THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 489/2015

In the matter between:

MARK WILLIAM SHELTON	**FIRST APPELLANT**
JONATHAN ANDREW CAMPBELL	**SECOND APPELLANT**

and

EASTERN CAPE DEVELOPMENT TRIBUNAL	**FIRST RESPONDENT**
PA RIVER DEVELOPMENT COMPANY PROPRIETARY LIMITED	**SECOND RESPONDENT**
EASTERN CAPE DEVELOPMENT APPEAL TRIBUNAL	**THIRD RESPONDENT**

Neutral citation: *Shelton v Eastern Cape Development Tribunal* (489/2015) [2016] ZASCA 125 (26 September 2016)

Coram: Lewis, Wallis, Willis and Saldulker JJA and Potterill AJA

Heard: 23 August 2016

Delivered: 26 September 2016

Summary: Constitutional law – Practice – Construction of judgments and orders – Principles applicable – When Chapters V and VI of the Development Facilitation Act 67 of 1995 declared invalid, by Constitutional Court, declaration of invalidity suspended for 24 months on conditions – Suspension period expiring without enactment of remedial legislation – court order not granting tribunal power to decide application after expiry of suspension period – appeal upheld.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Mgxaji AJ sitting as court of first instance):

1 The appeal is upheld.

2 The costs are to be borne by the First Respondent.

3 The order of the court a quo is set aside and the following order is substituted in its place:

'(a) It is declared that the First Respondent had no jurisdiction under s 33 of the Development Facilitation Act 67 of 1995 to decide upon the Second Respondent's application [10/5/4/4] after 17 June 2012.

(b) The decision by the First Respondent to grant the establishment of land development on:

(i) Part/portion of the remainder of Erf 361, Port Alfred (to be known as the remainder of Erf 5513, Port Alfred); and

(ii) The remainder of Erf 642, Port Alfred (to be known as the remainder of Erf 5513, Port Alfred),

is set aside.

(c) The costs are to be borne by the First Respondent.'

JUDGMENT

Potterill AJA (Lewis, Wallis, Willis and Saldulker JJA concurring):

[1] Chapters V and VI of the Development Facilitation Act 67 of 1995 (DFA)[1] that empowered a provincial development tribunal to decide a land development application were declared constitutionally invalid by the Constitutional Court on 18 June 2010.[2] The invalidity was suspended for 24 months in order to enable remedial legislation to be passed. However, the Legislature did not, in the period of suspension, rectify the position or enact new legislation. The crux of this appeal is whether a development tribunal retained the power, after the expiry of the suspension period, and therefore at a time when the order of constitutional invalidity was operative, to determine an application lodged with it prior to the expiry of the suspension period. In this matter the second respondent, PA River Development Company (Pty) Ltd (PA River), lodged with the first respondent, the Eastern Cape Development Tribunal (the tribunal), on 15 June 2012, one working day before the expiry of the suspension order an application to develop land in Port Alfred. The two appellants, Mr Mark Shelton and Mr Jonathan Campbell (first and second appellant respectively), filed an objection to this application. The tribunal granted the application on 28 January 2013, some seven months after the period of suspension had expired.

[2] The appellants instituted review proceedings in the Eastern Cape High Court, Grahamstown for an order declaring that the tribunal had no jurisdiction or entitlement in law to consider and decide PA River's application after 17 June 2012. The appellants

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[1] The Act came into effect on 22 December 1995 and it was repealed in whole with effect from 1 July 2015 in terms of s 59 read with Schedule 3 of the Spatial Planning and Land Use Management Act 16 of 2013.

[2] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* [2010] ZACC 11; 2010 (6) SA 182 (CC) *(CC Judgment)*.

sought further relief which fell by the wayside. Mgxaji AJ found that the tribunal was empowered to decide the land development application despite the suspension period having expired, and accordingly dismissed the review application. It is against this order that the appellants, with leave of the court a quo, bring this appeal. Only the first respondent has opposed the appeal and I shall refer to it as the respondent.

