IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 114/15

KZNHC CASE NO: 9645/14

In the matter between

TRONOX KZN SANDS (PTY) LTD	Applicant
and	
KWAZULU-NATAL PLANNING AND DEVELOPMENT APPEAL TRIBUNAL	First Respondent
MTUNZINI CONSERVANCY	Second Respondent
THE MTUNZINI FISH FARM (PTY) LTD	Third Respondent
UMLALAZI LOCAL MUNICIPALITY	Fourth Respondent
MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent

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TRONOX'S WRITTEN SUBMISSIONS

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INTRODUCTION

1 This is an application for confirmation of an order of constitutional invalidity in respect of section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 ("*PDA*"). The application raises squarely the extent to which provincial government may interfere with constitutionally entrenched municipal powers. In particular, this Court must determine whether a peremptory appeal against a municipal planning decision to a provincially appointed, funded and administered appellate body, namely the KwaZulu-Natal Planning and Development Appeal Tribunal ("*Appeal Tribunal*"), is constitutionally permissible.

2 The Applicant, Tronox, argues that section 45 of the PDA, which provides for an appeal from a municipal planning decision to the Appeal Tribunal, constitutes an impermissible interference by provincial government in land-use decisions, which are constitutionally allocated to the municipal sphere of government. Accordingly, Tronox seeks an order confirming the striking down of section 45.

3 Tronox also seeks confirmation of the order for consequential relief granted by the High Court, that the two pending appeals by the Second and Third Respondents (in terms of section 45 read with chapter 10 of the PDA), against the positive decision of the uMlalazi Municipality to approve Tronox's application for the vesting of land use rights for surface mining operations on the Remainder of Lot 91 and the Remainder of Portion 2 of Lot 91 uMlalazi 10011 Registration

Division GU, Province of KwaZulu-Natal, are declared to be unlawful and void *ab initio*. Tronox claims this substantive relief on the ground that it will suffer (and has already suffered) harm if it is forced to submit itself to an unconstitutional appeal process, both in terms of the time, money and energy wasted in this unconstitutional endeavour, the violation of the rule of law and the principle that a party should not be subjected to hearings before unconstitutional bodies.

4 This application, focussed on municipal planning appeals in KwaZulu-Natal, follows from two previous decisions of this Court, dealing with the interference by provincial bodies in municipal planning matters, in Gauteng and the Western Cape respectively:

4.1 In the first decision, **Gauteng Development Tribunal**,[1] this Court struck down chapters V and VI of the Development Facilitation Act 67 of 1995 which authorised provincial development tribunals, established in terms of that Act, to determine applications for the rezoning of land and establishment of townships – spheres of exclusive municipal competence. Jafta J emphasised that the Constitution allocates separate and distinct powers to each sphere of government, and national and provincial governments are not permitted by legislation to give themselves power to exercise executive

[1] **City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal** 2010 (9) BCLR 859 (CC) ("*Gauteng Development Tribunal*").

municipal powers or the right to administer municipal affairs.

4.2 In the second, **Habitat Council**,[2] Cameron J struck down section 44 of the Western Cape Land Use Planning Ordinance ("*LUPO*") on the ground that it provided for a provincially constituted appellate body to determine appeals against municipal land use decisions, thereby permitting provincial intervention in municipal planning decisions. This Court held unanimously that such intervention was not compatible with the Constitution's allocation of functions between local and provincial government.

5 In the current application, the High Court (per Lopes J) upheld Tronox's constitutional challenge to section 45 of the PDA. Lopes J refused to suspend the order, as the MEC had sought to persuade the High Court to do, and granted a further order that the two appeals by the Second and Third Respondents were void *ab initio*, subject to confirmation of the unconstitutionality of section 45 by this Court.

6 Before this Court, Tronox seeks confirmation of the High Court's order in its entirety.

7 The application for confirmation is opposed by the MEC, who has also launched a cross-appeal against the order of constitutional invalidity granted by the High

[2] **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others** 2014 (4) SA 437 (CC) ("*Habitat Council*").

Court.[3] The Fourth Respondent ("*uMlalazi Municipality*") abided the decision of the High Court[4] and again abides the decision of this Court.[5] It has filed an affidavit explaining that the fact that it notified the Second and Third Respondents of the appeal provisions in terms of the PDA "*does not make [the Municipality] 'complicit' in the appeal provisions of the Act.*" uMlalazi Municipality indicates that it has "*at all times adopted an entirely neutral stance towards the issue of whether the appeal provisions of the PDA are constitutional or not.*"[6]

8 The Second Respondent ("*Mtunzini Conservancy*") has not opposed the application for confirmation[7] and the Third Respondent ("*Mtunzini Fish Farm*") has also indicated that it will "*abide the Honourable Court's decision relating to section 45 of the KwaZulu-Natal Planning and Development Act, 2008 and will not participate in the hearing.*" Despite its notice to abide, the Mtunzini Fish Farm has sought to file an affidavit purporting to oppose the granting of substantive relief to Tronox.[8] We deal further below with the fact that this affidavit is not permitted by the Rules of this Court and falls to be disregarded in its entirety.

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3 Fifth Respondent's Notice of Appeal, Pleadings, p. 43.

4 Fourth Respondent's High Court Affidavit to Abide, Pleadings, p. 90.

5 Fourth Respondent's Notice and Affidavit to Abide, Notices, p. 5.

6 Fourth Respondent's Affidavit to Abide, paras 5 and 6, Notices, p. 5.

7 The Second Respondent did oppose the High Court Application (see Second Respondent's Notice of Opposition, Record, vol 1, p. 41 and Answering Affidavit, Record, vol 1, p. 43) but although it was represented at the hearing, did not make any submissions and elected to abide the High Court's decision (Transcript of the High Court proceedings, Record, vol 2, p. 115 at line 4).

8 Fish Farm Affidavit, Pleadings p. 64.

9 The argument that the establishment of the Appeal Tribunal is unconstitutional because its functions constitute provincial intervention in municipal land use decisions, which is incompatible with the Constitution's allocation of functions between local and provincial government, requires consideration and interpretation of the constitutional provisions relating to the allocation of governmental powers and the provisions of the PDA.

10 In what follows we deal with the factual matrix giving rise to this application, followed by the impugned provisions of the PDA and the constitutional context in which the challenge to the constitutionality of these sections must be determined. We set out jurisprudence relating to the exclusive competence of municipalities in respect of town planning decisions and show that the High Court's declaration of unconstitutionality cannot be faulted.

11 We then turn to the question of relief and show that the High Court was correct in finding that there is no basis for any suspension of the order of invalidity since no case has been made out as to why suspension would be necessary. We demonstrate that the Constitution requires that the Applicant's rights must be upheld and the two pending appeals declared unlawful. Finally we deal with two red herrings: namely the impact of SPLUMA on the current application and the admissibility of the Mtunzini Fish Farm affidavit.

BACKGROUND FACTS

12 To a large extent this application turns on a question of law and the facts are common cause.[9] As a result, we set out only the most salient facts giving rise to this application.

13 Tronox[10] is the global leader in the business of the production of titanium-based mineral commodities, which include feedstock to the pigment paint industry, low manganese pig iron, zircon and rutile.[11]

14 Tronox's operations are substantial and involved large capital investment in two mining areas in KwaZulu-Natal (Hillendale and Fairbreeze) and also in a central complex situate at Empangeni, which serves the Hillendale and Fairbreeze sites. The operation at Empangeni includes the establishment of a central processing complex, several different processing plants and two 36 megawatt electric arc furnaces. The enormous overall capital investment in the Tronox operation was justified by the availability of ore bodies at both the Hillendale and Fairbreeze sites. It is the latter site which forms the subject of this application.[12]

15 Around 2001, after obtaining all the relevant authorisations, Tronox commenced

[9] The MEC does not dispute the facts set out in Tronox's founding affidavit before the High Court. (See MEC's Answering Affidavit in the High Court, para 38, Record, vol 1, p. 69.)

[10] Tronox was previously named Exxaro Sands (Pty) Ltd, before that Ticor (Pty) ltd and before that Iscor Heavy Minerals (Pty) Ltd.

[11] Founding Affidavit, para 28, Record, Vol 1, p. 13.

[12] Founding Affidavit, para 29, Record, Vol 1, p. 14.

production at Hillendale. The Hillendale Mine life has now ended and it is critical that the Fairbreeze operation be brought into operation to justify the capital outlay and to ensure continuation of the operations, including employment. The approval of Tronox's PDA application by the uMlalazi Municipality is one of the requisite steps before production at Fairbreeze can commence.[13]

16 Various other related permits have been issued to the Applicant including an environmental authorisation, a water use licence and mineral rights licence.[14]

PDA Application

17 In October 2012, Tronox lodged an application with the uMlalazi Municipality in terms of Chapter 4 of the PDA, to vest land use rights for surface mining operations on a portion of the Fairbreeze site known as Fairbreeze C Extension ("FBCX"), namely Remainder of Lot 91 and the Remainder of Portion 3 of Lot 91. These land use rights are necessary to enable Tronox to carry out surface mining of titanium on the FBCX site, which was previously unzoned agricultural land.[15]

18 An amended PDA application was submitted in October 2013 as a result of

[13] Founding Affidavit, paras 30 and 31, Record, vol 1, p. 14.

[14] Founding Affidavit, para 34, Record, vol 1, p. 15.

[15] Founding Affidavit, paras 32-33, Record, vol 1, p. 15.

comments received on the first application.[16]

19 Both the Mtunzini Conservancy and the Mtunzini Fish Farm lodged objections to Tronox's PDA application, as did other parties.[17]

20 After considering the objections and the merits of the application, the uMlalazi Municipality issued a positive decision on 19 February 2014, in terms of which Tronox's application in terms of the PDA, to vest land use rights for surface mining operations on FBCX, was granted subject to certain conditions.[18]

21 The Mtunzini Conservancy and the Mtunzini Fish Farm launched appeals against this decision to the Appeal Tribunal in terms of section 45 of the PDA.[19]

22 The merits of these appeals are not relevant to this application; however the legal framework which governs the appeals is the subject of this constitutional challenge and it is to this framework which we now turn.

THE PDA

23 The preamble to the PDA sets out the framework of municipal decision making and the provincial appeal, stating:

[16] Founding Affidavit, para 35 Record Vol 1, p. 15.

[17] Founding Affidavit, para 36 and 37 Record vol 1, p. 15.

[18] Planning and Development Act Decision, Annexure A to the Founding Affidavit, Record, vol 1, p. 27.

[19] Founding Affidavit, para 40, Record, vol 1, p. 16.

> ***"Whereas planning and development decisions must be taken by local government, with appeals being resolved by an independent tribunal of experts appointed by the responsible Members of the Executive Council in consultation with the Executive Council of the Province..."***

24 Various sections of the PDA allow for the referral of decisions of a municipality to the Appeal Tribunal. Section 45, which is the section in issue in this application provides:

> ***"45. Appeal against municipality's decision on proposed development of land situated outside the area of a scheme***
> ***(1) A person who applied for the development of land situated outside the area of a scheme or who has lodged written comments in response to an invitation for public comment on a proposal to develop the land, who is aggrieved by the decision of the municipality, contemplated in section 43(1), may appeal against the municipality's decision to the Appeal Tribunal."***

25 The Appeal Tribunal is defined to mean the "*KwaZulu-Natal Planning and Development Appeal Tribunal established by section 100(1)*". The remainder of section 45 deals with the time limits for lodging the appeal and the consequences of not complying with it.

26 Section 45 is peremptory in that it is an internal remedy with which a party wishing to appeal a decision of the municipality would have to comply.[20] It is also a requirement which would have to be exhausted before judicial review could

[20] High Court judgment para 24, Pleadings, p. 32.

be lodged.[21]

27 In addition to section 45, there are various other sections in the PDA which give the Appeal Tribunal the power to hear and decide appeals against municipal planning decisions, namely:

27.1 Section 15 – dealing with appeals against the Municipality's decision on adoption, replacement or amendment of a scheme or a failure to decide on amendment schemes;

27.2 Section 28 – appeal against the Municipality's decision on proposed subdivision or consolidation of land;

27.3 Section 45 – appeal against the Municipality's decision on proposed development of land situated outside the area of a scheme;

27.4 Section 57 – appeal against municipality's decision relating to the phasing or cancellation of approved layout plans for subdivision of development of land;

27.5 Section 67 – appeal against municipality's decision on proposed alternation, suspension or deletion of restriction relating to land; and

27.6 Section 67*ter* of the Town Planning Ordinance 27 of 1949, to the extent to which it continues to be applied by the Appeals Tribunal, through transitional

[21] Section 7(1)(a) of the Promotion of Administrative Justice Act 3 of 2000 (unless there are "exceptional circumstances" present.)

provisions to the PDA, is also susceptible to failure.

28 While these sections are not directly challenged in this application, they will inevitably be affected by any order of constitutional invalidity which is made by this Court, as all of them take life force from the Appeals Tribunal established in Chapter 10 of the PDA.

29 Chapter 10 of the PDA (sections 100-134) is headed "*KwaZulu-Natal Planning and Development Appeal Tribunal*". It is divided into five parts and is 34 sections long. Chapter 10 sets out in detail the procedure for the establishment and operation of the Appeal Tribunal. Tronox had sought to challenge the constitutionality of chapter 10 of the PDA before the High Court but the High Court found that it was not necessary to determine this issue, and limited itself to a finding of unconstitutionality in respect of the operative section of the PDA (section 45).

30 In terms of Chapter 10, the MEC (as the Responsible Member of the Executive Council in terms of the PDA) has the following powers and responsibilities:

30.1 Appointing members for the Appeal Tribunal in terms of section 106(1);

30.2 Publishing the names of the persons appointed as members of the Appeal Tribunal in terms of section 106(2);

30.3 Keeping a register of the interests of members of the Appeal Tribunal

disclosed in terms of section 102 of the PDA;

30.4 Calling on interested persons who qualify as members of the Appeal Tribunal to apply for membership thereof in terms of section 105 (1) of the PDA);

30.5 Publishing names of those being considered for appointment as members of the Appeal Tribunal in terms of 105(2);

30.6 Determining the "*terms and conditions*" of the appointment of each member of the Appeal Tribunal as well as the remuneration which is paid to members of the Appeal Tribunal in terms of section 107;

30.7 Removing members of the Appeal Tribunal from Office in terms of section 108;

30.8 Designating a chairperson and Deputy Chairperson of the Appeal Tribunal in terms of section 109;

30.9 Providing "*administrative support*" and accommodation to the Members of the Tribunal in terms of section 112 of the PDA;

30.10 Funding the Appeal Tribunal in terms of section 112 of the PDA; and

30.11 Determining witness fees and the cost and penalty structure in terms of sections 131 and 132 of the PDA.

31 The Appeal Tribunal may, in terms of section 121(5), *inter alia,* uphold, alter, set

aside and replace the decision of a municipality. In terms of section 121(6) the Appeal Tribunal may even depart from a municipal Integrated Development Plan (IDP).

