

SOUTH AFRICA / JUDGMENT

Govan Mbeki Local Municipality and Another v Glencore Operations South Africa (Pty) Ltd and Others (334/2021;338/2021) [2022] ZASCA 93; [2022] 3 All SA 675 (SCA); 2022 (6) SA 106 (SCA) (17 June 2022) [2022] ZASCA 93

COURT

Supreme Court of Appeal

BEFORE

Maya, Dambuza, Plasket, Musi, Salie-Hlophe

CASE / FILE NUMBER

334/2021;338/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 334/2021

Case No: 338/2021

In the matter between:

GOVAN MBEKI LOCAL MUNICIPALITY

FIRST APPELLANT

EMALAHLENI LOCAL MUNICIPALITY

SECOND APPELLANT

and

GLENCORE OPERATIONS SOUTH AFRICA

(PTY) LTD

FIRST RESPONDENT

DUIKER MINING (PTY) LTD

SECOND RESPONDENT

TAVISTOCK COLLIERIES (PTY) LTD

THIRD RESPONDENT

UMCEBO PROPERTIES (PTY) LTD

FOURTH RESPONDENT

IZIMBIWA COAL (PTY) LTD

FIFTH RESPONDENT

Neutral citation: Govan Mbeki Local Municipality and Another v Glencore Operations South Africa (Pty) Ltd and Others (334/2021 and 338/2021) [2022] ZASCA 93 (17 June 2022)

Coram:

MAYA P and DAMBUZA and PLASKET JJA and MUSI and SALIE-HLOPHE AJJA

Heard:

6 May 2022

Delivered:

17 June 2022

Summary: Constitution – local government – Local Government: Municipal Systems Act 32 of 2000 – validity of municipal by-laws – whether provisions of by-laws fell within the legislative competence of a municipality.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Barnardt AJ, sitting as court of first instance):

In case no 334/2021 (Govan Mbeki Local Municipality):

- 1 The appeal is dismissed with costs, including the costs of two counsel.
- 2 The cross-appeal is upheld with costs, including the costs of two counsel.
- 3 Paragraph 4 of the high court's order is set aside.

In case no338/2021 (Emalahleni Local Municipality):

Salie-Hlophe AJA (Maya P and Dambuza and Plasket JJA and Musi AJA concurring):

[1] Two appeals are before us. They concern identical issues. They are both directed at orders of the Mpumalanga Division of the High Court, Middelburg (the high court), in which Barnardt AJ declared s 76 of the Govan Mbeki Spatial Planning and Land Use Management By-law[1] (the GMBL) and s 86 of the Emalahleni Municipal By-law on Spatial Planning and Land Use Management 2016[2] (the EBL) to be invalid and unconstitutional. A third municipality, the

Steve Tshwete Local Municipality, did not appeal against a similar order in respect of the invalidity of its comparable by-law. The respondents, Glencore Operations South Africa (Pty) Ltd, Duiker Mining (Pty) Ltd, Tavistock Collieries (Pty) Ltd, Umcebo Properties (Pty) Ltd and Izimbiwa Coal (Pty) Ltd, cross-appealed against the decision of the high court suspending the declaration of invalidity of the by-laws for a period of six months to allow the competent authority to correct the defect. The appeal and cross-appeal are with leave of the high court.

Facts

- [2] The respondents are companies that intend to transfer or take transfer of a number of immovable properties situated within the municipal boundaries of the three local municipalities mentioned above.
- [3] The municipalities all promulgated similarly crafted by-laws which placed restraints on the transfer of erven and land units within their respective areas of jurisdiction. In terms of these by-laws, an owner (transfer or) could not apply to the registrar of deeds to register the transfer of an erf or land unit except upon production of a certificate, issued by the municipality, certifying that all spatial planning, land-use management, and building regulation conditions or approvals in connection with those erven or land units had been obtained and complied with the requirements of the by-law. The respondents approached the high court for orders declaring the relevant sections of the by-laws to be constitutionally invalid. They argued that even if the municipalities had the power to enact such by-laws, they nonetheless infringed the land owner's constitutional right arising from its ownership, in that they placed insurmountable obstacles in the way of registering the transfer of ownership of their properties. They argued further that the by-laws, in effect, imposed an embargo on the registration of transfer of ownership of an immovable property until the municipality issues a certificate that the owner has proved that all the debts due in respect of the property have been paid and the use of the property and the buildings comply with its land-use scheme.