[3] The determination of this appeal depends upon a proper interpretation of the suspension order of the Constitutional Court: to ascertain the manifest purpose of the order. To put it plainly, did the court intend that 17 June 2012 (the expiry date of the suspension order) would be the cut-off date and that no further decisions should be made in terms of the abovementioned constitutionally impugned chapters of the DFA? The court's intention is to be ascertained from the language of the order, which is to be interpreted on its terms and the court's reasons given as whole.[3]

[4] The DFA created provincial development tribunals. In terms of Chapters V and VI, these provincial development tribunals had the power to regulate land use within municipal areas. The powers conferred on the provincial development tribunals conflicted with the constitutional reservation of power to execute municipal planning to municipalities. This court found that to be in conflict with the Constitution,[4] in that it permitted provincial bodies to take on the function of municipal planning. This court accordingly declared Chapters V and VI of the DFA constitutionally invalid.[5] The declaration of invalidity was suspended for 18 months from the date of the order subject to the following suspension orders (para 50):

'*(a)* No development tribunal established under the Act may accept for consideration or consider any application for the grant or alteration of land use rights in a municipal area.

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[3] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) 298 (A) at 304E; *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd & others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13; *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd & others* [2015] ZACC 12; 2015 (5) SA 370 (CC) para 22; *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) para 29; *True Motives 84 (Pty) Ltd v Mahdi and another* [2009] ZASCA 4; 2009 (4) SA 153 (SCA).

[4] Sections 151 and 156 read with Schedule 4 part B and Schedule 5 part B of the Constitution of the Republic of South Africa, 1996. *Johannesburg Municipality v Gauteng Development Tribunal & others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) *(SCA judgment)* paras 5-14, where the legislative scheme is discussed.

[5] *SCA judgment* para 50.

(b) No development tribunal established under the Act may on its own initiative amend any measure that regulates or controls land use within a municipal area.'

[5] On 18 June 2010 the Constitutional Court confirmed the declaration of constitutional invalidity of this court.[6] It held that the declaration of invalidity must be suspended for a period to avoid a complete halt of land development, prejudicing prospective land developers, which in turn could negatively impact on the economic growth of the country.[7] It was in the interest of the administration of land use and good governance to suspend the order.[8] The Constitutional Court considered 24 months to be a reasonable period within which Parliament could enact new legislation or rectify the defects identified.[9] New legislation was however not enacted within the 24 months.

[6] The Constitutional Court set aside para 2 (the suspension conditions imposed by this court) and replaced it with the following order (para 95):

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

8. The suspension is subject to the following conditions:

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

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

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

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

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[6] *CC judgment* para 95
[7] *CC judgment* paras 74 and 79-81.
[8] *CC judgment* para 80 fn 7.
[9] *CC judgment* para 80.

[7] The Constitutional Court explained the setting aside of para 2 as being necessary on the basis of new evidence which had been placed before it by the *amici curiae* and the provincial departments of KwaZulu-Natal and Mpumalanga. This evidence was to the following effect. When the Interim Constitution[10] reconfigured the provinces, the former self-governing homelands and the 'independent' States of Transkei, Bophuthatswana, Venda and Ciskei became part of the new provinces. These areas were incorporated with their applicable laws regulating land administration. This resulted in fragmented pieces of legislation applicable to one area and the DFA was designed to address this problem.[11] The new evidence before the court was that in most municipalities where these ordinances applied, the municipalities lacked the capacity to exercise the powers contained therein.[12]

[8] Paragraph 2 of this court's order had the effect of precluding development tribunals from accepting fresh applications during the period of suspension. Paragraphs 8(*c*) and (*d*) of the CC order on the other hand precluded them from receiving such applications in relation to Johannesburg and eThekwini and indicated how pending applications in those areas were to be disposed of. Other development tribunals could receive fresh applications during the period of suspension. That leaves the question whether they were empowered in relation to such applications to deal with and determine them once the period of suspension was over and the relevant legislative provisions became constitutionally invalid.