32 What is more, in terms of section 46, the municipal decision is suspended until the outcome of the appeal. The same applies with respect to the other appeal sections we identified earlier.[22] Finally, section 124 of the PDA makes it clear that a decision of the Appeal Tribunal is binding on all parties, including the municipality.

33 Given the aforegoing, we submit that there is no merit in the MEC's contention that the Appeal Tribunal is free of any direction or influence from Provincial Government. The nature of the MEC's involvement in the Appeal Tribunal extends to the appointment and removal of Appeal Tribunal members, her decisions regarding the management and remuneration of such members, the administrative support and funding which is provided to the Tribunal by the provincial government, her control over the appointment of registrars, deputy registrars and the provision of facilities to the Tribunal. This clearly amounts to direction or influence by the MEC. All of this is permissible through the PDA, a provincial Act.

[22] See sections 16, 29, 46, 58, 68 of the PDA and section 67*ter*(3) of the Town Planning Ordinance, all of which render the municipal decision inchoate until the outcome of the appeal to the Appeal Tribunal.

34 Furthermore, the MEC's argument regarding independence misses the point: Tronox's case is not that the Appeal Tribunal is the agent of the provincial government or that the MEC acts through the Appeal Tribunal to overrule municipal decisions. Rather, Tronox contends that the mere provision of a peremptory appellate body by the provincial government in terms of provincial legislation, no matter how independent or impartial that body may be, constitutes an unconstitutional intrusion into municipal powers.

35 We now turn to consider the constitutional framework within which the issues in this application are oriented.

RELEVANT CONSTITUTIONAL PROVISIONS

36 The question which confronted the High Court and which is before this Court for confirmation is how a provincially appointed body of unelected persons could have the power to override the decision of a municipality, which the municipality is entitled and indeed mandated to make in terms of the Constitution?[23]

37 In answering this question, this Court will have regard to the interlacing body of constitutional provisions governing the allocation of powers, responsibilities and competences of national, provincial and local government.

38 Section 40(1) of the Constitution provides that government "*is constituted as*

[23] High Court judgment para 19, Pleadings, p. 30.

national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated." Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space.

39 Section 41(1)(e) and (f) requires that:

> ***"All spheres of government and all organs of state within each sphere must-***
> ...
> ***(e) respect the constitutional status, institutions, powers and functions of government in other spheres;***
> ***(f) not assume any power or function except those conferred on them in terms of the Constitution."***

40 Section 151(4) provides that "*The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its power or perform its functions*".

41 The powers and functions of municipalities are set out in Chapter 7 of the Constitution. Section 156(1) provides:

> ***"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."***

42 Part B of Schedule 4 includes "***municipal planning***".

43 The Constitution requires national and provincial governments to take an active

role in empowering municipalities to exercise their constitutional mandates. In terms of section 154(1):

> ***"The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and to perform their functions."***

44 Furthermore, section 155(6)(b) requires that:

> ***"Each provincial government... by legislative or other measures must –***
> ...
> ***(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their affairs."***

45 This Court has repeatedly emphasised the need for each sphere of government to recognise and respect the constitutionally protected areas of competence – particularly regarding local government. The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere only under certain well-defined "*exceptional circumstances*", and even then only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.[24]

46 The powers which the provincial government has to oversee local government are

[24] **Gauteng Development Tribunal**, para 40.

"hands off", and province may not justify intrusion into municipal affairs by relying on these powers. In the **First Certification** case, this Court described those powers thus:[25]

> ***"In its various textual forms 'monitor' corresponds to 'observe', 'keep under review' and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control [local government] affairs, but has reference to other, broader powers of supervision and control. . . .***
> ***We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of [local government], beyond perhaps the power to measure or test at intervals [local government] compliance with national and provincial legislative directives or with the [Constitution] itself. What the [Constitution] seeks hereby to realise is a structure for [local government] that, on the one hand, reveals a concern for the autonomy and integrity of [local government] and prescribes a hands-off relationship between [local government] and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor [local government] functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy."***

47 In **Robertson and Another**,[26] this Court emphasised the need to respect municipal powers and functions holding:

> ***"The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, "inviolable and possesses the constitutional latitude within which to define and express its unique character" subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere***

[25] **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,** *1996* (4) SA 744 (CC) at paras 372-373.

[26] **City of Cape Town and Other v Robertson and Other** 2005 (2) SS 323 (CC) at para 60.

creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws."

48 In **Lagoonbay**,[27] a precursor to **Habitat Council**, where the constitutionality of LUPO was raised but not decided, Mhlantla AJ summarised the approach to challenges to provincial or national interference in municipal planning powers as follows:

"This Court's jurisprudence quite clearly establishes that:
(a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government;
(b) the constitutional vision of autonomous spheres of government must be preserved;
(c) while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on "what is appropriate to each sphere";
(d) "'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships"; and
(e) the provincial competence for "urban and rural development" is not wide enough to include powers that form part of "municipal planning".
At the very least there is therefore a strong case for concluding that, under the Constitution, the Provincial Minister was not competent to refuse the rezoning and subdivision applications."

49 We now turn to examine the **Gauteng Development Tribunal** and **Habitat**

[27] **Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others** 2014 (1) SA 521 (CC).

Council decisions in more detail.

Gauteng Development Tribunal

50 **Gauteng Development Tribunal** concerned a challenge to the constitutionality of Chapters V and VI of the Development Facilitation Act 67 of 1995 ("*DFA*") which authorised provincial development tribunals established in terms of the DFA to determine applications for the rezoning of land and the establishment of townships.[28] This Court was called upon to determine which sphere of government is entitled in terms of the Constitution to exercise the powers relating to the establishment of townships and the rezoning of land within the municipal area of the City.

51 The High Court had held that the Constitution does not bestow exclusive executive powers for planning on municipalities and concluded that the powers to rezone land and approve the establishment of townships fell outside the functional area of municipal planning. The Supreme Court of Appeal rejected these findings and held that, in the context of municipal functions, the word "planning" refers to the control and regulation of land use. On this interpretation, the Supreme Court of Appeal concluded that municipal planning includes the power to approve applications for the rezoning of land and the establishment of townships. By authorising tribunals to perform these functions, the DFA was held to be

[28] **Gauteng Development Tribunal**, para 1.

inconsistent with the Constitution and invalid.

52 This Court upheld the Supreme Court of Appeal's order of invalidity, holding that "*the Constitution confers different planning responsibilities on each of the three spheres of government in accordance with what is appropriate to each sphere.*"[29] Acknowledging that the functional areas allocated to the various spheres of government "*are not contained in hermetically sealed compartments*", Jafta J held that they nevertheless "*remain distinct from one another*" and that this is the position even in respect of functional areas that share the same wording like roads, planning, sport and others.[30] Having determined that Chapters V and VI of the DFA were inconsistent with the Constitution, Jafta J held that this "*leads inevitably to the confirmation of the order of invalidity granted by the Supreme Court of Appeal*".[31]

53 As regards remedy, this Court recognised the wide discretion on a court making a declaration of invalidity to formulate an order which is just and equitable not only to the litigants before it but also to those affected by the order.[32]

> ***"In circumstances where serious disruptions or dislocations in state administration would ensue if the order of invalidity takes immediate effect, section 172 explicitly authorises a court to suspend the order for***

[29] **Gauteng Development Tribunal**, para 53.

[30] **Gauteng Development Tribunal**, para 55.

[31] **Gauteng Development Tribunal**, para 71.

[32] **Gauteng Development Tribunal**, para 72.

a period determined by that court.[52] The effect of the suspension is that the invalid law continues to operate with full force and effect."

54 The evidence before this Court from all parties was that if the order of invalidity took immediate effect land development would come to a complete halt in most areas. This, the Court held, undoubtedly would not be in the interest of the administration of land use and good governance and may also have a negative impact on the economic growth of the country. However, the City of Johannesburg and the eThekwini Municipality, who were admitted as *amici curiae,* presented evidence that had sufficient capacity to exercise the powers under the DFA and should not be affected by the suspension of the order.

55 Accordingly, the Court granted a period of 24 months for Parliament to rectify the defects or enact new legislation, except as regards the eThekwini and Johannesburg Municipalities who were granted the specific relief which they sought.[33]

Habitat Council

56 **Habitat Council** concerned an application for confirmation of an order of the Western Cape High Court declaring section 44 of the Land Use Planning Ordinance (LUPO) unconstitutional and invalid.[34] Section 44 gave the Western

[33] **Gauteng Development Tribunal**, para 79.

[34] **Habitat Council**, para 1.

Cape provincial government the power to decide appeals against municipalities' planning decisions and to replace them with its own.

57 As in the current case, the question which confronted this Court was whether provincial intervention in particular municipal land use decisions is compatible with the Constitution's allocation of functions between local and provincial government.[35]

58 Under LUPO, the appellate body was a "*competent authority determined by the Premier*". It so happened that the Premier had designated the MEC as the competent body. However, the Constitutional Court made it clear that the identity of the "competent body" was not the issue, but the mere fact that the appellate body in respect of municipal planning decisions was appointed by Provincial Government rendered the appeal process unconstitutional.

59 The Provincial Minister conceded before the High Court that section 44 of LUPO was unconstitutional. The High Court concluded that the concession was correctly made, finding that the section is:[36]

> ***"...manifestly inconsistent with the Constitution to the extent that it not only permits appeals to the province against every decision made by a municipality in terms of LUPO, but also because it allows the [Provincial Minister] to replace every decision with his own decision."***

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[35] **Habitat Council**, para 1.

[36] **Habitat Council**, para 5.

60 However, the High Court reasoned that the province may legitimately exercise appellate powers over municipal planning decisions in two circumstances: namely when those powers impact on provincial overlapping competences or where it is necessary for the Province to exercise its powers of oversight. The High Court suspended its declaration of invalidity for 24 months to allow Province to enact a new regime and adopted an extensive reading in to keep the appellate powers of the Provincial Minister alive.

61 Before the Constitutional Court, none of the respondents (the developers) appeared, since they had already been granted effective relief by the High Court.

62 In confirmation proceedings, this Court held that the concession by the Provincial Minister that section 44 of LUPO was unconstitutional was "*correctly made.*"[37] Relying on **Lagoonbay** and **Gauteng Development Tribunal**, Cameron J held that:[38]

> ***"The provincial appellate capability impermissibly usurps the power of local authorities to manage 'municipal planning', intrudes on the autonomous sphere of authority the Constitution accords to municipalities and fails to recognise the distinctiveness of the municipal sphere... So the Provincial Minister was correct to concede that section 44's general appellate power is unconstitutional. Municipalities are responsible for zoning and subdivision decisions, and provinces are not".***

[37] **Habitat Council**, para 11.

[38] **Habitat Council**, para 13.

63 The reasons for this are clear: namely that municipalities are best suited to make those decisions since they face citizens insistent on delivery of government services and are the frontiers of service delivery. It was held that it is appropriate that they should be responsible for zoning and subdivision as these are localised decisions which should be based on information which is readily available to municipalities.[39]

64 In respect of the question whether there are any circumstances in which a province may permissibly hear appeals against a municipality's land-use decisions, Cameron J held that there were none, stating:[40]

> ***"This bogey must be slain. All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities. This follows from this Court's analysis of "municipal planning" in Gauteng Development Tribunal. Provincial and national government undoubtedly also have power over decisions so big, but their powers do not lie in vetoing zoning and subdivision decisions, or subjecting them to appeal. Instead, the provinces have coordinate powers to withhold or grant approvals of their own. It is therefore wrong to fear that a province would be powerless to stop the development of a "Sasol 4". That development would depend on myriad approvals, some of them provincial, some of them national."***

65 Dealing with the question of remedy, this Court rejected the reading in and suspension of the order which had been granted by the High Court, holding that:

65.1 There was no evidence placed before the Court that Province should be

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[39] **Habitat Council**, para 14.

[40] **Habitat Council**, para 19.

allowed to continue exercising unconstitutional powers as an interim measure;[41]

65.2 To suspend the declaration of invalidity would temporarily preserve an appellate power that is unconstitutional in its entirety;[42] and

65.3 The fact that some local authorities may lack planning capacity does not justify suspending the declaration of invalidity. Rather, it requires province to assist local government to develop the capacity required, holding:[43]

> ***"...Province must, as the Constitution envisages, "promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs". It cannot entail appellate oversight of zoning and subdivision decisions. And local government capacity problems do not justify this oversight being afforded on an interim basis. Instead, the Province is obliged to use its constitutional powers, which are not insubstantial, to assist municipalities to make planning decisions properly. That it can do by helping them increase their capacity. What legislative and other means the Province may use to do this is not before us and it is not necessary to express any view on it."***

66 Accordingly, this Court upheld the order of constitutional invalidity of section 44 of LUPO but held that such order was to be effective with immediate effect. This Court also did not interfere with the substantive relief which had been granted to the developers in the High Court in declaring the appeals in terms of the

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[41] **Habitat Council**, para 25.

[42] **Habitat Council**, para 26.

[43] **Habitat Council**, para 27.

unconstitutional section to be void *ab initio*.

MEC'S ARGUMENTS IN THIS COURT

67 Before the High Court and again before this Court, the MEC argues that section 45 of the PDA is not unconstitutional, essentially on two grounds:

67.1 First, she argues that the fact that the Appeal Tribunal is "*independent and impartial*"[44] from provincial control, which means that the present case is distinguishable from the **Habitat** decision wherein the "Administrator" appointed to decide the appeals was the MEC;

67.2 Secondly, she argues that the remedy of a town planning appeal is for the "*benefit of the lay litigants*" and forms a "*buffer between the municipal decision and a review application in the High Court*" and should thus be preserved.[45]

68 We submit that neither of these grounds has any merit.

69 In respect of the independence argument, the issue of whether or not the Appeal Tribunal has been performing its functions independently and impartially and whether the Appeal Tribunal is "wanted" by municipalities is entirely irrelevant to the question before this Court: namely whether the provincially constitutionally-

[44] MEC's Answering Affidavit, para 2, Pleadings, p. 44.

[45] MEC's Answering Affidavit, para 3, Pleadings, p. 44.

constituted Appeal Tribunal, deciding appeals against municipal planning decisions, is constitutionally permissible?

70 As **Habitat Council** makes clear, it is not the identity of the appellate decision maker which renders the appeal unconstitutional but the mere provision of a peremptory appeal in terms of provincial legislation, imposed on municipalities by provincial government.

71 Before the High Court, the MEC made an important concession in this regard, stating:[46]

> ***"It is not unconstitutional for the MEC to establish an Appeal Tribunal to provide municipalities with an internal appeal. Only the omission in the Act to give a municipality the choice to use the Appeal Tribunal to decide internal appeals might be unconstitutional.***
> ...
> ***It is only the provisions of section 45 which make such an appeal obligatory and involuntary [which] may be unconstitutional."***

72 As such, this case is on all fours with **Habitat Council** and **Gauteng Development Tribunal** to the extent that it involves impermissible provincial interference in municipal planning powers.

