CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 189/22

In the matter between:

GOVAN MBEKI LOCAL MUNICIPALITY	Applicant
and	
GLENCORE OPERATIONS SOUTH AFRICA (PTY) LIMITED	First Respondent
DUIKER MINING (PTY) LIMITED	Second Respondent
TAVISTOCK COLLIERIES (PTY) LIMITED	Third Respondent
UMCEBO PROPERTIES (PTY) LIMITED	Fourth Respondent
IZIMBIWA COAL (PTY) LIMITED	Fifth Respondent

Case CCT 191/22

In the matter between:

EMALAHLENI LOCAL MUNICIPALITY	Applicant
and	
GLENCORE OPERATIONS SOUTH AFRICA (PTY) LIMITED	First Respondent
DUIKER MINING (PTY) LIMITED	Second Respondent
TAVISTOCK COLLIERIES (PTY) LIMITED	Third Respondent
UMCEBO PROPERTIES (PTY) LIMITED	Fourth Respondent

IZIMBIWA COAL (PTY) LIMITED Fifth Respondent

GOVAN MBEKI LOCAL MUNICIPALITY Sixth Respondent

Neutral citation:	*Govan Mbeki Local Municipality v Glencore Operations South Africa (Pty) Ltd and Others; Emalahleni Local Municipality v Glencore Operations South Africa (Pty) Ltd and Others* [2024] ZACC 25
Coram:	Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J.
Judgments:	Chaskalson AJ (majority): [1] to [98] Dodson AJ (dissenting): [99] to [288] Rogers J (dissenting): [289] to [305]
Heard on:	16 November 2023
Decided on:	19 November 2024
Summary:	Municipal planning by-laws — transfer embargoes — delegated powers under section 32(1) of the Spatial Planning and Land Use Management Act 16 of 2013 — constitutionality of section 76 of the Govan Mbeki Spatial Planning and Land Use Management By-law — constitutionality of section 86 of the Emalahleni Municipal By-law on Spatial Planning and Land Use Management 2016 — section 118(1) of the Systems Act — right to property — order of invalidity

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Mpumalanga Division of the High Court, Middelburg):

1. Leave to appeal is granted.

2. The appeal against the order of the Supreme Court of Appeal is dismissed with costs, including the costs of two counsel.
3. The cross-appeal against the order of the Supreme Court of Appeal is upheld with costs, including the costs of two counsel.
4. The order of the Supreme Court of Appeal is varied by:
    4.1 the substitution of the following for paragraph 3 of the order in Case No 334/2021:
        "3. Section 76 of the Govan Mbeki Spatial Planning and Land Use Management By-Law 2016 is declared to be inconsistent with the Constitution and invalid"; and
    4.2 the substitution of the following for paragraph 3 of the order in Case No 338/2021:
        "3. Section 86 of the Emalahleni Municipal By-Law on Spatial Planning and Land Use Management 2016 is declared to be inconsistent with the Constitution and invalid."

JUDGMENT

CHASKALSON AJ (Mathopo J, Mhlantla J, Schippers AJ and Tshiqi J concurring):

Introduction

[1] This matter concerns municipal by-laws which attempt to enforce municipal planning schemes by preventing the registration of transfer of properties without proof that there has been full compliance with all municipal planning requirements in respect of the properties in question. The applicant municipalities both adopted municipal planning by-laws containing transfer embargoes along these lines. The Mpumalanga Division of the High Court, Middelburg (High Court) and the Supreme Court of Appeal declared the transfer embargo provisions of the municipalities' by-laws to be

inconsistent with the Constitution and invalid. The applicant municipalities now appeal to this Court against the decision of the Supreme Court of Appeal.

Background

[2] The applicants are Govan Mbeki Local Municipality (Govan Mbeki) and Emalahleni Local Municipality (Emalahleni). They are both municipalities in Mpumalanga which have adopted municipal planning by-laws containing transfer embargoes that are intended to enforce compliance with municipal planning requirements.[1]

[3] The respondents are Glencore Operations South Africa (Pty) Limited, Duiker Mining (Pty) Limited, Tavistock Collieries (Pty) Limited, Umcebo Properties (Pty) Limited and Izimbiwa Coal (Pty) Limited. Except for Umcebo Properties, which is a property holding company, the other four are mining companies. All of the respondents intend to transfer immovable properties in the jurisdictional areas of the applicants. In this judgment, I will refer to the applicants as "the municipalities" and to the respondents as "the property owners".

[4] The Govan Mbeki and Emalahleni by-laws are intended to operate within the framework of the Spatial Planning and Land Use Management Act[2] (SPLUMA). Both sets of by-laws refer to SPLUMA as "the Act".[3] Many of the chapters of the by-laws have introductory provisions that show that they are expressly designed to give effect to the framework provisions enacted in SPLUMA.[4]

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[1] The Govan Mbeki Spatial Planning and Land Use Management By-Law was promulgated in Provincial Notice 10 of 2016 in *Mpumalanga Provincial Gazette Extraordinary* 2650, 17 February 2016 (Govan Mbeki By-Law). The Emalahleni Municipal By-Law on Spatial Planning and Land Use Management was promulgated in Provincial Notice 4 of 2016 *Mpumalanga Provincial Gazette Extraordinary* 2653, 24 February 2016 (Emalahleni By-Law).

[2] 16 of 2013.

[3] See the definition of "the Act" in section 1 of both of the by-laws (above n 1).

[4] See for example above n 1 Emalahleni By-Law, Chapter 2: section 4(1) and section 5(1); Chapter 3: section 15; Chapter 4, Part C: section 33; Chapter 4, Part D: section 45(2) and (3); and Chapter 4, Part E, section 49. See also above n 1 Govan Mbeki By-Law, Chapter 1: section 3(1) and (3); Chapter 2: section 4(1), section 5(1),

[5] Section 74 of the Govan Mbeki By-Law and section 84 of the Emalahleni By-Law deal with requirements for the first transfer of properties out of a new development scheme or sub-division. They build on the provisions of section 53 of SPLUMA which states:

> "The registration of any property resulting from a land development application may not be performed unless the municipality certifies that all the requirements and conditions for the approval have been complied with."

[6] Section 74 of the Govan Mbeki By-Law states the following:

> "74 Restriction of transfer and registration
>
> . . .
>
> (2) No Erf/Erven and/or units in a land development area, may be alienated or transferred into the name of a purchaser nor shall a Certificate of Registered Title be registered in the name of the owner, prior to the Municipality certifying to the Registrar of Deeds that:
>
> (a) All engineering services have been designed and constructed to the satisfaction of the Municipality, including guarantees for services having been provided to the satisfaction of the Municipality as may be required; and
>
> (b) all engineering services and development charges have been paid or an agreement has been entered into to pay the development charges in monthly instalments; and
>
> (c) all engineering services have been or will be protected to the satisfaction of the Municipality by means of servitudes; and
>
> (d) all conditions of the approval of the land development application have been complied with or that arrangements have been made to the satisfaction of the Municipality for the compliance thereof within 3 months of having certified to the

section 14(1); Chapter 3: sections 15-6, section 17(1); Chapter 4: section 31; Chapter 5, Part C: section 57(3); Chapter 5, Part K: section 77(1)-(3); and Chapter 11, section 175.

Registrar in terms of this section that registration may take place; and

(e) that the Municipality is in a position to consider a final building plan; and

(f) that all the properties have either been transferred or shall be transferred simultaneously with the first transfer or registration of a newly created property or sectional title scheme."

[7] Section 84 of the Emalahleni By-Law is, for practical purposes, identical to section 74 of the Govan Mbeki By-Law. Neither of these two by-laws are challenged by the property owners.

[8] Instead, the property owners' constitutional challenge targets section 76 of the Govan Mbeki By-Law and section 86 of the Emalahleni By-Law. These impugned provisions deal with all property transfers and are not confined to original transfers out of new development schemes and sub-divisions of properties. Section 76 of the Govan Mbeki By-Law states the following:

"76 Certification by Municipality

(1) A person may not apply to the Registrar of Deeds to register the transfer of a land unit, unless the Municipality has issued a certificate in terms of this section.

(2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—

(a) a certificate of a conveyancer confirming that funds due by the transferor in respect of land, have been paid;

(b) proof of payment of any contravention penalty or proof of compliance with a directive contemplated in Chapter 9;

(c) proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme;

> (d) proof that all common property including private roads and private places originating from the subdivision, has been transferred; and
>
> (e) proof that the conditions of approval that must be complied with before the transfer of erven have been complied with.
>
> (f) Proof that all engineering services have been installed or arrangements have been made to the satisfaction of the Municipality."

[9] Section 86 of the Emalahleni By-Law includes no equivalent to section 76(2)(f) of the Govan Mbeki By-Law. In all other respects, it is, for practical purposes, identical to section 76 of the Govan Mbeki By-Law.

[10] Section 76 of the Govan Mbeki By-Law and section 86 of the Emalahleni By-Law seek to use transfer embargoes to enforce compliance with municipal planning, land use and building regulation requirements. They do so by requiring all property owners who want to apply to the Registrar for a transfer of their land first to obtain a certificate from the municipality (a "planning certificate"). The planning certificate confirms that all spatial planning, land use management and building regulation requirements and payments applying to the land unit in question have been complied with.

[11] The transfer embargoes in the impugned by-laws extend not only beyond those contemplated by section 53 of SPLUMA. They also extend beyond the transfer embargoes created by section 118(1) of the Local Government: Municipal Systems Act[5] (Systems Act) which were considered by this Court in *Mkontwana*.[6] Section 118(1) of the Systems Act requires the presentation of "rates clearance certificates" as a precondition for transfer of properties. A rates clearance certificate certifies only the payment of amounts that became due in the preceding two years for

[5] 32 of 2000.

[6] *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*).

municipal rates and services in respect of a property. In contrast, paragraph (a) of the impugned by-laws requires a certificate confirming payment by the transferor of all amounts due in respect of the property, irrespective of when those amounts became due. As the property owners point out, this means that a transferor must now prove payment of rates liabilities that may have arisen decades ago and that have not yet prescribed because the prescription period for taxes is thirty years.[7] Paragraphs (d), (e) and (f) of the Govan Mbeki By-Law (and paragraphs (d) and (e) of the Emalahleni By-Law) also make the current land owner responsible for ensuring that the original developer of the property complied with land use and planning requirements relating to the development.

[12] Unlike section 118 of the Systems Act, the impugned by-laws do not place obligations directly on the Registrar of Deeds. They merely prohibit an applicant from applying for transfer without obtaining a planning certificate under the by-laws. Nevertheless, the Office of the Mpumalanga Registrar of Deeds has taken the position that it will refuse to process transfer applications without the production of a planning certificate required by the by-laws.[8]

Litigation history

High Court

[13] On 18 July 2019, the property owners launched an application in the High Court for orders declaring the impugned by-laws unconstitutional and invalid.[9] The

[7] Section 11(a)(iii) of the Prescription Act 68 of 1969.

[8] The position of the Mpumalanga Deeds Registration Office is consistent with section 3(1)(b) of the Deeds Registries Act 47 of 1937 which states that:

> "(1) The registrar shall . . .
>
> (b) examine all deeds or other documents submitted to him for execution or registration, and after examination reject any such deed or other document the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exists: Provided that such deed or document need not be examined in its entirety before being rejected."

[9] The property owners also challenged the constitutional validity of section 82 of the Steve Tshwete Local Municipality Spatial Planning and Land Use Management By-Laws, Local Authority Notice 2 of 2016 *Provincial Gazette* 2633, 15 January 2016, the provisions of which are also framed in terms practically identical to those of section 76 of the Govan Mbeki By-Law. When this constitutional challenge succeeded in the

constitutional case of the property owners was based on several alternative causes of action. First, the property owners alleged that the impugned by-laws were inconsistent with section 25 of the Constitution, as their application led to an arbitrary deprivation of property. Second, they submitted that the impugned by-laws were unconstitutional because they legislate on matters which fall outside the scope of powers assigned to local government in terms of section 156 read with Part B of Schedule 4 and Part B of Schedule 5 to the Constitution. Third, they contended that the impugned by-laws were invalid because they were inconsistent with section 118 of the Systems Act. The property owners also sought a wide range of administrative review and interdictory relief in the alternative to their primary constitutional relief. For reasons that appear below, this relief is no longer relevant.

[14] Relying on *Mkontwana*, the High Court held that the impugned by-laws constituted a deprivation of property within the meaning of section 25(1) of the Constitution.[10] Having regard to the historical exclusion of mining properties from land use schemes,[11] the High Court held that the application of paragraph (c) of subsection (2) of the impugned by-laws to the property owners' mining properties amounted to an arbitrary deprivation of property.[12]

[15] The High Court also held that the impugned by-laws were inconsistent with section 118 of the Systems Act because they purported to "amend" the provisions of that section by imposing additional requirements before transfer applications could be processed at the office of the Registrar of Deeds. It concluded that this inconsistency

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High Court, the Steve Tshwete Municipality did not appeal the High Court decision. The present appeal is, therefore, confined to the Govan Mbeki and Emalahleni by-laws.

[10] *Glencore Operations South Africa (Pty) Ltd v Steve Tshwete Local Municipality* [2021] ZAMPMHC 39 (High Court judgment) at paras 41-51.

[11] *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* [2014] ZAGPPHC 218 (*Aquila Steel*) at paras 59-62. In para 56 of the High Court judgment, the Court quoted these paragraphs from the *Aquila Steel* judgment of the Gauteng High Court, but incorrectly attributed them to the judgment of this Court in *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* [2019] ZACC 5; 2019 (3) SA 621 (CC); 2019 (4) BCLR 429.

[12] High Court judgment above n 10 at paras 54-60.

with section 118 of the Systems Act was an independent ground of invalidity of the by-laws.[13]

[16] The High Court then considered whether the by-laws were covered by the municipalities' legislative competence over "municipal planning" under section 156(1)(a) read with Part B of Schedule 4 to the Constitution. The High Court cited *DVB Behuising*,[14] where this Court held that the registration of land rights was a residual national competence.[15] The High Court accordingly concluded that the municipal planning competence under Part B of Schedule 4 did not extend to matters concerning the registration and transfer of properties.[16] The High Court also held that the creation of the by-laws did not fall within the incidental powers conferred on municipalities by section 156(5) of the Constitution read with section 156(2).[17] As a result, the High Court concluded that there was no enabling authority for the municipalities to make the impugned by-laws and that the by-laws were inconsistent with the constitutional principle of legality. On the basis of this reasoning, the High Court declared the impugned by-laws to be unconstitutional and invalid.[18]

[17] For reasons that do not emerge clearly from the judgment, the High Court qualified its orders of invalidity of the impugned by-laws in two respects.[19] First, it

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[13] Id at paras 73-6.

