

SOUTH AFRICA / JUDGMENT

Le Sueur and Another v Ethekweni Municipality and Others (9714/11) [2013] ZAKZPHC 6 (30 January 2013)

[2013] ZAKZPHC 6

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Gyanda

CASE / FILE NUMBER

9714/11

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL,

PIETERMARITZBURG

CASE NO. 9714/11

In the matter between:

R

A LE SUEUR

.....FIRST

APPLICANT

R

A LE SUEUR N.O. & OTHERS

.....SECOND

APPLICANT

and

ETHEKWINI

MUNICIPALITY

.....FIRST

RESPONDENT

MINISTER

OF ENVIRONMENTAL AFFAIRS

.....SECOND RESPONDENT

MEC:

AGRICULTURE & ENVIRONMENTAL

AFFAIRS

KZN

.....THIRD

RESPONDENT

MEC: CO-OP GOVERNANCE & TRADITIONAL
AFFAIRS
.....FOURTH
RESPONDENT
ANY
OTHER INTERESTED PARTY
.....FIFTH
RESPONDENT

JUDGMENT

GYANDA J

[1] It is common cause that the applicants in their personal capacities, and in their capacities nomine officio as trustees of a trust are the owners of property, situate within the Province of KwaZulu-Natal which is therefore affected by resolutions of the first respondent, which affect their properties. The applicants, aggrieved by certain resolutions, adopted by the first respondent, the Ethekwini Municipality, made application in this court for the following relief as set forth in Part B of the Notice of Motion at page 3 thereof in the following terms:-

“B1. That the resolution to adopt the amendment of the Ethekwini Town Planning Schemes to introduce split zonings taken by the council of the Ethekwini Municipality on 28 October 2010, be and is hereby declared to be unconstitutional and set aside;

B2. THAT the resolution to adopt the amendment of the Ethekwini Town Planning Scheme to introduce D-MOSS (the acronym for the Durban

Municipality Open Space Systems), taken by the council of the Ethekwini Municipality on 9 December 2010 be and is hereby declared

to be unconstitutional and is set aside;

B3. THAT the said resolutions were passed in terms of a repealed ordinance and were without legality at the time of their passing and are hereby declared to be set aside as invalid;

B4. THAT the first respondent, pay the costs of this application jointly and severally with any other respondent or opposing party who may oppose this application;

B5. THAT the applicants be granted further or alternative relief.”

[2] The first respondent opposes the application as does the fourth respondent and the second and third respondent have filed notices indicating their intention to abide the decision of the court. The city of Cape Town was admitted by order of this court as amicus curiae and by agreement with the applicant was allowed to introduce or lead the evidence of a witness in the form of an affidavit in support of submissions it, the city, will make in this application. This amicus has likewise opposed the application. At the commencement of argument before me, the resolutions relating to the split zonings had been set aside at the instance of

the first respondent itself as it, the first respondent, realized that certain procedural steps had not been properly complied with in regard to those resolutions. The first respondent has accordingly requested that it be ordered to pay the costs of the application on the unopposed scale in so far as such costs were incurred exclusively in connection with the split zoning amendments set aside by the Order of the KwaZulu-Natal High Court, Durban on 1 October 2012. In the circumstances the relief sought by the applicants in regard to these split zoning amendments will not form part of the present judgment. I understood counsel for the applicant to argue nonetheless that the split zoning amendments were, like the D-MOSS amendments, unconstitutional. In as much as the split zoning amendments are not before me, I cannot consider any submissions in relation thereto and if and when the first respondent re-introduces the split zoning amendments, then the applicants can address argument in relation thereto in the appropriate forum at the appropriate time.

- [3] At the time that the application was argued before me therefore, the issues that fell to be resolved were the following:-

Whether or not the introduction of the amendments to the Ethekekwini Town Planning Schemes known as D-MOSS by resolution

of the Town Council and the Municipality taken on 9 December 2010, is unconstitutional in as much as:-

That that resolution was taken in terms of the Town Planning Ordinance, No. 27 of 1947 which had by that date been repealed and replaced by the KZN Planning and Development Act, No. 6 of 2008; and

Whether or not the amendment is saved by the provisions of Schedule 2 of the Planning Act, more especially Item 12 thereof, which provides as follows:-

“A resolution to adopt provisions of a Town Planning Scheme or rescind, alter or amend the provisions of a Town Planning Scheme in terms of Section 47bis (1)(a) or 47bis A

- (2) of the Ordinance was taken before this Act commenced:- that has not become effective and has not been abandoned must be proceeded

with as if this Act has not commenced.”

- (2) Whether or not, in any event and in as much as the amended Ordinances deal with the environmental functional area, they (the first respondent) have the authority whether in terms of the Constitution or any other law of general application to legislate on environmental issues.

- [4] To this end the applicant's arguments are simple and straight forward and may be summarized as follows:-

In as much as the amendments introduced by the first respondent,

were introduced in terms of the Town Planning Ordinance but completed under the Planning and Development Act, they are invalid; and

That a Municipality has no constitutional power to introduce such amendments with the environmental functional area being the subject matter.

