drawn on statutory drafting history on several occasions, albeit with careful circumspection. See, for example, *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at fn 74; *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 84; and *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 12. Our consideration of the evolving iterations of SPLUMB in the present matter does not push any interpretive boundaries in this regard, but in finding it unnecessary to delve into the drafting history here we also do not close the door for exploring this possibility in future.

[64] The first draft of SPLUMB, published on 6 May 2011, provided that Tribunals would continue to function until all pending matters were decided upon. The first reference to applications submitted in terms of the DFA being dealt with under SPLUMA was only recorded on 18 September 2012 (after the expiry of the suspension) following a Parliamentary Portfolio Committee meeting. This led to the 5 August 2013 iteration of SPLUMB, which provided that all applications submitted in terms of the DFA, but not finalised, were to be decided and disposed of in terms of SPLUMA.

[68] It simply cannot be accepted that in 2013, when SPLUMA was enacted, the Legislature was unaware of the gap. A whole year had passed since the suspension period had expired. Given this context, the purpose of section 60 can hardly be the limited "boilerplate" one favoured by the majority of the Supreme Court of Appeal.[65] Indeed, the formalistic interpretation adopted by the majority of the Supreme Court of Appeal is clearly at odds with a purposive interpretation which recognises the inevitability that Parliament knew about the gap and would have sought to address its consequences through the subsequent enactment of SPLUMA.

[69] The wording of section 60(2)(a) lends support to this purposive interpretation. It applies to matters "that have not been decided or otherwise disposed of". This formulation is amenable to an interpretation that these applications are "pending" for the purposes of SPLUMA, and remain ripe for resolution by the new competent decision-making body in terms of section 60(2)(a). Even if one rules out the application of the word "decided", because the Tribunals had no decision-making power, one can look to "otherwise disposed of". Mr Dykema was not told by the Tribunal that it was unable to decide and finalise his application. He was not told what steps were necessary to ensure such finalisation. His application had not been formally referred to, or finalised by, a competent decision-making body. It had not been disposed of at all. Instead, it had been left in limbo. It was the clear purpose of section 60(2)(a) and SPLUMA more generally to cater for such applications that had been left in limbo. Mr Dykema never withdrew or abandoned the application, and it was never refused or correctly referred onwards for resolution and disposal.

[70] Not only would it be invidious not to afford Mr Dykema justice as secured by this interpretation, but legal doctrine as well as logic favour him. First, we are obliged in interpreting the provisions of SPLUMA to promote the spirit, purport and objects of the Bill of Rights.[66] Second, if we accept – as Mr Dykema eventually conceded – that

[65] Supreme Court of Appeal judgment above n 26 at para 20.

[66] Section 39(2) of the Constitution sets out this imperative as follows:

the November 2012 Tribunal decision is invalid and that life cannot be breathed into it by doctrines applying to courts of law,[67] then, on 17 June 2012, Mr Dykema's application was indeed "pending" for the reasons already set out in this judgment.

[71] Both the majority of the Supreme Court of Appeal and Mr Malebane emphasised the practical difficulties that would arise from treating all unprocessed Tribunal applications as at 17 June 2012 as "pending" under SPLUMA. They are correct in this. Applications that would have been regarded as dead may now revive, provided they, like Mr Dykema's, were "pending" on 17 June 2012. This practical impact of holding for Mr Dykema is, however, tempered by the fact that applications that have been abandoned or waived will not revive.

[72] What the majority of the Supreme Court of Appeal does not, however, confront, is that the practical consequences of the converse position are even less palatable. It is not plausible that this Court could have envisaged that applications would continue for a two-year period until the invalidity order took effect, yet all applications properly lodged within that time became defunct, without more, when the order took effect. Given this, to hold SPLUMA applicable to applications "pending" on the crucial date seems the more plausible interpretive conclusion, as well as being more just. I therefore consider the most coherent, sensible and fair conclusion, based on an interpretation which is sensitive to text, context and purpose, to be that Mr Dykema's application is pending in terms of the section because it had not been "otherwise disposed of, [and therefore] must be continued and disposed of in terms of this Act".

Costs

[73] The root cause of the legal uncertainty in the dispute before us was Parliament's non-compliance with this Court's order in *Gauteng Development Tribunal*. Both Mr Dykema and Mr Malebane's applications were stranded in the legal no man's land

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[67] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A).

between the DFA and SPLUMA. They were equally entitled to seek legal clarity on their respective applications and it therefore seems just that each party should bear its own costs not only in this Court but also in the earlier litigation.

Order

[74] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside.
3. Mr Dykema's application submitted in terms of the Development Facilitation Act 67 of 1995 is declared to be "pending" under section 60(2)(a) of the Spatial Planning and Land Use Management Act 16 of 2013 and must accordingly be disposed of in the manner prescribed by section 60 of the Spatial Planning and Land Use Management Act 16 of 2013.
4. Each party is to pay its own costs, both in this Court and in respect of the litigation in the High Court and the Supreme Court of Appeal.

For the Applicant:	M C Erasmus SC and D J van Heerden instructed by Adriaan Venter Attorneys.
For the First Respondent:	S J du Plessis SC instructed by Kuilman Mundell and Arlow Attorneys.
For the Amicus Curiae:	A Liversage SC, J Hlongwane, L Kotze and S Manganye instructed by Prinsloo Bekker Attorneys.