[14] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v Northwest Provincial Government* [2000] ZACC 2; 2000 (4) BCLR 347; 2001 (1) SA 500 (CC) (*DVB Behuising*).

[15] At para 55 of the majority judgment in *DVB Behuising* (id) the following was stated:

> "The provisions of chapter 2 and chapter 3 that related to the granting of a limited form of 'ownership' rights in land in the township and those that related to the registration of those rights in chapter 9 dealt, on their face, with a form of land tenure, a matter not listed in Schedule 6."

The High Court judgment did not rely on this passage. Instead, at para 67, the High Court judgment cited a passage which it attributed to paras 34 and 35 of *DVB Behuising.* In fact, the first paragraph of this passage appears at para 104 of the judgment in *DVB Behuising* of Goldstone J, Sachs J and O'Regan J which dissented in part with the majority judgment. The second paragraph in the passage cited by the High Court does not appear anywhere in the *DVB Behuising* judgment.

[16] High Court judgment above n 10 at paras 69-70.

[17] Id at paras 70-2.

[18] Id at para 76.

[19] Id at para 83.

limited the orders of invalidity to circumstances covered by provisions of paragraphs (a) and (c) of subsection (2) of the impugned by-laws in relation to the property owners' mining properties, although these provisions were relevant only to the property challenge and not to the legality challenge.

[18] Second, it invoked section 172(1) of the Constitution to suspend its orders of invalidity for a period of six months to allow the constitutional defect in the by-laws to be corrected. Apart from being unreasoned, the suspension of invalidity was a misdirection on the part of the High Court. The only party with legislative authority to amend by-laws is the municipality that made those by-laws in the first place. As the High Court had concluded that the municipalities lacked any enabling power to make by-laws relating to registration and transfer of property, it would not have been possible for them to amend the by-laws in any way that corrected the constitutional defect in a manner other than an unqualified order of invalidity would have corrected the defect.

Supreme Court of Appeal

[19] The municipalities appealed to the Supreme Court of Appeal against the judgment and order of the High Court. The property owners cross-appealed against the two provisions of the High Court order that qualified the orders of invalidity.

[20] The Supreme Court of Appeal identified the legality issue as the first issue that had to be addressed because, if the property owners were correct on the legality issue, that would render all other issues academic.[20] The Supreme Court of Appeal discussed the scheme of local government powers under Chapter 7 of the Constitution and sections 155 and 156 of the Constitution.[21] It also analysed the provisions of SPLUMA to consider whether the by-laws were authorised by the enabling authority of

[20] *Govan Mbeki Local Municipality v Glencore Operations South Africa (Pty) Ltd* [2022] ZASCA 93; 2022 (6) SA 106 (Supreme Court of Appeal judgment) at para 6.

[21] Id at paras 14-9.

section 32(1) of SPLUMA, which states that a "municipality may pass by-laws aimed at enforcing its land use scheme".[22]

[21] It concluded that there was no enabling authority for the impugned by-laws.[23] The Supreme Court of Appeal reasoned that the impugned by-laws were not authorised as part of the municipal legislative competence over municipal planning because their true subject matter was not municipal planning but registration and transfer of property:

> "As this enforcement mechanism in the by-laws is a restriction on transfer, these are not aspects of municipal planning, but matters pertaining to the transfer and registration of property that are regulated by the Deeds Registries Act. That is not a municipal legislative competence, but a national one."[24]

[22] It concluded that the by-laws were beyond the by-law-making power conferred by section 32(1) of SPLUMA because "the system of enforcement envisaged in section 32 of SPLUMA does not provide for a restriction of the transfer of land".[25] Further, it held that the by-laws did not fall within the incidental powers conferred on municipalities by section 156(2) of the Constitution read with section 156(5). It stated the following in this regard:

> "The restriction on transfer of land is not a necessary power incidental to land-use management, as enforcement mechanisms of its land-use scheme are already provided for in Chapter 9 of the by-laws. The registration of transfer of property is expressly regulated by the Deeds Registries Act and section 118 of the Systems Act. There is thus no room for an implied municipal power to regulate the registrar's statutory power to register the transfer of properties. The embargo therefore cannot be incidental to the effective enforcement of a land-use scheme."[26]

[22] Id at paras 23-32.

[23] Id at para 40.

[24] Id at para 35.

[25] Id at para 37.

[26] Id at para 40.

[23] The Supreme Court of Appeal accordingly upheld the legality challenge to the impugned by-laws. It also endorsed the High Court's conclusion that the impugned by-laws were inconsistent with section 118 of the Systems Act and pointed out that, once the by-laws were not sourced in any lawful authority, the deprivation of property that they effected amounted to an arbitrary deprivation and was additionally inconsistent with the Constitution on this ground.[27] The Supreme Court of Appeal accordingly dismissed the municipalities' appeals with costs.

[24] On the cross-appeal, the Supreme Court of Appeal noted that the High Court provided no reasons for its order suspending the declaration of invalidity. The Supreme Court of Appeal held that it was not competent for the High Court to suspend the declaration of invalidity without any apparent reasons for doing so. It accordingly upheld the cross-appeals of the property owners with costs and set aside the suspension of the declaration of invalidity of the by-laws.[28]

[25] Apparently due to an oversight, the Supreme Court of Appeal did not address itself to the second aspect of the cross-appeals which sought to remove the qualifications in the High Court order that limited the orders of invalidity to circumstances covered by provisions of paragraphs (a) and (c) of subsection (2) of the impugned by-laws in relation to the property owners' mining properties.[29]

In this Court

[26] Aggrieved by the Supreme Court of Appeal's decision, both municipalities filed applications in this Court for leave to appeal and to set aside the High Court's order (main application). Govan Mbeki also filed a condonation application for the late filing of the record due to the length of time it took to prepare the record whilst relying on the

[27] Id at para 41.

[28] Id at para 42.

[29] This aspect of the cross-appeal was not addressed in the notice of cross-appeal, but we were informed from the bar that the property owners had addressed the issue in oral argument before the Supreme Court of Appeal and had handed up a draft order that removed the relevant qualifications in the High Court order.

services of a third-party company. The property owners oppose the municipalities' appeals. They also seek leave to cross-appeal against the failure of the Supreme Court of Appeal to remove the qualification in the High Court orders that limited the orders of invalidity to circumstances covered by provisions of paragraphs (a) and (c) of subsection (2) of the impugned by-laws in relation to the property owners' mining properties.

The arguments of the municipalities

[27] Govan Mbeki complains that the property owners' application in the High Court was premature because the property owners failed to show any live disputes with the municipality in relation to planning certificate applications for any of the properties that they allegedly wanted to transfer.

[28] On the legality issue, the municipalities submit that section 156(2) of the Constitution authorises the promulgation of by-laws as original legislation. They argue that the power to create by-laws derives from the Constitution itself and is not subject to the limits of the enabling authority conferred by SPLUMA. According to the municipalities, the impugned by-laws fall under the "municipal planning" competence in Schedule 4 to the Constitution because the impugned provisions are simply an enforcement mechanism to give effect to the remainder of the by-laws which directly address municipal planning issues.

[29] In this context, both municipalities invoke the decision of this Court in *DVB Behuising* which held that "functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively".[30] The municipalities argue that the transfer embargo in the impugned by-laws falls within their original constitutional powers because it is a reasonable mechanism chosen to enforce municipal planning and building regulation requirements. In this context, Emalahleni contends

[30] *DVB Behuising* above n 14 at para 17.

that this Court must defer to the municipalities' choice of the most appropriate enforcement mechanisms for ensuring compliance with municipal planning requirements.

[30] In the alternative to their primary argument that the impugned by-laws fall within original municipal powers over municipal planning and building regulations, both municipalities argue that, as mechanisms designed to enforce municipal planning and building regulations provisions, the impugned by-laws fall within the "necessary and incidental" municipal competence conferred by section 156(5) of the Constitution. In this regard, Govan Mbeki cites a series of judgments of this Court[31] and foreign courts[32] that confirm that one tier of government may have incidental powers to legislate validly within an area of exclusive legislative competence of another tier of government.

[31] Govan Mbeki also alleges, at the level of fact, that a transfer embargo is a necessary municipal planning enforcement mechanism and thus one which may be legislated within the municipality's incidental powers over municipal planning, because it is not feasible for the municipality to bear the cost of a municipal planning inspectorate to enforce the by-laws.

[32] Alongside the municipalities' argument that they have the power to make the impugned by-laws under their original constitutional powers, Emalahleni submits that section 32(1) of SPLUMA independently authorises the making of the by-laws because that section should be interpreted broadly so as to empower municipalities to choose any reasonable enforcement mechanisms to include in their by-laws.

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[31] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (*Mazibuko*) at para 111; *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) (*Liquor Bill*); and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification*) at para 244.

[32] *M'Culloch v State of Maryland* 17 US (4 Wheat) 316 (1819) (*M'Culloch v State of Maryland*) and *General Motors of Canada Ltd v City National Leasing* 1989 CanLII 133 (SCC); [1989] 1 SCR 641, 58 DLR (4th) 255 (*General Motors of Canada*).

[33] The municipalities also urge this Court to reject the conclusions of the High Court and the Supreme Court of Appeal that the impugned by-laws are inconsistent with section 118(1) of the Systems Act. In this regard, Emalahleni cites the judgment of this Court in *Telkom*[33] which held:

> "For section 156(3) to be activated, there must be real conflict between the challenged by-law and national legislation. And for a conflict to arise, the two pieces of legislation must be incapable of operating alongside each other. In other words, they must be mutually exclusive. If they are reasonably capable of co-existing, conflict as envisaged in section 156(3) would not have arisen."[34]

[34] Emalahleni submits that, applying the *Telkom* test, there is no conflict between the by-laws and section 118(1) because it is possible for property owners to comply with both sets of statutory requirements. Section 118(1) and the by-laws merely impose two separate sets of requirements both of which must be satisfied before land may be transferred. Emalahleni also cites the decision of this Court in *Maccsand*[35] as authority for the proposition that different tiers of government can impose separate requirements before private parties may perform certain acts and that, in such cases, compliance with the separate requirements is required cumulatively.

[35] Finally, in relation to the property challenge, both municipalities appear to accept that the by-laws amount to a deprivation of property. However, they emphasise the importance of the purpose of the impugned by-laws – namely, the enforcement of independent legal obligations in relation to municipal planning and building regulations. They argue that, having regard to this purpose, the limited deprivation of property rights effected by the by-laws is not arbitrary and thus does not violate section 25(1).

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[33] *Telkom SA SOC Ltd v Cape Town City* [2020] ZACC 15; 2020 (10) BCLR 1283 (CC); 2021 (1) SA 1 (CC) (*Telkom*).

[34] Id at para 34.

[35] *Maccsand (Pty) Ltd v City of Cape Town* [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) at para 47 (*Maccsand*).

The arguments of the property owners

[36] The property owners defend the findings of unconstitutionality made by the Supreme Court of Appeal and the High Court and adopt the reasoning of the Supreme Court of Appeal. They argue that the impugned by-laws constitute an extensive and arbitrary deprivation of property under section 25 of the Constitution. They also contend that the impugned by-laws are unlawful as they go beyond the constitutional competence over "municipal planning" or "building regulations". In this regard, they contend that the transfer embargo deals with land registration matters, not municipal planning or building regulation matters, that the impugned by-laws are not necessary or incidental to those local government competences within the meaning of section 156(5) of the Constitution, and fall beyond the enabling authority of section 32(1) of SPLUMA.

[37] The property owners also contend that the impugned by-laws conflict with section 118 of the Systems Act, and are thus invalid under section 156(3) of the Constitution. This, so it argued, was because the by-laws render section 118 meaningless and take away the owner's right to submit transfer documents to the Registrar and to demand transfer upon production of a section 118 certificate.

The issues before this Court

[38] The applications raise the following issues:

(a) preliminary questions of condonation and prematurity;

(b) jurisdiction and whether leave to appeal should be granted;

(c) legality issues: namely whether the municipalities have the power to make the impugned by-laws either under their original constitutional powers or under the powers delegated to them by section 32(1) of SPLUMA;

(d) if the municipalities have the power to make the impugned by-laws, whether the by-laws are inconsistent with section 118(1) of the Systems Act;

(e) if not, whether the impugned by-laws violate the fundamental right to property; and

(f) if the impugned by-laws are invalid in whole or in part, what remedy this Court should grant under its powers in terms of section 172(1) of the Constitution.

Preliminary issues

[39] The first preliminary issue is condonation. Govan Mbeki filed an electronic copy of the record within the deadline stipulated in the directions of this Court. However, it failed to file hard copies of the record within that deadline. Govan Mbeki has provided a reasonable explanation for its failure timeously to file hard copies of the record. This failure did not interfere with the Court's preparation for the hearing. Nor did it prejudice the property owners in any material respects. This Court, therefore, grants Govan Mbeki condonation for the late filing of hard copies of the deadline.

[40] The second preliminary issue is Emalahleni's complaint that the property owners' application in the High Court was premature, because the property owners failed to show any live disputes with the municipality in relation to planning certificate applications for any of the properties that they allegedly wanted to sell. At the hearing in this Court, counsel for Emalahleni rightly did not press this prematurity complaint.

[41] Since the early years of South African constitutional law, this Court has held that an applicant has standing to challenge the constitutionality of laws in the abstract if those laws threaten or affect the applicant's rights. Applicants do not have to wait until they are subjected to adverse consequences under the laws in question.[36]

[42] Property owners who want to sell their properties and who contend that section 86 of the Emalahleni By-Law is constitutionally invalid do not have to go

[36] *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 163-6.

through the process of applying under section 86 for planning certificates in advance of transferring their properties before they can challenge the constitutionality of section 86. If the section affects their rights to transfer their properties, they are entitled proactively to challenge the section in the abstract.

Jurisdiction and leave to appeal

[43] The applications for leave to appeal to this Court concern the constitutional powers of local government and the fundamental right to property. These are plainly matters within the constitutional jurisdiction of this Court.

