CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 44/96

EAST ZULU MOTORS (PROPRIETARY) LIMITED	Applicant
versus	
EMPANGENI/NGWELEZANE TRANSITIONAL LOCAL COUNCIL	First Respondent
MIAJEE PROPERTY INVESTMENTS (PROPRIETARY) LIMITED	Second Respondent
MINISTER OF LOCAL GOVERNMENT AND HOUSING, KWAZULU-NATAL	Third Respondent
TOWN AND REGIONAL PLANNING COMMISSION, KWAZULU-NATAL	Fourth Respondent

Heard on: 20 May 1997

Decided on: 4 December 1997

JUDGMENT

MADALA J:

[1] This is an application for leave to appeal against part of the order of Thirion J, which was made on 21 August 1996 in the Natal Provincial Division (as it was then called), in the following terms:[1]

> "(a) It is declared that to the extent that section 47 bis C of the Town Planning Ordinance 27 of 1949 (Natal) does not accord a right of appeal to the Commission, to an objector who feels aggrieved by a decision of a local

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1 *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1996 (11) BCLR 1545 (N) at 1557C-E.

authority in terms of section 47 bis 4(a), section 47 bis C is inconsistent with the provisions of section 8 of the Constitution of South Africa Act 200 of 1993.

(b) In terms of the proviso to section 98(5) of Act 200 of 1993 the legislature is required to correct the said defect in Ordinance 27 of 1949 not later than 31st March 1997.

(c) Save as aforesaid the application is dismissed.

(d) I make no order as to costs save that the Third Respondent is ordered to pay the costs of the applicant."

It is against paragraph (c) of the order which refused the ancillary relief that the applicant wishes to appeal. The ancillary relief sought in this Court was an order declaring that:

"the decision of the First Respondent in deciding to proceed with the amendment of the Town Planning Scheme in the course of preparation by rezoning 60 Kuleka Extension 1, situate in the Borough of Empangeni, to 'service station' and all further steps taken by the First and Second Respondents pursuant to such decision be and are hereby set aside."

[2] The applicant owns and carries on the business of a motor garage and service station on certain immovable property known as Lot 66 Kuleka Extension 1 in the Borough of Empangeni/Ngwelezane. The first respondent is the Empangeni/Ngwelezane Transitional Local Council. The second respondent is the registered owner of Lot 60, also in Kuleka Extension 1. In 1994 an application was submitted by the second respondent for the rezoning of Lot 60 from "general industry" to a "service station" in terms of section 47bisB of the Town Planning Ordinance 27 of 1949 (Natal) ("the Ordinance"). The applicant opposed the second respondent's application and lodged a written objection

with the first respondent. The first respondent considered the application and the objection and resolved to grant the application. The applicant then challenged the constitutionality of section 47bisC(1)(a) read with section 47bisB(3)(b) of the Ordinance, and simultaneously sought to set aside the rezoning.

[3] On 12 December 1996 Thirion J granted a certificate in terms of rule 18(e) of the rules of the Constitutional Court. The applicant and the third respondent duly filed their applications for leave to appeal and to cross-appeal to this Court respectively. However, because its application for leave to cross-appeal was not filed within the time limits stipulated by the rules of the High Court, the third respondent was further obliged to seek condonation for the late filing of the application for leave to cross-appeal. Both the application for leave to appeal and the application for leave to cross-appeal, as well as the one for condonation were, by directions given by the President of the Constitutional Court, to have been heard together with the merits of the appeal.

[4] In the cross-appeal, the third respondent sought to challenge the appropriateness of paragraph (d) of the order made by Thirion J, which called upon it to pay the costs of the application. The third respondent referred to paragraph 1.5 of the Notice of Motion in the application in the court *a quo*, wherein the applicant had sought an order for costs in the following terms:

> "1.5 ordering the Third and Fourth Respondents to pay the costs of this application

> jointly and severally with the First and Second Respondents but only in the event of them opposing the said application."

The third respondent did not oppose the application. It was submitted in the application papers on behalf of the third respondent that the order for costs (as contained in paragraph (d)) was inconsistent with prayer 1.5 of the Notice of Motion. In my view this would have been a sound submission. However, the cross-appeal was subsequently withdrawn. There is no appeal against paragraphs (a) and (b) of Thirion J's order.

