Town planning schemes

WHO HAS JURISDICTION?

From the COURTS

Basson and Others v *City of Johannesburg Metropolitan Municipality and Others & Eskom Pension and Provident Fund* v *City of Johannesburg Metropolitan Municipality and Others* 2005 JDR 1273 (T)

This judgment considered the constitutional dimension of town planning schemes and zoning: which sphere of government has jurisdiction to determine land use applications and to amend zoning schemes?

Background

Eskom and Basson brought applications to develop land to the Gauteng Development Tribunal (GDT) in compliance with the Development Facilitation Act (DFA). The Basson party had applied to establish a land development area that required the subdivision, rezoning and development of land for affordable group housing. Eskom owned two erven upon which a large unoccupied building stood, and they received an offer to rent the whole building, provided that the building could be extended by approximately 2 500 square metres. As the land zoning did not allow for the building to be extended, Eskom sought an amendment of the town planning scheme to rezone the erven. Eskom chose to launch the application under the DFA rather than the Town-Planning and Townships Ordinance (TPO), mainly for the reason that "the former route would take a fraction of the time of the latter".

KEY POINTS

- Municipalities do not have the exclusive authority to create townships and amend municipal planning schemes.
- Provinces can legally alter municipal land use plans through development tribunals.
- Developers may choose whether to make land use applications to municipalities or to the provincial development tribunals, two forums that use differing criteria to make decisions.
- However, the Land Use Management Bill, if adopted, will streamline planning processes and provide legal clarification.

In both cases the GDT approved the applications and in so doing established new land use rights. The GDT ordered that the relevant town planning schemes be amended according to these decisions. These town planning schemes were created and are maintained by the City of Johannesburg Metropolitan Municipality.

However, the City by this time refused to recognise the jurisdiction of the GDT to issue such orders and decisions. The City issued a letter to the applicants stating that GDT decisions would not be recognised, implemented or processed by the City, unless they related to the establishment of a township that was specifically authorised under the DFA.

Legal framework

The TPO originated in 1986 as national legislation and was assigned to the Province of Gauteng under proclamation in 1994. The TPO provides that town planning schemes are to be adopted and managed by local authorities. Applications to vary such schemes must be made to the relevant local government.

In 1995 Parliament enacted the DFA, which provides for provincial development tribunals to be created and to approve or reject land use applications according to DFA provisions. The Province of Gauteng established the GDT, a tribunal which has authority under the DFA to order amendments to town planning schemes and to approve of new townships.

Issue

The fundamental question before the High Court was whether the local government sphere has the exclusive authority to amend town planning schemes and approve of new townships, or whether the Constitution allows for the simultaneous operation of the TPO and DFA.

The City's argument

The City's initial argument was that the relevant sections of the DFA do not allow the GDT to amend town planning schemes or to establish a township, but only to act in respect of projects under the Reconstruction and Development Programme.

On the other hand, the city contended, if the DFA does give such powers, the provisions to this effect are unconstitutional. This is because municipalities are the only sphere of government that may make decisions and by-laws regarding township schemes and rezoning. Central to the City's claim was that such activities fall under "municipal planning," an area that is a local government matter under Schedule 4(B) of the Constitution.

Finally, the City argued that it is constitutionally untenable and impractical for two organs of state to make these types of decisions at the same time.

Decision

The Court rejected all three grounds of challenge advanced by the City. After analysing various provisions of the DFA, the Court concluded that GDT decisions and orders legally amend existing town planning schemes administered by the City. Such modifications, the Court held, prevail over any provision to the contrary in any other law governing land development or land-use planning or zoning schemes. Furthermore, the DFA anticipates that a plurality of government organs may authorise land development and that such land use approvals may be in accordance with different legislation.

On the City's claim that the functions in question relate to "municipal planning" under the Constitution and are subject to the exclusive authority of local government, it was decided that such a position is unsupportable. This is because the City uses a provincial law, the TPO, to adopt, amend and implement town planning schemes rather than using its own by-laws.

The TPO and the disputed provisions in the DFA were determined to relate to the functional area of "urban and rural development" rather than to "municipal planning". The Court reasoned that because the TPO is provincial legislation it relates to urban development rather than to municipal planning:

If this were not so, it would be in conflict with the provisions of section 104 of the Constitution as that section empowers the Provincial Legislature to only pass legislation with regard to matters within a functional area listed in Schedule 4 and that would, in the ordinary sense

In light of the gaps in planning processes and the uncertainty regarding who exactly has authority over land use planning, there is an obvious and pressing need for a clarification in law. The time has come to bring the Land Use Management Bill to life and usher in a new and better co-ordinated era for land planning systems in South Africa.

and for purpose of the present applications, only refer to matters such as urban development and not municipal planning.

Since "urban and rural development" is a functional area of concurrent national and provincial legislative competence under Schedule 4A of the Constitution, and the province has already legislated accordingly, the provisions of the DFA could not be interpreted as unconstitutional.

It was determined that the very nature of concurrent jurisdiction anticipates the establishment of different organs of state to perform functions related to urban and rural development. The issue raised by the City about the practicality of multiple organs performing these functions simultaneously was not addressed.

The City's refusal to recognise the decisions and orders issued by the GDT was therefore found to be unlawful.

Comment

The rationale given for the tribunal's order to the City to amend its town planning scheme as falling into the category of "urban development" rather than "municipal planning" is questionable and lacks insightful analysis. By reasoning that because the relevant statutes are provincial and national, they must therefore relate to provincial and national powers, the Court avoided making a clear distinction between "urban development" and "municipal planning". This conclusion also evokes parliamentary rather than constitutional sovereignty, as it assumes that Parliament and the provinces always act within their competencies.

The decision barely skims over what the scope and content of municipal planning is. This begs the obvious question: if municipal planning does not include the authority to amend town planning schemes, then there remains very little substance to the term. This cannot be what the Constitution intended.

The Court offered only the explanation that land development objectives (LDOs) are "related to" municipal planning. Features of LDOs include the planning of settlement density, transportation, the integration of communities and land use control. These are to be set by local authorities and must be approved by the relevant MEC.

In practice, LDOs have been abandoned and replaced by the spatial development framework component of integrated development plans (IDPs). Although the decisions and orders of provincial development tribunals are legally constrained by LDOs, the law does not require them to be consistent with IDPs. This increases the potential for uncoordinated decision-making and impedes the effective administration of municipal planning.

In light of the gaps in planning processes and the uncertainty regarding who exactly has authority over land use planning, there is an obvious and pressing need for a clarification in law. The DFA, intended as an interim measure, is now 12 years old. It will be repealed once the Land Use Management Bill (LUMB), drafted by the Department of Land Affairs, is promulgated. The LUMB in its most recent incarnation (March 2007) restores the authority over land use planning squarely within the local government sphere. The roles of the three spheres of government are clarified by the LUMB and interference with municipal land use decisions is to be permissible only in very specific circumstances. The time has come to bring the LUMB to life and usher in a new and better-coordinated era for land use planning systems in South Africa.

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