[5] It is common cause that Planning in KwaZulu-Natal had hitherto been regulated by the Town Planning Ordinance, No. 27 of 1949 which has been referred to in Argument before me as “TPO” which I will continue to refer to it as. The TPO had been repealed and replaced by the KwaZulu-Natal Planning and Development Act, No. 6 of 2008 which is hereinafter referred to as “PDA.” The PDA was brought into existence in stages which commenced on 1 March 2009 and the applicants contend that those parts of the PDA, relevant to this application were in fact brought into operation by 1 May 2010. This is not disputed by any of the respondents. The PDA repealed the TPO but provided for a transition from the TPO to the PDA. Schedule 4 of the Planning Act (PDA) provides for transitional measures for the Ordinance. Part 2 of the Schedule deals with “decisions not finalized in terms of Ordinance before commencement of this Act.” Item 12 thereof provides as follows:-

“A Resolution to adopt provisions of a Town Planning Scheme or rescind, alter or amend the provisions of a Town Planning Scheme in terms of Section 47bis (1)(a) or 47bis A

- (2) of the Ordinance that was taken before this Act commenced:- that has not become effective, and has not been abandoned, must be proceeded with as if this Act has not commenced.”
- [6] The point of departure between the applicant on the one hand and the first respondent on the other relates to the interpretation of the phrase, “a resolution to adopt provisions.”
- [7] The applicant contends that Item 12 of Schedule 4 only protects transitional procedures taken under the TPO if the “resolution to adopt” Town Planning Scheme Amendments was taken before 1 May 2010. They contend that no such Resolution was taken prior to the notices advertising the proposed amendments being published and no Resolution of the Council of the Municipality is referred to, prior to date of publication. Consequently, the applicants contend that the Municipality altered or amended the provisions of the Town Planning Schemes in a manner that is ultra vires the enabling Statute. They refer in support of their Argument to the case of Schoonies Een (Pty) Ltd v Mtubatuba Municipality (unreported). Case No. 483/2012. A decision of PLOOS VAN AMSTEL, J handed down on 11 June 2012, in support of their proposition. Whilst recognizing that the decision in Schoonies Een is different from the present case in as much as the Mtubatuba Municipality was not exempted Municipality in terms of the provisions

of Section 47bis A of the TPO whereas in the present case the Municipality is an exempted Municipality, they overlooked one crucial difference between the case of Schoonies Een on the one hand and the present situation on the other, namely that in Schoonies Een the process for the amendment of the Town Planning Scheme was set in motion at the instance of the landowner in terms of the provisions of Section 47bis B and not at the instance of the Municipality as in the

present case in terms of the provisions of Section 47bis A (2). In doing so, they clearly overlooked the fact that for a Municipality to decide whether or not an amendment to the Ordinance should be undertaken it must, as a matter of course, take a Resolution to that effect before any advertisement of the requisite notices is effected by publication. That publication is the indication of the Municipality's desire and intention to adopt

a particular stance. A Municipality, by its very nature, is not a single person and, therefore, before any step is taken to publish its notice of intention to amend any provision it must resolve after deliberation amongst its membership to adopt such a course of conduct. The case of Schoonies Een is therefore clearly different from the present case in which the process was set in motion by the Municipality itself and not by a landowner. In the case of Schoonies Een, the Municipality was obliged to publish the requisite notices on behalf of the landowner and had no authority to resolve whether or not it should adopt a Resolution to that effect. Therefore, the decision by PLOOS VAN AMSTEL, J in Schoonies Een cannot be regarded as authority for the proposition that in as much as no Resolution is referred to, as having been taken by the

Municipality that the steps taken in publishing the relevant notices is not a step taken that is protected by the provisions of Item 12.

[8] In this regard, it is relevant to bear in mind the provisions of Section 47bis (1)(a) referred to in Item 12 which reads as follows:-

"Before a Municipality adopts any provisions as part of its scheme in course of preparation or if it decides to rescind, alter or amend any such provisions adopted in terms of this Section, or prior to the commencement of the Town Planning Amendment Ordinance, 1959 (Ordinance 19 of 1959), or adopted as part of its scheme in course of preparation in terms of Section 48(3), it shall give notice of its intention." (my underlining)

[9] Section 47bis A (2)(a) stipulates as follows:-

"Where a Municipality exempted (as in this case) in terms of sub Section 1(a) desires to amend any provision of its scheme in the course of preparation, it shall give public notice of its intention." (my underlining)

[10] Having regard to the words used in the Sections referred to above, I am in full agreement with the submissions by the first respondent, that it is self-evident that a Municipality cannot "desire" anything without a Resolution to that effect by its Council (or by a committee or person to whom the power to make such a decision has been delegated in compliance to the provisions of Local Government; Municipal Systems Act) being taken. In the present case, the first respondent points out in the affidavit of Grieve, paragraph 96 at page 217 of the papers that the required Resolution was taken on 30 July 2009 and a copy of the Resolution is annexed, marked "G2" commencing at page 257 of the papers. A comparison of the Argument contended for on behalf of the applicant on the one hand and the first respondent on the other, discloses that the applicants contend that the reference in Item 12 to "a Resolution to adopt provisions" refer to a Resolution which comes at the end of the entire

process. Such a construction is not logical and, in my view, defeats the purpose of having a saving provision such as that referred to in Item 12. Saving provisions were clearly intended to save the costs and labour expended in regard to those decisions up to the stage when the PDA came into operation and to avoid the unnecessary duplication of such costs and labour by requiring all of those steps to be repeated for a Resolution to be taken in terms of the PDA.