[5] In the court below, the applicant had raised the question of the constitutional validity of section 47bisC(1)(a) read with section 47bisB(3)(b) of the Ordinance. The two sections read thus:

Section 47bisC(1)(a):

> "Any applicant contemplated in section 47*bis*B(3)*(b)* or any applicant or objector contemplated in section 47*bis*B(4)*(b)* who feels aggrieved by a decision of a local authority taken in terms of section 47*bis*(2)*(a)* or section 47*bis*A(4) respectively, may within twenty-eight days of being notified of the decision of the local authority, lodge a written appeal, including the grounds thereof and the arguments and representations in support thereof, to the commission."

Section 47bisB(3)(b):

> "In the event of the local authority contemplated in paragraph (*a)* declining to proceed with a proposed rezoning, the local authority shall, by registered post, notify the applicant and all objectors and persons who have made representations, of its decision

> and shall advise them of any such applicant's right of appeal provided for in section 47*bis*C(1)*(a)*."

The applicant's contention was that these sections are in conflict with the provisions of section 8 of the interim Constitution and are therefore invalid, to the extent that an objector to a proposed rezoning of land, who feels aggrieved by a decision of the unexempted local authority, is not accorded a right of appeal to the Town and Regional Planning Commission ("the Commission"), whereas applicants in such applications are afforded a right of appeal. On the other hand in a rezoning application made to an exempted local authority both objectors and applicants are afforded a right of appeal.

[6] Mr Shaw, who appeared on behalf of the applicant, took us through the maze of numerous elaborate provisions of the Ordinance, the complexity of which has been compounded by the number of amendments, insertions, substitutions and deletions which have been made in the almost fifty years of its existence. I venture to say that it is long overdue for overhaul. The complexity of the provisions of the Ordinance renders their reading extremely difficult and would certainly confuse the ordinary person in the street who might have an interest in such provisions.[2]

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[2] Just as an aside, there are now two sections reflected as section 47bisA(1), each of which has a totally different content.

For purposes of this judgment the relevant section 47bisA(1) reads:

> "*(a)* Notwithstanding anything to the contrary in this Ordinance, the Administrator may, by notice in the *Gazette* and with effect from a date specified in the notice or, in the absence of any such date, from the date of publication of such notice, exempt any local authority wholly or partially from all or any of the provisions of subsections (1) to and including (5) of section 47*bis* whereupon the succeeding provisions of this section shall

apply to such local authority; provided that the Administrator may at any time withdraw such exemption.

(b) In considering whether or not to grant any exemption contemplated in paragraph *(a)*, or to withdraw such an exemption, the Administrator shall, inter alia, take into account -

(i) the level of competency of the planning staff or consultants in the employ, or at the disposal, of such local authority; and

(ii) whether there is a structure or development plan approved in terms of section 44(5) or (6), respectively."

[7] The Ordinance sets out the procedures which govern applications to local authorities for the rezoning of land. These procedures differ according to whether the local authority is exempted or unexempted. Thirion J set out these procedures succinctly in his judgment[3] and consequently I do not need to repeat them here.

[8] It was submitted on behalf of the applicant that the failure of the legislature to make provision for a right of appeal by an objector against a decision of an unexempted local authority to proceed with the rezoning scheme meant that the applicant and the objector were in effect being treated unequally. Thirion J was of the view that this was the position. He accordingly declared section 47bisC of the Ordinance to be inconsistent with the interim Constitution, but acting under section 98(5) of the said Constitution decided not to make the declaration of invalidity effective immediately. His reason for not doing so was that an immediate declaration of invalidity:[4]

> ". . . would be bound to cause great disruption in the handling of appeals by the

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3 *East Zulu* above n 1 at 1550F-1553C.

4 Id at 1557B-C.

> Commission. It would seem to me that I should in the interest of justice and good government, invoke the provisions of the proviso to section 98(5) of the Constitution and require the legislature of the Province of KwaZulu-Natal to correct the defect in section 47bisC of the Town Planning Ordinance 27 of 1949 (Natal) before 1 April 1997."