The high court

- [4] The relief sought by the respondents was aimed at:
 - a. declaring the by-laws unconstitutional and invalid because they were inconsistent with s 25 of the Constitution, as their application leads to an arbitrary deprivation of property;
 - b. declaring the by-laws unconstitutional and invalid because they legislate on matters which fall outside the scope of powers assigned to local government in terms of s 156 read with Part B of Schedule 4 and Part B of Schedule 5 of the Constitution;
 - c. declaring the by-laws unconstitutional and invalid because they are not authorised by any empowering provisions (national or provincial legislation);

- d. declaring the by-laws unconstitutional and invalid because they conflict with the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) or the Spatial Planning and Land Use Management Act 16 of 2013 (the SPLUMA);
 - e. reviewing and setting aside the interpretation of the by-laws by the municipalities in terms of s 8 of the Promotion of Administrative Justice Act 3 of 2000, and compelling the municipalities to receive, consider and respond to all applications by the respondents based on the correct interpretation of the by-laws; and
 - f. reviewing and setting aside the decision by the registrar of deeds to give effect to the by-laws and directing the registrar of deeds to receive and process the applications for registration of transfer of the respondents' properties without requiring the respondents to produce planning certificates.
- [5] The high court declared the by-laws unconstitutional and invalid on the basis that they constituted an arbitrary deprivation of property as envisaged in s 25(1) of the Constitution. It held further that the by-laws were unconstitutional and invalid, because they were not authorised by s 156 read with Part B of Schedule 4 of the Constitution, and conflicted with s 118 of the Systems Act. The high court suspended the declaration of invalidity for a period of six months to enable the municipalities to cure the defects in their by-laws.

Issues

on appeal

- [6] The central issue in this appeal is the validity of the by-laws. The answer to this question requires consideration of whether the by-laws were enacted within the legislative competence of municipalities as contemplated in s 156 of the Constitution. It follows as a matter of logic that should the by-laws be determined to be falling outside the scope of powers assigned to local government in terms of the Constitution, they will be invalid for being ultra vires. Strictly speaking, this will obviate the need to consider the various further issues raised by the respondent, such as whether the by-laws amount to a constitutional infringement of property rights; or is in conflict with national legislation; as well as the administrative review grounds. In short, a finding that the municipalities do not have the power to cause restraint on the registration of transfer of property, on the facts hereof, would be dispositive of the matter. Despite this, the high court determined that, in addition to the conflict with s 156 of the Constitution, the by-laws were also invalid because they conflicted with s 118 of the Systems Act and amounted to an arbitrary deprivation of property in terms of s 25(1) of the Constitution. All three bases for invalidity form part of the orders granted by the high court.
- [7] Accordingly, the issues on appeal are whether the impugned by-laws:

- a. are unconstitutional and invalid, because they legislate on matters which fall outside the scope of powers assigned to local government in terms of s 156 read with Part B of Schedule 4 and Part B of Schedule 5 of the Constitution;
- b. exceed the functional area of 'municipal planning', in that they regulate the transfer of property; and
- c. are an incidental power as envisaged in s 156(5) of the Constitution.

The by-laws

[8] Two sections of the GMBL are relevant. First, s 74, headed 'Restriction of transfer and registration' provides:

'(1) Notwithstanding the provisions contained in this By-law or any conditions imposed in the approval of any land development application, the owner shall, at his or her cost and to the satisfaction of the Municipality, survey and register all servitudes required to protect the engineering services provided, constructed and installed as contemplated in Chapter 7.

(2) No Erf/Erven and/or units in a land development area, may be alienated or transferred into the name of a purchaser nor shall a Certificate of Registered Title be registered in the name of the owner, prior to the Municipality certifying to the Registrar of Deeds that:

- (a) All engineering services have been designed and constructed to the satisfaction of the Municipality, including guarantees for services having been provided to the satisfaction of the Municipality as may be required; and
- (b) all engineering services and development charges have been paid or an agreement has been entered into to pay the development charges in monthly instalments; and
- (c) all engineering services have been or will be protected to the satisfaction of the Municipality by means of servitudes; and
- (d) all conditions of the approval of the land development application have been complied with or that arrangements have been made to the satisfaction of the Municipality for the compliance thereof within 3 months of having certified to the Registrar in terms of this section that registration may take place; and
- (e) that the Municipality is in a position to consider a final building plan; and
- (f) that all the properties have either been transferred or shall be transferred simultaneously with the first transfer or registration of a newly created property or sectional title scheme.'