- [11] I am further in agreement with the submission by the first respondent that to adopt the interpretation argued for by the applicants to the words “Resolution to adopt” in Item 12 cannot be correct in as much as:-

In the case of non-exempted Municipalities, the Resolution to adopt at the end of the process was to be made under the Section 47bis (4) of the Ordinance; and

In the case of exempted Municipalities, that final decision was to be made in terms of Section 47bis A (4) of the Ordinance.

Neither of which Sections are referred to in Item 12. Item 12 would have of necessity had to refer to those provisions if that was indeed the intention of the Legislature in promulgating that provision. On the other hand, if the contentions of the applicant were correct, then the reference in Item 12 to Sections 47bis (1)(a) and 47bis A

- (2) are meaningless and contribute nothing at all to the legislative force of Item 12.

- [12] I am respectfully in agreement with the submission by and on behalf of the first respondent that the learned Judge in Schoonies Een was wrong when he stated in paragraph 17 of his judgment that neither Sections 47bis (1)(a) or 47 A (2) “provides for a Resolution or for the adoption or amendment of provisions of a scheme” to hold as he did would imply that a Municipality would be incapable of initiating an amendment process of its own. In this regard, I am in agreement with the submission that the learned Judge in Schoonies Een overlooked that “desire or intention” on behalf of a Municipality can only be expressed by Resolution of its Council “or of a committee or person lawfully delegated that function” and that the decision to go ahead is an important one. It is substantial and substantive, not taken lightly and is not a mere formality.

Without such a decision or “desire or intention” in the case of a Municipality initiating the amendment process, the publication of its intention cannot follow.

- [13] It is clear therefore that the legislative device of using a term such as “desires to” or “wishes to” to denote a first decision in a process designed ultimately to generate a decision having legal effect, is exemplified in the decision of *Diggers Development v City of Matlosana*.¹ In that case the Supreme Court of Appeal considered an Ordinance which conferred powers on the Council to let, sell, exchange or otherwise alienate immovable property which provided that:-

“Whenever a Council wishes (my underlining) to exercise any of the powers conferred by paragraph

- (a) in respect of immovable property... the Council shall cause a notice of the Resolution to that effect to be:-

Affixed to the Public Notice Board of the Council; and

Published in a newspaper...”

The Judgment in that case at paragraph 22 thereof reads as follows:-

“It is clear from this Section that it is triggered once the Council “wishes” to exercise any power referred to in Section 79(18)(a). It must then publish the notices to enable persons to object. The appropriate

dictionary meaning of the word ”wish” in the shorter oxford dictionary is:-

‘2. a desire expressed in words or the expression of such’

There is a difference between “wish” and ”contemplate” and the latter word being defined in the same dictionary as:-

‘to look at with continued attention.

to deal mentally, to mediate upon, ponder, study.

3. to consider in a certain aspect’ ”.

A person who “wishes” to do something, has decided to do so; a person who contemplates doing something has not yet decided whether or not to do so. The Section uses the word “wishes” in two places; “whenever a Council wishes” to exercise any of the powers and “any person who wishes to object”. Both in context connote a settled intention.” I am in agreement with the submission on behalf of the first respondent that there is no distinction to be drawn between the use of the word “wishes” in the Diggers case and the use of the word “desires” in the Ordinance under consideration. It is clear, therefore, in the case of the Town Planning Ordinance, when a Municipality “desires” to do something, it has decided or resolved to do it. Furthermore, it is clear that that decision can only be taken by a Resolution. The publication thereof is proof that the resolution had been taken to proceed. One further matter has to be referred to in relation to the decision of Schoonies Een so heavily relied upon by the applicant. That is, that in paragraph 22 of his Judgment in Schoonies Een, PLOOS VAN AMSTEL, J observed that for the purposes of that decision:-

*“It is not strictly necessary for current purposes to identify the Resolution contemplated by Item 12.”
That exercise is only*

relevant to the question whether it can be said that the publication of the notice in terms of Section 47bis (1)(a) was such a Resolution, as that was the only step taken by the Municipality before the commencement of the Planning Act.”

Clearly, therefore, he did not consider the relevance of the resolution for current purposes, more especially for the purposes of Section 47bis A (2).

- [14] In the present case, I am satisfied that before the step was taken by the Municipality to publish the advertisement of its intention to amend the Ordinance to bring into operation the D-MOSS Amendments, that it had in fact resolved and taken a Resolution to do so before such publication was effected. Publication was additional proof of such a resolution. It is clear from what followed that at no stage did the Council take any step or give any indication after publication that the process had been abandoned.
- [15] In the circumstances, I am satisfied that in regard to the D-MOSS Amendments, such amendments were pending and not finalized and had not been abandoned before the repeal of the Ordinance and are saved by the provisions of Schedule 4 of the Planning Act and Part 2 of the Schedule, more especially Item 12 thereof, as contended for by the first respondent. Accordingly, the submission by the applicant that the D-MOSS Amendments are invalid falls to be dismissed.
- [16] The applicants contend that in introducing the D-MOSS Amendments, the Municipality had acted ultra vires its powers as it did not have the authority to legislate in the sphere of the environment which it contends is the exclusive sphere of the National and Provincial Government. In attempting to legislate on issues in relation to the environment therefore the applicants contend, that the Municipality had acted unconstitutionally and illegally and, therefore, the D-MOSS Amendments fall to be set aside as being unconstitutional and illegal. The applicant contends that the “environment” is listed in Schedule 4, Part A of the Constitution as a functional area of the current National and Provincial competence, excluding Municipalities at Local Government level from such area of activity. The Argument by the applicant is that in as much as the amendments to the Town Planning Scheme are legislative instruments and are law, the first respondent does not have original or delegated authority to legislate in relation to the environment. Furthermore, the National Environment Management Act, No. 107 of 1998 (NEMA) which was enacted to give effect to Section 24 of the Constitution regarding the protection of the environment, which is the framework Act providing for all specific environmental laws makes no reference to environmental impact procedures being exercised by Municipalities. Nor does it empower a Municipality to make laws relating to the protection of the environment. Accordingly, the Municipality, by creating the D-MOSS Amendments has legislated for the protection of the environment and has created its own process for authorizing these activities at a Municipal level. It is argued by the applicants that the functions of the environmental authorities (Provincial and National) and the functions of the Municipality are different and distinct. Accordingly, the Constitution sets out the executive authority of Municipalities which are the matters set out in Part B of Schedule 4 and Part B of Schedule 5 or “any other matter assigned to it by National or Provincial legislation”. In Section 156(1) of the Constitution and, by virtue of the provisions of Section 156(2) of the Constitution, the Municipalities power to make bylaws is limited to these fields or areas exclusively which does not include the environment. This is notwithstanding the provisions of Section 152 which lists as one of the objects of Local Government as “to promote a safe and healthy environment”. The applicants contend that the Constitutional Court in the case of: *The City of Johannesburg*