The applicant's complaint against this order was that the consequential relief that it had sought in the court *a quo* was not granted.

[9] The attitude of the applicant appears to have been that since the court *a quo* found in the applicant's favour on the constitutional validity of section 47bisC(1), it should automatically have granted the ancillary relief sought. But this is not the right approach to constitutional litigation. There are instances where a court has found for the claimant on the constitutional challenge but declined in the interests of justice and good government to grant any other relief.[5] In any event this Court stated in *S v Bhulwana*; *S v Gwadiso*[6] that if the interests of good government outweigh the interests of the individual litigants the court will not grant relief even to successful litigants. In this regard O'Regan

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5 *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC); *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC).

6 *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

J stated:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants (see *US v Johnson* 457 US 537 (1982); *Teague v Lane* 489 US 288 (1989)). On the other hand, as we stated in *S v Zuma* (at 43), we should be circumspect in exercising our powers under section 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process."

In order to grant leave to appeal to the applicant it will be necessary for this Court to be satisfied that the applicant has prospects of success on appeal. In the light of our recent judgments on equality jurisprudence,[7] Thirion J's decision on the unconstitutionality of section 47bisC and his order in terms of paragraphs (a) and (b) is open to doubt. I am appreciative of the fact that we had not yet delivered our judgments on equality at the time of his order, and consideration may have to be given to the correctness of the order of Thirion J in view of those judgments. For the reasons which follow I do not find it

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[7] *Harksen v Lane NO and Others* CCT 9/97, 7 October 1997, as yet unreported; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); and *Brink v Kitshoff NO* 1996 (4)

necessary, however, to do so in the present case.

[10] In the court *a quo* no order was sought declaring section 47bisB invalid, nor was it suggested in argument that if section 47bisC is invalid, the provisions of section 47bisB in terms of which the rezoning was granted should also be declared to be invalid. In any event it would not be competent for this Court to make such an order on appeal. Indeed if there was substance in such a contention and such an order were to be made, its consequences would be so far-reaching that a court would be more likely to put the legislature on terms to correct the defects in the legislation than to make a declaration of invalidity with immediate or retrospective effect.

[11] Even assuming that section 47bisC is invalid, a declaration to that effect would not result in the rezoning decision being set aside. Accordingly, as long as section 47bisB stands, so the validity of the rezoning would also stand. If only section 47bisC were to be amended with retrospective effect to provide for an appeal to the Commission by an objector against a decision of the local government and the applicant were then to prosecute an appeal successfully, only then could it obtain the consequential relief it now seeks.

SA 197 (CC); 1996 (6) BCLR 752 (CC).

[12] This difficulty was put to Mr Shaw during argument, and he acknowledged, correctly in my view, that the consequential relief sought by the applicant could not be granted on appeal. What the appellant could ask for on appeal, he suggested, would be an order directing the legislature to rectify the defect in the legislation by allowing a right of appeal to the objector. That is not an order which this Court would be likely to make in the circumstances of the present case even if it were to be of the view that section 47bisC should be declared to be unconstitutional. The consequences of such a declaration might be addressed by the legislature in various ways. It might amend section 47bisB(3) to provide for a different procedure for the processing of rezoning applications, it might decide to allow objectors a hearing before the Commission when it considers the application in terms of section 47bisB(3)(a) read with section 47bis(2) to (5), it might allow an appeal against a grant of a rezoning application to be noted to the Town Planning Appeals Board or some other body in view of the fact that the Commission will already have expressed an opinion on the issue, or it might require the Commission to express an opinion on all applications for rezoning, whether granted or not, and do away with the right of appeal which the aggrieved applicants have under section 47bisC. These and other possible ways of dealing with the problem are legislative choices to be made by the legislature and not this Court. In my view, the legislature needs to apply its mind to the problems arising from the application of this Ordinance.

[13] In the circumstances, and even if it is assumed in favour of the applicant that

section 47bisC is invalid, there are, in my view, no reasonable prospects that this Court would make an order on appeal which would be of any benefit to the applicant. I would therefore refuse leave to appeal.

ORDER

It is therefore ordered that the application for leave to appeal is dismissed.