[9] Secondly, s 76, headed 'Certification by Municipality' provides:

'(1) A person may not apply to the Registrar of Deeds to register the transfer of a land unit, unless the

Municipality has issued a certificate in terms of this section.

- (2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—
- (a) a certificate of a conveyancer confirming that funds due by the transferor in respect of land, have been paid;
 - (b) proof of payment of any contravention penalty or proof of compliance with a directive contemplated in Chapter 9;
 - (c) proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme;
 - (d) proof that all common property including private roads and private places originating from the subdivision, has been transferred; and
 - (e) proof that the conditions of approval that must be complied with before the transfer of erven have been complied with.
 - (f) Proof that all engineering services have been installed or arrangements have been made to the satisfaction on the Municipality.’

[10] Similarly, two sections of the EBL are relevant. First, s 84, headed ‘Restriction of transfer and registration’ provides:

‘(1) Notwithstanding the provisions contained in this By-law or any conditions imposed in the approval of any application, the owner must, at his or her cost and to the satisfaction of the Municipality, survey and register all servitudes

required to protect the engineering services provided, constructed and installed as contemplated in Chapter 7.

- (2) No Erf/Erven and/or units in a land development area, may be alienated or transferred into the name of a purchaser nor must a Certificate of Registered Title be registered in the name of the owner, prior to the Municipality certifying to the Registrar of Deeds that:
- (d) all conditions of the approval of the application have been complied with or that arrangements have been made to the satisfaction of the Municipality for the compliance thereof within 3 months of having certified to the Registrar in terms of this section that registration may take place; and
 - (f) that all the properties have either been transferred or must be transferred simultaneously with the first transfer or registration of a newly created property or sectional title scheme.’

[11] Secondly, s 86, headed ‘Certification by Municipality’ provides:

- (2) The Municipality must not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—

- (d) proof that all common property including private roads and private places originating from the subdivision, has been transferred to the owners' association as contemplated in Schedule 5; and
- (e) proof that the conditions of approval that must be complied with before the transfer of erven have been complied with.'

[12] The by-laws are almost identically worded; the common factor is a restraint on the registration of transfer of property. An intending transferor of property, like the respondents, must satisfy the requirements of s 76(2) of the GMBL, or s 86(2) of the EBL in order to obtain the certificate prescribed by subsection 1 of the respective sections. Additionally, the impugned provisions impose a duty on the registrar of deeds not to accept an application to register the transfer of a land unit unless the municipality has issued a certificate in terms of that section. The effect is that unless the transferor first satisfies the requirements of the municipal by-laws, the requisite certificates may not be issued. Essentially, the impugned provisions place an embargo on the registration of transfer of immovable property until the requirements of the by-laws are met, because until such time the certificate is issued the registrar cannot register the transfer of the property.

[13] The argument for the respondents was that the legislative competence of the municipalities with regard to 'municipal planning' does not extend to regulating the transfer of properties. The restriction imposed by the impugned provisions can only be imposed by national legislation, such as s 118 of the Systems Act and s 53 of the SPLUMA, which, according to the respondents, can be described as the interface between deeds registration, municipal financial management and municipal spatial planning.

The powers of local government

[14] The Constitution allocates legislative power between national and provincial governments on the basis of the subject matter of the legislation. Schedules 4 and 5 of the Constitution contain lists of subjects known as a 'functional area'. The provincial legislatures are entitled to legislate, inter alia, on the subjects listed in Schedules 4 and 5. Both schedules are made up of two parts: Part A and Part B. Executive and administrative power of functional areas mentioned in Part B of the two schedules are reserved for municipalities.

[15] Section 156(1)(a) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. Section 156(2) of the Constitution authorises local authorities to exercise legislative powers by passing by-laws. Section 11(3)(m) of the Systems Act is the subsidiary legislation giving effect to this.

[16] Sections 155(6)(a) and (7) of the Constitution read:

‘(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—

(a) provide for the monitoring and support of local government in the province;

...

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in

Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).’

[17] In other words, the nature of Schedule 4B and Schedule 5B matters as constitutionally protected local government matters is determined by the limits put on national and provincial legislative power by ss155(6)(a) and (7) of the Constitution. Thus, the national and provincial governments exercise a regulatory role over municipalities under s 155(7) of the Constitution. The Constitutional Court has explained that the role of these two spheres ‘is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities’.[3] Nevertheless, s 151(3) of the Constitution affords a municipality the right to ‘govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution’. This authority is reiterated in s 4(1)(a) of the Systems Act, which states that ‘[t]he council of a municipality has the right to: (a) govern on its own initiative the local government affairs of the local community’.