[44] The issues raised by the municipalities are not frivolous. They are constitutional issues of substance and in respect of which a decision by this Court will be in the interests of justice. Accordingly, leave to appeal must be granted.

Analysis

[45] As illustrated by the Supreme Court of Appeal judgment, an analysis of the constitutional validity of the impugned by-laws must start with the legality issue. Legal authority is the logical starting point because, without legal authority, the municipalities cannot make any valid by-laws. It follows that, if the legality challenge is successful, the by-laws are invalid and it would be unnecessary to investigate the property challenge or the complaint that the by-laws are inconsistent with section 118 of the Systems Act.

[46] Any investigation into whether municipalities have authority to make the impugned by-laws must consider the scheme of local government legislative competence under the Constitution. There are four important features of the Constitution relevant to this scheme. The first is that, with the advent of the interim Constitution, the status of local government changed.[37] In *Fedsure* this Court

[37] The transformation of local government since the advent of democracy and the context for this transformation is discussed in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) (*Fedsure*) at paras 2-4; *African National Congress v Minister of Local Government and Housing, KwaZulu-Natal* [1998] ZACC 2; 1998 (3) SA 1 (CC); 1998 (4)

emphasised that local government no longer depends on national or provincial legislation for its existence and powers. Rather, it is an entrenched sphere of government with original powers that derive directly from the Constitution.[38] As this Court stated in *Robertson*:[39]

> "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 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."[40]

[47] The municipalities are correct when they submit that they do not need to point to a source in SPLUMA for the power to make the impugned by-laws if they can show that this power is vested by the Constitution itself.

[48] The second relevant feature of the Constitution concerns the specific nature of the legislative powers conferred on municipalities by the Constitution. The powers of municipalities are governed by section 156 of the Constitution. The primary original powers vested in municipalities are executive powers, not legislative powers. Section 156(1)(a) provides that municipalities have the original executive authority to

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BCLR 399 (CC) at paras 4-12; *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council, Western Cape Legislature*) at paras 182-6; and *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) at paras 101-3.

[38] *Fedsure* id at paras 54-8.

[39] *City of Cape Town v Robertson* [2004] ZACC 21; 2005 (2) SA 323 (CC); 2005 (3) BCLR 199 (CC) (*Robertson*).

[40] Id at para 60.

administer any functional areas of competence listed in Part B of Schedules 4 and 5 (local government schedule matters).[41]

[49] The original legislative powers vested in municipalities are narrower and are conferred only in relation to, and in aid of, the executive powers of the municipalities. These original legislative powers are conferred by section 156(2) of the Constitution which states that a municipality "may make . . . by-laws for the effective administration of the matters which it has the right to administer".

[50] The constrained by-law making power vested by the Constitution in municipalities differs materially from the legislative powers vested in Parliament and the provincial legislatures by section 44(1)(a)(ii) and section 104(1)(b) respectively. The latter sections confer legislative power in direct terms. They do not define the legislative powers of the National Assembly or the provincial legislatures with reference to the executive powers of national or provincial governments.[42] Parliament and the provincial legislatures both have unqualified legislative power within their functional areas of competence. In obvious contrast, the original local government legislative power is limited only to the making of laws for the effective exercise of local government executive power over local government schedule matters. The lesser status of local government legislative power under the Constitution is also reflected in section 156(3) of the Constitution which invalidates local by-laws that conflict with national or provincial legislation.[43]

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[41] Section 156(1)(b) of the Constitution recognises that a municipality will also have executive authority over "any other matter assigned to it by national or provincial legislation" but this is not original executive authority.

[42] Section 44(1)(a)(ii) confers on the National Assembly the power "to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5".

Section 104(1)(b) vests a provincial legislature with the power—

> "to pass legislation for its province with regard to—
>
> (i) any matter within a functional area listed in Schedule 4;
>
> (ii) any matter within a functional area listed in Schedule 5."

[43] Sections 156(2) and 156(3) of the Constitution.

[51] The Constitution confers only limited legislative powers on municipalities because, mindful of the acute legacy of apartheid at a local level,[44] the constitutional scheme contemplates that the primary duties of municipalities must be in relation to service delivery,[45] which is quintessentially an executive function, not a legislative function. The limited legislative role of local government is also reflected in the fact that the Constitution does not create separate legislative and executive bodies for local governments, as it does in the case of the national and provincial governments. Rather, it vests the legislative powers of local government in the same councils that are the executive authorities of municipalities.[46]

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[44] See the authorities cited at n 37 above.

[45] This is reflected in sections 152 and 153 of the Constitution which set out the objects and developmental duties of municipalities and state the following:

> "152 Objects of local government
>
> (1) The objects of local government are—
>
> (a) to provide democratic and accountable government for local communities;
>
> (b) to ensure the provision of services to communities in a sustainable manner;
>
> (c) to promote social and economic development;
>
> (d) to promote a safe and healthy environment; and
>
> (e) to encourage the involvement of communities and community organisations in the matters of local government.
>
> (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).
>
> 153 Developmental duties of municipalities
>
> A municipality must—
>
> (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
>
> (b) participate in national and provincial development programmes."

See also *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC) (*Habitat Council*) at para 14 where this Court described municipalities as "the frontiers of service delivery".

[46] Section 151(2) of the Constitution. See *Democratic Alliance v Masondo N.O.* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) (*Masondo*) at para 21.

[52] In terms of section 156(5), municipalities also have the right to exercise powers over matters that are "reasonably necessary for, or incidental to, the effective performance of [their] functions".[47] Whatever the ambit of the necessary or incidental *executive* powers vested in municipalities by section 156(5), there is only limited scope for necessary or incidental local government *legislative* powers deriving directly from section 156(5) of the Constitution. This is because the primary legislative power of municipalities is, itself, framed in the nature of a power that is incidental to the original executive powers vested in municipalities – it is a power which is limited to the making of "by-laws for the effective administration of the matters which [a municipality] has the right to administer". Reading section 156(5) as a direct source of incidental municipal legislative powers would render section 156(2) superfluous.

[53] However, section 156(5) may serve as an indirect source of legislative power. If, in terms of section 156(5), certain executive powers are reasonably necessary for or incidental to the effective performance of a municipality's functions in respect of local government schedule functions, such additional executive powers are vested directly in the municipality by section 156(5) of the Constitution. Section 156(2) then empowers the municipality to make by-laws to assist in the effective implementation of these additional executive powers.

[54] This principle is illustrated by the judgment of this Court in *Mazibuko*.[48] One of the issues in *Mazibuko* concerned the installation of pre-paid water meters by the City of Johannesburg. In this context, this Court had to decide whether a by-law which referred to a "metered full pressure water connection" should be interpreted to refer only to post-paid meters and thus not to permit the City to exercise powers vested in

[47] Section 156(5) of the Constitution. The section states:

> "A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

[48] *Mazibuko* above n 31.

respect of "metered full pressure water connections" in relation to pre-paid meters. This Court found that—

> "the power to install pre-paid meters is one which is reasonably incidental to providing services to citizens in a sustainable manner that permits cost recovery [and therefore] it is a power that is reasonably incidental to the effective performance of the functions of a municipality."[49]

Having found that the power to install pre-paid meters was incidental to what was an executive function of the City (providing services in a sustainable manner), this Court interpreted the by-law so as to assist the effective administration of this incidental executive power. So, it held that references to "metered full pressure water connections" included pre-paid meters.[50]

[55] The third feature of the Constitution relevant to the scheme of local government competence flows from *Gauteng Development Tribunal*[51] where this Court stated that "barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise".[52] There are numerous judgments of this Court that emphasise that the powers allocated to different spheres of government are not contained in hermetically sealed compartments and that some overlap is necessary.[53] However, the provision in the Constitution for exclusive powers of provincial and local government is a feature that departs from the scheme of the interim Constitution. With very few exceptions, the latter did not vest exclusive powers in provincial or local government and generally contemplated a

[49] Id at para 111.

[50] Id at paras 108 and 111.

[51] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Gauteng Development Tribunal*).

[52] Id at para 56. See also *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR (CC) (*AngloGold Ashanti Ltd*).

[53] See for example *Organisation Undoing Tax Abuse v Minister of Transport* [2023] ZACC 24; 2023 (10) BCLR 1189 (CC); 2024 (1) SA 21 (CC) (*OUTA*) at para 82(g); *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* [2016] ZACC 2; 2016 (3) SA 160 (CC); 2016 (4) BCLR 469 (CC) (*Tronox*) at para 20; and *Gauteng Development Tribunal* above n 51 at para 55.

regime in which the powers of provincial and local government would be exercised concurrently with those of national government.[54] Judgments addressing the approach to the interpretation of powers in relation to functional areas under the interim Constitution were not affected by concerns of a scheme of exclusivity running through the Constitution and may not reflect the correct approach to similar questions under the Constitution today.

[56] The fourth relevant feature of the Constitution is the scheme of co-operative government under the Constitution. Both subsections (2) and (5) of section 156 must be interpreted within the broader context of how powers are distributed under the Constitution within this scheme of co-operative government. If municipalities want powers over functional areas falling within national or provincial competence, they are entitled to request that such powers be vested in them or even assigned to them as contemplated by sections 99, 126, 156(1)(b), 156(4), and 238 of the Constitution[55] in

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[54] See for example *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24; 1997 (1) BCLR 1 (CC); 1997 (2) SA 97 (CC) at paras 149-151 and *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* [1996] ZACC 3;1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC). The shift to a constitutional regime of exclusive powers was a product of the Constitutional Principles in Schedule 4 to the interim Constitution. Constitutional Principle XIX prescribed that the final Constitution would have to provide for exclusive and concurrent powers at national and provincial levels of government. So, while the interim Constitution itself operated on a principle of concurrent powers, not exclusive powers, it prescribed that the final Constitution would operate differently.

[55] The relevant provisions of the Constitution state the following:

> "99 Assignment of functions
>
> A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment—
>
> (a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
>
> (b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and
>
> (c) takes effect upon proclamation by the President."
>
> "126 Assignment of functions
>
> A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment—
>
> (a) must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;

the case of executive powers or sections 44(1)(a)(iii) and 104(1)(c) of the Constitution in the case of legislative powers.[56]

[57] If municipalities have a legitimate claim to powers falling within the functional areas of provincial and national competence in order to enforce or support their own

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(b) must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and

(c) takes effect upon proclamation by the Premier."

"156 Powers and functions of municipalities

(1) A municipality has executive authority in respect of, and has the right to administer—

. . .

(b) any other matter assigned to it by national or provincial legislation.

. . .

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it."

"238 Agency and delegation

An executive organ of state in any sphere of government may—

(a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or

(b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis."

[56] The relevant provisions of the Constitution state the following:

"44 National legislative authority

(1) The national legislative authority as vested in Parliament—

(a) confers on the National Assembly the power—

. . .

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government."

"104 Legislative authority of provinces

(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—

. . .

(c) to assign any of its legislative powers to a Municipal Council in that province."

powers over local government schedule matters, the system of co-operative government will operate to ensure that such powers are assigned to them. In this regard, apart from the general co-operative government obligations to local government under Chapter 2, national and provincial government are bound by the specific obligations in sections 154(1) and 156(4) of the Constitution which state:

> "154 Municipalities in co-operative government
>
> (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, to exercise their powers and to perform their functions."
>
> "156 Powers and functions of municipalities
>
> . . .
>
> (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—
>
> (a) that matter would most effectively be administered locally; and
>
> (b) the municipality has the capacity to administer it."

[58] Where a municipality wants to exercise powers over matters falling outside Part B of Schedule 4 or 5 merely because it considers such powers desirable to support its powers over local government schedule matters, the national government or provincial government with authority over the relevant non-local government schedule matters may choose to assign the relevant powers to the municipality that requests them. Equally, however, it may choose not to assign the relevant powers to the municipality.

[59] The choice to vest municipalities with powers over matters that are not local government schedule matters is ordinarily a choice that is to be made by the national government or the relevant provincial government. It is not a choice that can simply be assumed by a municipality invoking incidental executive powers under section 156(5) or the incidental legislative competence under section 156(2). So, a municipality cannot

routinely invoke sections 156(2) or 156(5) to lay claim to powers over matters falling outside of the local government schedules merely because the municipality considers that it would be convenient or desirable to have access to such powers for the purpose of performing its functions over local government schedule matters.

[60] Having regard to this broad scheme of local government competence under the Constitution, it is necessary to consider the three possible sources of legal authority for the impugned by-laws that the municipalities assert. First, there is the power under section 156(2) of the Constitution to make by-laws for the effective administration of "municipal planning" or "building regulations", which are local government schedule matters over which the municipalities are given authority under section 156(1)(a) of the Constitution. Second, there is the incidental power of municipalities under section 156(5) of the Constitution. The third potential source relied upon by the municipalities is section 32(1) of SPLUMA. As pointed out above, in section 32(1) of SPLUMA, Parliament has expressly assigned by-law making powers in respect of the enforcement of land use schemes to municipalities.[57] Each of these potential sources of authority for the impugned by-laws will be considered in turn.

Section 156(2)

[61] The municipalities' invocation of section 156(2) as a source of legal authority for the impugned by-laws was based on submissions as to how this Court approached the subject matter of a law with respect to functional areas of competence in *DVB Behuising* and *Abahlali*.[58] These cases, however, are not appropriate reference points because they dealt respectively with questions of provincial executive competence under the transitional provisions under the interim Constitution and provincial legislative competence under the current Constitution. Both of these competences were competences which the respective constitutions vested in provinces in relation to functional areas of competence in unqualified terms. In contrast, the

[57] See sections 156(1)(b) and 44(1)(a)(iii) of the Constitution.

[58] *Abahlali BaseMjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2010 (2) BCLR 99 (CC).

limited legislative competence vested in municipalities is an incidental competence, vesting a municipality only with the power to make laws for the effective administration of the matters which they have the executive power to administer.

[62] For similar reasons, there is not much assistance to be gained by looking to other cases dealing with the characterisation of subject matter of legislation in relation to the legislative powers of the provinces under the interim Constitution,[59] the legislative powers of national or provincial government under the Constitution,[60] or the unqualified executive authority of municipalities over local government schedule matters under the Constitution.[61] The question to be answered in this case is not whether the impugned by-laws are properly characterised as laws with respect to the functional areas of municipal planning and building regulations. It is the materially different question of whether the impugned by-laws fall within the legislative competence of the municipalities to make by-laws for the effective administration of municipal planning and building regulations.