[9] A declaration of invalidity of post-Constitution legislation has retrospective effect from the date on which the Act was enacted.[13] Suspension of the declaration means that the invalid law continues to apply during the period of suspension.[14] The Constitutional Court found it just and equitable in regard to the DFA not to order that the

[10] Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).
[11] In its long title, the DFA mentions as one of its purposes: 'to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses'.
[12] *CC judgment* paras 24 and 79.
[13] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC) paras 31 and 32.
[14] Ibid.

invalidity take immediate effect and therefore suspended the order for a generous period of 24 months for Parliament to enact new legislation or to correct the defects. It recognised that Parliament might not remedy the invalidity within two years and said the following in regard to the possible retrospectivity of the order of constitutional invalidity:[15]

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

Counsel for the respondent submitted that although the court only referred to approved applications it should be interpreted to embrace all applications submitted, including those not determined before the order of invalidity came into force, because the court did not set a cut-off date to receive new applications. This paragraph, however, did no more than to expressly apply the general principle that an order of invalidity should have no effect on matters which were finalised prior to the date of the order of invalidity coming into effect. It was expressly addressed to applications finalised before the expiry of the period of suspension, not the fate of applications not finalised by that date.

[10] We were urged to interpret the Constitutional Court's condition of suspension in 8*(a)* of the order as not only providing for the making, processing and adjudication of applications in the period of suspension but also for the adjudication of all outstanding applications after the expiry of the period of suspension. The condition of suspension in 8*(a)* ordered tribunals to uphold the municipalities' integrated-development plans, spatial-development frameworks and urban-development boundaries when determining applications for the grant or alteration of land-use rights. Paragraph 83 of the judgment set out the reason for this condition thus:

'The role played by these plans in the administration of land is important. They provide for, among other things, the alignment of resources utilised to supply basic services to local communities. There can be no doubt that any development undertaken within a municipal area affects the budget of the municipality concerned, particularly in the supply of services.'

[15] *CC judgment* para 85.

This provision was capable of applying to existing applications already before development tribunals at the time the Constitutional Court gave its judgment and also to applications lodged after that date because it deals only with the manner in which development tribunals were to resolve cases not whether they could continue to do so after the expiry of the period of suspension.

[11] The condition of suspension in para 8(*b*) of the order prohibited development tribunals from exercising the power in ss 33(2) and 51(2) of the DFA to exclude any by-law or Act of Parliament applicable to land. In para 84 of the CC judgment it was held that this power enabled development tribunals to intrude unnecessarily into the domain of the Legislature. Once again this provision was capable of being applied in relation to pending applications as well as new applications without indicating whether the latter was permissible. This too is neutral for the same reason as in para 10.

[12] Paragraph 8(*c*) of the order prohibited the development tribunals having jurisdiction in the areas constituting the City of Johannesburg Metropolitan Municipality and the eThekwini Municipality from accepting or determining any applications for the grant or alteration of land-use rights after the date of the order, that is, after 18 June 2010. Paragraph 8(*d*) made provision for the disposition of the applications in those areas that were pending prior to that date. The paragraph is relevant because it is the only one in the Constitutional Court's order that prohibits development tribunals from dealing with fresh applications during the period of suspension of invalidity. It was relied upon by counsel for the respondent in support of the argument that during that period development tribunals were entitled to receive and determine applications. That does not, however, address the problem occasioned by the period of suspension expiring when applications lodged during that period were as yet unresolved.