73 In respect of the submission that the town planning appeal is for the benefit of the lay litigants, this does not and could not justify the usurpation of municipal planning powers by provincial government. In terms of the constitutionally-

[46] MEC's Answering Affidavit, paras 22 and 24, Record vol 1, p. 63.

allocated powers, Municipalities may choose whether and on what terms to provide for an internal appeal against their town planning decisions, but such appeals must be heard by municipal bodies. As dealt with further below, there is no inherent right in the Constitution or PAJA to an internal appeal.

74 Further, although the MEC argues that the "appeal" process is to assist lay litigants, that submission is obviously one-sided: what of applicants such as Tronox who are entitled to lawful, reasonable and procedurally fair decision making and who are entitled to finality in the administrative decision making process and to legal certainty, all of which we submit are key elements of the Rule of Law? In this matter, the positive municipal decision granted to Tronox on 19 February 2014, has been sterilised by virtue of section 46 of the PDA. This equates to a period of 22 months by the time of the hearing of this case before this Court, with significant prejudice to Tronox's rights.

THE HIGH COURT JUDGMENT

75 Given the aforegoing, the conclusion of the High Court that section 45 of the PDA is unconstitutional, to the extent that it constitutes interference by the province in municipal planning decisions, by providing for an appeal from a municipal decision to an appellate body created by the provisions of Chapter 10 of the PDA, cannot be faulted.

76 As Lopes J held:[47]

> ***"[29] ... Whilst the procedure envisaged in Chapter 10 does not envisage a provincial power mero motu to overturn municipal decisions, it subjects the municipalities to the scrutiny of an appeal in circumstances where the municipality may not have resolved that an appeal process is appropriate or desirable.***
> ***[30] In my view, when Cameron J referred in paragraph 19 of Habitat to provincial governments not having the power to subject a municipality's veto of a zoning application to an appeal, this is what he had in mind. He did not qualify that statement by suggesting that he referred to provincial governments taking decisions of first instance, or just overruling decisions of municipalities."***

77 The High Court was also correct in finding that the provision of the appeal by provincial government amounts to an impermissible usurpation of the functions of a municipality and places the current application on the same footing as **Habitat Council**:[48]

> ***"The operation of s 45 and Chapter 10 in my view, usurps the functions of a municipality. It does not preserve the autonomy of municipalities, and constitutes provincial government interference with the sphere of the municipality's constitutional empowerment to make decisions relating to municipal planning. I am accordingly of the view that Habitat is indistinguishable from the circumstances of this matter."***

78 In respect of the relief to be granted the High Court, the High Court rejected the MEC's request for a suspension of the order. Lopes J held that not only had the MEC failed to establish an evidential foundation justifying a suspension as

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[47] High Court judgment, paras 29 and 30, Pleadings, p. 34.

[48] High Court judgment, para 33, Pleadings, p. 36.

required in terms of the decision of this Court in **Mistry**,[49] but heeded the warning of Cameron J in **Habitat Council** that to do so would temporarily preserve an appellate power that is unconstitutional in its entirety.[50]

79 Lopes J held that "*the reasons proffered for the suspension of the order I propose do not outweigh the considerations expressed by Cameron J as referred to above. I accordingly decline to suspend the operation of my declaration of invalidity*".[51]

80 Lopes J also made it clear that the only appeals which will be directly affected by his order were those of the Mtunzini Conservancy and the Mtunzini Fish Farm. In respect of the other appeals – the evidence being that there were twenty appeals pending before the Appeal Tribunal, eleven of which had not yet been set down for hearing – it was held that the parties to those appeals were not before Court and no order was made in respect of them.[52]

81 Again, the High Court's reasoning in respect of the relief granted cannot be faulted and it is to the question of relief which we now turn.

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[49] **Mistry v Interim Medical and Dental Council of South Africa and Others** 1998 (4) SA 1127 (CC) at para 37.

[50] **Habitat Council** paras 26 and 27.

[51] High Court judgment, para 43, Pleadings, p. 40.

[52] High Court judgment, para 44, Pleadings, p. 40.

RELIEF

82 Section 172(1)(a) of the Constitution provides that a court declaring any law to be invalid must do so to the extent of its inconsistency with the Constitution. There is no discretion in this regard and the invalidity follows automatically from the finding of unconstitutionality. In terms of this section, Tronox seeks an order confirming the High Court's striking down of section 45 of the PDA with immediate effect on the grounds set out herein.

There are no grounds for suspending the order

83 Before the High Court, the MEC sought an order suspending the declaration of invalidity for a period of two years. However, neither the MEC nor the Mtunzini Conservancy (which filed an opposing affidavit but did not make any submissions at the hearing) presented any evidence or made our any case that an immediate declaration of constitutional invalidity would result in chaos or disorder.[53] Furthermore, neither of these Respondents denied that an order of immediate invalidity would not leave aggrieved parties without a remedy – an objector may still take the decision on judicial review and an applicant still has an appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000.

84 Again before this Court, the MEC again requests an order suspending the order of

[53] Tronox's Replying Affidavit, para 14, Record, vol 1, p. 74.

only reason advanced by the MEC for the request for suspension was the following statement in the MEC's Answering Affidavit: "*This period will ensure a seamless transition of legality as oppose[d] to chaos) and provide the KwaZulu-Natal Legislature with an opportunity to correct any defects in the 2014 PDB, so that it may be constitutionally compliant and consistent with SPLUMA.*"[68]

93 Lopes J rejected this unsubstantiated submission, holding that the "*reasons proffered for the suspension of the order I propose do not outweigh the considerations expressed by Cameron J... I accordingly decline to suspend the operation of my declaration of invalidity.*"[69]

94 In the present instance:

94.1 Tronox is entitled to appropriate or effective relief in the form of an order declaring the pending appeals of the Mtunzini Conservancy and Mtunzini Fish Farm to be void *ab initio*;

94.2 None of the respondents has made out a case for suspension of the order sought or for a just and equitable remedy to be crafted by this Court;

94.3 The order sought will not leave aggrieved parties without a remedy;

94.4 The applicant's evidence that it will suffer (and has suffered) harm if it is

[68] Answering Affidavit, para 36, Record, vol 1, p. 68.

[69] High Court judgment, para 43, Pleadings, p. 40.

forced to submit itself to an unconstitutional appeal process both in terms of the time, money and energy wasted in this unconstitutional endeavour, the delay occasioned by the automatic suspension of the positive decision by Umlalazi Municipality, and the violation of the rule of law and the principle that a party should not be subjected to hearings before unconstitutional bodies is uncontested.

95 Accordingly, the MEC's request for a suspension should be refused.

Vindication of the Constitution / Effective Relief

96 Closely linked to the question whether the declaration of invalidity should be suspended is the question of consequential relief which Tronox claims – namely that the two pending appeals against the positive decision of the uMlalazi Municipality be declared void *ab initio*.

97 The unlawfulness of these appeals is a natural consequence of the declaration of invalidity and, if the order is not suspended, would flow in the ordinary course from Tronox's success in this application. It also flows from Tronox's right to be granted effective or appropriate relief.

98 The starting point in the analysis of relief is the constitutional requirement that conduct which is unconstitutional must be set aside. Furthermore, once a constitutional breach is established, a court is "*mandated to grant appropriate*

relief".[70]

99 In **Fose**,[71] this Court stated:

> ***"[i]n our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced."***

100 To this, this Court added in **Mvumvu**[72] that *"constitutional breaches ... must be redressed effectively, by, where possible, vindicating the infringed rights fully*".

101 In this case, the "effective remedy" is to grant the substantive relief which Tronox claims – namely a declaration that the two pending appeals by the Mtunzini Conservancy and Mtunzini Fish Farm are void *ab initio*.

102 On the other hand, a suspension of the order sought, or a refusal to grant the substantive relief sought will not provide effective relief to Tronox.

103 However, even if this honourable Court is persuaded to grant a suspension of the declaration of invalidity, the Applicant will argue that it is in any event entitled to effective consequential relief in respect of its claims.

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[70] **President of the Republic of South Africa and Others v Modderklip Boerdery (Pty)** Ltd 2004 (6) SA 40 (SCA) at para 18, confirmed **President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd** 2005 (5) SA 3 (CC) at para 53.

[71] **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) at para 69.

[72] **Mvumvu and Others v Minister for Transport and Another**2011 (2) SA 473 (CC) at para 48.

104 Regarding effective relief, the courts have repeatedly recognised the importance of affording successful litigants effective substantive (or consequential) relief in order to give a declaration of invalidity practical effect for the applicant.[73]

105 As Ackermann J reasoned in **Fose:**[74]

> ***"This Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. ..."***

106 For the Applicant, "effective relief" means not having their authorisation applications adjudicated by an unconstitutional appeal body. It also means that they are entitled to finality in administrative decision making and legal certainty, which we submit are critical components of the Rule of Law. This is particularly so in this case, where the uMlalazi municipality has sought to defend its decision on appeal and which would, by itself, have grave difficulty reversing its positive decision without lawful authority, in the light of the *functus officio* doctrine, which recognises principles of administrative certainty and fairness.[75]

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[73] **S v Bhulwana** 1996 (1) SA 388 (CC), where the Constitutional Court held: *"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 individual litigants that the Court will not grant relief to successful litigants."*

[74] **Fose**, para 69.

[75] **Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another** 2014 (3) SA 251 (SCA) at paras 23-25. *See also* Hoexter, *Administrative Law in South Africa*, 2ed., Juta, 2012, at page 278 ("Application of the *Functus Officio* doctrine").

107 Effective relief is an important feature of constitutional adjudication. In **Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality**, the Supreme Court of Appeal held:[76]

> ***'. . . though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in Fose v Minister of Safety and Security) "without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced":'***

108 It was pointed out in the replying affidavit in the High Court that neither the MEC nor the Conservancy engaged in their answering affidavits with the fact that, if the application for the declaration of constitutional invalidity is successful, the Applicant, as the party who has brought the challenge to Court is entitled to effective consequential relief. Nor has this issue been dealt with by the MEC before this Court.

109 In the premises, even if this Court should grant a just and equitable remedy suspending the declaration of invalidity for a period (which it will be argued is in any event not justified), then the Court should not hesitate to exclude from that suspension the two pending appeals in respect of Tronox. This will ensure that Tronox is granted the consequential relief to which it is entitled upon succeeding in declaring the impugned section of the PDA unconstitutional.

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[76] **Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality** 2007 (6) SA 511 (SCA), para 17.

110 We turn now to deal with two red herrings in this application – the first is the reliance by the MEC on SPLUMA which Tronox submits is entirely irrelevant to the present application and the second is the Mtunzini Fish Farm's affidavit, which is not properly before this Court and falls to be ignored.

RED HERRINGS

SPLUMA

111 The MEC suggests for the first time, in her answering affidavit before this Court, that the constitutionality of section 45 can be "*saved by a reading in which is now appropriate because of the enactment of a national Act, the Spatial Planning and Land Use Management Act No 16 of 2013 ('SPLUMA') on 1st July 2015.*"[77] She proposes an amendment to section 45 "*with a connection to SPLUMA*" with the following underlined words "read in" to the section:

> ***"A person who applied for the development of land situated outside the area of a scheme or has lodged written comments in response to an invitation for public comment on a proposal to develop the land, who is aggrieved by the decision of the municipality contemplated in section 43(1) may, subject to the provisions of section 51 of the Spatial Planning and Land Use Management Act No 16 of 2013, appeal against the municipality's decision to the Appeal Tribunal as the municipality's appeal authority contemplated in section 51 aforesaid."***

112 The MEC explains that section 51 provides for an internal appeal to the executive authority of the municipality or, as an alternative, allows the municipality to

[77] MEC's Answering Affidavit, para 19, Appeal Record p. 57.

authorise a body or institution outside the municipality or in a manner regulated in terms of provincial legislation to assume the obligations of an appeal authority.[78]

113 The MEC seeks to suggest that it is permissible for municipalities to "delegate" an appeal from their own decisions to an appeal tribunal established in terms of SPLUMA. It is, at best, questionable from a constitutional perspective whether this form of "delegation" or more likely "assignment of powers" between levels of government is permissible.[79] As the High Court hinted at para 36 of the judgment:

> ***"That a municipality, of its own volition, refers a 'municipal planning' decision to an independent body on appeal, may, however, in itself be unconstitutional because the municipality is enjoined to deal with these matters itself."***

114 However, this is not a matter which this Court need address in this application.

115 The MEC did not ask for a reading in before the High Court,[80] and has for the first time sought to suggest before this Court that the unconstitutionality of section 45 can be saved by a reading in in terms of SPLUMA.

116 The MEC's argument in this regard appears to be based upon the flawed assumption that objectors have a right to an internal appeal and that an internal

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[78] MEC's Answering Affidavit, para 20.6, Appeal Record p. 59.

[79] **Executive Council, Western Cape Legislature v President of RSA** 1995 (4) SA 877 (CC) at para 173.

[80] High Court judgment, para 38, Pleadings, p. 38.

appeal is required to be provided (either by the Municipality or Province). This is not so. By the time that a decision has been made by the Municipality in respect of a planning application under the PDA, *audi alteram partem* has already taken place. Section 33 of the Constitution does not confer a right to an internal appeal; neither does the Promotion of Administrative Justice Act 3 of 2000 guarantee an internal appeal. There is simply no right to *audi* upon *audi*.

117 In the premises, not only is the application of SPLUMA of dubious constitutionality, it is also entirely unnecessary to "rescue" the constitutionality of the section. If section 45 is struck down through the confirmation of the High Court's order, the resulting PDA will not be unconstitutional because it no longer provides for an internal appeal mechanism. Decisions will continue to be made in accordance with constitutionally sanctioned municipal powers as well as in accordance with provincial norms and standards and the other criteria set out in the PDA, which in the case of section 45 decisions, include the criteria in section 42 of the PDA.

118 As set out above, there are alternative remedies which would be open to dissatisfied parties under the PDA (including a judicial review) and they have no right to the provision of an internal appeal.

The Mtunzini Fish Farm affidavit

119 The Mtunzini Fish Farm played no part in the proceedings before the High Court.

It did not oppose the application; nor did it file any affidavits. Again before this Court, the Mtunzini Fish Farm abides the decision of the Court.

120 However, on 30 July 2015, the Mtunzini Fish Farm, purported to file an affidavit in this matter.[81] It put this affidavit up ostensibly upon the basis that this Court could "in its discretion" accept the affidavit or not. In its Directions dated 28 August 2015, the Chief Justice asked the parties to deal in their written submissions with the admissibility of this affidavit.

121 Tronox's position is that the Mtunzini Fish Farm Affidavit is not properly before the Court and is inadmissible. It should be disregarded in its entirety.

122 In its affidavit, the Mtunzini Fish Farm states:[82]

> ***"I wish to advise that the Third Respondent, the MFF, will abide the decision if the Constitutional Court but I wish to express how the MFF will be affected, if the order made under subparagraph (iii) [declaring the pending appeals by the Second and Third Respondents to be unlawful and void ab initio] is confirmed as it stands."***

123 Then, notwithstanding its decision not to oppose the confirmation proceedings and to abide the decision if this Court and its assertion that it has "*no wish to engage in the interpretation of the validity of section 45*", the Mtunzini Fish Farm proceeds to make submissions concerning the appropriate remedy which this

[81] Mtunzini Fish Farm Affidavit, Pleadings, p. 64.