[63] Once the question is framed correctly, the municipalities' claim of original legislative competence under section 156(2) does not stand up to scrutiny for two separate reasons. First, the by-law making power conferred by section 156(2) on a municipality is a power to make by-laws "for the effective administration of matters which it has the right to administer". Implicit in section 156(2) power is that the effective administration contemplated by the Constitution is administration by the municipality itself, rather than by organs of state under the control of the national or provincial executives. The purpose of a transfer embargo is not for a municipality itself to administer municipal planning and building regulations. Rather, it is a device designed to enlist the Registrar of Deeds, a national government organ of state, in the

[59] See for example *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* [1996] ZACC 15; 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) (*Amakhosi*).

[60] See for example *OUTA* above n 53 and *Liquor Bill* above n 31.

[61] *Gauteng Development Tribunal* above n 51 and *OUTA* above n 53.

administration of a function that the Constitution designates as a municipal responsibility.

[64] Even if it were notionally possible for by-laws to be made under section 152 to enlist the support of national or provincial executive authorities in the administration of local government matters, the by-laws in this case would not fall into such a category.

[65] Govan Mbeki argued that it could not "effectively perform its municipal planning functions without a suitable enforcement mechanism" and that the transfer embargo in the impugned by-laws was the most suitable enforcement mechanism available to it. The Supreme Court of Appeal gave short shrift to this argument, holding:

> "The restriction on transfer of land is not a necessary power incidental to land-use management, as enforcement mechanisms of its land-use scheme are already provided for in Chapter 9 of the by-laws."[62]

[66] The Chapter 9 enforcement mechanisms to which the Supreme Court of Appeal referred include the creation of criminal offences for contraventions of the by-laws,[63] municipal powers to serve compliance notices on owners and persons suspected of unlawful land use or construction activity,[64] municipal powers to direct owners and occupiers to demolish unauthorised building work,[65] and municipal powers of entry onto private properties for the purposes of enforcing the by-laws.[66] These enforcement mechanisms supplement[67] and amplify the enforcement mechanisms contained within

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[62] Supreme Court of Appeal judgment above n 20 at para 40.

[63] Section 162 of the Govan Mbeki By-Law and section 174 of the Emalahleni By-Law.

[64] Sections 163 and 164 of the Govan Mbeki By-Law and sections 175 and 176 of the Emalahleni By-Law.

[65] Section 163(2)(a) of the Govan Mbeki By-Law and section 175(2)(a) of the Emalahleni By-Law.

[66] Sections 169 and 171 of the Govan Mbeki By-Law and sections 181 and 183 of the Emalahleni By-Law.

[67] Section 170(1) of the Govan Mbeki By-Law makes clear that, for the purposes of ascertaining compliance with the by-laws, an authorised employee of the municipality may exercise any of the powers conferred by section 32 of SPLUMA. The corresponding provisions of the Emalahleni By-Law is section 182(1).

section 32 of SPLUMA.[68] The by-laws also make clear that, in addition to these enforcement powers, the municipality retains its power to approach the courts for interdictory and other appropriate relief to enforce the by-laws.[69]

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[68] Section 32 states in relevant part:

> "(3) A municipality—
>
> (a) may designate a municipal official or appoint any other person as an inspector to investigate any non-compliance with its land use scheme; and
>
> (b) must issue each inspector with a written designation or appointment in the prescribed form, stating that the person has been appointed in terms of this Act.
>
> . . .
>
> (5) An inspector contemplated in subsection (3) may, subject to subsection (8)—
>
> (a) enter any land at any reasonable time without previous notice for the purpose of ascertaining an issue required to ensure compliance with this Act;
>
> (b) question any person who is or was on or in such land, either alone or in the presence of any other person, on any matter to which this Act relates;
>
> (c) require from any person who has control over or custody of a book, record or other document on or in such land, to produce to the inspector forthwith, or at such time and place as may be determined by the inspector, such book, record or other document;
>
> (d) examine any such book, record or other document or make a copy thereof or an extract therefrom;
>
> (e) require from such a person an explanation of any entry in such book, record or other document;
>
> (f) inspect any article, substance, plant or machinery which is or was on the land, or any work performed on the land or any condition prevalent on the land, or remove for examination or analysis any article, substance, plant or machinery or a part or sample thereof;
>
> (g) seize any book, record or other document or any article, substance, plant or machinery or a part or sample thereof which in his or her opinion may serve as evidence at the trial of any person charged with an offence under this Act or the common law: Provided that the user of the article, substance, plant or machinery concerned, as the case may be, may make copies of such book, record or document before such seizure; and
>
> (h) direct any person to appear before him or her at such time and place as may be determined by the inspector and question such person either alone or in the presence of any other person on any matter to which this Act relates.
>
> (6) When an investigator enters any land in terms of subsection (5), a person who controls or manages the land must at all times provide such facilities as are reasonably required by the inspector to enable him or her to perform his or her functions effectively and safely under this Act.
>
> . . .
>
> (9) An inspector may, where necessary, be accompanied by a police official or any other person reasonably required to assist him or her in conducting the inspection.

[67] Govan Mbeki sought to bolster its claim to transfer embargoes as a power required for it "effectively [to] perform its municipal planning functions" by alleging that the cost of setting up a municipal planning inspectorate was beyond its means. Emalahleni did not put up any evidence of its own in this regard but advanced a similar argument, relying on the evidence of Govan Mbeki. However, on proper analysis, the evidence of Govan Mbeki undermines the proposition for which the municipalities sought to use it.

[68] The proposed budget for a planning inspectorate prepared by the Govan Mbeki deponent, Mr van der Merwe, estimated the start-up cost per planning inspector, including equipment, training, first year salary and vehicle expenses, at only R564 800. After once-off start-up costs were stripped out of this budget, the recurrent cost of the entire proposed five-person planning inspectorate was not much more than R2.5 million per annum. This cost is not one that should be beyond the means of a municipality the size of Govan Mbeki if it is a functional municipality.

[69] Govan Mbeki put up no information relating to its overall budget to suggest that it could not afford the R2.5 million per annum cost of the inspectorate that it regarded as necessary to enforce the by-laws. Emalahleni put up no evidence whatsoever relating to the affordability of a planning municipal inspectorate. So, on the evidence before this Court, cost considerations do not support the notion that transfer embargoes are a power vested in municipalities by the Constitution to enforce their municipal planning schemes and building regulations effectively because inspectorates are unaffordable.

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(10) An inspector may issue a compliance notice in the prescribed form to the person who controls or manages the land or the owner or person in control of a private dwelling if a provision of this Act has not been complied with.

(11) A compliance notice remains in force until the relevant provision of the Act has been complied with and the inspector has issued a compliance certificate in respect of that notice."

[69] Section 166(b) of the Govan Mbeki By-Law and section 178(b) of the Emalahleni By-Law.

[70] Quite aside from the absence of evidence to support the municipalities' cost argument, there is a principled problem with this argument. In effect, the municipalities are asking to be allowed to slough off the executive responsibilities vested in them by section 32 of SPLUMA and Chapter 9 of their own by-laws, and to replace the pro-active administrative enforcement system designed by SPLUMA and the by-laws with one which depends on the retrospective enforcement of planning requirements by property owners themselves and the Registrar of Deeds when a property is sold. This is an unlawful abdication of executive obligations imposed on the municipalities.

[71] Chapter 9 of the by-laws does not give the municipalities a discretion to decline to enforce planning requirements proactively. It includes provisions which impose on the municipalities clear enforcement obligations that require a functional municipal planning inspectorate. Thus, both by-laws state that:

> "The Municipality *must comply and enforce compliance with*—
>
> (a) the provisions of this By-law;
> (b) the provisions of a land use scheme;
> (c) conditions imposed in terms of this By-law or previous planning legislation; and
> (d) title deed conditions."[70] (Emphasis added.)

> "The Municipality *must serve a compliance notice* on a person if it has reasonable grounds to suspect that the person or owner is guilty of [a planning related offence created by the by-laws]."[71] (Emphasis added.)

[72] The requirement for a functional municipal planning inspectorate is also contemplated by the provisions of section 32 of SPLUMA quoted above.[72] In the circumstances, if a municipality objectively lacks the financial resources to create a

[70] Section 161 of the Govan Mbeki By-Law and section 173 of the Emalahleni By-Law.

[71] Section 163(1) of the Govan Mbeki By-Law and section 175(1) of the Emalahleni By-Law.

[72] See above n 68.

functional municipal planning inspectorate, its remedy is to call on the national government to provide it with the necessary allocation of additional revenue under section 214 of the Constitution,[73] as part of the co-operative government obligations of national government under sections 151(4)[74] and 154(1)[75] of the Constitution. Its remedy is not to look for shortcuts that will enable it to abdicate its executive responsibilities.

[73] The superficial attraction of the municipalities' argument that a transfer embargo should be seen as falling within the original by-law making power conferred by the Constitution flows from fact that the municipal planning function and the national deeds registration functions are capable of being confused with one another. The Constitution, however, treats the national deeds registration function separately from the municipal

[73] Section 214 titled "Equitable shares and allocations of revenue" states:

> "(1) An Act of Parliament must provide for—
>
> (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
>
> . . .
>
> (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.
>
> (2) The Act referred to in subsection (1) . . . must take into account—
>
> . . .
>
> (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
>
> (e) the fiscal capacity and efficiency of the provinces and municipalities;
>
> (f) developmental and other needs of provinces, local government and municipalities;
>
> . . .
>
> (h) obligations of the provinces and municipalities in terms of national legislation."

[74] Section 151(4) states:

> "The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[75] Quoted in [57] above.

planning function.[76] Once these two functions are separated, there is no basis to treat a by-law dealing with the national function as falling within the competence to make by-laws for the effective administration of the municipal competence, simply because it is used to enforce matters relating to that municipal competence.

[74] As the property owners pointed out in argument, if an embargo on registration of transfer is seen as falling within the original municipal legislative competence conferred by the Constitution simply because the municipality would want to use it to enforce compliance with town planning by-laws or building regulations, there would be no principled basis for distinguishing cases where a municipality wanted to use a transfer embargo to enforce compliance in relation to another municipal competence. So, a municipality would be entitled to make by-laws placing an embargo on registration of transfer without certificates confirming that, for example:

(a) "smart" electricity and water meters had been installed at the property in accordance with a municipal policy that all properties should now have meters of this nature installed;[77]

(b) no public nuisance was being created at the property; or

(c) no sale of food or liquor to the public had been taking place at the property otherwise than in accordance with a lawfully issued licence, and any fines in relation to unlawful food or liquor trade from the property had been paid in full.

[75] Such embargoes would be no less capable of being characterised as by-laws made for the effective administration of the underlying municipal competences over water services, electricity reticulation, the control of public nuisances or the control of undertakings that sell food or liquor to the public, than the embargoes in the present

[76] "Municipal planning" is expressly included in Part B of Schedule 4 and is thus a local government matter. Deeds registration appears in none of the schedules in the Constitution and, as pointed out in *DVB Behuising* above n 14 at para 55, is a residual functional area of national government competence.

[77] In fact, section 14(1) of the City of Cape Town Water By-Law, 2010 (*Western Cape Provincial Gazette* 6847, 18 February 2011) purports to require a seller wishing to transfer ownership of their property first to produce a certificate from a plumber confirming that the water installation at the property conforms to the requirements of the by-law.

case can properly be characterised as by-laws made for the effective administration of the municipal competences over building regulations and municipal planning.

[76] In fact, the logical problem goes much further. If the transfer embargo in the impugned by-laws is seen as falling within the original municipal legislative competence conferred by section 156(2) of the Constitution and not as an impermissible attempt to exercise legislative power within the national government area of competence over deeds registration matters, there would be no principled basis for distinguishing cases where a municipality wanted to legislate within the fields of other provincial or national government competences to create embargoes to enforce compliance with building regulations and municipal planning requirements. So, on the logic of the municipalities' approach, the original legislative power conferred on them by the Constitution, compliance with building regulations and municipal planning requirements could be enforced by by-laws requiring certificates of the sort contemplated by the by-laws at issue in the present case as a pre-condition for—

(a) the owner or occupant of a property to apply for an identity document or a passport;

(b) the owner or occupant of a property to apply for a cellphone SIM card; or

(c) the owner or occupant of a property to export goods that had been manufactured or stored at the property.

[77] The two problems described above would also operate interchangeably. On the logic of the municipalities' argument, the Constitution would empower municipalities to enforce compliance with legal requirements in relation to any municipal functional area of competence by imposing embargoes in relation to any functional area of provincial or national competence. Provided only that the purpose of the embargo was to enforce requirements relating to a matter within municipal competence, there would be no limits to the functional areas in which municipalities could impose embargoes through by-laws.

[78] The examples above show that there is no merit to the municipalities' argument that any measure to enforce compliance with by-laws addressing local government schedule matters is a power vested in municipalities directly by the Constitution. The judgment of my Colleague, Dodson AJ, (the second judgment) disagrees and asserts that the transfer embargoes in the present case are somehow distinguishable. However, the second judgment is unable to provide any conceptual basis for distinguishing the transfer embargoes in the impugned by-laws from the notional embargoes contemplated above. The only suggestion it offers in this regard is that if a municipality were to use transfer embargoes to enforce by-laws relating to municipal competences other than municipal planning and building regulations it would still have to show that those transfer embargoes were not invalid under sections 25(1) and 156(3) of the Constitution. But that conflates two separate issues. The issue to be determined first is the issue of legislative competence – whether the Constitution confers original power on municipalities to make the impugned transfer embargo by-laws. The question of invalidity for inconsistency with section 25(1) and 156(3) of the Constitution is an entirely different enquiry and one that presupposes legislative competence.

Section 156(5)

[79] As pointed out above, there is no scope for additional incidental legislative powers to be conferred on municipalities directly by section 156(5) of the Constitution because the primary legislative power under section 156(2) is, itself, framed as an incidental power, and section 156(5) should not be interpreted so as to render section 156(2) superfluous.