Chaskalson P, Langa DP , Mokgoro J and Sachs J concur in the judgment of Madala J.

O'REGAN J:

[14] I have had the opportunity of reading the judgment prepared by Madala J in this matter. Although I agree with him that the application for leave to appeal should be refused, I do so for the reasons set out in this judgment which differ from those given by Madala J.

[15] The applicant owns and operates a petrol station in the borough of Empangeni/Ngwelezane in KwaZulu-Natal. The second respondent successfully applied for the rezoning of a nearby property to permit it to build and operate a petrol station on it. The applicant objected to the rezoning. Once its objection had failed, the applicant

launched an application for an order declaring that certain aspects of the procedure governing rezoning applications in the Town Planning Ordinance 27 of 1949 (Natal) (the "Ordinance") were unconstitutional and an interdict preventing the second respondent from acting in terms of the rezoning decision.

[16] The KwaZulu-Natal Provincial High Court found that the provisions of the Ordinance were indeed inconsistent with section 8 of the Constitution of the Republic of South Africa, 1993 Act 200 of 1993 (the "interim Constitution") and on 21 August 1996 it made an order to that effect. However, in terms of section 98(5) of the interim Constitution, it suspended the order of invalidity and placed the KwaZulu-Natal legislature on terms to rectify the unconstitutionality of the Ordinance not later than 31 March 1997. The court refused to grant any ancillary relief. The applicant appeals against the refusal of ancillary relief because although the applicant persuaded the court below that the relevant provisions of the Ordinance were unconstitutional, the applicant obtained no effective relief. The ancillary relief sought by the applicant in this Court is an order in the following terms:

> "[that] the decision of the First Respondent in deciding to proceed with the amendment of the Town Planning Scheme in the course of preparation by rezoning 60 Kuleka Extension 1, situate in the Borough of Empangeni, to 'service station' and all further steps taken by the First and Second Respondents pursuant to such decision be and are hereby set aside."

[17] In order to grant leave to appeal to the applicant, it will generally be necessary for this Court to be satisfied that the applicant has reasonable prospects of success on appeal. The applicant seeks leave to appeal against the refusal of ancillary relief by the court below. As the ancillary relief would only be granted if the primary ruling of unconstitutionality was correct, it is necessary for us to consider whether that finding was correct, even though there was no appeal against that finding. In this sense, the approach of the Court will be similar to that followed at common law where a costs order is the subject of an appeal, but where there is no appeal on the merits. In *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A), Watermeyer CJ held that the proper approach was as follows:

> "A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend upon whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). The form in which this rule is usually stated is that the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs. Now, discarding for the moment the idea of discretion, in an appeal against an order for costs the Court of appeal does not judge a party's right to his costs in the Court *a quo* by asking the question *was he the successful party* in that Court. It asks *ought he to have been* the successful party in the Court and decides the question of costs accordingly. It may or may not be necessary in such cases to deal with the order which was actually made on the merits; it may even be that no order on the merits was made in the Court *a quo* because by the time the matter came before that Court the necessity for an order was gone and the sole question was one of costs. This shows that the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not. In deciding whether or not the Court below made the correct order as to costs the reasons which prompted that Court to make its order must be

> examined and those reasons must be the actual reasons and no others.
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> If the actual reasons were in fact a mistaken view of the law or a mistaken view of the facts and a wrong order as to costs was made because of those wrong views, then a Court of appeal must correct the order as to costs if that order is appealable." (at 863)

See also *Du Plessis v Nienaber* 1948 (4) SA 293 (T), *Partridge Ltd v Buttar* 1953 (2) SA 415 (N) and *Koen v Baartman* 1974 (3) SA 419 (C) at 422C-H.

[18] It is necessary, therefore, to consider the merits of the applicant's constitutional challenge to the rezoning procedures contained in the Ordinance. The Ordinance distinguishes between exempted and non-exempted local authorities and provides different procedures for rezoning applications depending on whether the relevant property falls within the area of jurisdiction of an exempted or a non-exempted local authority. The first respondent, the Empangeni-Ngwelezane Transitional Local Council, is a non-exempted local authority. Crisply, the difference between the two procedures is that when a local authority is exempted by the Administrator in terms of section 47bisA(1)(a) of the Ordinance, that local authority may decide to approve an amendment to a town-planning scheme without first referring the proposal to the Town and Regional Planning Commission (the "Commission"). A non-exempted local authority may not approve such an amendment without first seeking the opinion of the Commission. The difference in powers of exempted and non-exempted local authorities requires different procedures.