[18] Furthermore, s 156(5) of the Constitution capacitates a municipality to ‘exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions’. This means that there might be matters that fall outside the local government’s core powers and competencies, but are nevertheless indispensable for the effective administration of those matters.

[19] However, s 156(5) may not be used to increase the functional areas of local government’s powers, but rather to enhance the efficacy of administering an existing functional area. In other words, it must be necessary for, or incidental to, an existing constitutional power. The provisions do not serve the purpose of creating new categories of functions. Thus, the impugned provisions may be authorised only if that is reasonably necessary for, or incidental to, the effective performance of a municipality’s land-use planning function. And, in terms of s 156(3) of the Constitution, in the event of a conflict between national and provincial legislation and local government legislation, the local government legislation is invalid.

[20] In *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others*,^[4] the Constitutional Court held the following in regard to the status of the power of local municipalities:

‘Municipalities have the fiscal and budgetary powers vested in them by Chapter 13 of the Constitution, and a general power to “govern” local government affairs. This general power is “subject to national and provincial legislation”. The powers and functions of municipalities are set out in section 156 but it is clear from sections 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments, and that national and provincial legislation has precedence over municipal legislation.

The powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to “compromise or impede a municipality’s ability or right to exercise its powers or perform its functions” (emphasis supplied). There is also a duty on national and provincial governments “by legislative and other measures” to support and strengthen the capacity of municipalities to manage their own affairs and an obligation imposed by section 41(1)(g) of the Constitution on all spheres of government to “exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”.

[21] The Constitution therefore requires co-operative government between national, provincial and municipal legislation. This is encapsulated by s 40 of the Constitution which provides:

‘(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.’

[22] This principle is effectively implemented through the framework legislation of national and provincial government. Accordingly, where framework legislation at the national and provincial level has been promulgated, particularly where there is necessary overlap between the spheres of government due to the nature of the subject-matter to which the legislation pertains, it is necessary for municipal law to be exercised within the scope of the guidelines in order to ensure cooperation, consistency and rationality.

[23] The respondents contended that the impugned provisions are by-laws enacted in the context of municipal planning within the framework legislation of the SPLUMA. Indeed, the GMBL and EBL were expressly promulgated subject to the SPLUMA.^[5] Their purpose is to regulate spatial planning and land-use management. The SPLUMA is thus the framework legislation within which

the municipal competence for municipal planning is exercised.

[24] The long title of the SPLUMA reads:

‘To provide a framework for spatial planning and land-use management in the Republic; . . . to provide a framework for policies, principles, norms and standards for spatial development planning and land use management; . . . to promote greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications; . . . to provide for the facilitation and enforcement of land use and development measures . . .’

[25] The preamble reads as follows:

‘AND WHEREAS various laws governing land use give rise to uncertainty about the status of municipal spatial planning and land use

management systems and procedures and frustrates the achievement of cooperative governance and the promotion of public interest;

AND WHEREAS it is necessary that – . . . a uniform, recognisable and comprehensive system of spatial planning and land use management be established throughout the Republic to maintain economic unity, equal opportunity and equal access to government services . . .’

[26] Section 2 of the SPLUMA is also relevant. It reads:

‘(1) This Act applies to the entire area of the Republic and is legislation enacted in terms of—

- (a) section 155(7) of the Constitution insofar as it regulates municipal planning; and
 - (b) section 44(2) of the Constitution insofar as it regulates provincial planning.
- (2) Except as provided for in this Act, no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with the provisions of this Act.’

[27] Section 3 of the SPLUMA sets out its objects. It provides:

‘The objects of this Act are to—

- (a) provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic.’

Section 9 concerns itself with national support and monitoring. Section 9(2) provides:

‘The national government must, in accordance with this Act and the Intergovernmental Relations Framework Act, develop mechanisms to support and strengthen the capacity of provinces and municipalities to adopt and implement an effective spatial planning and land use management system.’

Section 10 deals with provincial support and monitoring. Section 10(5) provides that provincial governments ‘must develop mechanisms to support, monitor and strengthen the capacity of municipalities to adopt and implement an effective system of land use management in accordance with this Act’. (Own emphasis.)

[28] Schedule 1 to the SPLUMA provides for ‘MATTERS TO BE ADDRESSED IN PROVINCIAL LEGISLATION’. It contains an extensive list of topics which cover a comprehensive ambit of municipal planning. Item 12 is concerned with the development of spatial development frameworks, and item 12(2)(a) provides:

‘The national government, a provincial government and a municipality must participate in the spatial planning and land use management processes that impact on each other to ensure that the plans and programmes are coordinated, consistent and in harmony with each other.’