[80] To the extent that section 156(5) can operate, together with section 156(2) indirectly to vest additional legislative powers in municipalities for the effective implementation of additional executive powers vested by section 156(2), it does not assist the municipalities. In support of its argument on incidental powers, Govan Mbeki referred to a range of judgments, local and foreign, dealing with the issue of incidental powers vested by a constitution. These judgments are illustrative of the types of powers that courts have recognised as incidental powers in a constitutional context—

(a) the power to charge service fees for the provision of services within a functional area of competence, as recognised by this Court in the *Certification* judgment as an incident of the authority over the functional area in question;[78]

(b) the power to procure or install equipment relating to the relevant functional area of competence, for example, the power to install pre-paid meters as an incident of municipal competence over the functional area of water services, as recognised by this Court in *Mazibuko*;[79]

(c) the power to incorporate a body to perform functions within the areas of competence assigned to the United States Government by the individual States within the US Federal system, that was the incidental power of the United States Government recognised by the United States Supreme Court in *M'Culloch v State of Maryland*;[80] and

(d) the power to create a civil claim for anti-competitive acts that the Canadian Supreme Court recognised as an incident of the Canadian Federal Government's authority over the regulation of trade and commerce in *General Motors of Canada*.[81]

[81] Counsel for Emalahleni went so far as to describe these powers (and other similar powers, such as the power to create criminal offences or to impose administrative fines in relation to local government schedule matters) as "colourless powers", in the sense that they did not relate specifically to a single functional area of competence, but rather were powers that could be used to reinforce any functional area of competence. The concept of "colourless powers" may be open to question.[82] However, the narrow ambit of the incidental powers recognised in the constitutional authorities cited by the

[78] *Certification* above n 31 at para 438.

[79] *Mazibuko* above at n 31 at para 111.

[80] *M'Culloch v State of Maryland* above n 32.

[81] *General Motors of Canada* above n 32.

[82] For example, the creation of civil claims or criminal offences implicate the criminal and civil justice systems which are functional areas of national government competence, even if most of the officials working in those systems fall within the judicial branch of government, or the constitutionally independent National Prosecuting Authority, rather than the Departments of State controlled by the National Executive.

municipalities reflects the fact that incidental powers cannot be invoked loosely to exercise power over matters falling within functional areas assigned to other tiers of government and implicating the duties of state officials under the control of executive authorities in other tiers of government.

Section 32(1) of SPLUMA

[82] There remains the third possible source of legal authority for the impugned by-laws. It is the authority to make by-laws under section 32(1) of SPLUMA which vests municipalities with the power to make by-laws "aimed at enforcing its land use scheme".

[83] It is clear from sections 44(1)(a)(iii), 104(1)(c) and 156(1)(b) of the Constitution that Parliament and the provincial legislatures can assign powers, including by-law making powers, in municipalities over matters which fall outside the functional areas of original municipal competence.[83] So, section 32(1) of SPLUMA could, notionally, have vested municipalities with the power to make enforcement by-laws that impose transfer embargoes. However, the scheme of local government powers under the Constitution demands that any by-law making power vested in municipalities by national or provincial legislation does not ordinarily extend beyond the power to make by-laws in relation to local government schedule matters unless the contrary intention is clear in the enabling provision in the national or provincial legislation.

[84] There is nothing in section 32(1), or indeed in SPLUMA more broadly,[84] which suggests an intention to confer by-law making powers which would vest municipalities

[83] See for example Part 4 of the Housing Act 107 of 1997, which assigns to municipalities extensive executive powers over housing matters even though housing is not a functional area of municipal competence but rather a Part A Schedule 4 area of concurrent national and provincial competence. Read with Part 4 of the Housing Act, section 156(2) of the Constitution then gives municipalities the power to make by-laws for the effective administration of the matters assigned to them in terms of Part 4 of the Housing Act.

[84] Para (e) of subsection (2) of the impugned by-laws bears some resemblance to the embargo contained in section 53 of SPLUMA which states:

with powers generally to embargo the transfer of properties without the production of planning certificates. SPLUMA has considered when municipalities should be vested with registration embargo powers relating to planning compliance. Section 53 of SPLUMA confines such powers to cases of registration arising out of original land development applications. It provides that in such cases transfer shall not be registered "unless the municipality certifies that all the requirements and conditions for the approval have been complied with". Section 74 of the Govan Mbeki By-Law and section 84 of the Emalahleni By-Law adumbrate section 53 of SPLUMA by restating the transfer embargo it imposes and setting out in detail the requirements and conditions that must be certified by the municipality before transfer can proceed. These by-laws clearly fall within the by-law making power conferred by section 32(1) of SPLUMA read with section 53 thereof.

[85] However, the embargoes in sections 76 and 86 of the respective Govan Mbeki and Emalahleni By-Law do not confine their operation to original registrations arising out of land development applications. They purport to apply to all transfers of property after such original registrations. In so doing, they purport to regulate deeds registration and transfer in a manner that goes beyond not only section 53 of SPLUMA but also section 118 of the Systems Act. Embargoes that encroach in this way on the national competence over land transfer and deeds registration are not obviously contemplated by SPLUMA. Therefore, section 32(1) cannot be interpreted to confer on municipalities the power to impose transfer embargoes of the sort contained in the impugned by-laws.

> "The registration of any property resulting from a land development application may not be performed unless the municipality certifies that all the requirements and conditions for the approval have been complied with."

However, section 2(e) of the impugned by-laws goes significantly beyond section 53 of SPLUMA. As pointed out by counsel for the property owners, section 53 imposes only an original registration embargo which requires a local government certificate as a precondition for first registration of the developed or sub-divided property upon the original development of a township register or subdivision of a property. Para (e) of subsection (2) imposes a transfer embargo that burdens the property in perpetuity whenever there is an attempt to transfer it. That para (e) embargoes subsequent transfer as opposed to original registration is clear not only from the wording of the by-law, which refers to "transfer" not "registration", but also because the original registration embargo is already addressed both by section 53 of SPLUMA and by the unimpugned provisions of section 74(2)(d) of the Govan Mbeki By-Law and section 84(2)(d) of the Emalahleni By-Law.

The second judgment

[86] The second judgment finds that the impugned by-laws fall within the by-law making power conferred by section 156(2) of the Constitution. I have engaged with some of the reasoning in the second judgment in my discussion above. My broad conceptual differences with the second judgment are summarised in the following paragraphs.

[87] First, the second judgment seeks to negate the clear wording of the Constitution that distinguishes between the unqualified legislative competences conferred by the Constitution on Parliament and provincial legislatures and the limited legislative competence conferred by the Constitution on municipalities in terms that are framed as an incidental power to municipalities' executive powers. The second judgment cannot account for the clear textual differences between section 156(2) on the one hand, and sections 44(1)(a)(ii) and 104(1)(b) on the other. So, it effectively turns a blind eye to these differences.

[88] The second judgment states that "the conferral of legislative authority on provincial legislatures in terms of section 104(1)(b) is as circumscribed as its conferral on municipalities in section 156(1) and (2)".[85] This is simply incorrect. Section 104(1)(b) does not confer legislative power on a province "for the effective administration of the matters which it has the right to administer". It confers legislative power on a province—

> "to pass legislation for its province with regard to—
>
> (i) any matter within a functional area listed in Schedule 4;
>
> (ii) any matter within a functional area listed in Schedule 5;
>
> (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

[85] At [210(b)] of the second judgment.

> (iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation."

The manner in which section 104(1)(b) confers legislative power on the provinces is self-evidently broader than the manner in which section 156(2) confers legislative power on municipalities.

[89] The second judgment repeatedly conflates issues of legislative competence (which is an issue of whether a power exists) with issues of constitutional consistency (which is an issue of whether a power that does exist, has been exercised in a manner that is unconstitutional). I have already commented above on the second judgment's conflation of questions of legislative competence and questions of consistency with sections 25(1) and 153 of the Constitution.[86] There is a similar conflation in the second judgment of questions of legislative competence and questions of consistency with section 41(1)(f) of the Constitution.[87]

[90] The second judgment's invocation of the provisions of section 3(1)(b) of the Deeds Registries Act fails to take account of the fact that if a municipality does not have the competence to legislate for a transfer embargo, a by-law purporting to impose a transfer embargo falls out of the category of "any other law" contemplated in section 3(1)(b).[88] The second judgment also draws a false analogy between a by-law made beyond the legislative competence of a municipality (which "may exercise no power and perform no function beyond that conferred upon them by law") and dispositions made in the wills by testators who do not need to source their powers of testation in any law.[89]

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[86] At [78].

[87] At [212] of the second judgment.

[88] At [233] of the second judgment.

[89] At [234] of the second judgment. *Fedsure* above n 37 at paras 54-8.

[91] For similar reasons, the reliance in the second judgment on *OUTA* and *Robertson* is misplaced. Neither of those judgments concerned the legislative powers of local government. *OUTA* involved a constitutional challenge based on the exclusive legislative powers of *provincial government* and the exclusive *executive* powers of local government. *Robertson* involved the original constitutional power of a municipality (conferred by section 229(1) of the Constitution) to raise revenue through property rates. As *OUTA* and *Robertson* did not concern the by-law making power of municipalities, neither of those judgments had to consider the ambit of the by-law making powers conferred by section 156(2) of the Constitution. *OUTA* and *Robertson* both confirm that the status of local government under the Constitution is different from what it was in the pre-constitutional era and that local government is an entrenched sphere of government with original powers that derive directly from the Constitution.[90] But that still begs the competence question, namely whether or not the by-law making powers that a municipality asserts can properly be sourced in the Constitution.

[92] Finally, the second judgment impermissibly invokes its conclusions as to the desirability of transfer embargoes to justify its conclusions in relation to the legislative competence of municipalities to make by-laws imposing transfer embargoes.[91] Transfer embargoes may or may not be desirable. That is an issue that must be separated from the constitutional question whether municipalities have the legislative competence to enact by-laws imposing transfer embargoes. By way of comparison, it may have been desirable for better resourced provincial appeal tribunals to exercise some oversight over the executive decisions of municipalities on local government schedule matters. However, this Court has had no difficulty in repeatedly determining this competence issue against the provinces without regard to questions of desirability.[92]

[90] See [46] above. *OUTA* above n 53 at para 21.

[91] At [248(f) to (h)].

[92] See for example *Habitat Council* above n 45; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC); *Maccsand* above n 35; and *Gauteng Development Tribunal* above n 51.

Conclusion

[93] As there is no constitutional or legislative source for the power of the municipalities to make by-laws imposing transfer embargoes as enforcement mechanisms for their town planning schemes and building approval matters, the impugned by-laws are inconsistent with the Constitution, unlawful and invalid.

[94] In view of the fact that the legality challenge to the by-laws succeeds, there is no need to consider the property owners' further challenges based on section 118(1) of the Systems Act and section 25(1) of the Constitution.

Remedy

[95] If the by-laws are unlawful and invalid, the property owners are entitled to an unqualified order of invalidity. Invalid by-laws are invalid in their entirety and in their application to all properties, not only to mining properties. There is no reason to limit the orders of invalidity to circumstances covered by the application of the provisions of paragraphs (a) and (c) of section (2) of the impugned by-laws in relation to the property owners' mining properties.

[96] The appeal must therefore fail and the cross-appeal must succeed. The municipalities are organs of state. Hence, they do not receive the protection of *Biowatch*[93] and the property owners are entitled to their costs.

[97] The orders of the High Court and the Supreme Court of Appeal link the unconstitutionality of the by-laws to section 25 of the Constitution and section 118 of the Systems Act. This judgment does not do so. Therefore, the order of this Court should not sustain the specific reference to these provisions in the High Court order.

[93] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

Order

[98] The following order is made:

1. Leave to appeal is granted.
2. The appeal against the order of the Supreme Court of Appeal is dismissed with costs, including the costs of two counsel.
3. The cross-appeal against the order of the Supreme Court of Appeal is upheld with costs, including the costs of two counsel.
4. The order of the Supreme Court of Appeal is varied by:
    4.1 the substitution of the following for paragraph 3 of the order in Case No 334/2021:
        "3. Section 76 of the Govan Mbeki Spatial Planning and Land Use Management By-Law 2016 is declared to be inconsistent with the Constitution and invalid"; and
    4.2 the substitution of the following for paragraph 3 of the order in Case No 338/2021:
        "3. Section 86 of the Emalahleni Municipal By-Law on Spatial Planning and Land Use Management 2016 is declared to be inconsistent with the Constitution and invalid".

DODSON AJ (Kollapen J concurring):

Introduction

[99] I have had the pleasure of reading the judgment of my Colleague, Chaskalson AJ (first judgment). I gratefully adopt his setting out of the background to the application, the litigation history, the arguments of the parties in this Court, the issues raised and the abbreviations used. I agree that condonation should be granted for the late filing of the hard copy of the record, that the matters raised in the application are constitutional matters falling within the jurisdiction of this Court and that it is in the interests of justice that leave to appeal be granted.

[100] I differ, however, from his finding that the impugned transfer embargoes are constitutionally invalid because they fall outside the legislative competence of the respective municipalities and within the legislative competence of Parliament – this because "there is no constitutional or legislative source for the power of the municipalities to make by-laws imposing transfer embargoes as enforcement mechanisms for their town planning schemes".[94]

[101] Because I have come to a different conclusion in relation to the legislative competence issue, there is no neat, single answer to the multi-pronged challenge that was brought by the respondents (collectively, Glencore). I shall therefore deal with the issues raised in the following order:

(a) conflict with section 118 of the Systems Act;
(b) arbitrary deprivation of property;
(c) intrusion upon national sphere's legislative authority;
(d) that SPLUMA precludes the transfer embargo;
(e) administrative justice review;
(f) mandatory orders;
(g) relief against the Registrar of Deeds, Mpumalanga;
(h) conclusion; and
(i) relief and costs.

Conflict with section 118 of the Systems Act

[102] Based on section 156(3) of the Constitution, Glencore asserts that the transfer embargos contained in sections 76 and 86 of the Govan Mbeki By-Law (GM By-Law) and Emalahleni By-Law (EM By-Law) respectively, are invalid because they conflict with national legislation in the form of section 118(1) of the Systems Act.

[94] First judgment at [93].

[103] Section 156 of the Constitution, headed "Powers and functions of municipalities", provides in relevant part as follows:

> "(1) 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.
>
> (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
>
> (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative."

[104] Section 156(3) refers to section 151(4), which reads:

> "(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[105] Glencore's challenge is based on the first sentence of section 156(3). We are not here dealing with the situation contemplated in the second sentence of section 156(3), namely where national legislation is inoperative because there is a conflict referred to in section 149 of the Constitution.[95]

[106] The national legislation with which the transfer embargoes in the by-laws are said to be in conflict is section 118(1) of the Systems Act. It is headed "Restraint on transfer of property" and contains its own transfer embargo, which reads as follows:

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[95] Section 149, which is headed "Status of legislation that does not prevail", says:

> "A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains."