[13] Paragraphs 81 and 82 of the judgment provide the reasons for the orders in 8*(c)* and 8*(d)*. The tribunals in the two municipalities were barred from considering new land development applications because these two municipalities were authorised and had the capacity to deal with the planning powers. The court held it was just and equitable to

protect these municipalities from interference, but it was necessary for the affected tribunals to finalise all pending applications before them during the suspension period. The reason why these two municipalities were singled out was because evidence pertaining to land use was put before the court. Absence of information about the capacity of other municipalities is the reason why paragraphs 8*(c)* and 8*(d)* were not extended to include all tribunals.

[14] In summary, therefore, the Constitutional Court suspended the declaration of constitutional invalidity for two years. The court order permitted development tribunals to receive and dispose of applications during the period of suspension of its order of constitutional invalidity. It foresaw the possibility that Parliament might not pass remedial legislation within the period of suspension. In that event it specifically provided that applications already disposed of under Chapters V and VI of the DFA would not be rendered invalid as a result of the constitutional invalidity of those provisions. But it was silent on the position of applications lodged during the period of suspension but not determined during that period.

[15] The question is whether the appellants are correct in saying that, once the period of suspension passed, the development tribunals lost the power to deal with outstanding applications, or whether the respondents are correct in saying that the power to deal with such outstanding applications is to be implied in the order of the Constitutional Court. There was no evidence before us that the municipality in this matter did not have the capacity to deal with applications in respect of land falling within its jurisdiction and that therefore the tribunal should continue to determine matters. The difficulty is that the tribunal could not continue to determine the application after the period of suspension because the DFA was inconsistent with the Constitution. The tribunal's only lifeline was the period of suspension. The Constitutional Court extended the 18 month suspension period of this court to 24 months finding it a reasonable time-frame by which to rectify the identified problems. It therefore did not, in terms of the order, intend to cater for any determinations after the 24 months suspension period.

[16] What is clear is that tribunals in those two municipalities only had the capacity to determine applications, which were submitted before the date of the Constitutional Court's order, within the suspension period and there is nothing in the orders or reasons from which an intention can be inferred that other tribunals in other municipalities could, against constitutional principles of retrospectivity, determine applications after the period of suspension. In *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd & others,*[16] the Constitutional Court was also confronted with the question of the principles governing the operation of orders of constitutional invalidity that are suspended, where the suspension period passed without the enactment of remedial legislation. The court confirmed the default position that the law will be invalid from the moment it was promulgated unless varied by an order of court.[17] In this case there is no order varying the default position. There is nothing in the order that invites an interpretation that the Constitutional Court intended to vary the default position. If such an unusual order were intended, one would have expected the Constitutional Court to have expressed it in clear language setting out the circumstances which existed to justify the exercise of that unusual power.[18] This is especially so as a court cannot revive an invalid Act, but may only preserve its validity during the period of suspension.[19]

[17] Respondent's counsel relied on what he argued was a necessary implication from the fact that the order permitted development tribunals to receive fresh applications during the period of suspension of constitutional invalidity. However, the Constitutional Court was alive to the possibility that the period of suspension might pass without the enactment of remedial legislation. It dealt with that in para 85 of its judgment without providing that, in that event, all pending applications, whether lodged within the period of suspension or otherwise, should be determined by development tribunals. But since the relevant provisions were constitutionally invalid, such an implication is precluded.

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[16] [2015] ZACC 12; 2015 (5) SA 370 (CC)
[17] Paragraph 20.
[18] See *Minister for Justice and Constitutional Development v Nyathi & others* [2009] ZACC 29; 2010 (4) SA 567 (CC) para 26.
[19] *Ntuli* (above) para 30; *Ex parte Minister of Social Development & others* [2006] ZACC 3; 2006 (4) SA 309 (CC) paras 39-40.

This is fortified by the fact that a necessary implication can never be contrary to constitutional principles pertaining to invalidity; expiry of the suspension order renders the Act retrospectively invalid, subject to the reservation already dealt with in respect of determined applications. Counsel also sought to rely on s 12(2)*(c)* of the Interpretation Act 33 of 1957. He argued that PA River had acquired a right for its application to be determined and no Act must be interpreted retrospectively so as to take away or impair a vested right.[20] At best for PA River, however, it had a right during the period of suspension to lodge an application. The right was qualified by the fact that, after the expiry of the suspension period, the tribunal could not exercise powers declared to be unconstitutional.

