

SUMMARY OF THE JUDGMENT

BUILDING PLANS: APPEAL TO REVIEW BOARD UNCONSTITUTIONAL

City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others (CCT186/17) [2018] ZACC 15 (7 June 2018)

In terms of the National Building Regulations and Building Standards Act, a municipality is charged with the duty to approve or reject building plan applications in its jurisdiction. Since the Constitution further grants municipalities autonomy with regards to building regulations and municipal planning, another or 'higher' arm of government cannot usurp these powers. The question which arose here was whether the Review Board, established in terms of the aforementioned Act and at national government level, could validly adjudicate appeals against decisions of the municipality to approve plans? The Constitutional Court held that insofar as the Review Board adjudicated on objections, the municipality's powers was usurped, and the action unconstitutional. Going forward, the make-up of an appeals board will therefore have to be amended so as to retain the decision-making authority within the municipality.

The Judgment can be viewed [here](#).

FACTS

During June 2012, the City of Johannesburg Municipality ('the City') received an application for the erection of a cellular mast on a private property. Two owners of adjacent properties objected to the erection of the cellular mast, but the City granted approval in terms of its policy on the erection of cellular masts.

The City exercised this power in terms of the provisions of the National Building Regulations and Building Standards Act, 103 of 1977 (the Building Act) as well as section 156(1) of the Constitution. The latter confers specified powers on municipalities, as follows:

"A municipality has executive authority in respect of, and has the right to administer:

- a) *The local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and*
- b) *Any other matter assigned to it by national or provincial legislation."*

Part B of Schedule 4 of the Constitution lists functional areas that fall within the executive authority of municipalities. These include building regulations and municipal planning.

This means that matters relating to these two functional areas are subject to the exclusive executive power of municipalities.

The objectors were unhappy and took the City's decision on appeal to the National Building Regulations Review Board (the Review Board), as provided for in section 9 of the Building Act. Section 9 grants power to the Review Board – which is established by the Minister of Trade and Industry - to adjudicate an appeal made by an objector and to dismiss the appeal or to uphold it in whole or in part. The Review Board is an organ of state at national level, established in terms of the Building Act. As such, the review provisions provided for in section 9, had the effect of subjecting decisions of a municipality on matters of land use and building regulations, to an appeal by an organ of state at national level.

The City therefore objected to the referral of the matter to the Review Board as any pronouncement by the Board would have the effect of usurping powers that vested in the municipality, it argued. It stated further that the Constitution establishes a government that consists of three spheres: the national; provincial and the local sphere. While these spheres are distinct from one another, they are also interdependent and interrelated. Each sphere however enjoys a degree of autonomy to exercise its powers and perform its functions within its defined space. Each sphere had to respect the status, powers and functions of the other spheres and may not exercise functions of these spheres, except where the Constitution itself permits. Section 9, insofar as it allowed the City's powers to be usurped by the Review Board, therefore had to be declared unconstitutional.

HELD:

- Part B of Schedule 4 of the Constitution lists functional areas that fall within the executive authority of municipalities. These include building regulations and municipal planning. This meant that matters relating to these two functional areas are subject to the exclusive executive power of municipalities. When the City approved the building plans for the erection of the cellular mast, the City was exercising these powers.
- The Court ruled that it is impermissible for the national sphere to pass legislation (such as section 9, read with regulation 13 of the Building Act, which gives it power to exercise the executive authority of a municipality. While the national and provincial spheres may exercise their legislative and executive powers to enable municipalities to exercise their own powers and perform their own functions, they may not take over or arrogate to themselves and exercise the executive authority of a municipality.

For these reasons the Constitutional Court confirmed the order of the High Court, i.e. that section 9 of the Building Act was unconstitutional and therefore invalid, to the extent that it empowers the Board to exercise appellate powers over decisions of a municipality. The Court ruled that the declaration of invalidity will only operate prospectively, and that any pending appeals will be decided under section 9 of the Building Act.

With regards to the present appeal, the Court held that the decision of the City to grant the building permit to construct the cellular mast would stand.

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