CONSTITUTIONAL COURT OF SOUTH AFRICA

Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others

CCT 114/15

Date of hearing: 9 November 2015
Date of judgment: 29 January 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the constitutional validity of section 45 of the KwaZulu-Natal Planning and Development Act (PDA).

The applicant, Tronox KZN Sands (Pty) Ltd (Tronox), is a large producer of titanium ore and titanium dioxide. In February 2014 its application for prospective land-use rights was approved by the fourth respondent, Umlalazi Municipality. Subsequently, the second and third respondents, the Mtunzini Conservancy (Conservancy) and the Mtunzini Fish Farm (Pty) Ltd (Fish Farm) sought to appeal that decision in terms of section 45 of the PDA. The section provides that any person who is aggrieved by a municipality's planning decision may appeal to the first respondent, the KwaZulu-Natal Planning and Development Appeal Tribunal (Appeal Tribunal).

Before the Appeal Tribunal could decide the two appeals, Tronox launched proceedings in the KwaZulu-Natal Division of the High Court in Pietermaritzburg (High Court), challenging the constitutionality of section 45 of the PDA. The Court held that section 45 was unconstitutional since the appeal process created by the province impermissibly interfered with the municipalities' constitutionally-recognised power to manage municipal planning. The Court declared the two appeals unlawful, subject to the declaration of invalidity being confirmed by the Constitutional Court.

Before the Constitutional Court, Tronox asked for confirmation of the High Court order. The confirmation application was opposed by the fifth respondent, the Member of the Executive Council for Co-operative Governance and Traditional Affairs (MEC). She contended that section 45 is constitutionally acceptable, as the Appeal Tribunal is an independent and impartial body staffed by experts and not provincial officials. If the confirmation order were to be granted, the MEC called for a 24-month suspension to give the Legislature enough time to remedy the defect. Alternatively, she contended that this Court should order a reading-in to render section 45 constitutionally valid.

The sixth respondent, eThekwini Municipality, argued that all provisions of the PDA that provide for an appeal to the Appeal Tribunal against exclusive municipal decisions are constitutionally invalid. It submitted that any reading-in had to be crafted in a just and equitable manner.

In a unanimous judgment, written by van der Westhuizen J, the Court confirmed the High Court order insofar as it declared section 45 of the PDA constitutionally invalid. It agreed with the High Court that section 45 of the PDA interfered with municipalities' exclusive constitutional power to make municipal planning decisions. The fact that the Appeal Tribunal was not staffed by provincial officials did not save the provision. Municipalities were still subjected to an appeal process by the province, which intruded upon their autonomous power. The Court held that neither a reading-down nor a reading-in was possible in this case. It also declined to suspend the declaration of invalidity. It held that appeals already finalised under section 45 were not to be affected. Appeals still pending in terms of the appeal process had to continue until finalised. However, in considering them, the Appeal Tribunal was required to uphold the municipalities' integrated development plans, if in existence. Accordingly, the MEC's application for leave to appeal was dismissed and she was ordered to pay the legal costs of Tronox.