> "(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate—
>
> (a) issued by the municipality or municipalities in which that property is situated; and
>
> (b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid."

[107] The certificate referred to in the subsection is generally referred to as a "rates clearance certificate", although it requires payment of indebtedness also in respect of municipal service fees and other amounts payable to municipalities. The certificate is not required in respect of debts outstanding for more than two years.

[108] Glencore's complaint is that the significantly broader restraint provided for in the transfer embargoes in sections 76 and 86 of the respective by-laws renders the rates clearance certificate in section 118(1) of the Systems Act redundant and abolishes the entitlement to register transfer after securing it. This is primarily because the by-laws do not have the two-year cap that limits the restraint in section 118(1). The impugned provisions therefore include any unprescribed debts, no matter how far back in time they were incurred. And they embargo transfer not only for non-payment of a debt but also because of other forms of non-compliance.

[109] The Govan Mbeki and Emalahleni municipalities (Municipalities) contend that the transfer embargoes in the by-laws have a different purpose from, and can comfortably co-exist with, the transfer embargo in section 118(1). The purpose of the transfer embargoes in the by-laws is a planning and building-regulatory purpose, not a financial purpose.

[110] In *Telkom*,[96] the majority of this Court laid down the following test for establishing whether there is an invalidating conflict:

> "For section 156(3) to be activated, there must be real conflict between the challenged by-law and national legislation. And for a conflict to arise, the two pieces of legislation must be incapable of operating alongside each other. In other words, they must be mutually exclusive. If they are reasonably capable of co-existing, conflict as envisaged in section 156(3) would not have arisen."[97]

[111] For a proper analysis of the transfer embargoes some disaggregation is necessary. We must distinguish between those components of the by-laws that require certification of the absence of financial indebtedness (sections 76(2)(a) and (b) of the GM By-Law and 86(2)(a) and (b) of the EM By-Law) and those that require certification solely of municipal planning[98] compliance (section 76(2)(c) to (f) of the GM By-Law and sections 86(2)(c) to (e) of the EM By-Law).

[112] Starting with sections 76(2)(a) and 86(2)(a) of the respective by-laws, these impose the following requirements:

> "(2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—
>
> (a) a certificate of a conveyancer confirming that funds due by the transferor in respect of land, have been paid"

In the case of the GM By-Law and, in the case of the EM By-Law:

[96] *Telkom* above n 33.

[97] Id at para 34.

[98] The Municipalities contend that the embargoes are also aimed at building regulation. It is in my view unnecessary to decide this because, for reasons that will become apparent, the impugned provisions that are found to be valid in this judgment fall squarely within the competence of municipal planning.

> "(2) The Municipality must not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—
>
> (a) a certificate of a conveyancer confirming that funds due by the transferor in respect of land, have been paid"

[113] The only difference in the wording of these provisions in the respective by-laws is that the GM By-Law uses the word "may" and the EM By-Law uses the word "must". In this context there is no difference in the meaning of the words. Each creates an identical, peremptory prohibition. I will therefore in the balance of the judgment treat the opening paragraph of subsection (2) as being identical in the respective by-laws.

[114] Paragraph (a), which is identically worded in each of the respective by-laws, is remarkable in the following respects:

(a) First, it superimposes itself upon other laws. It prohibits the issuing of a certificate to transfer a land unit "in terms of any law" unless the certificate in paragraph (a) is furnished. "Any law" would include section 118(1) of the Systems Act and any other national or provincial legislation that might impose a certificate requirement. Applied with reference to section 118(1), the provision prevents a certificate from being issued under section 118(1), notwithstanding that the transferor qualifies for a rates clearance certificate under it because the last two years' indebtedness have been settled.

(b) Second, unlike section 118(1), it contains no limit as to the age of the debt that must be settled. Indebtedness in respect of a charge constituting a municipal tax, such as municipal rates, would only prescribe after 30 years in terms of section 11(a)(iii) of the Prescription Act.[99] As soon as the indebtedness of the transferor exceeds two years' worth, this will

[99] 68 of 1969. *Jordaan v City of Tshwane Metropolitan Municipality* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) (*Jordaan*) at para 25. *City Treasurer and Rates Collector, Newcastle Town Council v Shaikjee* 1983 (1) SA 506 (N) is authority for municipal rates being a form of "tax" in terms of section 11(a)(iii) of the Prescription Act.

operate to prevent the rates clearance certificate from being issued under section 118(1).

(c) Third, and again unlike section 118(1), it is not limited to indebtedness in respect of the land unit that is to be transferred. It includes any indebtedness of the transferor in respect of "land". That could include indebtedness in respect of other properties. Naturally, if this is constitutionally problematic, one must consider whether a reading down of the word "land" is possible to limit it to the land unit to be transferred. The difficulty with this is that in the opening paragraph of subsection (2) there is a precise reference to "a land unit" which is to be transferred. In paragraph (a), there is no attempt to link the word "land" back to the earlier reference to "a land unit". The paragraph seems also to have been deliberately broadly worded. I will nevertheless assume in favour of the Municipalities that a reading down is possible so as to limit "land" to "the land unit" that is to be transferred.[100]

(d) Fourth, it is not limited to "funds due" in respect of debts relevant to municipal planning. Any funds due are included. This would include those covered by section 118(1). In the circumstances, the provision does not have a distinctive purpose as argued by the Municipalities.

[115] Practically speaking, the result is that the two-year limit in section 118(1) becomes meaningless. For as long as all of the transferor's indebtedness exceeding the last two years' worth is not paid, the rates clearance certificate cannot be issued in terms of section 118(1). It is so that paragraph (a) of subsection (2) of the respective by-laws has the mitigating feature that it is confined to the indebtedness of the owner. In this respect, it differs from, and is less stringent than, section 118(1), which also includes within its reach unpaid municipal debts of a possessor of the property, lawful or

[100] *Tronox* above n 53 at para 39.

otherwise.[101] But this mitigating feature is insufficient to avoid the conflict between the two provisions.

[116] The GM and EM By-Laws' provisions are therefore not reasonably capable of co-existing with section 118(1) of the Systems Act. Section 76(2)(a) of the GM By-Law and section 86(2)(a) of the EM By-Law are invalid in terms of section 156(3) of the Constitution by reason of their conflict with national legislation.

[117] Section 76(2)(b) and section 86(2)(b) of the GM and EM By-Laws respectively are on a different footing. Each reads as follows:

> "(2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—
>
> . . .
>
> (b) proof of payment of any contravention penalty or proof of compliance with a directive contemplated in Chapter 9."[102]

[118] The following observations may be made in this regard:

(a) There is no attempt to regulate the same indebtedness as that covered by section 118(1). The only debt covered here is "any contravention penalty" imposed under chapter 9 of each of the by-laws.

(b) Chapter 9 of each of the respective by-laws deals with "compliance and enforcement". It includes provisions for the issuing and enforcement of a compliance notice against any person guilty of an offence under the chapter. The listed offences are forms of conduct that are in breach of either the by-laws or a land use scheme made in terms of them. They

[101] *Mkontwana* above n 6 at paras 49-60.

[102] As indicated in paragraphs [112] to [113] above, the GM By-Law uses the word "may" in subjection (2) while the EM By-Law uses the word "must", but the words bear an identical meaning in this context. I will therefore in each instance where subsection (2) of the respective by-laws is quoted, refer only to the subsection (2) as it is worded in the GM By-Law.

include, for example, "utilis[ing] land in a manner other than prescribed by the land use scheme of the [m]unicipality".[103]

(c) Prosecution for the offences is provided for along with potential sentences of a fine or imprisonment for up to 20 years.[104]

(d) However, provision is also made for the municipality to insist on corrective action through the issuing of a compliance notice setting out details of the breaches and the steps required to remedy them.[105] This would seemingly avoid a criminal prosecution if the corrective action is taken.

(e) If part of the corrective action requires securing authorisation from the municipality for any particular activity or "development parameter" the municipality may impose a contravention penalty. This may include any costs incurred by the municipality. This contravention penalty is what is referred to in paragraph (b) in sections 76(2) and 86(2) of the respective by-laws. It is distinct from and does not include the fines that may be imposed pursuant to a criminal prosecution for a contravention of the by-laws.

(f) Paragraph (b) is thus tailored to achieve precisely the purpose of the by-laws.

(g) There is no conflict between paragraph (b) and section 118(1), save insofar as the words in the introductory part of subsection (2), "in terms of any law, or", would preclude the issue of a rates clearance certificate under section 118(1) until any compliance notice had been complied with and "any contravention penalty" paid. That conflict is resolved not by striking down paragraph (b), but rather by striking down the words "in terms of any law, or" in the opening paragraph of subsection (2). That would allow a clearance certificate to be issued in terms of section 118(1) while corrective action is taken in terms of the compliance notice.

[103] Section 162 of the GM By-Law and section 174 of the EM By-Law.

[104] Id.

[105] Sections 161-9 of the GM By-Law and sections 174-80 of the EM By-Law.

(h) Paragraph (b) seeks to achieve an entirely different purpose from section 118(1) and is reasonably capable of co-existing with it. There is no conflict. Section 156(3) therefore provides no basis for striking it down.

[119] The same reasoning applies to paragraphs (c) to (f) of section 76(2) of the GM By-Law and paragraphs (c) to (e) of section 86(2) of the EM By-Law. Paragraphs (c) to (f) of the GM By-Law read as follows:

> "(2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—
>
> . . .
>
> (c) proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme;
>
> (d) proof that all common property including private roads and private places originating from the subdivision, has been transferred;
>
> (e) proof that the conditions of approval that must be complied with before the transfer of erven have been complied with; and
>
> (f) proof that all engineering services have been installed or arrangements have been made to the satisfaction of the Municipality."

[120] Paragraphs (c) to (e) of section 86(2) of the EM By-Law are identical to paragraphs (c) to (e) of section 76(2) of the GM By-Law, save that the words "to the owners' association as contemplated in Schedule 5" appear at the end of paragraph (d) of section 86(2) of the EM By-Law.

[121] Once the words "in terms of any law, or" in the opening paragraph of subsection (2) of the GM and EM By-Laws are struck down, those paragraphs do not overlap with section 118(1) in any way. They are all reasonably capable of operating alongside section 118(1). There are no financial or debt-recovery provisions in these paragraphs. I am accordingly satisfied that they are not invalid on the basis of any conflict with national legislation as contemplated in section 156(3) of the Constitution.

[122] It is so that by prohibiting a person from applying to the Registrar of Deeds to register the transfer of a land unit, the transfer embargoes under the by-laws notionally kick in before the transfer embargo under section 118 can operate, because the latter's prohibition is directed at the Registrar of Deeds. However, in effect, they operate simultaneously to prevent the Registrar from registering the transfer. Because they have different purposes, that is a legitimate area of overlap and is not unmanageable. In particular, these paragraphs will not operate to prevent a municipality from issuing a rates clearance certificate in terms of section 118(1), if there is a striking down of the words "in terms of any law, or" in subsection (2).

[123] There is the potential problem that the rates clearance certificate may expire in terms of section 118(1A)[106] because 60 days have passed while a compliance issue is being resolved. This may mean that a transferor will have to sequence applications for the respective certificates accordingly. This does not attain the level of a conflict in terms of section 156(3). In *Maccsand*,[107] dealing with similar concerns to those raised by Glencore in this matter, this Court said the following:

> "Another criticism levelled against the finding of the Supreme Court of Appeal by Maccsand and the Minister for Mineral Resources was that, by endorsing a duplication of functions, the court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive, but it lacks substance. The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own

[106] Section 118(1A) of the Systems Act provides as follows:

> "A prescribed certificate issued by a municipality in terms of subsection (1) is valid for a period of 60 days from the date it has been issued."

[107] *Maccsand* above n 35.

> competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another."[108]

[124] There is accordingly no substance in the challenge to the remaining paragraphs in subsection (2) of section 76 and 86 of the GM and EM By-Laws respectively, on the basis of section 156(3) of the Constitution.

Arbitrary deprivation of property

Introduction

[125] Glencore challenges the transfer embargoes on the basis that they give rise to an arbitrary deprivation of property in breach of section 25(1) of the Constitution. Section 25(1) provides that "[n]o one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property".

[126] The concept of a transfer embargo is not a novel one in our legal system. This Court explored their history in its judgment in *Jordaan*.[109] It points out that "[t]he need for statutory intervention to assist municipalities to collect debts became evident so far back as 1848".[110] The earliest example that is cited is section 275 of the Divisional Councils Act.[111] This Court traces the use of the term "embargo" in this context back to the 1909 judgment of Curlewis J in *Cohen's Trustees*.[112]

[127] Transfer embargoes have come to be used to achieve a range of municipal, safety and other socially desirable purposes. As the first judgment points out, section 14(1) of the City of Cape Town Water By-law requires a transferor to produce a certificate from

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[108] Id at para 47.

[109] *Jordaan* above n 99 at paras 16-24.

[110] Id at para 19.

[111] 40 of 1889 (Cape). See *Jordaan* above n 99 at fn 36.

[112] Id at fn 37. *Cohen's Trustees v Johannesburg Municipality* 1909 TH 134 (subsequently overturned in *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811).

a plumber confirming that the water installation at the property conforms to the requirements of the water by-laws.[113] Regulation 7(5) of the Electrical Installation Regulations, 2009[114] promulgated in terms of the Occupational Health and Safety Act[115] similarly prohibits a change of ownership unless there is an electrical compliance certificate. Section 53 of SPLUMA imposes a transfer embargo on "[t]he registration of any property resulting from a land development application . . . unless the municipality certifies that all the requirements and conditions for the approval have been complied with".

[128] Other municipalities have also adopted transfer embargoes directly linked with municipal planning obligations. Section 137(1) read with section 54 of the City of Cape Town Municipal Planning By-law, 2015 imposes a transfer embargo in respect of the transfer of land units arising from an approved subdivision without a certificate confirming that the conditions imposed upon approval have been complied with. Section 137(2) imposes a transfer embargo on land subject to a compliance notice or a contravention levy, which is very similar to that provided for in paragraph (b) of subsection (2) of the GM and EM By-Laws. Many other municipalities have similar provisions in their by-laws.[116]

[129] Sections 74 of the GM By-Law and 84 of the EM By-Law themselves impose transfer embargoes on first transfers of land units following a land development application. These are not challenged by Glencore. The first judgment considers these to be validly imposed by reason of the similar transfer embargo in section 53 of SPLUMA.[117]

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[113] First judgment at [74].