Metropolitan Municipality v Gauteng Development Tribunal² decreed that Municipalities constitutionally hold the functional power of Municipal planning to the exclusion of other spheres of Government or organs of their making, and that the Supreme Court of Appeals in the same case [2010(2) SA 554 SCA at 40-41] adopted the definition of “Municipal Planning” which is summarized as “the control and regulation of land use at a Municipal level, the zoning of land and establishment of townships.” The applicants contend that the other related functional areas in respect of which Municipalities have authority are air pollution, storm water management services, water and sanitation services, beaches, cemeteries, facilities for the accommodation, care and burial of animals, refuse removal, refuse dumps and solid waste disposal. They submit that none of these approach the area of “environment” or “nature conservation” or “biodiversity protection”. The applicants contend further that in as much as D-MOSS Amendments relate to land which consists of “indigenous forests” the “administration of indigenous forests” this is a National or Provincial functional area in respect of which the Municipality has no authority to legislate. The applicants contend that although there may be an overlapping between regulation of land use and other functional areas which overlapping is dealt with in the case of *Maccsand v City of Cape town*³ that such overlapping does not give a Municipality the power to legislate in the functional areas “overlap”.

[17] In addition, the applicants, although they did not raise the unconstitutionality of the D-MOSS Amendments on the basis that it amounts to an expropriation or deprivation of an owners proprietary rights contrary to the provisions of the Constitution, raise the issue of lack of compensation and contend that the conduct of the Municipality in enacting the D-MOSS Amendments amounts to “expropriation by stealth” which is “unlawful, unconstitutional and unconscionable”. These aspects as correctly pointed out by the first respondent in Argument, were only raised by the applicants in reply and therefore, constitute a new matter that the applicants are impermissibly attempting to introduce. I agree with this submission, and will accordingly ignore this argument.

[18] In as much as it is common cause that no expropriation of the applicant’s properties have occurred. If and when it is to occur, such expropriation would have to be done:-

By law;

For a public purpose and in the public interest; and

Subject to the payment of compensation in accordance with the provisions of Section 25(2) of the Bill of Rights.

This issue is therefore not an issue that falls to be determined in the present application and I will accordingly refrain from making any ruling in respect thereof.

[19] I am in total agreement with the submission by the first respondent that the approach adopted by the applicant is unduly narrow and incorrect. In the first place, Section 72 of the Bill of Rights provides:-

“The State must protect, promote and fulfill the rights in the Bill of Rights”

Clearly, the “State” includes the Local Government in the form of the Municipality and hence the first respondent. In as much as the Government is constituted by National, Provincial and Local spheres of Government which are distinctive, interdependent and inter-related as provided for in Section 40(1) of the Constitution. It is clear therefore that functional areas of Constitutional competence as set out in Schedules

4 and 5 of the Constitution are not the only provisions dealing with Governmental responsibilities and duties. Section 24(b) of the Bill of Rights provides that everyone has the right to have an environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:-

“(i) Prevent pollution and ecological degradation;

Promote conservation; and

Secure ecologically sustainable development and use of natural resources while promoting justifiable, economic and social development”.

It is therefore correct, as pointed out by the first respondent, that there is nothing in the Bill of Rights itself to suggest that the protections offered by Section 24 of the Constitution are only binding on National and Provincial spheres of Government. Quite evidently these obligations apply to all three spheres of Government. Municipalities may not legislate in conflict with Section 24 of the Constitution. It is evident that Section 152(1)(d) of the Constitution requires that Local Government “promote a safe and healthy environment”. Together with the reference in Section 24 of the Constitution to reasonable legislative and other measures to promote ecologically sustainable development, justifiable economic and social development as well as the promotion of conservation is also binding on a Municipality when it exercises its powers and performs its functions as set out in Parts B of Schedules 4 and 5 of the Constitution and those allocated to it in terms of Section 156(1)(b) of the Constitution and Section 156(4). The Constitutional Court has recognized in *ex parte: Chairperson of the Constitutional Assembly*⁴; in *re: certification of the Constitution of the Republic of South Africa*:-

“at the very minimum, socio economic rights can be negatively protected from improper invasion”

[20] It is submitted by the first respondent that it is within this context that Municipal powers including the function “Municipal Planning” which appears in Part B of Schedule 4 must be assessed and interpreted. Section 156(1)(b) provides that a Municipality has the executive authority and the right to administer not just matters listed in Parts B of Schedule 4 and 5 but also:-

“Any other matter assigned to it by National or Provincial legislation”.