[19] The procedure for an amendment to the town-planning scheme in the case of a non-exempted local authority is briefly as follows:

(a) the owner of land applies to the local authority where the land is situated for an amendment of the town-planning scheme in terms of section 47bisB(1);

(b) the local authority publishes the details of the application and calls for objections in terms of section 47bisB(2)(a) read with section 47bis(1)(a) and (b);

(c) within twelve weeks of the date for receipt of objections, the local authority decides whether or not to proceed with the proposed amendment with or without modification in terms of section 47bis(2)(a);

(d) an applicant aggrieved by the local authority's decision not to proceed in terms of section 47bis(2)(a) may appeal to the Commission in terms of section 47bisC(1)(a) read with section 47bisB(3)(b). Any decision of the Commission contrary to that of the local authority shall be given effect (section 47bisC(3) read with section 48(1)). An aggrieved objector has no right of appeal;

(e) if the local authority decides to proceed with the proposed amendment, it shall notify the Commission and give its reasons for its decision (section 47bis(2)(b));

(f) within eight weeks of receipt of the notification from the local authority, the Commission advises the local authority of its opinion on the proposed amendment (section 47bis(3)). The Commission may also exercise its powers contained in section 47bis(6)(a) which include powers to direct the local authority to further advertise the proposed amendment or to call a meeting to explain the proposed amendment;

(g) once it has received the opinion of the Commission, the local authority decides

whether to proceed with the proposed amendment. If the decision of the local authority is not in accordance with the Commission's opinion, the decision has no effect until the Commission indicates that it will not use its powers in terms of section 48(1) to compel the local authority to approve or refuse the proposed amendment (section 47bis(4) and (5));

(h) the local authority may appeal to the Administrator against any use of the Commission's powers in terms of section 48(1). Neither the applicant nor an objector has a right of appeal against the decision of the local authority.

[20] The procedure to be followed in the case of exempted local authorities is, in essence, the following:

(a) the owner of land applies to the local authority where the land is situated for an amendment of the town-planning scheme in terms of section 47bisB(1);

(b) the local authority publishes the details of the application and calls for objections in terms of section 47bisB(2)(b) read with section 47bisA(2);

(c) within 56 days of the closing date for objections, the local authority decides whether to adopt the amendment in terms of section 47bisA(4). If it decides to adopt an amendment, the local authority notifies the Administrator of its decision and the reasons for such decision in terms of section 47bisA(5);

(d) an applicant and any objector may appeal to the Commission in terms of section 47bisC(1)(a) read with section 47bisB(4)(b). The decision taken by the local

authority shall have no effect until the time for noting an appeal in terms of section 47bisC(1)(a) has lapsed or until any appeal lodged has been finalised.

[21] The applicant argued that the procedure to be followed to obtain an amendment of a town-planning scheme in the case of non-exempted local authorities was in breach of the equality clause of the interim Constitution on two grounds. An objector to a proposed amendment in a non-exempted local authority has no right of appeal against the preliminary decision of a local authority in terms of section 47bis(2) to proceed with a proposed amendment although an applicant who is aggrieved by the decision of the local authority not to proceed with the proposed amendment has a right of appeal in terms of section 47bisC(1). The second challenge relied on the fact that, in terms of section 47bis(4), neither an applicant nor an objector has a right of appeal against the decision of a non-exempted local authority to proceed with or refuse a proposed amendment. On the other hand, applicants and objectors aggrieved by a decision of an exempted local authority to proceed with or refuse a proposed amendment both have a right of appeal to the Commission in terms of section 47bisC(1). Before dealing with these challenges in detail, it is necessary to consider the proper approach to section 8 of the interim Constitution.