[82] Mtunzini Fish Farm Affidavit, para 3, Pleadings, p. 66.

Court ought to grant following from the declaration of invalidity.

124 Essentially, the Mtunzini Fish Farm argues that it would suffer prejudice if the consequential relief sought by Tronox is granted (and its appeal is declared void *ab initio*) because it would be "*deprived of [its] right to appeal*".[83] It then proceeds to set out various "*reasons why this Honourable Court should apply its remedial powers to achieve a just and equitable result*".

125 As set out above, this is not only based on a fundamental misconception about the right to administrative justice – there is no "right to appeal" in either the Constitution or PAJA – but it also fails to recognise Tronox's established right to a remedy once it succeeds in having section 45 of the PDA declared unconstitutional.

126 The arguments raised by the Mtunzini Fish Farm, of course, give no attention to the position of Tronox, which has suffered and continues to suffer harm, and which is entitled to lawful, reasonable and procedurally fair administrative action. Tronox is also entitled to finality in the administrative process and to legal certainty, all of which are components of the founding constitutional principle – the Rule of Law.

127 The arguments belatedly raised by the Mtunzini Fish Farm ought properly to have

[83] Mtunzini Fish Farm Affidavit, para 7, Pleadings, p. 68.

been raised in the High Court, and not now, in circumstances where Tronox was unable to deal with them in evidence or argument, nor could the court *a quo* deal with these submissions.

128 This Court's rules are clear about the filing of affidavits: Rule 16(2) applies to persons who wish to appeal against a finding of constitutional invalidity and requires:

> ***A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.***

129 The Mtunzini Fish Farm did not give notice of its intention to appeal against the order of Lopes J. On the contrary, it has indicated that it abides the decision of this Court. We respectfully submit that, at best, the affidavit is a misguided but impermissible attempt to influence the outcome of the case and, at worst, is tantamount to an abuse of court process. As such, the affidavit of the Mtunzini Fish Farm is not properly before the Court and should not be taken into account in the determination of the issues at stake in this application.

CONCLUSION

130 Tronox accordingly seeks an order confirming the order of the High Court and a dismissal of the MEC's appeal, both with the costs of two counsel.

ANDREA A GABRIEL SC

SARAH PUDIFIN-JONES

Chambers, Durban
25 SEPTEMBER 2015

CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 114/15

In the matter between:

TRONOX KZN SANDS (PTY) LTD	Applicant
and	
KWAZULU-NATAL PLANNING AND DEVELOPMENT APPEAL TRIBUNAL	First Respondent
MTUNZINI CONSERVANCY	Second Respondent
MTUNZINI FISH FARM (PTY) LTD	Third Respondent
UMLALAZI LOCAL MUNICIPALITY	Fourth Respondent
MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent

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THE MTUNZINI FISH FARM (PTY) LTD 'S WRITTEN SUBMISSIONS

INTRODUCTION

1.

The Mtunzini Fish Farm (Pty) Ltd ("The MFF") represented by Gavin Stuart Carter interprets the Honourable Chief Justice's directions, dated 28 August 2015 as including it, The MMF, to also submit argument relating to the admission of the affidavit dated 30 July 2015 into the proceedings, notwithstanding that it is not formally before the Court. If this is not the case, the MMF leaves the admissibility of the affidavit in the hands of the Court, and the following submission is to be ignored.

2.

The Applicant, Tronox KZN Sands (Pty) Ltd ("Tronox"), seeks an order declaring sections 45 and the entirety of Chapter 10 (sections 100-134) of The Kwazulu-Natal Planning and Development Act 6 of 2008 ("PDA") to be unconstitutional and invalid.

3.

The Applicant also seeks substantive relief in the form of an order that the two pending appeals by the Second and Third Respondents are declared to be void *ab initio.*

4.

MFF records herein why the affidavit should be admitted, including why it has not participated in the hearings.

5.

It responds to Tronox's other submissions as to why the affidavit should not be admitted.

6.

Insofar as it is necessary to submit written submissions as to the content of the affidavit, this is also included herein.

WHY THE AFFIDAVIT SHOULD BE ADMITTED

7.

MFF accepts the submission by the Applicant that the High Court review was the appropriate forum to raise these issues. As stated in its affidavit, MFF did not participate in the High Court hearing as it was not in a financial position to do so, as is the case now. It also anticipated that the submissions made by the Fifth Respondent would cover the concerns of the Third (and Second) Respondent, as to the consequential relief sought, and that the relief would have included an order that the affected Appeals would remain alive and that a potential order of invalidity would be suspended allowing those Appeals to be disposed of. This turned out not to be the case.

8.

Prior to the High Court hearing the MFF did cause a letter to be issued to the parties stating that it would abide the High Court's decision as it related to the validity of the impugned provisions PDA and again recorded its concerns relating to the prejudice that would be suffered in the event that the Third and Second Respondents right to an Appeal be removed. It is unclear as to whether the contents of this letter found its way to those arguing the matter in Court. It was not sent to the Registrar.

9.

The relief sought by the Applicant is accepted by the Third Respondent as being consequential to a declaration of invalidity. However, an alternative consideration, as described in its affidavit, is available and has been submitted for the purposes of assisting the Court in its consideration and not for the purposes of opposition.

10.

It is agreed that the submission of this affidavit does not fall squarely within the Rules of the Court. MFF is not an *amicus*, as it is cited as a Respondent. The MFF, by the submission of this affidavit, has no intention of abusing the process of the Court and apologizes to the Court and the parties if it is perceived as such. It may be misguided, but it remains of the view that this Honorable Court has the discretion and power to deal with the affidavit as it deems fit with the input of the Applicant and the other Respondents.

RESPONSE TO TRONOX' OTHER SUBMISSIONS ON THE AFFIDAVIT

11.

Tronox opposes the admission of the affidavit and MFF's proposal to its consequential relief on three grounds:

a) Finality;

b) Prejudice; and

c) Unconstitutionality.

12.

Ironically enough if finality is what is of concern to the Applicant, if the appeals procedure had not been interdicted as the Applicant had caused, this appeal may

have been finalized during or about July 2014 when the matter was originally set down for hearing.

13.

The Applicant complains of prejudice that it is suffering from the delays, yet does not take into account the equal, if not greater prejudice the MFF has suffered by being subjected to continuous legal challenges that they have been forced to enter into in order to protect its existing facility; the uncertainty as to the continuing viability of its enterprise that has been developed over many years due to the threat of the proposed mining; and the prejudice that it will suffer if the Applicant is allowed to continue without the grounds of appeal being addressed - i.e. the water quality assessments that have not been undertaken and the resultant water quality changes that will be to the detriment of the MFF.

14.

The MFF's ground of appeal relates to a physical and mechanical issue, and not a question of law, that could have and should have been resolved outside of these processes. Never did the MFF contemplate that its concern over its water quality would be embroiled in the Constitutional Court over a matter of legal jurisdiction. Tronox has not engaged constructively with the MFF - preferring to take it all the way to the Constitutional Court. This after many other legal administrative challenges which, to a degree, were accessible to the MFF.

15.

Tronox is not opposing the validity of the impugned provisions on the moral high ground of good law, but rather to exploit a possible error in jurisdiction to its benefit and to the detriment of others. It has taken every possible legal resource that is available to achieve this.

16.

The alleged unconstitutional situation that Tronox faces is the possibility of appearing before an appeals' forum that may be unconstitutionally constituted. The constitutional rights of Gavin Carter and the MFF that will be encroached upon are, *inter alia,* the rights to equality, occupation, access to justice, and environmental rights. Section 36 provides this Court with the wherewithal to determine when it is justifiable to encroach upon another's rights taking both party's rights and circumstances into account. And this is what the MFF has asked the Court to consider.

17.

As such the MFF respectfully requests that its affidavit be admitted and the submissions therein be considered.

THE CONTENT OF THE AFFIDAVIT: RELEVANT FACTS

18.

The relevant facts that the MFF wishes to place before the Court goes to the prejudice that it will suffer if the relief sought declaring the appeals void *ab initiio* is granted; why and how this is unconstitutional and why and how that can be mitigated by this Honourable Court in considering alternative options. This is recorded in its affidavit specifically at paragraphs 5-11. These facts have not hereto fore been placed before any hearing. To the extent necessary they are summarized below.

19.

It has always been contended, and clearly illustrated, that the proposed mine will impact negatively on the MFF, the original of which was first developed over twenty years ago. The MFF's development of the pre-existing fish farm into the only marine

aquaculture facility of its kind in KZN (and included in the President of South Africa's Phakiso Project) commenced in 2008. The mine's activity will impact on the water quality upon which this substantial aquaculture facility relies.

20.

The MFF finds itself in a position whereby its legitimate right, or at least, expectation to an appeal has been removed through no fault of its own but by a potential error in the drafting and interpretation of legislation. It is submitted that judicial notice can be taken that the drafters (and municipalities) at all times, past, present and in terms of future applications intended a right of appeal to the planning decisions.[1] The current impugned law has simply and regrettably, potentially placed the right in the wrong forum. It does not make the right wrong, it makes the forum potentially wrong.

21.

Should the Constitutional Court declare the two appeals void *ab initio,* it will lead to an inequitable result. [2] This will be contrary to the Constitution and the Promotion of Administrative Justice Act, 2000.

22.

The MFF accepts the default position of retrospectivity when a provision of a law is declared invalid. However in considering the impacts that may result from the declaration of invalidity of any law, Section 172(1)(b)[3] provides the court with the

[1] In this regard reference is made to the Town Planning Ordinance No. 27 of 1949 the KZN PDA and now The Spatial Planning and Land Use Management Act,No.16 of 2013 (commencing on 1 July 2015), as well as in past, present and proposed future legislation in other provinces.

[2] For the two appellants and and potentially other appeals that are still pending. The judgment refers to the lack of retrospectivity as it relates to appeal decisions already taken but is silent on any other pending appeals currently before the KZN Appeals Tribunal.

[3] Section 172. Powers of courts in constitutional matters
(1)When deciding a constitutional matter within its power, a court -
(a)must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b)may make any order that is just and equitable, including -
(i)an order limiting the retrospective effect of the declaration of invalidity; and

remedial powers "*to make any order that is just and equitable"* in the circumstances *"including an order limiting the effective of the declaration of invalidity".*

23.

The interim Constitution did not contain the "just and equitable" provision. Instead it allowed for the suspension of validity, where the striking down of many old pre-constitutional laws would have resulted in chaotic conditions if the decisions taken under those invalid provisions would also have been struck out *ab initio.*[4]

24.

The final Constitution does not make this distinction, but Section 172(1)(b) does recognise that in some instances, even if post constitutional, there are circumstances where justice and equity must prevail, and the power to regulate the consequences of the invalidity subsists. Under the final Constitution Respondents do not have to establish the potential for chaotic conditions and legislative vacuums in order for the court to vary the retrospectivity of an order of invalidity - as long as it is just and equitable for the court to do so. This constitutes a wide power and can be utilised for numerous reasons, including the effect that an order may have on the administration of justice. The court must clearly contextualise this in its judgment.[5]

25.

The Court needs to take cognisance that the harm that may attach to the two Respondents will be inequitable and disproportionate to the declaration of invalidity, and may use its tempering power to mitigate against this in terms of its retrospective result.

(ii)an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[4] Section 98(6) as confirmed in *Executive Counsel, Western Cape legislative, and others vs President of the Republic of South Africa and others* [1995] ZACC8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (Executive Counsel) at para 107.

[5] *Cross Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12 at para 25 and 26.

26.

The reasons why this Honourable Court should apply its remedial powers to achieve a just and equitable result are as follows:

a. For time immemorial, up until the High Court hearing, applicants and affected parties have had the right to an internal appeal in respect of planning matters. MFF and Mtunzini Conservancy and all other potential appellants have had this legitimate expectation.

b. The Umlalazi Municipality (who effectively is the aggrieved party insofar as its powers are ostensibly being encroached upon) reinforced this legitimate expectation by confirming its acceptance of the PDA appeals tribunal as the authorised appeals tribunal to its decision, directing the Second and Third Respondent to it as its executive appeals tribunal.

c. The Umlalazi Municipality took a decision, contrary to its professional registered town planner's recommendation, with the knowledge that the objectors had an internal remedy on appeal. Its decision may have been different or conditional had this not been the case.

d. A review to the High Court is not an equivalent process to an internal appeal. The remedy of an internal appeal is more cost effective and readily accessible. It is a step that the courts insist is utilised in lieu of, and prior to, resorting to the courts. It is a wide appeal, granting the appeal authority more investigative powers on the merits of the case. A review is limited to the actions of the decision-maker in terms of Section 6 of PAJA.

e. The Second and Third Respondents' appeals are not trifling as the Applicant averred at court. The merits of the appeals were not deliberated at court and all Respondents deserve equal treatment and justice before the law without being pre-judged. The rights of the Applicant cannot prevail over the rights of the Respondents merely because the Applicant is a large mining company who wishes to force the mining prior to having all its rights in place.

f. The Respondents will be deprived of an appeal under both the KZN PDA, as well as under the new planning dispensation governed by the Spatial Planning and Land Use Management Act No.16 of 2013 ("SPLUMA") (commenced on 1 July 2015), as the application was not brought under the latter Act.

g. The use of the courts remedial powers in this instance will not result in a situation that will perpetuate an ongoing invalid circumstance with the resultant consequences. It will merely render an equitable result for the two Appellants.

h. The MFF accepts the principle of finality in litigation however in terms of Section 173 of the Constitution the court has the inherent power to protect and regulate its own process, and to develop the common law, taking into account the interest of justice. In terms of this section the court has the power to depart from the general rule of finality.[6] The list of where a court regulates its own processes is not exhaustive and includes situations where it was necessary to address accessory or consequential matters which were seemly overlooked or inadvertently admitted or where the full implications of the order were not previously apparent.[7]

ALTERNATIVE RELIEF

[6] As confirmed in *Cross Border Road Transport Agency vs Central African Road Services (Pty) Ltd and Others* [2015] ZACC 12 at para 39 and 40
[7] *ID at para 40*

27.

The alternative order then may be that the order be suspended as it relates to the Second and Third Respondents' appeals for such period as the appeals may reasonably be heard by the KZN PDA Appeals Tribunal.

28.

Alternatively that the Constitutional Court uses its remedial powers in determining that the MFF (and Mtunzini Conservancy) has a right to an appeal before the Executive Authority of the Municipality as the appeal authority in terms Section 51 (2) of SPLUMBA[8], read with the transitional provisions under section 60[9] of that Act.

29.

Further in the alternative that the KZN PDA Appeals Authority is the appeals authority under Section 51(6)[10] for the purposes of disposing of these two appeals. This in any event is what was originally envisaged and accepted by the Umlalazi Municipality.[11]

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[8] Section 51. Internal appeals
"(1)A person whose rights are affected by a decision taken by a municipal planning tribunal may appeal against the decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.
(2)The municipal manager must within a prescribed period submit the appeal to the executive authority of the municipality as their appeal authority."