Accordingly, Section 156(4) of the Constitution provides indications that even matters reserved for National and Provincial legislative authority in Parts A of Schedules 4 and 5 may be dealt with at Municipal level. It provides:-

“The National Government and Provincial Governments must assign to a Municipality, by agreement and subject to any conditions, the

administration of a matter listed in Part A of Schedule 4, or Part A of Schedule 5 which necessarily relates to Local Government, if:-

The matter would most effectively be administered locally; and

The Municipality has the capacity to administer it”

Section 156(5) provides that “a Municipality has the right to exercise any power concerning a matter reasonably necessary for or incidental to, the effective performance of its functions.” It is apparent that although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern or sphere of National and Provincial responsibility that Local Governments in the form of Municipalities are in the best position to know, understand, and deal with issues involving the environment at the local level. The first respondent correctly submits, in my view, that the framers of the Constitution did not intend thereby to allocate legislative powers amongst the three spheres of Government in hermetically sealed, distinct and water tight compartments. This is apparent from the Constitutional Court ruling in *ex parte: President of RSA*⁵; constitutionality of the Liquor Bill, where it dealt with the allocation of powers to these three spheres of Government at paragraph 40 thereof in the following terms, “the first provision of the Constitution constitutes the Republic of South Africa as ‘one, sovereign, democratic state’.” The Unitarian emphasis of this provision is, however not absolute, since it must be read in conjunction with the further provision of the Constitution which show that Governmental power is not located in National entities alone. That appears particularly from Section 40(1), in terms of which “Government is constituted as National, Provincial and Local spheres of Government which are distinctive, interdependent and inter-related”,

and from Section 43, in terms of which the legislative authority is vested in Parliament for the National sphere, in the Provincial Legislatures for the Provincial sphere and in Municipal Councils for the local sphere. Section 40 is part of Chapter 3. This introduced a “new philosophy” to the constitution, namely that of co-operative Government and its attendant obligations. In terms of that Philosophy, all spheres of Government are obliged in terms of Section 40(2) to observe and adhere to the principles of co-operative Government as set out in Chapter 3 of the Constitution. In these circumstances, I am fully in agreement with the submission by the first respondent that the environment is an ideal example of an area of legislative and executive authority or power which had to reside in all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4. As was pointed out by the Constitutional Court in *Warey Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*⁶:-

“There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of sub-division of ‘Agricultural Land’ the one may in effect veto the decision of the other. It should be borne in mind, that the one sphere of control operates from a municipal perspective and the other from a national perspective. Each having its’ own constitutional and policy considerations.”

In a decision referred to by the applicant in argument, *Maccsand v City of Cape Town*⁷ the overlapping areas of control in the Constitutional model were analyzed as follows:-

“[47] Another criticism leveled against the finding of the Supreme Court of Appeal in Maccsand and the Minister or Mineral Resources was that, by endorsing a duplication of functions, the Court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive, but it lacks substance. The Constitution allocates powers to three spheres of Government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of Government to co-operate with one another in mutual trust and good faith, and to co-ordinate the actions taken with one another.

[48] The fact that in this case mining cannot take place until the land in question is apparently rezoned is therefore permissible in our Constitutional Order. It is proper for one sphere of Government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its powers, which does not extend to the power of the other functionary. This is so, in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through co-operation between the two organs of State, failing which, the refusal may be challenged on review”.

This view of the Constitutional Court was confirmed in *Johannesburg Municipality v Gauteng Development Tribunal*⁸:-

“[55] It is, however, true that the functional areas allocated to the various spheres of Government are not contained in hermetically

sealed compartments. But that notwithstanding, they remained distinct from one another. This is the position even in respect of functional areas that share the same wording, like roads, planning, sports and others. The distinctiveness lies in the level at which the particular power is to be exercised. For example, the Provinces exercise powers relating to provincial roads whereas Municipalities have authorities over “municipal roads”. The prefix attached to each functional area identifies a sphere to which it belongs. This distinguishes it from the functional area allocated to the others spheres. In the example given, the functional area of provincial roads does

not include “municipal roads”. In the same vein “provincial planning” and “regional planning and development” do not include “municipal planning”.

At paragraph 57 of that judgment, the Constitutional Court explained the meaning of “municipal planning” in the following terms:-

“[57] Returning to the meaning of “municipal planning”, the term is not defined in the Constitution. But “planning”, in the context of Municipal affairs is a term which has assumed a particular, well established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control of regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose the word to use “planning” in the Municipal context, they were aware of its common meaning. Therefore I agree with the Supreme Court of Appeal that in relation

to municipal matters the Constitution employs “planning” in its commonly understood sense...”.

[21] Municipalities under the banner of “municipal planning” have historically always exercised executive legislative responsibility over environmental affairs within a municipal area. The drafters of the Constitution were aware of this fact and recognized this fact in the manner in which the newer Constitutional dispensation was formulated.