[22] The approach to be adopted to section 8 was summarised as follows by Goldstone J in *Harksen v Lane NO and Others* (CCT 9/97, 7 October 1997, as yet unreported, at

para 53):

"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

This passage summarised the jurisprudence of this Court developed in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); and *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[23] In each equality challenge the first question is whether the challenged provision or conduct differentiates between different categories of people. If it does, then it is necessary to consider whether the differentiation bears a rational connection to a legitimate government purpose. It is only this aspect of equality jurisprudence which is at issue in this case. The applicant did not argue, nor could it successfully have argued, that the differentiation under consideration here was differentiation which constituted discrimination as contemplated by section 8(2) of the interim Constitution. For the purposes of this case, therefore, it is only necessary to consider the first leg of equality analysis. If the differentiation should be shown to have no rational basis, then a breach of section 8(1) will have been established and the question of justification in terms of section 33(1) of the interim Constitution will arise. If however, the differentiation is held to have a rational basis, that will be the end of the matter.

[24] In *Prinsloo v Van der Linde and Another* (above), it was held that:

> "It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional

> State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation." (footnotes omitted) (at para 25)

The first question to be answered in any equality challenge, therefore, is whether the governmental action or regulation under consideration is rational. The question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose. In considering this question in the context of this case, I shall deal with the applicant's two challenges separately.

[25] In its first challenge, the applicant argues that in affording a right of appeal to applicants and not to objectors at the time when a local authority makes its preliminary decision as to whether to proceed with a proposed amendment to a town-planning scheme or not, the Ordinance unconstitutionally differentiates between applicants and objectors. Like Thirion J, I cannot accept this proposition. In the context of the procedure for amending town-planning schemes in non-exempted local authorities, the local authority's preliminary decision as to whether to proceed with the scheme or not affects applicants and objectors quite differently. If the local authority decides not to proceed with the

scheme, it would be, in effect, a final decision. It puts an end to the applicant's application, without the Commission ever having considered it, and in the absence of an appeal, there is nothing further that an applicant can do. The right of appeal permits an applicant to put its case before the Commission. If, on the other hand, the local authority decides to proceed with the application, that is not a final decision, but one which is subject to consideration by the Commission. The local authority must send to the Commission copies of all objections it has received. The Commission therefore will have an opportunity to consider the representations made by objectors. It seems to me that there is a rational reason for differentiating between applicants and objectors at this stage of the procedure. It is to afford applicants a remedy where a local authority refuses an application outright and in particular it affords them an opportunity of putting their application before the Commission. Objections will, as a matter of course, always be placed before the Commission before an application for an amendment is finally approved by a local authority. I agree, therefore, with the decision of Thirion J in this regard.

[26] The second ground upon which the applicant challenges the constitutionality of the Ordinance lies in the difference in procedure between exempted and non-exempted local authorities. When an exempted local authority makes a decision in respect of an application to amend the town-planning scheme, aggrieved applicants and objectors have a right of appeal to the Commission in terms of section 47bisC(1). This is the first time the Commission has sight of the application for amendment or of the objections to it. On

the other hand, when a non-exempted local authority which has referred an application to the Commission and received the Commission's opinion in terms of section 47bis(3) and (4), makes a decision in respect of the amendment, neither the applicant nor the objectors who are aggrieved by that decision have a right of appeal.

[27] The difference in the procedures applicable to exempted and non-exempted local authorities lies in the difference between the two types of local authorities. Section 47bisA(1) provides that an Administrator may, by notice in the provincial Gazette, exempt a local authority from the provisions of the Ordinance. Section 47bisA(1)(b) provides that in considering whether or not to grant such an exemption, the Administrator shall take into account the following factors:

> "(i) the level of competency of the planning staff or consultants in the employ, or at the disposal, of such local authority; and
> (ii) whether there is a structure or development plan approved in terms of section 44(5) or (6), respectively."

These factors indicate that the Administrator will exempt a local authority from certain provisions of the Ordinance where that local authority has a significant level of town-planning expertise available to it and where it has established guidelines for town planning in its area of jurisdiction. The question is whether the difference between the procedures applicable to exempted and non-exempted local authorities are rationally related to the differences between exempted and non-exempted local authorities.