[114] Electrical Installation Regulations, GN R242 *GG* 31975, 6 March 2009.

[115] 85 of 1993.

[116] See for example sections 47 and 55 of the Midvaal Local Municipality Spatial Planning and Land Use Management By-law; sections 54 and 62 of the Mogale City Local Municipality Spatial Planning and Land Use Management By-law, 2018; and sections 47 and 55 of the Emfuleni Local Municipality Spatial Planning and Land Use Management By-law, 2018.

[117] It is quoted at [5] above.

[130] Against that background, I proceed to assess whether there is a breach of section 25(1) of the Constitution arising from the impugned transfer embargoes.

Deprivation

[131] For there to be a deprivation of property under section 25(1), there must be a substantial interference with the property right in question.[118] There is no need to dwell on this. *Mkontwana*[119] establishes that a transfer embargo such as that under consideration gives rise to a deprivation of property as contemplated in section 25(1). This is so because it restrains the right to freely alienate property, an important incident of ownership.[120]

Arbitrariness

[132] The focus of debate in this matter is whether the deprivation that the embargo gives rise to is arbitrary. The accepted test for arbitrariness was that laid down in *FNB* as follows:[121]

> "[D]eprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
>
> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
>
> (b) A complexity of relationships has to be considered.
>
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

[118] *Jordaan* above n 99 at para 59 and the authorities quoted at footnote 106.

[119] *Mkontwana* above n 6 at paras 32-3.

[120] Id at para 33.

[121] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*) at para 100.

> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
>
> (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
>
> (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
>
> (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
>
> (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25."

[133] The test requires identification of, and an examination of the relationship between, means and ends, where the means are constituted by the deprivation under scrutiny. That is achieved by asking the following questions:

(a) What are the means and the ends in question?

(b) What is the nature of the relationship between the purpose of the deprivation and the *person* affected?

(c) What is the nature of the relationship between the purpose of the deprivation and the *property* affected, taking into account the *nature* of the property and the *extent* of the deprivation?

(d) Weighing the answers to the foregoing questions on the basis of the guidance provided in the *FNB* test, is there sufficient reason for the deprivation, in the sense that the ends do indeed justify the means, or is the deprivation arbitrary?

(e) Although not part of the challenge here, is the deprivation procedurally fair?

[134] In making these assessments, one must also bear in mind that modern, constitutional conceptions of property ownership have forgone absolutism in favour of an acknowledgement that property use must consider not only the interests of the owner, but also those of broader society.[122]

The means and the ends

[135] What are the means in question? The means are the embargo on transfer. As Cameron J observes in *Jordaan*, the embargo places the transferor in a "squeeze".[123] Pressure is applied on her to comply with the particular duty owed to the municipality. Absent compliance, the transfer she desires (and may well have committed herself to bringing about in a deed of sale) cannot happen.

[136] What are the ends? It is not necessary to consider paragraph (a) of sections 76(2) and 86(2) of the respective by-laws because it is invalid by reason of its conflict with section 118(1) of the Systems Act.

[137] Paragraph (b)'s end is to have the transferor carry out the corrective action that a compliance notice demanded and settle the contravention penalty imposed. This will bring the transferor and the property into compliance with the by-law and, where applicable, the land use scheme.

[122] *Jordaan* above n 99 at para 51 and the authorities at fn 94.

[123] *Jordaan* above n 99 at para 16.

[138] Paragraph (c)'s end is to enforce the land use scheme. It is non-financial. It calls for proof of compliance with the land use scheme, even if the transferor has not been subject to a compliance notice.

[139] Paragraphs (d) to (f) of the GM By-Law and (d) to (e) of the EM By-Law aim to ensure that all of the requirements and conditions imposed when a land development application was approved, have been complied with.

The relationship between the purpose and the person affected

[140] What observations are to be made about the relationship between the purpose of the deprivation and the person whose property is affected?

[141] Paragraph (b) does not expressly identify the person subject to the unpaid penalty or the extant compliance notice. The non-compliance sought to be corrected and the penalty sought to be recovered under paragraph (b) could thus, on the face of it, be that of the current or a previous owner or a person currently or previously in possession of the premises. Where the conduct giving rise to the compliance notice or penalty is not that of the current owner, the relationship between the purpose of the embargo and the person affected becomes more remote.

[142] An interpretation of paragraph (b) that imposed a transfer embargo on the current owner in respect of a penalty or compliance notice imposed on a previous owner or occupier would offend the value system underlying the Bill of Rights. In particular, it would offend the value of procedural fairness because the penalty or compliance notice will have been issued without the current owner having been afforded an opportunity to be heard. An interpretation of paragraph (b) that favours constitutional validity and compliance with the value system underlying the Bill of Rights must be preferred.[124] The transfer embargo could therefore not be applied against the current owner in respect

[124] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at paras 21-3 (*Hyundai*).

of a penalty or compliance notice imposed on a previous owner or person occupying under them or during their tenure.

[143] As regards a penalty or compliance notice imposed on an occupier during the tenure of the current owner, as pointed out by this Court in *Mkontwana*,[125] an owner who places another in possession of the property, or does not respond to an unlawful taking of possession, retains the capacity and the responsibility to ensure that the occupier meets her obligations and uses the property lawfully and reasonably. Remedies, including eviction, are available against the occupier. The by-laws themselves recognise the agency of the owner in relation to an occupier by criminalising inaction by the owner in the face of breach of the land use scheme by an occupier,[126] and by requiring that any compliance notice be served on, and demand compliance with the by-law or land use scheme by, both of the occupier and the owner.[127] This also ensures that procedural fairness will apply to an owner in respect of a breach of the by-law or land use scheme by an occupier. A rational and reasonable connection is thus retained between the restriction and the person affected when the transfer embargo is enforced against the current owner, notwithstanding that the initial offending conduct was that of the occupier.

[144] On a reading of paragraph (b) as applying only to contravention penalties imposed on and directives issued to current owners and persons occupying under their watch, there is no irrationality or unreasonableness in the purpose/person relationship.

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[125] *Mkontwana* above n 6 at paras 47-8 and 59.

[126] See sections 162(2) of the GM By-Law and 174(2) of the EM By-Law.

[127] See sections 163(2) of the GM By-Law and 175(2) of the EM By-Law. Each provides as follows:

> "(2) A compliance notice must direct the occupier and owner to cease the unlawful land use or construction activity or both, forthwith or within the time period determined by the Municipality and may include an instruction to—
>
> (a) demolish unauthorised building work and rehabilitate the land or restore the building, as the case may be to its original form within 30 days or such other time period determined by the Municipal Manager; or
>
> (b) submit an application in terms of this By-Law within 30 days of the service of the compliance notice and pay the contravention penalty."

[145] Paragraph (c) requires "proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme". In the context of the purpose/person relationship, Glencore raises the problem of non-compliance arising from the conduct or omission of a preceding owner.

[146] Here, two scenarios must be considered. The first is where the By-Law was not in force when the preceding owner owned the property and such owner transferred the land unit in a condition that was non-compliant with the land use scheme. Such owner would not have needed a compliance certificate because the By-Law was not yet in force. The second is where the By-Law was in force before transfer to the current owner, but the preceding owner's non-compliance with the land use scheme was overlooked and a certificate was wrongly issued, allowing transfer to the current owner to take place in contravention of the land use scheme.

[147] As regards the first scenario, the introduction of new legislation must always carry with it the possibility of imposition of new obligations that impact differently or even negatively on persons that were previously unregulated or regulated differently. In this scenario, despite the possible negative impact, it cannot without more be said that arbitrariness characterises the relationship between the purpose of the measure and the current owner. New laws have to start somewhere.[128]

[148] In addition, the current owner retains the benefit of the presumption that the law does not intend unjust, inequitable or unreasonable results,[129] along with the protections in the Bill of Rights. Each situation would have to be considered with reference to the particular facts and the particular provisions of the By-Law and the land use scheme in issue.

[128] On the reality that new legislation might validly introduce anomalies and hardships, see *Ngcobo v Salimba CC; Ngcobo v Van Rensburg* [1999] ZASCA 22; 1999 (2) SA 1057 (SCA) at para 11.

[129] Du Plessis "Statute Law and Interpretation" in *LAWSA* 2 ed (2011) vol 25(1) at para 334 and *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (*Mhlungu*) at para 36.

[149] As regards the second scenario, it is inappropriate to assess the potential arbitrariness (and hence possible constitutional invalidity) of a by-law on the basis of anticipated non-compliance by either the previous owner or the municipality.[130] Moreover, where the municipality was at fault in allowing a transfer to be registered unlawfully, it is not inconceivable that the current owner may have a legal defence or remedy against the subsequent imposition of a compliance notice or penalty. For example, and without deciding the point, it may be that "the . . . buildings constructed on the land unit", as referred to in paragraph (c), must be restrictively interpreted to refer only to buildings constructed by the current owner, not the previous owner. Again, the matter will have to be considered on the particular facts at the time.

[150] I am accordingly satisfied that in the second scenario too, there is no relational difficulty between the purpose of the transfer embargo and its impact on the current owner.

[151] Next I assess the purpose/person relationship with reference to paragraphs (d) to (f) of the GM By-Law and (d) to (e) of EM By-Law.[131] Paragraph (d) requires proof that all common property originating from a subdivision, including private roads and private places, has been transferred. Paragraph (e) requires proof that conditions of approval of a land development application have been complied with. Paragraph (f), which only appears in the GM By-Law, requires proof that all engineering services have been installed or arrangements made to the satisfaction of the municipality for their installation.

[152] On the face of it, these paragraphs link the transfer embargo and the issuing of the requisite certificate to proof of fulfilment of duties that are imposed on an owner who is the *developer* in a land development application.[132] This may point to a need to

[130] *Van Rooyen v the State (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 37.

[131] These paragraphs of the GM and EM By-Laws are set out in [119] above.

[132] The first judgment interprets these paragraphs in the same way. See [11] above.

read these paragraphs down so as to apply only to owners that are the developers of the land unit in question. The difficulties with such a reading down, however, are threefold:

(a) The first is that these obligations imposed upon a developer, and linked to the first transfer of a land unit pursuant to the development, are already enforced by the transfer embargoes in section 74, read with section 75 of the GM By-Law and section 84, read with section 85 of the EM By-Law.[133] This is so even though the wording of the provisions, and the mechanics of the certification, are not identical in sections 74 and 76 respectively and in sections 84 and 86 respectively. There is a presumption against superfluity in a statute.[134]

(b) The second is that the word "owner" in the opening paragraph of subsection (2) cannot mean "owner" generally in relation to paragraphs (a) to (c) and "owner-developer" in relation to paragraphs (d) to (f).[135]

(c) The third is the conjunction "and" between paragraphs (d) and (e). This points to the requirements in paragraphs (a) to (f)[136] as being cumulative. The conjunction "and" cannot be read as cumulative for owner-developers and partially disjunctive for other owners.

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[133] Paragraph (d), requiring proof of transfer of all common property, is provided for as against a developer by section 74(2)(f) read with section 75 of the GM By-Law and section 84(2)(f) read with section 85 of the EM By-Law. Although paragraph (d) refers more narrowly to a subdivision, a subdivision is a form of land development application as contemplated in the relevant parts of sections 74 and 84 of the respective by-laws. See in this regard the definition of "land development" in section 1 of SPLUMA. The opening paragraph of section 1 of each of the by-laws, correctly read, adopts definitions from SPLUMA into the By-Law. I say correctly read because this paragraph can be read as the by-law imposing its definitions on the statute, but that would be in conflict with sections 151(3) and 156(3) of the Constitution.

Paragraph (e), requiring proof of compliance with the conditions of approval of the development application, is covered by section 74(2)(d). Paragraph (f), requiring proof that all engineering services have been installed or the making of satisfactory arrangements for their installation, is covered by section 74(2)(a).

[134] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 608 (CC) at para 57 and the authorities referred to at fn 94, and *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 84 (judgment of Van der Westhuizen J).

[135] *Woodlands Dairy (Pty) Ltd v Competition Commission* [2010] ZASCA 104; 2010 (6) SA 108 (SCA) at para 18.

[136] In the GM By-Law, the conjunction "and" also comes between paragraphs (d) and (e), even though the final component of the proof required is in paragraph (f). This appears to be a typographic error in the process of adopting a standard-form by-law, to which an additional form of proof was then added.

[153] A reading down of paragraphs (d) to (f) does not therefore seem possible. By contrast, the third judgment holds that a reading down is possible. I do not agree that any meaning can be given to paragraphs (d) to (f) that is not already catered for by sections 74 and 75. Even if read down to apply only to owner-developers, paragraphs (d) to (f) are entirely superfluous.[137] Although presented to the Registrar of Deeds by the owner or her agent, the "certificate to transfer a land unit" contemplated in sections 76(2) and 86(2) of the respective by-laws is in effect a certificate that embodies a communication from the Municipality to the Registrar of Deeds that transfer may take place. In that sense, it does not differ materially from the section 74 certificate that is a direct communication from the municipality to the Registrar of Deeds. Each certificate communicates to the Registrar of Deeds that she may lift the transfer embargo.

[154] The threefold obstacles to the reading down remain. The reading down achieved in this judgment in relation to paragraph (b) so as to confine its impact to penalties and compliance notices directed at owners and occupiers, is achieved via the incorporation by reference of chapter 9 in that paragraph. The scheme of chapter 9 would limit the penalties and compliance notices to those imposed on the owner or occupier. This interpretation of paragraph (b) does not give the word "owner" in section 76(2) a bifurcated meaning, as the third judgment in effect does. The reading down brought about by the third judgment in truth requires the reading in at the beginning of each of paragraphs (d) to (f) of the words "in the case of an owner who is transferring a land unit for the first time after approval of a land development application," or of a proviso at the end of section 76(2) as follows:

> "Provided that paragraphs (d) to (f) apply only to an owner who is transferring a land unit for the first time after approval of a land development application."

[137] See n 133 above.

[155] That in my view demonstrates that the interpretation in the third judgment is "unduly strained". As pointed out in *Hyundai*, a legislative body "is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them".[138] The by-laws in this aspect do not achieve that. If the Municipalities intended the qualification or the proviso, they ought to have included it. Neither municipality asked for a constitutional remedy in the form of a reading-in.