[22] It is clear that both at the time that the Constitution was enacted and since then Municipalities have been allocated by national legislation and provincial legislation and policies, a legislative and executive mandate with respect to environmental matters, placing such matters squarely within the concept of municipal planning. The Local Government Transition Act which came into effect on 2 February 1994 provided:-

“an environment – every person shall have the right to an environment which is not detrimental to his or her health or wellbeing.”

The powers of the Transitional Metropolitan Councils which were specified in Schedule 2 to the Act included as item 19, “metropolitan environment conservation.” The Transitional Act was amended to deal with Metropolitan Councils and Metropolitan Local Councils. In the case of Metropolitan Councils, Item 21 of Schedule 2 required the council to attend to “the co-ordination of environmental affairs.” And in the case of Metropolitan Local Councils, the mandate under Item 14 of Schedule 2 A was “the management and control of environmental affairs.” These amendments were introduced in November 1996 and required the councils to which they related to formulate and implement “integrated development plan.” It was defined as a plan aimed at integrated development in management of the Municipal Area which had to be compiled having regard to the general principles contained in Chapter 1 of the Development Facilitation Act, 1995 (Act 67 of 1995). Section 31(c) of Chapter 1 of the Development Facilitation Act requires policy, administrative practice and laws to promote efficient and integrated land development with respect to a number of features, one of which is the encouragement of “environmentally

sustainable land development practices and processes.” Section 3(1)(h) requires policy, administrative practice and laws to promote “sustained protection of the environment”.

[23] That was the state of the role of municipalities with regard to planning and with regard to a specific environmental mandate at the time when the Constitution was enacted in February 1997. This position prevailed with the formulation of matters over which municipalities had constitutional competence and in particular in the formulation of the various categories specified in Parts B of Schedules 4 and 5 to the Constitution. Accordingly, the framers of the Constitution must be taken to have been aware of the fact that the matters for which Municipalities would be responsible, involved environmental considerations. It is clear, therefore, that when the functional areas were allocated in Schedules 4 and 5, the framers of the Constitution knew what “municipal planning” encompassed. Although it is clear that the Local Government Transition Act was meant to be transitional but the source of the LGTA was Section 245 of the Interim Constitution which provided that “local government shall not be restructured otherwise than in terms of the Local Government Transition Act 1993.” As KRIEGLER, J remarked at paragraph 178 in *Executive Council Western Cape Legislative and Others v President of RSA*⁹:-

“The metamorphosis is governed by the Transition Act all the way up to the point where the democratically elected structures have taken over.”

[24] Chapter 5 of the Municipal Systems Act deals with integrated development planning at municipal level and recognizes in Section 23(1)(c) that there is an obligation on the Municipality:-

“Together with other organs of State to contribute to the progressive realization of the fundamental rights contained in Section 24... of the Constitution.”

This is clearly legislative mandate from national legislature in regard to environmental matters.

[25] In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*¹⁰ the Constitutional Court, per YACOOB J, recognized that the National Legislature, by promulgating the Municipal Structures Act and the Municipal Systems Act, recognized that “land-use planning” is a municipal competence “at paragraph 132.” It went on to analyze the provisions of the Systems Act as follows:-

“[133] An integrated development plan is defined in the Municipal Structures Act as a ‘plan aimed at the integrated development and management of a municipal area’. Truly integrated planning is only possible if the Municipality decides on land-use within the bounds set by National and Provincial legislation”.

“[134] This is made explicit in the Municipal Systems Act that was passed about two years later. The legislation compels each Municipal Council to adopt a single, inclusive and strategic plan for the development of its Municipality. That plan is expressly required to be “compatible with National and Provincial development plans and planning requirements binding on the Municipality in terms of legislation.”

This requirement accords with the Constitutional allocation of the legislative power in relation to Municipal planning concurrently to the National and Provincial governance. The plan must, amongst other things, contain a spatial developmental framework which must include the provision of basic guidelines for a land-use management system for a Municipality’ ”.

At paragraph 136 it went on to emphasize the following:-

“Some requirements of the spatial developmental framework must be emphasized. The framework must ‘set out objectives that reflect the desired spatial form of the municipality. The framework must also contain strategies to achieve the desired spatial form, these strategies must ‘indicate desired patterns of land-use within the Municipality’ and ‘address the spatial reconstruction of the Municipality’. The strategy must also relate to the location and nature of development within the Municipality. The final requirement of the

regulations worth mentioning is that the special framework must “set out basic guidelines for a land-use management system in the Municipality”.

[26] In addition, Section 2(4)(f) of the Local Government; Municipal planning and Performance Management Regulations published on 24 August 2001 requires spatial development frameworks reflected in an integrated development plan to:-

“contain a strategic assessment of the environmental impact of the spatial development framework”.

At paragraph 137 in Warey Holdings the Court went on further as follows:-

“[137] It will have been seen that the Constitution, the relevant legislation and the regulations provide a comprehensive and careful

system for the involvement of National, Provincial and Local Government in the process of Municipal spatial planning. It must be

emphasized that once it adopts an integrated development plan, a Municipality must give effect to it and conduct its affairs in a manner consistent with that plan. Any rezoning decisions like the decision in this case must be taken consistently with the integrated

Municipal plan. This plan must in turn be consistent with National and Provincial Legislation”.