Item 12(5) provides that a ‘municipal spatial development framework must assist in integrating, coordinating, aligning and expressing development policies and plans emanating from the various sectors of the spheres of government as they apply within the municipal area’.

[29] Item 20 concerns the preparation of municipal spatial development frameworks. Item 20(2) states:

‘The municipal spatial development framework must be prepared as part of a municipality’s integrated development plan in accordance with the provisions of the Municipal Systems Act.’ (Own emphasis.)

[30] The national legislation sets out a wide field of avenues available to the municipality to enforce the land-use scheme in respect of which it may make by-laws. Section 32, under the heading ‘Enforcement of land use scheme’, sets out, inter alia, the following powers of enforcement:

‘(1) A municipality may pass by-laws aimed at enforcing its land use scheme.

(2) A municipality may apply to a court for an order—

(a) interdicting any person from using land in contravention of its land use scheme;

(c) directing any other appropriate preventative or remedial measure.

(3) A municipality—

(a) may designate a municipal official or appoint any other person as an inspector to investigate any non-compliance with its land use scheme.’

- [31] From the above, it is clear that the SPLUMA is the framework legislation that authorises the making of the by-laws. While it does not regulate the powers and procedures of the authorities responsible for land-use decisions and development applications in any detail, it is significant that the SPLUMA also does not give carte blanche to municipalities to make any policy decisions they choose. The SPLUMA lays down the limits within which municipalities may legislate.
- [32] A local municipality is empowered by the Constitution, the Systems Act and the SPLUMA to promulgate by-laws to regulate and control municipal planning, enforce municipal planning and enforce an adopted land-use scheme. However, this power is to be exercised within the parameters so prescribed.
- [33] As I have shown, even though the by-laws, of which the impugned provisions form part, deal on their face with municipal planning, the impugned provisions themselves restrict the transfer and registration of ownership in immovable property and constitute an embargo on transfer unless their requirements have been fulfilled. Taking into account the statutory and constitutional provisions I have mentioned, the question to be answered is whether municipalities' legislative competence extends to regulating the transfer of properties.
- [34] In my view, the embargo on transfers strays beyond municipal planning. It prescribes to the registrar of deeds under what circumstances a transfer can take place. It precludes a transferring owner from complying with their obligations under an agreement of sale. It prevents a transferee from receiving ownership as they are entitled to under the agreement of sale.
- [35] It is, at best, a spot check at the time a property is to be transferred, and one that may be seen as opportunism on the part of a municipality at the crucial stage when the property has been sold by the owner and requires the registration of transfer of the property to the prospective new owner. The by-laws purport to prohibit the registrar from acting in accordance with powers and obligations in terms of the Deeds Registries Act 47 of 1937, whilst the municipality sits back and awaits compliance with all the requirements set out in the by-laws, including payment of certain costs due to it. As this enforcement mechanism in the by-laws is a restriction on transfer, these are not aspects of municipal planning, but matters pertaining to the transfer and registration of property that are regulated by the Deeds Registries Act. That is not a municipal legislative competence, but a national one.
- [36] The appellants' contention that the impugned provisions are an enforcement mechanism to ensure compliance with the municipal planning and land-use functions is even more thread bare when it is considered that the embargo does not apply when a property is leased. Seen from that perspective, the embargo is not an effective method of preventing the unlawful use of land or buildings as contemplated in the SPLUMA, but an arbitrary one. If the SPLUMA intended to authorise municipalities to introduce an embargo on registration of transfer of properties as an enforcement mechanism, it would have provided for that expressly. Neither s 32(1) of the SPLUMA, which requires municipal by-laws that enforce the

municipality's land-use scheme, nor any of its other provisions, authorise the embargo.