[28] Thirion J held that the difference between the applicable procedures constituted a breach of section 8 of the interim Constitution because it did not have a reasonable basis. He based this conclusion on two grounds: first, he reasoned that although the Commission has to have sight of the application and objections in any given application and has to provide a non-exempted local authority with its opinion on the proposal, that opinion is not binding on the local authority which may act contrary to it. In my view, this line of reasoning fails to take adequate account of the fact that if the non-exempted local authority chooses a course of action not approved by the Commission, its decision will have no force and effect in terms of section 47bis(5) until the Commission indicates that it will not exercise its powers to compel the local authority to give effect to its opinion. No decision inconsistent with the opinion of the Commission can therefore be implemented without, in effect, the Commission's effective consent. An objector or applicant in the area of a non-exempted local authority knows that a decision will not be implemented without the effective approval of the Commission. The position of objectors and applicants in exempted local authorities is that the decision of the local authority will be implemented unless there is a successful appeal to the Commission. The fact that an objector or applicant has no right to appeal to the Commission in respect of decisions of a non-exempted local authority does not mean that the decision will be implemented against the opinion of the Commission. In my view, therefore, it is not correct to conclude that objectors and applicants in relation to non-exempted local authorities are deprived of the favourable view of the Commission.

[29] Thirion J's second reason for concluding that the procedure was in breach of section 8 was based on the fact that the proceedings before the Commission when its opinion is sought by a non-exempted local authority in terms of section 47bis(3) are not the same as the proceedings which occur on appeal (that is, in the case of exempted local authorities). In the former proceedings, there is no written argument and the Commission may receive information upon which the objectors have not had an opportunity to comment.

[30] There is no doubt that the Ordinance establishes different procedures for the amendment of town-planning schemes of exempted and non-exempted local authorities. There is no doubt too that the procedure followed by the Commission on appeal in terms of section 47bisC(1) in relation to decisions of exempted local authorities is not identical to the procedure whereby it gives an opinion to a non-exempted local authority in terms of section 47bis(3). The function of the Commission in the context of each procedure is different and it seems to me that the difference between the procedures is rationally connected to the different function of the Commission in the context of amendments to town-planning schemes applicable in the case of exempted and non-exempted local authorities. It is not sufficient for the applicant to persuade us that a better or more coherent procedure could have been established. It is for the applicant to show us that the differentiation between the procedures is not rational. That the applicant has failed to do.

[31] It is important to emphasise that the applicant based its case solely on section 8 of the interim Constitution. It did not in the court below, nor in this Court, seek to invoke the provisions of section 24 of the interim Constitution which entrenches the right to administrative justice.

[32] I have come to the conclusion, therefore, that Thirion J erred in finding section 47bisC of the Ordinance to be in breach of section 8 and therefore unconstitutional to the extent that it does not afford a right of appeal to an objector who is aggrieved by the decision of a local authority made in terms of section 47bis(4)(a) of the Ordinance. In the light of my conclusion, it is inevitable that the application for leave to appeal brought by the applicant cannot succeed. As indicated above, the applicant's right to ancillary relief is dependent upon the provisions of the Ordinance being found unconstitutional. As the applicant has failed to establish that those provisions are unconstitutional, there is no prospect that this Court would grant ancillary relief to the applicant in the circumstances. In the light of the conclusion that I have reached, it is not necessary to consider the question of whether, and in what circumstances, this Court would grant ancillary relief such as that sought by the applicant.

ACKERMANN J, GOLDSTONE J, KRIEGLER J:

[33] For the reasons given by Madala J in his judgment we agree that, on the assumption that section 47bisC of the Town Planning Ordinance 27 of 1949 (Natal) is constitutionally invalid, the applicant is not entitled to the consequential relief it seeks. For the reasons furnished by O'Regan J in her judgment we agree that section 47bisC is not inconsistent with section 8 of the interim Constitution and that the applicant is not entitled to the relief it seeks. We accordingly agree that the application for leave to appeal be dismissed.

For the applicant:	D J Shaw QC and G O van Niekerk instructed by Webber Wentzel Bowens.
For the Respondents:	C J Hartzenberg instructed by Loots Attorneys Pietermaritzburg.