[27] In Maccsand (Pty) Ltd and Another v City of Cape Town Others,¹¹ the Supreme Court of Appeal located zoning schemes within the private context of integrated development plans and spatial development frameworks as reflective of:-

“The central role [that Municipalities play] in land-use planning in their areas of jurisdiction. It is, no doubt, appropriate for them to do so given their knowledge of local conditions...” (At paragraphs 19-21)

The applicant has not disputed on the papers that D-MOSS Amendments were introduced consistently with the respondents integrated development plan. The Municipality is under a statutory duty to plan in accordance with its integrated development plan. Nor is there any suggestion by and on behalf of the applicants that the provisions of D-MOSS conflict in any way with National or Provincial Legislation or Policies on such matters.

[28] The first respondent has tendered the affidavits of Roberts and Forbes with respect to the evolution of historical planning and the integration of environmental matters within that; and with respect to the contents of D-MOSS and the split zoning initiatives. That these two persons are experts based on their curriculum vitae cannot be disputed and accordingly was correctly not disputed on the papers. The position adopted by the applicants is that these witnesses were biased in as much as they had a material interest in the outcome of this application in as much as the matter of Roberts’ PHD theses is the framework for the D-MOSS Amendments. In addition, both she and Forbes are employed by the Municipality.

However, as correctly pointed out by the first respondent, the facts testified to by both Roberts and Forbes have not been contradicted in any way by the applicants. Accordingly, these facts remain undisputed on the papers before me. A reading of the affidavits of both Roberts and Forbes does not in my view indicate the presence of any bias on their part in favour of the first respondent. And as correctly pointed out by the first respondent in Argument, the allegations of bias would go the weight to be attached to their opinions and when, as in this case, their factual evidence is not challenged, the weight to be attached thereto is not diminished in any significant respect. What is more, the amicus curiae, on behalf of the city of Cape Town supports the views expressed by Roberts and Forbes. In addition, it is clear from their submissions that Cape Town spent many years developing “overlay zones” to assist in protecting the environment, similar to that

presented in the D-MOSS Amendments. The city of Cape Town clearly supports the position of the first respondent supported as it is by the evidence of Roberts and Forbes.

[29] In fact, none of the respondents cited support of the stand point of the applicants vis-a-vis the contention that the first respondents’ transgression in the field of environmental legislation in enacting the D-MOSS Amendments is unconstitutional and therefore unlawful. Most importantly, the Minister of Environmental Affairs; the MEC; Agriculture and Environmental Affairs, KwaZulu-Natal and the MEC for Co-Operative Governance, KwaZulu-Natal have not contradicted the view or stand point of the first respondent in this regard at all. If indeed, the first respondent was transgressing into the exclusive realm of the National and Provincial Governance in legislating on Environmental matters, I would be extremely surprised, to say the least, if they did not express their objection thereto in the present application. The affidavits of Roberts, Forbes and indeed Grieves indicate how Municipal Planning Schemes have evolved from what they traditionally were to what they are today.

They clearly indicate that it is impossible as a matter of accepted town planning practice to divorce environmental and conservation concerns from town planning principles. I agree.

[30] In the light of the applicant's failure to challenge from the evidence of Forbes, Roberts and Grieves, I am in full agreement with the submission by and on behalf of the first respondent that such failure weakens the contentions and arguments advanced by the applicants. As concluded in *The Minister of Health v New Clicks SA (Pty) Ltd and Others*¹² where the Court found that such failure to challenge and controvert the evidence results in the fact that the evidence of the first respondent in that regard stands unchallenged as there is simply nothing to gainsay such evidence.

[31] Section 40(2) of the Town Planning Ordinance passed in 1949 recognized that schemes shall deal with matters referred to in the Schedule to the Ordinance. Which is headed "matters to be dealt with by schemes" and includes as Item 15 the following:-

"The preservation or conservation of buildings or other objects of architectural, historic or artistic interest and places of natural

interest or beauty".

The last aspect thereof, clearly, relates to environmental matters. It is correctly pointed out by the first respondent that other courts have recognized the provisions of schemes containing conservation controls. In *Port Edward Town Board v Kay*¹³ the court characterized a zoning of "conservation reserve" as a "legally enforceable encumbrance relating to the property" [at 681(i)] with the purpose being "nature conservation" at [682(B)].

[32] In the Cape, the Land-Use Planning Ordinance, 1985 and the Town Planning Schemes passed pursuant to that ordinance have been held to constitute statutory provisions concerned with the protection of the environment in *Hangklip Environmental Action Group v MEC Environmental Affairs*¹⁴

[33] In the result, I am satisfied that the first respondent has proved that prior to the advent of the Constitution "Municipal Planning" involved the power to regulate land-use whilst taking into account, amongst other things, the need to protect the natural environment. It is clear that the term "Municipal Planning" encompassed that meaning when used in the Constitution. I am accordingly in full agreement with the first respondent's submission that it is impossible to separate environmental and conservation concerns in town planning practice from a "Municipal Planning" perspective.

[34] It is accordingly not surprising that NEMA, the National Environmental Management Act, 107 of 1998 which replaced the Environmental Conservation Act, sets out in Chapter 1, a set of national environmental management principles

which apply “throughout the Republic to the actions of all organs of State that may significantly affect the environment”. The reference to all organs of State clearly encompasses Local Government Structures such as the first respondent. Accordingly, in *Fuel Retailers Association v D-G: Environmental Management, Mphumulanga*¹⁵ NGCOBO, J characterized the significance of NEMA’s principles as follows:-

“[67] NEMA principles “apply... to the actions of all organs of State (my underlining) that may significantly affect the environment. They provide not only the general framework within which environmental

management and implementation decisions must be formulated, but they also provide guidelines that should guide the State organs in the exercise of their functions that may affect the environment. Perhaps more importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment. It is therefore plain that these principles must be observed as they are of considerable importance to the protection and management of the environment.”