[9] Section 60.Transitional provisions
"(1) The repeal of laws referred to in section 59 or by a provincial legislator in relation to provincial or municipal planning does not affect the validity of anything done in terms of that legislation;
(2) (a)All applications, appeals or other matters pending before a tribunal established in terms of section 15 of the Development Facilitation Act, 1995 (Act No. 67 of 1995) at the commencement of this Act that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act.
(b) A reference to a tribunal in terms of section 15 of the Development Facilitation Act, 1995 must for the purposes of deciding or otherwise disposing of any application, appeal all other matters pending before a tribunal at the commencement of this Act must be construed as a reference to a local or metropolitan municipality.
(c)References to a designated officer and the registrar in terms of the Development Facilitation Act, 1995 must for the purposes of deciding or otherwise disposing of any application, appeal all other matters pending before a tribunal at the commencement of this Act must be construed as a reference to an official of a local or metropolitan municipality designated by such municipality to perform such function. "

[10] Section 51
"(6) A municipality may, in the place of its executive authority, authorise that a body or an institution outside of the municipality or in a manner regulated in terms of the provincial legislation, assume the obligations of an appeal authority in terms of this section."

[11] As confirmed in the affidavit of the Municipal Manager dated 14 July 2015.

30.

This will place these two appeals in the same position as those other appeals that have been finalised under the KZN PDA Appeals Tribunal that are not to be affected by the retrospectivity of the declaration of invalidity of section 45 of the KZN PDA.[12]

CONCLUSION

31.

The Third Respondent regrets and apologizes to the Court that it is not in a position to be able to more formally present its submissions to the Court by way of briefing counsel. It does not intend to argue the submissions.

32.

The MFF respectively requests that this Honourable Court:

(a) admits the affidavit of Gavin Stuart Carter on behalf of the MFF;

(b) considers the contents of the affidavit; and

(c) provides consequential relief that is just and equitable.

GAVIN STUART CARTER

FOR THE MTUNZINI FISH FARM (PTY) LTD

MTUNZINI, KWAZULU-NATAL.

ALDINE ARMSTRONG ATTORNEYS

359 CURRIE ROAD, DURBAN.

[12] In terms of paragraph (iv) of the Court Order.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTION HILL

CCT CASE NO : 114/2015

KZNHC CASE NO. : 9645/14

In the matter between:

TRONOX KZN SANDS (PTY) LTD. **APPLICANT**

and

KWAZULU-NATAL PLANNING AND DEVELOPMENT APPEAL TRIBUNAL **FIRST RESPONDENT**

MTUNZINI CONSERVANCY **SECOND RESPONDENT**

THE MTUNZINI FISH FARM (PTY) LTD. **THIRD RESPONDENT**

UMLALAZI LOCAL MUNICIPALITY **FOURTH RESPONDENT**

MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **FIFTH RESPONDENT**

FIFTH RESPONDENT'S WRITTEN ARGUMENT

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1. **INTRODUCTION**

1.1. Tronox KZN Sands (Pty) Ltd as Applicant ("Tronox") applied for and was granted the following order by the KwaZulu-Natal High Court, Pietermaritzburg :-

"(i) Section 45 of the KwaZulu-Natal Planning and Development Act, 2008 is hereby declared to be unconstitutional to the extent that it constitutes interference by the province in municipal planning decisions by providing for an appeal from a municipal Appeal Tribunal, created by the provisions of Chapter 10 of the Act.

(ii) Pending the confirmation by the Constitutional Court in terms of Section 172 (2) (a) of the Constitution of the Republic of South Africa 1996 of (i) above, the hearing of the appeals pending in terms of Section 45 by the Mtunzini Conservancy and the Mtunzini Fish Farms (Pty) Ltd in respect of the decision of the Umlalazi Municipality to approve the land-use rights for surface mining operations on the Remainder of Lot 91 and the Remainder of

Portion 3 of Lot 91, Umlalazi 1011 Registration Division GU, Province of KwaZulu-Natal, are suspended.

(iii) In the event of the Constitutional Court confirming the declaration of invalidity in terms of paragraphs (i) above, the two appeals referred to in (ii) above are declared to be unlawful and void ***ab initio***.

(iv) Paragraph (i) above shall not be applicable to any final decisions of the KwaZulu-Natal Planning and Development Appeal Tribunal made prior to the date of this order.

(v) The Fifth Respondent be and is hereby directed to pay the costs of this application, such costs to include costs consequent upon the employment of two counsel, and on that basis the costs reserved for decision of this court by Madondo J on the 21st July 2014."

1.2. The full judgment is contained at pages 164 – 184 of the Record.

1.3. Tronox has applied, in terms of Section 172 (2)(d) of the Constitution, Section 8(1)B of the Constitutional Court Complementary Act 13 of 1995[1] and Rule 16 of the Constitutional Court Rules for a confirmation order of paragraphs (i) to (v) of the High Court Judgment[2] (hereinafter referred to as the Tronox Judgment) and costs.

1.4. There are before this Court :-

A record of two volumes ("the Record")

A Pleadings volume ("the Pleadings")

A Notices Volume ("the Notices")

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1 This should be a reference to Section 15 of the Superior Courts Act 10 of 2013, but no issue is made hereof

2 Page 2 of the Pleadings

1.5. Fifth Respondent ("the MEC") has lodged a Notice of Appeal[3] and an answering (opposing) affidavit to Tronox's application for a confirmation order.[4]

1.6. Third Respondent, the Mtunzini Fish Farm (Pty) Ltd ("the Fish Farm") filed a letter to abide[5] and an affidavit.[6]

1.7. Fourth Respondent ("Umlalazi Municipality") filed a "notice to abide"[7] and a "clarifying affidavit".[8]

1.8. In this argument the MEC argues :-

1.8.1. That the appeal provided in terms of Section 45 (and Sections 15, 28, 57 and 67) of the KwaZulu-Natal Planning and Development Act 6 of 2008 ("PDA") does not offend the Constitution of the Republic of South Africa, 1996, as interpreted by the decisions of this Court or the main principle established therein.

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[3] Pleadings : pages 43 - 49
[4] Pleadings : pages 50 – 63
Notices : pages 1 -3
[5] Notices : pages 11 - 12
[6] Pleadings : pages 64 - 73
[7] Notices : pages 5 - 7
[8] Notices : pages 8 - 10

1.8.2. The impugned appeal process is in respect of and to a completely independent and impartial body. The provision of an appeal to the Appeal Tribunal, established in Chapter 10 of the PDA, does not constitute provincial government interference with “municipal planning” or the usurping of a municipal function.

1.8.3. There was no interference with the functioning of the relevant municipality, which was instrumental in setting up the appeal; factually there was no interference.

1.8.4. Alternatively, and in the event that the provision of an appeal to the Appeal Tribunal is unconstitutional, it is contended that an order be granted in terms of Section 172 (1)(b) of the Constitution in terms of which the declaration of invalidity is not retrospective **and** is suspended for a period of two years.

1.8.5. The role of the Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”) may be considered as the National Legislation in respect of which the PDA, as Provincial Legislation, may be interpreted.

2. THE CONSTITUTIONAL SCHEME

2.1. Municipal Planning as a functional area has been bedevilled by a re-ordering of legislative instruments to ensure the constitutional integrity of planning processes.

2.2. Development was conducted nationally and provincially by the Development Facilitation Act 67 of 1995 (“DFA”) and various provincial legislative instruments. These instruments were in some respects inconsistent with the constitutional scheme in the following ways :-

2.2.1. In terms of Section 156 (1)(a) of the Constitution, local government has executive authority in respect of and has the right to administer the function of “municipal planning” (Part B of Schedule 4 and Part B of Schedule 5).

2.2.2. In the context of the spheres of government (national, provincial and local) all spheres must "not assume any power or function except those conferred on them in terms of the Constitution" (Section 41(1)(f) of the Constitution).

2.3. These were the main principles for the decisions in**Johannesburg Metropolitan Municipalityv Gauteng Development Tribunal & Others("the DFA Case")**[9] and **Minister of Local Government, Western CapevHabitat Council & Others ("Habitat")**[10]**.**

2.4. In the DFA Case (which did not deal with appeals at all) it was held that a municipality has the autonomous power to make decisions and carry out functions within the functional area of "municipal planning".

2.5. In Habitat (which dealt with appeals) it was held that the appeal under the Western Cape Ordinance was a

[9] 2010 (6) SA 182 (CC) especially at paras 43 - 57
[10] 2014 (4) SA 437 (CC)

provincial interference in municipal land-use decisions, and a provincial appellate power was unconstitutional.[11]

2.6. The appeal under Land Use Planning Ordinance 15 of 1985 ("LUPO") is in terms of old-order legislation based on principles of provincial sovereignty over local authorities and is to the "Administrator", which is now the MEC for Local Government (See paras 1 and 3 and the footnotes thereto).

2.7. The conclusion in Habitat was that this appeal under LUPO was the exercise of a provincial appellate power over a municipality's exercise of its planning functions.

2.8. With these propositions there is no dispute from the MEC.

2.9. For completeness it should be stated that LUPO was considered in **Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd.**[12] by this

[11] At paragraphs 15 and 20
[12] 2014 (1) SA 521 (CC)

Court but the constitutionality of Section 44 thereof was not ruled on because it was not impugned.[13]

2.10. The essence of the principle is then :-

2.10.1. local government has the exclusive right to execute and administer the function of “municipal planning”;

2.10.2. no other sphere of government must assume that power;

2.10.3. the power of the municipality is in this sense original, and the municipality is best placed to make such decisions;

2.10.4. the decision-making process must not be interfered with by a provincial veto or a decision made by another sphere which imposes on municipalities the priorities of other spheres of government.

[13] Paras 30 – 47 and Habitat at paras 11 - 13

2.11. It is submitted that the approach adopted in the Tronox Judgment is unduly absolutist and an extreme position on the exclusive right of municipalities.

3. DISTINGUISHING FEATURES IN THIS MATTER

3.1. The establishment of the Appeal Tribunal and the provision of an internal appeal is not the exercise of the provincial government of any function or power, albeit that the appeal process is established by Provincial Legislation.

3.2. The internal appeal is a domestic appeal staffed by experts - not provincial politicians or officials - for the purpose of providing all parties with an independent expert tribunal for the purpose of hearing internal appeals from municipal functionaries. Indeed, some of the members of the Tribunal are municipal officials in planning departments.

3.3. The members of the Tribunal are impartial, independent and completely free from provincial control. They are not agents of the province.

3.4. The Appeal Tribunal has no original jurisdiction under the PDA. Municipalities make all the original decisions. The Appeal Tribunal has operated successfully and without any complaint, particularly from municipalities, of usurping the functions of municipalities in KwaZulu-Natal.

3.5. It is significant that in most cases involving objections the municipal planning decisions involve the real combatants; the developer and the "aggrieved" parties. The emphasis is on adjudication and not the exercise of the will of the municipality.

3.6. The Appeal Tribunal is an expert adjudicative body on municipal planning.

3.7. The "appellate oversight" in Habitat was exercised by the "Administrator" who is now the Minister of Local Government in the Western Cape government.[14]

3.8. The "Minister" had the power to decide appeals and substitute municipal decisions with his own. It is clearly an

[14] Habitat : para 1; footnote 1

interference by provincial government in the planning function of local government.

3.9. LUPO is old order legislation.

3.10. The distinctions are manifest and apparent. The PDA is a provincial Act passed under the new order. The appellate authority is there for the convenience of the municipality and the parties as an internal remedy which has no provincial agenda or priority attached to it.

3.11. It is a domestic remedy in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and its effect, *inter alia*, is to ensure that the High Courts are not swamped by reviews of municipal decisions. It provides a simple and inexpensive internal appeal in the public interest.

3.12. In Habitat it was the municipality that attacked the constitutionality of the LUPO provision.[15]

[15] Habitat Council v Provincial Minister of Local Government & Others 2013 (6) SA 113 (WCC) at 116 C and Habitat para 4

3.13. In the DFA Case the constitutional attack came from the Johannesburg Metropolitan Municipality, supported by Ethekwini Metropolitan Municipality.

3.14. In this attack the Municipality has abided. It filed various affidavits at different times. Initially it abided and stated that it would not advance arguments or submissions in the matter.[16] In a later affidavit filed herein[17] it is clear that the Municipality is not impugning the constitutionality of any part of the PDA. It states that the Municipality adopted a "neutral stance" towards the issue of constitutional invalidity. It can therefore be safely argued that the Municipality concerned is not aggrieved, and is not complaining of any interference.

3.15. This gives rise to a further distinction with the DFA Case and Habitat. An essential element of impeding a municipality's ability or rights or any compromise thereof is lacking.

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[16] Record : pages 89 - 91
[17] Notices : pages 8 - 10

3.16. It is therefore submitted that Section 45 (and the various other sections which provide the same) are not unconstitutional.

3.17. The appeal ought to succeed and the application for confirmation should be dismissed.

4. SPLUMA

4.1. The national Act which repealed the whole of the DFA was brought into operation on 1 July 2015. This is SPLUMA. It was not in operation at the time of the Tronox Judgment, but it is now in operation and it is submitted that its provisions may be taken into account. It takes up a great deal of the ground in relation to municipal planning. What is left to provincial legislation is set out in Schedule 1 thereof.

4.2. SPLUMA contains specific provisions in regard to a Municipality's decision-making on municipal planning. In Chapter 6 the Municipality is described as the "authority of the first instance." Section 33 (1) creates a Municipal Planning Tribunal within a Municipality which may be

shared between municipalities. In some cases an official may be delegated to take the decision (Section 35 (2)).

4.3. The clear intention is for municipalities to have a specialised official or Tribunal deciding these applications, which would exclude councillors from deciding them (Section 36).

4.4. Internal appeals are dealt with by Section 51, which provides for a compulsory appeal against the municipal planning decision. This appeal is to the executive authority which is defined as the executive committee or executive mayor of the municipality. However, Section 51 (6) gives the municipality the option of authorising a body or institution outside the municipality to assume the obligations of an appeal authority.

4.5. It is in this context that the Appeal Tribunal established in terms of the PDA is the most appropriate appellate tribunal.

4.6. It is submitted that Section 45 is reasonably capable of being read in a way which avoids it being found to be

inconsistent with the constitution and invalid, which this court has recognised is the first port of call in constitutional interpretation. Section 45 may appropriately be interpreted to mean as follows:-

> "A person who applied for the development of land situated outside the area of a scheme or has lodged written comments in response to an invitation for public comment on a proposal to develop the land, who is aggrieved by the decision of the municipality contemplated in Section 43 (1) may, **subject to the provisions of Section 51 of the Spatial Planning and Land Use Management Act No. 16 of 2013**, appeal against the municipality's decision to the Appeal Tribunal **as the municipality's appeal authority contemplated in Section 51 aforesaid.**"

(the bold words are those to be "read in.")

