



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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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)

Today, the Supreme Court of Appeal (SCA) dismissed with costs two appeals, 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 (the GMBL) and s 86 of the Emalahleni Municipal By-law on Spatial Planning and Land Use Management 2016 (the EBL) to be invalid and unconstitutional. The SCA further upheld with costs a cross-appeal brought by the respondents 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 costs awarded included the costs of two counsel.

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, were companies that intended to transfer or take transfer of a number of immovable properties situated within the municipal boundaries of the appellant municipalities. The municipalities 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 (transferor) 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.

The central issue in the appeal was the validity of the by-laws. The SCA found that the answer to this question required consideration of whether the by-laws were enacted within the legislative competence of municipalities as contemplated in s 156 of the Constitution. Accordingly, the issues on appeal were whether the impugned by-laws: (a) were unconstitutional and invalid, because they legislated on matters which fell 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) exceeded the functional area of 'municipal planning', in that they regulated the

transfer of property; and (c) were an incidental power as envisaged in s 156(5) of the Constitution.

The SCA found that the Spatial Planning and Land Use Management Act 16 of 2013 (the SPLUMA) was the framework legislation within which the municipal competence for municipal planning was exercised. The SPLUMA authorised the making of the by-laws and laid down the limits within which municipalities may legislate. Therefore, this power was to be exercised within the parameters so prescribed.

The SCA found that even though the by-laws, of which the impugned provisions formed part, dealt on their face with municipal planning, the impugned provisions themselves restricted the transfer and registration of ownership in immovable property and constituted an embargo on transfer unless their requirements had been fulfilled. Thus, the question to be answered was whether municipalities' legislative competence extended to regulating the transfer of properties.

The SCA held that the embargo on transfers strayed beyond municipal planning. As this enforcement mechanism in the by-laws was a restriction on transfer, these were not aspects of municipal planning, but matters pertaining to the transfer and registration of property that were regulated by the Deeds Registries Act 47 of 1937. The competence with regards to deeds registration (including registration of transfer of properties) was not a municipal function, for it was within the domain of national government. The SCA found that it was significant that although it afforded the municipality a wide discretion to invoke enforcement for non-compliance, the system of enforcement envisaged in s 32 of the SPLUMA did not provide for a restriction of the transfer of land, and so did not authorise the embargo.

The SCA held further that the restriction on transfer of land was not a necessary power incidental to land-use management, as enforcement mechanisms of its land-use scheme were already provided for in Chapter 9 of the by-laws. The registration of transfer of property was expressly regulated by the Deeds Registries Act and s 118 of the Systems Act. There was thus no room for an implied municipal power to regulate the registrar's statutory power to register the transfer of properties. The embargo therefore could not have been incidental to the effective enforcement of a land-use scheme and the impugned by-laws were invalid insofar as they imposed a mechanism which impermissibly regulated the transfer of property. They exceeded the legislative competence of the respective municipalities, and thus offended the principle of legality.

The SCA agreed with the high court's finding 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. This was because the by-laws sought in effect to 'amend' s 118 by adding to its terms. The SCA also agreed with the high court's finding that the impugned sections of the by-laws amounted to an arbitrary deprivation of property. In this regard, the SCA held that 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.

Lastly, the SCA found that no reasons were given in the high court's judgment for the order to suspend the declaration of invalidity for six months. The SCA held that in the absence of any such reasons for that deviation from the default position of setting

aside unconstitutional exercises of public power, that order was not competent. Thus, the suspension of the declaration of invalidity of the by-laws was set aside.

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