[35] On 13 May 2009, the KwaZulu-Natal Province published in an extraordinary Provincial Gazette, the KwaZulu-Natal Environmental Implementation Plan, pursuant to Section 11 of NEMA. In Section 2.2 it lists “functional areas of competence with environmental relevance” for Municipalities and includes “Municipal Planning”. It also recognizes in Section 2.5.1 that in implementation of environmental governance in the Local Government Sphere will occur

through the IDP (integrated development plan) which is the “key strategic document that guides all development activities within each Municipality”. As a matter of provincial policy therefore, the KwaZulu-Natal Province recognizes the importance of environmental matters within “Municipal Planning”.

[36] Moreover, Section 33 of NEMA itself recognizes competence of Municipalities to legislate in respect of the environment. This Section allows a person to institute a private prosecution in respect of a breach of any duty laid down, inter alia, in any municipal bylaw “where that duty is concerned with the protection of the environment and the breach of that duty is an offence”. Moreover, the Environmental Management Framework Regulations which were published under NEMA in June 2010 stresses the role of Municipalities, and contain a particular reference (in Item 3.2.4) to spatial development frameworks which Municipalities are required to prepare in terms of the Municipal Systems Act. The regulations record that few of the “developed SDF’s are credible” and states requirements for such a document which include the requirement that the spatial development framework must guide and inform the following within the municipality:-

“1. Plan for desired spatial growth of a municipal area, viz, directions of growth, major movement routes;

2. Guidelines for land-use management for the municipalities;

Special development areas for targeted management to address past imbalances;

Conservation of both the built and the natural environment;

Areas in which particular types of land use should be encouraged and others discouraged; and

Areas in which the intensity of land development could be either increased or reduced”.

[37] NEMA therefore recognizes the role of Municipalities and Municipal duties with regard to the environment in its Municipal planning function. It is clear, therefore, that Municipalities are entitled to regulate environmental matters from micro level for the protection of the environment.

[38] Section 48 of the National Environmental Management: Biodiversity Act, No. 10 of 2004 provides for the co-ordination and alignment of Biodiversity Plans and requires co-ordination between any Integrated Development Plan adopted by a Municipality, any spatial development framework regulating land-use management, land development and spatial planning matters administered by the Minister responsible for land affairs and any other plans prepared in terms of National or Provincial Legislation. Item 1.2 of the National Biodiversity Framework recognizes that Municipalities do not have as their core business, Biodiversity Diversity conservation but their policies, programs and decisions impact directly and substantially on how South Africa's Biodiversity is managed. The following is said in relation to Municipalities:-

“(a) These organs of State play a key role in managing natural resources, and are required to take Biodiversity into account in terms of the Constitution and NEMA;

(b) The local sphere of Government deserves particular mention. Day to day decisions about how land and other natural resources are used at a local level ultimately determine whether development is sustainable. While Local Government does not make all these decisions itself (many of them are made by provincial and national departments, or by individual land owners or resource users), it has a key role to play in insuring co-ordination and integrated management of national resources...”

[39] It is clear from the foregoing and the Arguments advanced by the first respondent that contrary to the submissions by and on behalf of the applicants, Municipalities have traditionally been involved in regulating environmental matters at the local level and that their functions at this level has been recognized by the drafters of the Constitution. Hence, although environmental matters stood as the apparently exclusive area for National and Provincial governance at those levels, it is clear that the authority of the Municipalities at Local Government level to manage the environment at that level has always been and is still recognized. It is inconceivable that the drafters of the Constitution intended by the manner in which the constitution was framed to exclude Municipalities altogether from legislating in respect of environmental matters at the local level. In any event, it is clear that national and provincial legislation in respect of environmental issues recognizes the part to be played by Municipalities at the Local Government level in managing and controlling the

environment.

[40] Accordingly, I am satisfied that Municipalities are in fact authorized to legislate in respect of environmental matters to protect the environment at the local level and that the D-MOSS Amendments in no way transgress or intrude upon the exclusive purview of the National and Provincial governance in respect of environmental legislation. I am, therefore, satisfied that the D-MOSS Amendments introduced by the first respondent is not unconstitutional and invalid on the basis contended for the by applicants, namely, that the first respondent did not have the authority to legislate in this regard.

I would accordingly dismiss the application with costs, such costs to include the costs of two counsel and I order that in as far as the split zoning applications are concerned, the first respondent is directed to pay the applicants costs thereof on an unopposed basis.

GYANDA J

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HEARD ON: 14 NOVEMBER 2012

DELIVERED ON: 30 JANUARY 2013

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1(824/2010)

[2011] ZASCA 247(1 December 2011)

22010(6) SA 1826 (CC) at 49-57

32012(4) SA 181 (CC) especially at 43-51 thereof

41996(4) SA 744 (CC) at 78

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62009(1) SA 337 (CC)

72012(4) SA 181 (CC)

82010(6) SA 182 (CC) at 55

91995(4) SA 877 (CC)

102009(1) SA 337 (CC)

112011(6) SA 633 (SCA)

122006(2) SA 311 (CC) at 402-404

131996(3) SA 664 (AD)

142007(6) SA 65(C) at (B-E)

152007(6) SA 4 (CC)

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