4.7. This reading down applies equally to Sections 15, 28, 57 and 67 of the PDA.

4.8. This would give the municipality the option of authorising this Appeal Tribunal as the appeal authority.

4.9. This could solve the capacity problems of all the smaller municipalities, and provide a highly credible appellate authority for the use of all municipalities.

5. AVOIDANCE OF UNCERTAINTY, LOSS OF CONFIDENCE AND CHAOS

5.1. Tronox appears to be solely concerned with avoiding any kind of appellate oversight in respect of the decision in its favour. Its interests are commercial and limited to its own affairs.

5.2. On the contrary the MEC is concerned about the public interest.

5.3. Since 18 June 2010[18] municipal planning processes which are the lifeblood of development and progress has been in a state of flux and transition. For two years thereafter the DFA completed its pending processes, but the remedial legislation has only now been brought into effect.[19] All this time the PDA Appeal Tribunal has been operating

[18] The date of the suspended 24 month order in the DFA Case
[19] SPLUMA on 1st July 2015

unhindered until the Tronox application was brought. This has been followed by at least two other applications which have been brought on the same basis.

5.4. The MEC contends that this disruption to orderly municipal planning applications is disastrous to development and progress and gives rise to uncertainty and a loss of confidence in the law and the administration.

5.5. At present there are still about twenty appeals pending[20]and the processes are frozen until certainty is restored.

5.6. This is not intended to be, nor is it a criticism levelled at any quarter. However, any solution it is submitted, must be just and equitable and in the public interest and the interests of certainty and a restoration of confidence in the established processes.

5.7. To this end the KwaZulu-Natal Provincial Government commits itself to taking any measures to achieve this end. It is proposed that all the sections which impose an appeal

[20] Record : page 68 : para 35

similar or identical to the one under Section 45 of the PDA should be dealt with in this hearing. It is certainly the MEC's view to treat them the same in any future restorative process.

5.8. It is submitted that an essential contributor to this restorative process is an order which suspends the operation of the order of constitutional invalidity, an order which does not apply the order retrospectively and which provides for the continuation and finalisation of pending processes under the present legislative regime.

5.9. It is submitted that the affidavit of the Fish Farm should be accepted as evidence before Court. While it is accepted that as a general rule evidence not adduced in the High Court or it not to form part of the evidence on appeal in the Constitutional Court. However Tronox put up no solid argument as to why the evidence ought to be excluded other than reliant on the general rule. The MEC abides the court's decision as to whether Fish Farm's evidence is to be considered but submits that the evidence will certainly

be useful in fashioning a just and equitable remedy under this court's exercise of its remedial discretion.

5.10. In the event that the affidavit is not excluded, it is submitted that the issues raised therein deserve consideration. These views are representative of the members of the public who had an expectation that municipal processes were legitimate and that an internal appeal would be available and that the rules of the process should not be changed or disrupted for pending processes.

5.11. Tronox itself cannot say that it entered the process on the expectation that there would be no appeal.

6. **REMEDY**

6.1. If the order of constitutional validity is confirmed, the question arises as to what is just and equitable in the circumstances.[21] The MEC submits that what is just and equitable involves :-

[21] Estate Agencies Affairs Board v Auction Alliance (Pty) Ltd. And Others, 2014 (3) SA 106 (CC) at paragraphs [52] to [62]; Bengwenyama Minerals (Pty) Ltd. v Genorah Resources (Pty) Ltd., 2011 (4) SA 113 (CC) at paragraph [84].

6.1.1. the suspension of the order of invalidity for twenty four months in order that the provincial legislature may remedy the defect;

6.1.2. a reading-in like the reading down of Section 45 dealt with above in respect of all the affected sections as an interim measure to operate during the period of suspension;

6.1.3. an order that all pending appeals be held and finalised during the period of suspension;

6.1.4. an order that all pending processes for municipal authority under Sections 15, 28, 45, 57 and 67 of the PDA will be completed in terms of the PDA, as amended by this order;

6.1.5. an order that the declaration of constitutional invalidity will not be retrospective.

6.2. The justification for these orders is to be found in the affidavits submitted on behalf of the MEC in the High Court and in this Court.[22]

6.3. The MEC has put up evidence, which Tronox by its very identity, is not in the position to dispute. Tronox is an individual commercial enterprise which does not have insight into the processes and functioning of most of the municipalities in KwaZulu-Natal. The MEC does have such knowledge. The evidence is simply that on a factual level the order proposed is just and equitable.

6.4. It is submitted that these justifications and evidence in the context of the significant disruptions to planning processes provide the basis to satisfy the test for a suspension.[23]

6.5. In the Tronox Judgment the High Court refused the suspension of the order.[24]

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[22] MEC's affidavit : Record : pages 63 – 68 : paras 21 – 37
MEC's affidavit : Record : pages 56 – 60 : paras 18 - 20

[23] Mistry v Interim National Medical and Dental Council of South Africa 1988 (4) SA 1127 (CC) at para 37

[24] See especially paras 40 - 43

6.6. With respect to the Court, on its own findings there are significant distinguishing features between the Habitat Case and this Case. These are referred to above.

6.7. The Court also did not heed the actual features of the DFA Case and the Habitat Judgment in both Courts. In the DFA Case a two year suspension was granted with a completion of processes. In Habitat before the Western Cape High Court a period of twenty four months suspension was allowed. By the time the case was dealt with in this Court, almost a year had passed and although the suspension was not continued, pending appeals were protected.

6.8. The justice and equity of this matter calls for the orders proposed by the MEC set out above.

6.9. They are accordingly moved for.

Dated at PIETERMARITZBURG on this the 6th day of OCTOBER 2015.

A.J. DICKSON SC
ANTON KATZ SC
Fifth Respondent's Counsel

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTION HILL

CCT Case No. 114/15

KZNHC Case No. 9645/14

In the matter between:

TRONOX KZN SANDS (PTY) LTD	Applicant
and	
KWAZULU-NATAL PLANNING AND DEVELOPMENT APPEAL TRIBUNAL	First Respondent
MTUNZINI CONSERVANCY	Second Respondent
THE MTUNZINI FISH FARM (PTY) LTD	Third Respondent
UMLALAZI LOCAL MUNICIPALITY	Fourth Respondent
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent
eTHEKWINI MUNICIPALITY	Sixth Respondent

SIXTH RESPONDENT'S WRITTEN SUBMISSIONS

A. THE FOCUS AND STRUCTURE OF ETHEKWINI'S SUBMISSIONS

1. The sixth respondent, eThekwini municipality ("the municipality" or "eThekwini") makes submissions:-

1.1 supporting confirmation of the declaration of invalidity of section 45, an appeal provision in the KwaZulu-Natal Planning and Development Act ("the *PDA*");

1.2 against the appeal of the MEC for Co-operative Governance and Traditional Affairs ("the *MEC*");

1.3 that this court should widen the scope of its enquiry to declare constitutionally invalid the other appeal provisions in sections 15, 28, 57 and 67 of the PDA;

1.4 on the appropriate remedy to be granted consequent upon the declaration of invalidity.

2. The municipality specifically concerns itself with the effect of the judgment of the high court in **Tronox KZN Sands (Pty) Ltd v The KwaZulu-Natal Planning and Development Appeal Tribunal and Others** ("**Tronox**") on all the provisions in the PDA. It addresses what remedy would most appropriately address the situation created by a declaration of invalidity of these appeal provisions, particularly in the light of the commencement of the Spatial Planning and Land Use Management Act 2013 ("*SPLUMA*") on 1 July 2015 and eThekwini's specific circumstances.

3. We refrain from entering the debate regarding the involvement of the Mtunzini Fish Farm in these proceedings as eThekwini was not a party to the high court proceedings.

4. In these written submissions:-

4.1 we start by advancing submissions regarding why the appeal provisions in the PDA intrude impermissibly on municipalities' constitutional competence for '*municipal planning*' and illustrating the extent of actual and potential encroachment by the KwaZulu-Natal Planning and

Development Appeals Tribunal ("the *tribunal*") which eThekwini Municipality has experienced with reference to specific appeals;

4.2 section C deals with the need for this court to pronounce on the invalidity of all the PDA appeal provisions, not just s45;

4.3 section D focuses on the appropriate remedy which this court should fashion and here we address:-

4.3.1 the remedy formulated by the high court, specifically the limitation on retrospectivity and nullity and why we submit it is appropriate;

4.3.2 why the MEC's proposed suspension of the declaration of invalidity is inappropriate and unwarranted;

4.3.3 the difficulties with the reading-in proposed by the MEC arising from:-

4.3.3.1 the fact that it is linguistically unclear;

4.3.3.2 the legal and practical problems associated with it;

4.3.3.3 the anomaly created by the MEC's proposal in respect of planning decisions made by municipal councils;

4.4 section E contains our proposals on the most appropriate remedies which also make provision for eThekwini's specific circumstances.

B. THE PDA APPEAL PROVISIONS INTRUDE ON MUNICIPAL PLANNING COMPETENCE

5. In its written argument, the applicant has set out the scheme of the PDA which locates the appeal powers of the tribunal within the sphere of provincial government and made submissions on why the PDA conflicts with the constitutional scheme. eThekwini supports

those submissions and does not repeat them. We simply highlight certain additional and noteworthy matters.

6. Municipal planning is an original power conferred on municipalities by section 151(6), read with Part B of Schedule 4 of the Constitution.

7. Municipal competence in respect of planning is exercised subject to framework legislation including the Local Government: Municipal Systems Act, 2000 ("the *Systems Act*") which requires municipalities to adopt and give effect to an Integrated Development Plan ("IDP") in land use management[1]. The IDP guides all planning decisions[2] and encompasses a broad and high level vision.

8. The Systems Act reiterates that a municipal council, in exercising the municipality's executive and legislative authority, has a right "*to do so without improper interference*"[3]. The Systems Act empowers municipalities "*to do anything reasonably possible for, or incidental*

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1 Section 25(1).

2 Section 35(1) of the Systems Act

3 in section 4 (1) (b)

to, the effective performance of its functions and the exercise of its powers"[4].

9. The comprehensive nature of the regulation of land use envisaged by the Constitution, the Systems Act and other legislation has two important features:-

9.1 firstly, in effect and by design it leaves little space for the intervention of a third party – in this case, an appeal tribunal established and operated by the province;

9.2 secondly, the constitutional scheme demands of municipalities that they adopt co-ordinated, broad and holistic measures to achieve their municipal planning objectives and avoid fixation on site specific considerations.

10. Although the PDA recognises that municipalities exercise extensive control and regulation of land use within their municipal areas and creates a framework within which these powers are to be exercised

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[4] section 8 (2)

by municipalities themselves, the scheme of the PDA fundamentally dilutes that exclusive competence[5].

11. Contrary to the constitutional and legislative scheme, the appeal provisions of the PDA allow the tribunal to interpose itself into this important function of municipalities by creating the right to appeal against all municipal decisions on:-

11.1 scheme adoptions, replacement or amendments (section 15);

11.2 proposed sub-divisions or consolidation of land (section 28);

11.3 proposed development of land situated outside the area of a scheme (section 45);

11.4 applications for the phasing or cancellation of an approved layout plan (section 57);

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[5] Chapter 2 recognises the purpose of schemes being "*to regulate land use and to promote orderly development in accordance with the municipality's IDP*" (section 3) and section 4 places the responsibility for preparing schemes exclusively on municipalities.

11.5 proposed alteration, suspension or deletion of restrictions relating to land (section 67).

12. The tribunal is given the power in respect of all these municipal planning decisions to determine the appeal as it sees fit, including the power to alter the municipality's decision, replace the municipality's decision with its own decision and order the municipality to perform certain actions[6].

13. To make matters worse, the tribunal is not enjoined by the PDA or required by the Systems Act to adopt the broad approach the municipality itself must adopt. In the result, the tribunal's focus is restricted to the specific site involved and it is thus empowered to ignore broader issues of municipal resources, capacity, sustainability and planning strategy. This in itself defeats section 4(1)(b) of the Systems Act which is intended to protect municipalities from improper interference[7].

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6 The power is derived from section 121 of the PDA which empowers the presiding officer to decide on all matters of law, arising during the hearing, including whether a matter is a question of fact or of law, in addition to determining matters of procedure and questions and matters with regard to the procedure at the hearing.

7 See paragraph 11 of these submissions.

14. The *ad hoc*, site-specific focus of the tribunal also creates the danger of ignoring cumulative impacts. Whilst each development application taken in isolation might be regarded as having a negligible impact, taken together there is the worrying risk that they result in damaging (and often irreversible) consequences for the environment and the municipality's planning and development goals.

15. The actual encroachment by the tribunal as well as the potential for intrusion into municipal planning competence is well illustrated by the specific appeals referred to by eThekwini. In highlighting these appeals, the municipality does not seek to escape its obligation to ensure that proper procedure is applied when exercising its municipal functions. It simply seeks to illustrate that the over- broad and intrusive scope of the powers vesting in the tribunal have allowed it to encroach upon the municipal planning process. To make matters worse, the tribunal has interfered in an impractical and myopic manner and, in so doing, improperly side-lined and frustrated the municipality's long-term objectives and interests.

16.

16.1 Perhaps the clearest illustration of the potential for interference presented by the appeal provisions in the PDA is to be found in the appeal arising from an annual review of the municipality's consolidated schemes[8].

16.2 The municipality initiated a scheme amendment[9] pursuant to the review. This process is subject to appeals to the tribunal under section 15 of the PDA.

16.3 A single, private landowner, which was the only objector, appealed against a scheme amendment regarding the parking requirements of four regional schemes affecting the whole of the municipality's jurisdiction and thousands of property owners and users.

16.4 Whilst directed at the amendment of the south scheme, this appeal in effect challenges all four scheme reviews because the same assessment and statutory process was followed for all four schemes. This applies notwithstanding that the

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8 PDA Appeal 84 : Mahadeo: paragraphs 45 – 61.

9 In terms of s9 of the PDA. This involved a public notification process which must follow the procedure in Part 2 of Schedule 1 of the Act

appellants' claimed land use rights are located only in the south.

16.5 If section 15 prevails, notwithstanding the municipality's challenge in these proceedings, the tribunal is empowered to and will doubtless approach the appeal as it has the others : on a site specific basis. In other words, the tribunal will retain the power to overturn or even rewrite the municipality's scheme amendment across all four schemes, even though that would not be in the interests of any other parties other than the objector[10].

17. PDA Appeal 54[11] lay against the refusal of a rezoning application in the outer-west region. The tribunal was interposed and empowered by the PDA[12] to undermine eThekwini's autonomy by approving, with or without conditions, an application for a development which the municipality had found itself unable to reconcile with its planning frameworks or objectives and which would have required it

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10 The hearing of PDA 84 was interdicted on the 26th June 2015 in KZP Case No. 8116/15 pending the determination of this matter and any application which the municipality may launch within thirty (30) days of this court declining to determine the constitutional validity of sections 15, 28, 57 and 67 of the Act. The MEC is also a party to these proceedings.