[37] Notably, the framework for the enforcement of by-laws is contained in ss 32(2) to 32(12) of the SPLUMA. Those enforcement provisions are to be found in Chapter 9 of the by-laws, headed 'Compliance and Enforcement'. They provide for a range of enforcement procedures, including criminal sanctions and the issue of compliance notices. Significantly, these provisions are clearly based on s 32 of the SPLUMA. In terms of that section, various mechanisms are set out in its aim to empower a municipality to enforce its land-use scheme, including, inter alia, interdicting any person from using land in contravention of its land-use scheme; designation of a municipal official to inspect any non-compliance; and provision of the manner of inspection and investigation by such an official for the purposes of issuing a compliance notice. A notice of non-compliance informs the owner of his or her transgression. Owners have administrative law remedies in respect of such a notice. The gist of s 32 of the SPLUMA is that it is the task of municipal inspectors to determine whether there has been any non-compliance of the land-use scheme. The onus is on the inspectors to prove the transgression when it comes to a criminal trial. It is significant to mention that although it affords the municipality a wide discretion to invoke enforcement for non-compliance, the system of enforcement envisaged in s 32 of the SPLUMA does not provide for a restriction of the transfer of land.

[38] The competence with regards to deeds registration (including registration of transfer of properties) is not a municipal function, for it is within the domain of national government. This is further evidenced, for example, by the fact that property transfer fees are contained in Part A of Schedule 4 of the Constitution and thus fall under a functional area of concurrent national and provincial legislative competence.

[39] Further, the argument for the appellants that its by-laws are also aimed at protecting future buyers from acquiring land with some legal impediment which burdens the property is without merit. Such a power does not fall within its mandate of municipal planning. Furthermore, trite principles in our law of contract govern the contract of purchase and sale between the land owner and a buyer, and therefore their respective rights and obligations. In any event, restraint against registration of transfer is only triggered after the property had been sold and the purchaser seeks to have it transferred. The notion that it is borne out of altruism for the purchaser is not a role for the municipality. And so too the notion that it is a measure by which to create revenue for the municipality, as was suggested by the parties. Both of these purposes, if they were the real purposes

of the by-laws, would have been improper purposes. It follows that a municipality may not regulate registration of transfer of properties.

[40] The restriction on transfer of land is not a necessary power incidental to land-use management, as enforcement mechanisms of its land-use scheme are already provided for in Chapter 9 of the by-laws. The registration of transfer of property is expressly regulated by the Deeds Registries Act and s 118 of the Systems Act. There is thus no room for an implied

municipal power to regulate the registrar's statutory power to register the transfer of properties. The embargo therefore cannot be incidental to the effective enforcement of a land-use scheme and the impugned by-laws are invalid insofar as they impose a mechanism which impermissibly regulates the transfer of property. They exceed the legislative competence of the respective municipalities, and thus offend the principle of legality.

- [41] The high court found that the impugned by-laws were also in conflict with s 118 of the Systems Act, because they sought to impose on sellers of property liabilities in addition to those contemplated by that section. In reaching this conclusion, it held that the by-laws sought in effect to 'amend' s 118 by adding to its terms. I agree with this conclusion. It also found that the impugned sections of the by-laws amounted to an arbitrary deprivation of property. As they were not justified in terms of a law and were thus bereft of lawful authority, by definition the deprivations of property that they sought to authorise were arbitrary. It follows that I agree with the high court in this respect too.
- [42] The high court suspended the declaration of invalidity for six months 'to allow the competent authority to correct the defect'. No reasons were given in the judgment for this order. In the absence of any such reasons for this deviation from the default position of setting aside unconstitutional exercises of public power, this order was not competent. I can see no reason to keep the invalid by-laws in operation, especially because of the usurpation by the two municipalities of legislative functions of other spheres of government. It follows that the suspension of the declaration of invalidity of the by-laws must be set aside. The respondents' cross-appeal must therefore succeed.

Conclusion

- [43] For these reasons, the appeals are dismissed with costs, including the costs of two counsel; and the cross-appeal against the suspension of the declaration of invalidity is upheld with costs, including the costs of two counsel.

- [44] I make the following order:

In case no334/2021 (Govan Mbeki Local Municipality):

In case no 338/2021 (Emalahleni Local Municipality):

G SALIE-HLOPHE

ACTING JUDGE OF APPEAL

APPEARANCES

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Instructed by:

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Van der Merwe & Sorour Attorneys, Bloemfontein

For respondents: S J du Plessis SC (with K Hopkins and S O Ogunronbi)

Instructed by:

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[1] Provincial Notice 10 of 2016, Provincial Gazette (Mpumalanga) 2650 of 17 February 2016.

[2] Provincial Notice 4 of 2016, Provincial Gazette (Mpumalanga) 2653 of 24 February 2016.

[3] City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) para 59.

[4] Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) para 29.

[5] See s 3 of the respective by-laws, read with the definition of 'Act' in s 1.

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/govan-mbeki-local-municipality-and-another-v-glencore-unknown-topic-asca-2022--6a3ea5213b1caa9129817723>

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