[18] The lodging of the application, opportunistically one day before expiration of the suspension period, could not preserve the powers of the tribunal to decide the matter after the expiry of the suspension date. The tribunal should not have accepted an application one day before the expiry of the 24 months' suspension period as the application could not be decided within a day. After the Constitutional Court judgment, the Department of Rural Development and Land Reform issued a *Policy Statement*.[21] The official position regarding applications received in terms of the DFA before 17 June 2012 was set out in para 4.1, with 4.1(b) stating that

'applications received by development tribunals before 17 June 2012 will continue to be heard and determined by the tribunals even after 17 June 2012 as if the Constitutional Court had not declared invalid Chapters V and VI of the DFA'.

It was argued that the tribunal thus acted as advised. If the tribunal was relying on the *Policy Statement* to decide the matter, then it was ill-advised to do so because a policy statement cannot preserve an invalid Act.

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[20] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission & others* [1999] ZASCA 40; 1999 (4) SA 1 (SCA) para 12.

[21] *Statement by the Department of Rural Development and Land Reform on the Spatial Planning and Land Use Management Bill (SPLUMB) and the Constitutional Court Judgment in the Development Facilitation Act (DFA) case*, 22 March 2012 available on the Department of Rural Development and Land Reform's website at: http://www.ruraldevelopment.gov.za/news-room/media-statements/file/1041-statement-by-the-department-of-rural-development-and-land-reform-on-the-spatial-planning-and-land-use-management-bill-splumb-and-the-constitutional-court-judgment-in-the-development-facilitation-act-dfa-case (accessed on 7 September 2016).

[19] Parliament enacted the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) which came into operation on 1 July 2013, three years after the expiry of the suspension period. Section 59 of SPLUMA repealed the DFA in its entirety. The court below found that s 60(2) of SPLUMA entitled the tribunal to decide the matter. It provides:

'[a]ll applications, appeals or other matters pending before a tribunal established in terms of Section 15 of the [DFA] that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act.'

The tribunal could only, in terms of s 60(2) of SPLUMA, decide the matter if the tribunal acted lawfully in terms of the DFA. The reality is that the DFA was invalid when the tribunal took its decision and the transitional provisions of SPLUMA cannot be utilised to validate the decision.

[20] The tribunal derived its authority to decide PA River's application from the chapters that were declared invalid. Upon expiry of the suspension period, 17 June 2012, the tribunal no longer had the power to decide the application.

[21] In the result the following order is made:

1 The appeal is upheld.

2 The costs are to be borne by the First Respondent.

3 The order of the court a quo is set aside and the following order is substituted in its place:

'(a) It is declared that the First Respondent had no jurisdiction under s 33 of the Development Facilitation Act 67 of 1995 to decide upon the Second Respondent's application [10/5/4/4] after the expiry of the Constitutional Court's suspension order.

(b) The decision by the First Respondent to grant the establishment of land development on:

(i) Part/portion of the remainder of Erf 361, Port Alfred (to be known as the remainder of Erf 5513, Port Alfred); and

(ii) The remainder of Erf 642, Port Alfred (to be known as the remainder of Erf 5513, Port Alfred),

is set aside.

(c) The costs are to be borne by the First Respondent'

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S Potterill
Acting Judge of Appeal

APPEARANCES:

For the Appellants:	E A S Ford SC
Instructed by:	Rushmere Noach Inc, Port Elizabeth
	McIntyre & Van der Post, Bloemfontein
For the First Respondent:	T J M Paterson SC (with him N J Sandi)
Instructed by:	L G Nogaga Attorneys, Grahamstown
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