11 Mahadeo: paragraphs 62 – 67.

12 In terms of section 121.

to expend substantial amounts for the provision of infrastructure and services[13]. The fact that the appeal did not proceed on its merits is, in our submission, irrelevant – what is, is the potentially highly intrusive power enjoyed by the tribunal.

18. In PDA Appeal 64[14] in respect of the proposed development of a fresh food outlet in Chatsworth, the tribunal saw fit to override the reasonable exercise of the municipality's discretion regarding how to give effect to the public notification of and participation processes in the PDA. The tribunal ordered the municipality to hold public hearings although it had decided this was not appropriate and engaged in a different participation process[15]. The fact that the response of the public remained unaltered notwithstanding these onerous, expensive and possibly misdirected rulings of the tribunal

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13 Mahadeo: page 23, paragraph 66.

14 Mahadeo : paragraphs 71 - 79

15 In **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 CC at [145] the court held that "*the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures …*". The standard of reasonableness was found by the Supreme Court of Appeal in **DA v eThekwini Municipality** 2012 (2) SA 151 at paragraph 24 to apply to municipal councils in determining whether the requirement of public participation has been satisfied.

highlights the encroachment on the exercise of municipal discretion contemplated by the constitutional scheme.

19. The formalistic and technical approach adopted by the tribunal and permitted by the PDA in respect of the Mpumalanga Mall rezoning appeal (PDA75)[16], demonstrates the extent to which the appeal provisions in the PDA create seemingly unlimited opportunities for objectors to stall proposed developments by lodging repeated appeals and thereby obstruct the proper functioning of the municipality for municipal planning, regardless of the level of public support for the proposed development. All this, without the tribunal apparently taking any cognisance of the economic hardship and social prejudice occasioned by these appeal decisions.

20. We submit that the above case studies collectively highlight that the tribunal's powers of appeal:-

20.1 are broad and intrusive;

20.2 encroach on the municipality's constitutionally ordained planning function and undermines its municipal plans, all

[16] Christodoulou affidavit : Intervention application 55 to 61

of which are grounded in a long-term vision and derived from a perspective of sustainability;

20.3 have allowed the tribunal to interfere with and in certain cases frustrate and undermine economic progress in the city;

20.4 permit decisions which ultimately erode the municipality's constitutional function for municipal planning;

20.5 ignore the cumulative impact of the appeal decisions which damage the municipality's planning and development goals;

20.6 result in two different structures, within the different spheres of government, exercising authority over the same issues with entirely different perspectives; and

20.7 are, it follows, unconstitutional.

21. eThekwini contends that the high court correctly found that the tribunal is established at the provincial level and is managed, regulated and supported at a structural level by the office of the MEC, all of which serve to relocate power from municipalities to provincial government[17]. The same is true of all the other PDA appeal provisions which eThekwini seeks to have set aside.

22. This Court has set its face firmly against constitutionally invalid interference by provincial government in municipal planning:-

22.1 in **Gauteng Development Tribunal**[18] and in **Maccsand**[19] where it was held that the functional area of municipal planning is primarily located in the local government sphere;

22.2 in **Lagoonbay**[20] where this court unequivocally set out the parameters of provincial government involvement at a local government level;

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17 at [31] of the judgment

18 **Johannesburg Municipality v Gauteng Development Tribunal and Others** 2010 (6) SA 182 (CC).

19 **Maccsand (Pty) Ltd v City of Cape Town** 2012 (4) SA 181 (CC) at [42].

20 **Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate** 2014 (1) SA 521 (CC) at [46].

22.3 in **Habitat Council**[21], which determined[22] that the provincial appellate capability in applications for rezoning and sub-division applications under the Land Use Planning Ordinance ("*LUPO*"), impermissibly usurped the power of local authorities to manage 'municipal planning', intruded on the autonomous sphere of authority the Constitution accords to municipalities and failed to recognise the distinctiveness of the municipal sphere.

23. The MEC claims that **Habitat Council** is "*materially distinguishable*" from the present dispute for two reasons:

23.1 firstly because it pertained to old order legislation which usurped and vetoed the municipality's exercise of its planning functions and the municipality affected by the interference had complained of and was instrumental in bringing the matter to court[23];

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21 **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v the Habitat Council and Others** 2014 (4) SA 437 (CC)

22 at [13]

23 The MEC's appeal notice at paragraph 6 and Kuhn's affidavit at paragraph 13.

23.2 secondly the non-participation of the Umlalazi Municipality means there is no evidence of any interference.

24. The first ostensible basis of distinction is immaterial and artificial. The question is whether the impugned legislation operates unconstitutionally, not whether it is old or new order legislation. That determination is to be made objectively. As Cameron J, writing for the Court in **Habitat Council** noted[24]:- "... *the power of regulation* (located in section 155(7) of the Constitution) *is afforded to national and provincial governments in order to 'see to the effective performance by municipalities of their functions' The constitutional scheme does not envisage the province employing appellate power over municipalities' exercise of their planning functions".*

25. The second point of distinction ignores both the potential for provincial interference inherent in the appeal provisions themselves, and the evidence of eThekwini which demonstrates actual interference

[24] at [22]

26. The high court's declaration of invalidity is consequently correct and must be confirmed.

C: CLARITY AND FINALITY REGARDING ALL THE PDA PROVISIONS IS DESIRABLE

27. We submit that an overwhelming case has been established by the applicant and eThekwini for the declaration of invalidity of section 45 to be confirmed. All the arguments relating to the constitutional invalidity of section 45 apply equally to the other appeal provisions.

28. It follows then, that all those affected by the other appeal provisions in the PDA should also be afforded relief[25].

29. Following the high court judgment in **Tronox**, there has been much confusion and uncertainty relating to the constitutional validity of the other appeal provisions[26]. Twenty two PDA appeals are currently pending, 10 of which involve eThekwini[27]. The MEC has yet to extend the tribunal members' term of office which came to an end on

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25 Which would accord with this Court's approach in **S v Bhulwana 1996 (1) SA 388 (CC at [101]**

26 Mahadeo : paragraph 89, page 35

27 Mahadeo : paragraph 91, page 36

30 June 2015. This, together with uncertainty regarding what view this Court will take has, according to both the MEC and eThekwini[28], led to paralysis in the appeals process.

30. Even without the present impasse the existence of the appeals process in the PDA and the manner in which such appeals are conducted creates significant delays in land development applications which in turn obstructs much needed development within the municipal boundaries[29]. Clarity regarding the validity and constitutionality of the other appeal provisions is thus desirable for all KZN municipalities as well as the parties to appeals pending under the other appeal provisions.

31. eThekwini will be compelled to bring separate proceedings declaring the other appeal provisions to be inconsistent with the Constitution and invalid if this court declines to deal with their validity in the present proceedings and in so doing, interdict the finalisation of each and every appeal pending the outcome of the constitutional challenge.

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[28] Mahadeo : paragraph 91, page 36

[29] See the affidavit of Christodoulou.

32. We submit that it would be desirable and would promote the principles of finality and certainty if this Court were to deal with the constitutionality of all the appeal provisions in the PDA rather than requiring separate proceedings subsequent to these, with all the delay and the expense of public money that entails. In this too, eThekwini and the MEC are in agreement.

33. Expeditious certainty and finality in this regard are particularly important as the PDA appeal provisions are finite in scope given the advent of SPLUMA[30], which came into force on 1 July 2015 after the judgment of the high court in **Tronox.**

34. Section 51 of SPLUMA creates a right of appeal in respect of planning decisions taken by a municipal planning tribunal (a new municipal decision making body created under SPLUMA) or a municipal official authorised in terms of SPLUMA. The appeal lies to the municipality's executive authority, or an external body chosen by the municipality in terms of section 51(6).

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[30] SPLUMA is national legislation intended to provide a framework within which municipal planning competence is to be exercised.

35. SPLUMA did not repeal the PDA and nor could it. Consequently the direct conflict between the PDA appeal provisions and section 51 of SPLUMA renders the appeal provisions in the PDA inoperative with effect from 1 July 2015 by virtue of section 146(2)(b) of the Constitution and sections 2(2) and 10(2) of SPLUMA.

36. That in turn means that the effect of declaring appeals null and void is limited to only the 22 pending appeals[31] and, potentially, to decisions already made under the PDA prior to 1 July 2015 where the period to note an appeal in terms of the PDA has not yet expired. In eThekwini's estimation, there are perhaps 35 such cases which could potentially result in appeals[32].

37. Declaring all appeal provisions invalid in the present context would not, we submit, offend against judicial economy[33] because the very same reasons that underpin the impermissible encroachment identified in section 45 apply to the remaining appeal provisions.

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31 Mahadeo: paragraph 91, page 36

32 Mahadeo : paragraph 98, page 38

33 Cf **Habitat** at [24]

This places the municipality's case regarding all the appeal provisions conveniently within the ambit of the present enquiry[34].

D: WHAT IS THE APPROPRIATE REMEDY?

38. Even if this Court declines to deal with the validity of all the appeal provisions now, it is important, we submit, to consider the implications of the remedy within the broader context of all the appeal provisions of the PDA so to formulate a remedy which can be applied to all the PDA appeal provisions in due course[35].

39. We deal firstly with the remedy fashioned by the high court and why we submit it is appropriate before turning to deal with the MEC's contention that the declaration of invalidity should be suspended to allow for legislative correction and the alternative remedy of a reading in which she proposes.

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34 **Phillips and Others v The National Director of Public Prosecutions** 2006 (1) SA 505 CC at [43] – [44] and **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others** 2009 (4) SA 222 CC at [40] – [41].

35 As was done in **Da Silva v RAF 2014 (5) SA 573 (CC)** where this Court endorsed the same remedy as that granted in respect of other similar sections in the legislation previously declared unconstitutional

(i) The remedy fashioned by the high court

40. The high court ruled that the declaration of invalidity would not affect final decisions made by the tribunal before its judgment was handed down but declared that the appeals which gave rise to the high court proceedings would be null and void *ab initio* if this court confirmed the declaration of invalidity[36].

Limitation on retrospectivity

41. The limitation on the retrospective effect of the declaration of invalidity formulated by the high court is of course desirable so as to avoid the chaos which would otherwise occur[37]. It is however important to note that there are presently review proceedings pending in respect of PDA appeal decisions and the prospect of further reviews of PDA appeal decisions handed down less than 6 months ago which can still be instituted within the 180 day time limit imposed by the Promotion of Administrative Justice Act, 2000[38]. In

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36 Judgment [45] (at Record p.182)

37 The MEC accepts this at paragraph 18 of Kuhn's affidavit.

38 Mahadeo, para 104, p.40

at least one of these pending reviews[39], the applicant seeks an order declaring section 15 of the PDA unconstitutional.

42. eThekwini submits that any PDA appeal decisions which are presently subject to review proceedings or still capable of being timeously brought on review should not be considered as final decisions for purposes of interpreting and applying a provision limiting the retrospective effect of the declaration of invalidity.

Nullity

43. The order of the high court nullifying pending appeals is just and equitable even if it is applied (either in these proceedings or in due course) to all the PDA appeal provisions in the light of:-

43.1 the reasoning of this court in **Habitat Council**[40] that it was undesirable to perpetuate the functioning of an unconstitutional tribunal;

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39 Mahadeo, para 104, p.40

40 at [26]

43.2 the availability of review as a remedy to those whose pending or prospective appeals are nullified;

43.3 the fact that, *in toto*, there are only 22 pending appeals and a limited number of potential future appeals;

43.4 the advent of SPLUMA on 1 July 2015, with the implications for future appeals described above.

(ii) <u>The MEC's proposal: suspension, with or without a reading in</u>

44. The MEC seeks the suspension of any order of invalidity for a period of two years to correct the defect; alternatively, or in addition to the suspension, the MEC seeks a "*reading in*" to section 45 and the other appeal provisions in the PDA in order to preserve the tribunal's existence[41].

45. The MEC contends that Chapter 10 of the PDA creates an "*internal planning appeal which is for the benefit of lay litigants and is an*

[41] Kuhn: paragraphs 17 and 19.

inexpensive domestic appeal as a buffer between the municipal decision and a review application to the high court"[42].

46. The desirability for a "*buffer*" between local government and the judiciary is unexplained. Importantly, for this "*buffer*" to exist in the form of the tribunal perpetuates the interference from provincial government in municipal planning and *"subjects the municipalities to the scrutiny of an appeal in circumstances where the municipality may not have resolved that an appeal process is appropriate or desirable*"[43].

Suspension of the declaration of invalidity

47. Jappie AJ, writing for this court in **Cross Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another**, observed[44]:-

> "*A court's discretion to suspend the effect of an order of invalidity entails the exercise of a wide power and can be*

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42 Kuhn: paragraph 10.

43 [29] of high court judgment

44 [2015] ZACC 12 at [25].

utilised for numerous reasons provided it is just and equitable to do so. This often relates to giving the legislator time to intervene but could equally relate to concerns of the effect an order might have on the administration of justice."

48. The MEC bears the onus of justifying that a suspension order is justified[45] and must lay a proper basis therefor.

49. A decision on whether it is appropriate to exercise this broad discretion in favour of granting a suspension, requires the Court to balance the harm that would flow from declaring the appeal provisions invalid with immediate effect against the harm that would result from keeping the provision in operation pending rectification by the provincial legislature[46].

50. Here, a declaration of invalidity with immediate effect results in no lacuna which creates uncertainty, administrative confusion or hardship[47].

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45 **Mistry v Interim Medical and Dental Council 1998 (4) SA 1127 (CC) at [37]**

46 **Coetzee v Government of the Republic of South Africa and Others 1997 (3) SA 527 (CC) at [21]**

47 cf. **Gauteng Development Tribunal at [73] – [80]**

51. In the present case, the MEC expresses no concerns regarding the administration of justice and a legislative correction is, we submit, unnecessary, particularly since the advent of SPLUMA.

52. We submit that suspension of the declaration of invalidity is not warranted or appropriate for the following four reasons:-

52.1 suspension of the declaration would perpetuate the interference by provincial government in municipal planning contrary to this court's approach in **Habitat Council**, which was something the high court was careful to avoid[48];

52.2 no detailed information was presented in order to justify the suspension[49];

52.3 the limited number of pending appeals means that they could all be finalised within the period of suspension, with the effect that no real remedial relief is granted at all[50];

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48 Paragraphs 41 – 43 of the high court judgment

49 [41] – [43] of the high court judgment

50 Which is contrary to the principle repeatedly endorsed by this Court that a successful litigant should ordinarily obtain relief : see e.g. **S v Bhulwana supra at [32]**

52.4 the PDA continues in force subject to SPLUMA thus providing procedures for planning applications, the criteria by which they must be evaluated and an internal appeal going forward. This means that there is no danger of an immediate declaration of invalidity causing chaos in planning applications which might warrant a suspension.

Reading the PDA appeal provisions subject to s 51 of SPLUMA

53. In the alternative to a suspension, or in conjunction with a suspension, the MEC proposes that the appeal provisions in the PDA be read in subject to section 51 of SPLUMA with the words in bold as follows:-

> "*A person who applied for the development of land situated outside the area of a scheme or who has lodged written comments in response to an invitation for public comment on a proposal to develop the land, who is aggrieved by the decision of the municipality contemplated in section 43(1) may,* ***subject to the***

provisions of Section 51 of the Spatial Planning and Land Use Management Act No. 16 of 2013, *appeal against the municipality's decision to the Appeal Tribunal* ***as the municipality's appeal authority, contemplated in Section 51***".

54. The Supreme Court of Appeal in **Mkhize v Umvoti Municipality and Others**[51] established that "*the purpose of reading in as a constitutional remedy is to render the legislation compliant with the provisions of the Constitution. A court is not vested with any general legislative capacity merely by virtue of the fact that it has found a particular statutory provision not in compliance with the Constitution. The function of the court is to find a means to remedy the constitutional defect but, at the same time, remain consistent with the legislative scheme*".

55. We argue in the context of **Mkhize** that the MEC's proposed reading in to vindicate the impugned appeal provisions is inappropriate for the following reasons:-

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[51] **2012 (1) SA 1 (SCA) at [19]**.

55.1 it is unclear and it does not achieve the end at which it is apparently aimed by virtue of the manner in which it is framed;

55.2 although the MEC's solution appears attractive it has legal and practical problems which would need to be addressed by orders which would require this court to legislate so as to render the solution workable; and

55.3 the proposal creates an anomalous situation in respect of appeals from decisions taken by a municipal council or its executive committee.

56. We deal with each of these difficulties in turn.

(i) <u>Reading in as proposed is unclear</u>

57. It is not clear on the face of it what "*subject to section 51 of SPLUMA*" and an appeal to the appeal tribunal "*as the municipality's appeal authority*" actually mean.

58. Linguistically, they could mean either:-

58.1 that municipalities should be taken to have appointed the appeal tribunal as the appeal authority under SPLUMA in relation to all appeals pending before SPLUMA came into force, so that such appeals proceed before the appeal tribunal notwithstanding SPLUMA; or

58.2 that the appellant has a choice between the tribunal and the municipality's executive authority ; or

58.3 that the right to appeal to the appeal tribunal only exists where the municipality has appointed the tribunal as its external appeal authority in terms of section 51(6) of SPLUMA.

59. The fact that there are three possible meanings to the reading in renders it instantly problematic, and any reading in this Court might see fit to fashion would need to be modified from that proposed by the MEC.

60. The first two possible readings would achieve an unconstitutional result and are therefore presumably not what was intended. If the third reading was intended, this should be made clear at the end of section 45 (and all the other PDA appeal provisions), as the MEC proposes, by an additional insertion of following words:- "***if so appointed by the municipality in accordance with section 51(6)***".

61. The other difficulties inherent in the proposed reading in are not as easily dealt with.

(ii) <u>Legal and practical problems with the proposed reading in</u>

62. Absent specific orders from this Court, the reading in would only apply to appeals after 1 July 2015 as SPLUMA was not in force before then and cannot apply retrospectively. The reading in as proposed does not therefore address what is to happen to all appeals presently pending, nor those which could still be lodged in respect of decisions taken prior to 1 July 2015.

63. It accords with s12 of the Interpretation Act 33, 1957 and the principle in **City of Johannesburg and Another v Ad Outpost**[52] that pending appeals be dealt with in accordance with the law in force at the time that the decision on the applications giving rise to the appeal was taken. However that is presumably not what the MEC intended, particularly given the override of the PDA appeal provisions created by SPLUMA as we have explained.

64. It appears that what is intended by the MEC is that pending PDA appeals would proceed before municipalities' executive authorities or external appeal authorities appointed in terms of section 51(6) of SPLUMA. In the event a municipality had elected to appoint the tribunal as its external appeal authority then the tribunal would finalise the appeal. Presumably the same division of appellate authority would apply to appeals noted after 1 July 2015 in respect of PDA decisions taken before that date.

65. Although superficially attractive as a solution, this is legally problematic:-

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52 2012 (4) SA 325 (SCA) at [18] – [21].

65.1 the transitional provisions in section 60 of SPLUMA do not deal with applications and appeals under the PDA pending, but not yet determined, at the time SPLUMA came into force;

65.2 although all tiers of government have been aware of SPLUMA for some two years now and eThekwini has been preparing for its introduction, the PDA has not been amended to conform with SPLUMA or to provide transitional measures regarding PDA applications and appeals pending as at 1 July 2015 and rights accrued under the PDA prior to the coming into force of SPLUMA which should have been dealt with.

66. Consequently, to '*convert*' PDA appeals to SPLUMA appeals, and to allow SPLUMA to operate retrospectively would require this court to formulate orders akin to transitional provisions, which neither the national nor the provincial legislature saw fit to do.

67. It would be necessary therefore, for the Court to fashion a comprehensive order[53] to achieve the apparent aim of the reading in and render the remedy effective.

68. To the extent that this Court would view such a quasi-legislative function as appropriate notwithstanding the principle expressed in **Mkhize**, the order would need to :-

68.1 preserve the validity of everything done in respect of PDA appeals prior to this Court's order; and

68.2 declare that the reading in applies to PDA appeals pending at the time the order is made and those noted subsequently against decisions taken prior to 1 July 2015.

69. However, even further intervention by this Court would be required to render the reading in workable as in its present form it is unclear to what extent such '*converted appeals*' would be subject to SPLUMA.

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53 As it did in **Bhe v Magistrate, Khayelitsha 2005(1) SA 580 (CC)**, see [116]

70. There are significant differences between the SPLUMA and the PDA which raise the following questions:-

70.1 as the two pieces of legislation set out different criteria to be applied to planning and land use applications, if an appeal under the PDA is now "*subject to SPLUMA*" does that mean that the appeal is to be determined in terms of SPLUMA criteria which did not apply to the original application? Our submission is that this cannot possibly be correct;

70.2 in terms of what rules will the appeal tribunal function? There are different rules in the PDA and in the regulations to SPLUMA. eThekwini is in the process of adopting a bylaw to give effect to SPLUMA. The bylaw will create rules for appeals which lie predominantly with the municipality's executive authority but, in respect of certain planning decisions, to an external appeal authority to be established by the municipality. It would seem most appropriate in eThekwini's case that it deal with the appeals according to the bylaws it adopts. However, not all

municipalities have SPLUMA bylaws yet so what would be the default position? and

70.3 what powers will the appellate body exercise? Those under the PDA, those under SPLUMA, or those applicable to a particular municipality in terms of their SPLUMA bylaw?

71. In the light of these questions, eThekwini respectfully submits that if this Court inclines towards fashioning some kind of hybrid appeal remedy, the applicable criteria, procedures and powers of the appellate body must be specified in the order. The concern of the municipality is that there is no doubt there will be a great deal of litigation regarding how the appeals must be conducted[54] and it would be in the interests of certainty and clarity for this Court's order to address the issues which are likely to arise. We make suggestions in the section E of these submissions on how this might be achieved. Of course none of these difficulties arise if the high court's order is simply endorsed.

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[54] Mahadeo: paragraph 134.

72. Whilst the difficulties described above can be addressed in a carefully crafted order, the final issue arising from the proposed reading in is more fundamentally problematic.

Anomalous situation in respect of council decisions

73. SPLUMA creates a decision-making structure at first instance which apparently excludes council, the executive authority of the municipality and councillors[55] except in matters pertaining to scheme amendments initiated by a municipality and changes to the land use scheme affecting the scheme regulations setting out terms and conditions relating to the use and development of land[56]. The appeal provided for in section 51 of SPLUMA can therefore competently lie to the executive authority of the municipality as it was not involved in the original decision.

74. There is no such exclusion in the PDA which permits all decisions of first instance to be taken by the council or its executive committee ('e*xco*') and in fact, reserves[57] decisions on the adoption or

55 Section 35 read with s36(2), 38(1)(b) and s46, 42
56 Section 28 of SPLUMA
57 In section 156

replacement of a scheme to the municipality and prevents the delegation of this power to, *inter alia*, an official employed by the municipality[58].

75. We submit that it is inappropriate that decisions made under the PDA by council or exco should go on appeal before the original decision maker, yet that is the effect of the remedy proposed by the MEC in cases where council or exco made the decision. Doubtless appellants in such instances would complain that the issue had been prejudged and so the appeal was no real remedy at all. Even if they did not decry this at the outset, they would nevertheless be entitled to challenge such appeals on review, *inter alia* on the grounds that the issues had been prejudged. If reviews are almost certain in such cases, why provide an appeal?

76. The MEC's proposal further undermines the fundamental *functus officio* principle and accords the original decision-maker the power to change its own decision by way of exercising an appellate power.

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[58] PDA appeal 84 referred to above is a case in point as it involves a scheme review initiated by the municipality and approved by council.

77. We submit with respect that it is not appropriate for this Court to try and resolve this difficulty by creating a bifurcated remedy which would accord a municipal appeal to some appellants (which may be followed by a review) and restrict others, where decisions were made by council or exco, to a review only. That treats appellants in an unequal manner on an apparently arbitrary basis.

78. Still less would it be appropriate to subject decisions made by exco or council to an appeal before the PDA tribunal and have other PDA appeals heard by the municipality as if they were lodged under SPLUMA.

79. eThekwini's specific circumstances present a solution to this problem as far as eThekwini is concerned.[59]. eThekwini is in the process of adopting a bylaw to give effect to SPLUMA. Whilst the proposed bylaw is still in draft, it envisages that:-

79.1 certain planning decisions at first instance (in addition to those reserved for council in terms of section 28 of SPLUMA) will be taken by council, not the municipality's planning tribunal or

[59] Mahadeo: page 52, paragraph 142.

a municipal official authorised in terms of section 35 of SPLUMA;

79.2 appeals from decisions of the municipal planning tribunal and authorised officials will lie to council; and

79.3 appeals from decisions of council at first instance will lie to an external appeal authority which eThekwini is establishing, in terms of section 51(6) of SPLUMA.

80. The external appeal mechanism so created solves the problem of council or exco being 'judge and jury in their own case', as this appeal body could hear the PDA appeals where council or exco had made the original decision under the PDA.

81. The problem is of course that this mechanism would not be available to all municipalities – as they may have made different bylaws or have not yet adopted a SPLUMA bylaw. This is not a bar to the Constitutional Court fashioning a separate remedy for eThekwini[60],

[60] Cf. **Gauteng Development Tribunal at [18]**

and creating a general order for all other municipalities in KwaZulu-Natal, however that would not address the anomaly.

E: THE APPROPRIATE ORDERS

82. In the light of the aforegoing, eThekwini submits that orders in the following terms are the most appropriate:-

"1. The appeal is dismissed.

2. Sections 15, 28, 45, 57 and 67 of the KwaZulu-Natal Planning and Development Act, 2008 are declared to be unconstitutional and invalid to the extent that they constitute interference by the province in municipal planning decisions by providing for an appeal from the municipal decision to an appellate body namely the KwaZulu-Natal Planning and Development Tribunal, created by the provisions of Chapter 10 of the Act.

3. Save as is provided in paragraphs 4, the declaration of invalidity shall not apply to any final decision of the KwaZulu-Natal Planning and Development Appeal Tribunal made prior to the date of this order.

4. All appeal decisions presently on review before the KwaZulu-Natal High Court and those taken within 180 days of this order are declared null and void.

5. All pending appeals lodged under sections 15, 28, 45, 57 and 67 of the Act are declared null and void ab initio."

83. Alternatively, and only in the event that a reading in is seen to be more appropriate, in addition to the orders set out in paragraphs 1 and 2 above, the following should in our submission be added:

"It is declared that:

2. Sections 15, 28, 45, 57 and 67 of the Act are to be read as though:

2.1 The words "subject to the provisions of section 51 of the Spatial Planning and Land Use Management Act, 16 of 2013" appear between the words "may" and "appeal; and

2.2 The words "if so appointed by the municipality in accordance with section 51(6) of the Spatial Planning and Land Use Management Act" appear at the end of the text of each of those sections.

3. All steps taken pursuant to sections 15, 28, 45, 57 and 67 of this Act before the date of this order are declared valid;

4. All appeals pending under sections 15, 28, 45, 57 and 67 of the Act as at the date of this order, as well as all appeals to be noted in respect of decisions taken prior to 1 July 2015:

4.1 subject to 4.2, shall proceed and be finalised by the executive authority of the municipality concerned or its external appeal authority appointed in terms of section 51(6) of Spatial Planning and Land Use Management Act.

4.2 in respect of eThekwini municipality, shall proceed before its executive authority for appeals against decisions made by its executive committee or council which shall proceed and be finalised by eThekwini municipality's external appeal authority.

4.3 with reference to the applicable criteria and requirements set forth in the Act in respect of the type of application with which the appeal is concerned.

4.4 in accordance with the time frames, rules and procedures and powers set out in the bylaws governing appeals in terms of s51 of Spatial Planning and Land Use Management Act".

A. Annandale SC

S. Mahabeer

Counsel for the Sixth Respondent

Chambers

6 Durban Club Place

Durban

9 October 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTION HILL

CASE CCT. 114/15
KZNHC CASE NO: 9645/14

In the matter between:

TRONOX KZN SANDS	Applicant
and	
KWAZULU-NATAL PLANNING AND DEVELOPMENT APPEAL TRIBUNAL	First Respondent
MTUNZINI CONSERVANCY	Second Respondent
THE MTUNZINI FISH FARM (PTY) LTD	Third Respondent
UMLALAZI LOCAL MUNICIPALITY	Fourth Respondent
MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent
eTHEKWINI MUNICIPALITY	Sixth Respondent

APPLICANT'S (TRONOX) BRIEF FURTHER SUBMISSIONS (2 pages)

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1. The purpose of these submissions is to inform the Court that the Applicant ("*Tronox*") and Second Respondent ("*Mtunzini Conservancy*") have entered into a settlement agreement on 3 November 2015.

2. The effect of the settlement on the town planning appeal which forms the subject of this application is the following:

   2.1 Mtunzini Conservancy will abide the decision of this Court and make no submissions at the hearing or any adjournment thereof.

2.2 In the event that this Court confirms the declaration of constitutional invalidity, the rezoning appeal will fall away and the rezoning adopted by the Umlalazi Municipality on 19 February 2014 will stand.

2.3 In the event that this Court does not confirm the declaration of invalidity or makes such other ruling as may result in the appeal of the Mtunzini Conservancy not being set aside, Mtunzini Conservancy undertakes to withdraw the rezoning appeal (Appeal No. 62) within 7 days of the date of the Constitutional Court judgment being issued.

3. Accordingly, there is no longer a live dispute between Tronox and the Mtunzini Conservancy inasmuch as Mtunzini Conservancy has undertaken to withdraw its appeal against the granting of authorisation in terms of the KwaZulu-Natal Planning and Development Act 6 of 2008 ("*PDA*") if that appeal is not set aside by this Court.

4. The settlement does not affect the Third Respondent ("*Mtunzini Fish Farm"*), whose appeal remains extant.

ANDREA GABRIEL SC
SARAH PUDIFIN-JONES

Chambers, Durban
4 NOVEMBER 2015