[156] Absent a reading down, the effect of paragraphs (d) to (f) of the GM By-Law and (d) to (e) of the EM By-Law is to cast obligations of the developer on subsequent owners of land units in the scheme. They are purchasers of a land unit or units in the scheme who were not responsible for its development and who bore no responsibility for complying with the conditions of approval of the development. This is a serious relational mismatch between the purpose of the deprivation and the person whose property is affected. That introduces arbitrariness into the relationship.

[157] This arbitrariness is compounded by the fact that it is surely the municipality that must assume the primary role in ensuring that the developer complies with the conditions that the municipality itself has imposed, not the purchaser of a unit in the development. If an instance of non-compliance by the developer was subsequently to emerge, it would be grossly unreasonable for the owner of a unit to be delayed in effecting transfer while the municipality seeks to achieve compliance by the developer, an endeavour that may well generate a lengthy legal dispute.

The relationship between the purpose and the property affected

[158] The nature of the property here is full ownership of immovable property. Applying the *FNB* test,[139] this will require a heightened level of justification for the deprivation.

[138] *Hyundai* above n 124 at para 24.

[139] *FNB* above n 121 at para 100(e).

[159] The extent of the deprivation of ownership here is partial, not all-embracing as in *FNB*. What is forfeited pending satisfaction of the conditions enabling the issue of the required certificate, is the right to transfer the property in order to complete the process of alienation. In *Mkontwana* this was described as "a single but important incident of ownership".[140] As appears from that judgment, the extent of the deprivation is dependent on the extent of the delay in transfer brought about by the embargo.

[160] In *Mkontwana*, it was recognised that it would not be arbitrary to delay transfer until the owner of the property in question had settled all of her debt.[141] In that matter, the potential for arbitrariness was introduced by the fact that section 118(1) makes the transferor responsible also for the debts of the occupier (lawful and unlawful). This was ultimately found to be adequately ameliorated by the two-year limit on the age of the debt.

[161] In relation to paragraph (b), transfer is only delayed for as long as it takes to correct the non-compliance and pay the contravention penalties in respect of the land unit in question. A potential complication may arise where the contravention or penalty is that of the occupier rather than the owner. However, as pointed out earlier with reference to *Mkontwana*, an owner has the responsibility to ensure the lawful use of their property even when it is occupied by another. In a worst-case scenario, an owner may be forced at their own expense to remediate the occupier's non-compliance, or pay their penalty, to ensure that transfer can proceed. They would have a right of recovery against the occupier. The deprivation is thus a temporary one.

[162] Paragraph (c) expressly limits application of the transfer embargo to the land unit sought to be transferred. In requiring proof of compliance with the land use scheme, it serves as a reminder of the close connection between the purpose of the deprivation and

[140] *Mkontwana* above n 6 at para 45.

[141] Id at para 46.

the property. Here the purpose/property relationship is even closer in my view than that in respect of municipal debt under section 118(1).[142] Land use schemes seek to ensure the orderly, safe and developmentally optimal use of all land.[143] The embargo is thus precisely focused on its purpose and the property to which it applies.

[163] Taking all of this into account, the purpose of the deprivation in paragraph (c) aligns with the property to which it applies and the deprivation represents a temporary and reasonable incursion into the owner's property rights.

[164] Paragraphs (d) to (f) of the GM By-Law and paragraphs (d) to (e) of the EM By-Law are a different kettle of fish. The purpose of the deprivation under these paragraphs, compliance with the development approval conditions, is one related to the land development as a whole, including, expressly, common property and roads in the development. All of this has relatively little to do with the particular land unit in respect of which transfer is subsequently sought. There is also a temporal disjunct insofar as it relates to the property as it was in the course of development, not the land unit that emanated from the development upon its completion, which is now sought to be transferred. Again, these disjuncts introduce arbitrariness.

Sufficient reason or arbitrary deprivation?

[165] I accept that the nature and extent of the deprivation in this case is such as to require more than a "mere rational relationship between means and ends".[144] Justification of the deprivation lies closer to the proportionality end of the spectrum. Weighing the overall relationship between means and ends I come to the following conclusions:

[142] I say this because municipal debt mainly comes from the consumption by the owner or occupier of municipal services delivered to the property, and from rates, which are aimed at raising revenue mainly for municipal amenities in the surrounding area, rather than the property itself.

[143] See section 25(1) of SPLUMA.

[144] *FNB* above n 121 at para 100(g).

(a) There is sufficient reason for paragraph (b) of the two by-laws. There the transfer embargo supports ends which are manifestly socially justifiable and in both the public and private interest, namely compliance with a land use scheme in respect of the very property sought to be transferred. Glencore says that the embargo changes the GM and EM By-Laws' soft enforcement scheme in Chapter 9 into a hard one. It contemplates using a sledgehammer to crack a nut. I disagree. Chapter 9 includes in its armoury criminal prosecution and imprisonment for up to 20 years. The transfer embargo is soft in comparison. It ties in neatly with the soft approach of a compliance notice and administrative penalty in place of prosecution.

(b) There is sufficient reason for paragraph (c) of the two by-laws. Again, the transfer embargo here supports ends which are manifestly socially justifiable. Glencore says that the embargo represents outsourcing by the municipality of its enforcement obligations. That is not so. The enforcement mechanisms co-exist in a mutually supporting way. None would give rise to disproportion sufficient to constitute arbitrariness. This is so even taking into account Glencore's concerns regarding non-compliance by a previous owner. But that would not be in the ordinary course. And it is not enough to render the provision arbitrary.

(c) There is insufficient reason for paragraphs (d) to (f) of the GM By-Law and paragraphs (d) to (e) of the EM By-Law. Assessing them through the lens of the relational analysis required by *FNB* demonstrates that they are entirely disproportional. The deprivation is potentially severe and is seriously misdirected, visiting the sins of the developer upon an innocent subsequent owner. It is not justifiable to expect a purchaser of a land unit in a development to employ the full range of professionals to assess whether the developer has complied with the approval conditions; even less so a later seller or purchaser of the unit.

Justification

[166] Paragraphs (d) to (f) of the GM By-Law and paragraphs (d) to (e) of the EM By-Law thus give rise to an arbitrary deprivation of property, thereby limiting the fundamental right not to be subject to a law that permits arbitrary deprivation of property. Can this be justified in terms of section 36 of the Constitution?

[167] Emalahleni made a faint attempt to argue that Glencore's challenge should fall at this last hurdle. It did so solely on the basis that the purpose of the impugned provision is important, the purpose being to administer adequately spatial planning and land use in order to meet its constitutional obligations. This is a reference to section 36(1)(b) of the Constitution.

[168] A party seeking to defend an otherwise unconstitutional limitation of a right in the Bill of Rights bears an onus to justify the offending law with reference to *all* of the factors listed in section 36(1) of the Constitution.[145] The fact that paragraphs (b) and (c) of the by-laws survive scrutiny under section 25(1) of the Constitution[146] means that there remain in place adequate provisions to achieve the spatial planning and orderly land use purposes of sections 76 and 86 of the GM and EM By-Laws. Debt control is catered for by section 118 of the Systems Act. And the provisions required to ensure that developers comply with their obligations are to be found in sections 74 and 75 of the GM By-Law, sections 84 and 85 of the EM By-Law and section 53 of SPLUMA.

[169] I am accordingly satisfied that the limitation insofar as it pertains to paragraphs (d) to (f) of section 76 of the GM By-Law, and paragraphs (d) to (e) of section 86 of the EM By-Law, cannot be justified in an open and democratic society based on human dignity, equality and freedom.

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[145] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at paras 18-9.

[146] This is subject to the further challenges discussed below.

Conclusion on arbitrariness

[170] Paragraphs (d) to (f) of section 76 of the GM By-Law, and paragraphs (d) to (e) of section 86 of the EM By-Law, are constitutionally invalid on the ground that they give rise to an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution.

[171] Paragraphs (b) and (c) of sections 76 and 86 of the GM and EM By-Laws survive the challenges based on section 25(1) and 156(3) of the Constitution. It therefore becomes necessary to consider whether they survive the challenge based on legislative competence.

Legislative competence

[172] Section 43 of the Constitution deals with the "legislative authority of the Republic". It reads:

> "43. In the Republic, the legislative authority—
>
> (a) of the national sphere of government is vested in Parliament, as set out in section 44;
>
> (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
>
> (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156."

[173] Here we are concerned with the allocation of legislative authority as between the national and local spheres of government. However, to get a sense of the scheme underlying the allocation and to be able to compare it with the scheme underlying the interim Constitution, it is appropriate to include in the analysis the provisions dealing with the provincial sphere of government.

Parliament

[174] Section 44(1) to (4) of the Constitution provides, in relevant part, as follows:

"44(1) The national legislative authority as vested in Parliament—

(a) confers on the National Assembly the power—

. . .

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power—

. . .

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."

Provinces

[175] Section 104 of the Constitution provides in relevant part as follows:

> "104(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—
>
> . . .
>
> (b) to pass legislation for its province with regard to—
>
> (i) any matter within a functional area listed in Schedule 4;
>
> (ii) any matter within a functional area listed in Schedule 5;
>
> (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
>
> (iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and
>
> (c) to assign any of its legislative powers to a Municipal Council in that province.
>
> . . .
>
> (4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4."

Municipalities

[176] Section 151 of the Constitution provides:

> "(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
>
> (2) The executive and legislative authority of a municipality is vested in its Municipal Council.
>
> (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
>
> (4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[177] Section 154(1) of the Constitution reads:

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

[178] Section 156 of the Constitution reads as follows:

> "(1) 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.
>
> (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
>
> (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.
>
> (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—
>
> (a) that matter would most effectively be administered locally; and
>
> (b) the municipality has the capacity to administer it.
>
> (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

Schedules 4 and 5 of the Constitution

[179] Schedule 4 itemises the particular areas of legislative competence that are shared by the national legislature and the provincial legislatures. Schedule 5 itemises the particular areas of legislative competence that are exclusive to the provincial sphere of

government. Each of Schedules 4 and 5 is further divided between Part A and Part B, as follows:

> **"Schedule 4**
>
> **Functional Areas of Concurrent National and Provincial Legislative Competence**
>
> **Part A**
>
> [The various functional areas are then listed. I include only those that may be relevant to the discussion below.]
>
> . . .
>
> Industrial promotion
>
> . . .
>
> Regional planning and development
>
> Road traffic regulation
>
> . . .
>
> Trade
>
> **Part B**
>
> The following local government matters to the extent set out in section 155(6)(a) and (7):
>
> . . .
>
> Building regulations
>
> . . .
>
> Municipal planning
>
> **Schedule 5**
>
> **Functional Areas of Exclusive Provincial Legislative Competence**
>
> **Part A**
>
> [The various functional areas are then listed. I include only those that may be relevant to the discussion below.]
>
> . . .
>
> Liquor licenses
>
> . . .
>
> Provincial planning
>
> . . .
>
> Provincial roads and traffic

> **Part B**
> The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):
> [The various functional areas are then listed. I include those that may be relevant to the discussion below.]
> . . .
> Municipal roads
> . . .
> Traffic and parking"

[180] Part B in each of Schedules 4 and 5 thus operates to define areas of municipal legislative competence through the combined operation of section 156(1)(a) and (2), which are quoted above. The instruments through which municipalities exercise their legislative authority are by-laws.

The OUTA judgment

[181] In the recent decision in *OUTA*,[147] this Court had occasion to deal with the constitutional system for the allocation of legislative power between the three spheres of government. The case involved a challenge to the constitutional validity of legislation passed by Parliament in the exercise of its national legislative power to create a new system of administrative adjudication of road traffic offences (the AARTO Act).[148] The High Court had concluded that the AARTO Act "unlawfully intrude[s] upon the exclusive executive and legislative competence of the local and provincial governments."[149] Primarily on this basis, the High Court declared the AARTO Act to be constitutionally invalid. It reached this conclusion on the basis that the AARTO Act encroached upon the exclusive provincial legislative competence of "Provincial roads and traffic" in Part A of Schedule 5 to the Constitution and the exclusive provincial and municipal legislative competences of "Municipal roads" and "Traffic and parking" in Part B of Schedule 5 to the Constitution.

[147] *OUTA* above n 53.

[148] Administrative Adjudication of Road Traffic Offences Act 46 of 1998.

[149] *OUTA* above n 53 at para 7.

[182] In a unanimous judgment, this Court declined to confirm the High Court's order of constitutional invalidity. The Court identified the relevant principles and the approach to be adopted in determining the sphere of government under whose legislative authority particular legislation falls. It did so through a chronological examination of four judgments of this Court on the subject.[150] A number of observations may be made on the basis of *OUTA* that are relevant to the determination of this matter.

[183] The first observation is this. The first judgment seeks to draw a distinction between the scheme for legislative competence under the interim Constitution and the final Constitution respectively. It holds that for this reason judgments under the interim Constitution "may not reflect the correct approach to similar questions under the [final] Constitution today".[151]

[184] The four judgments analysed in *OUTA* span both constitutional eras. It is important to see if this Court identified any form of change in principle or in approach as between the two constitutions in its decision in *OUTA*.

[185] Two of the judgments, *Amakhosi* and *DVB Behuising*, were decided under the interim Constitution, whilst two of the judgments were decided under the final Constitution, namely *Liquor Bill* and *Gauteng Development Tribunal*. In the earliest judgment considered, *Amakhosi*, Chaskalson P described the approach to characterising legislation for purposes of the legislative competence inquiry as follows:

> "If the purpose of the legislation is clearly within Schedule 6, it is irrelevant whether the Court approves or disapproves of its purpose. But purpose is not irrelevant to the Schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6, its true purpose and effect is to achieve a

[150] *Amakhosi* above n 59; *DVB Behuising* above n 14; *Liquor Bill* above n 31; and *Gauteng Development Tribunal* above n 51.

[151] First judgment at [55].

> different goal which falls outside the functional areas listed in Schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature."[152]

[186] That dictum was followed in *DVB Behuising* and *Liquor Bill*,[153] notwithstanding that the former was decided under the interim Constitution and the latter was decided under the final Constitution. *Gauteng Development Tribunal* did not refer to *Amakhosi*. However, one can detect the influence of the principles and the approach laid down in *Amakhosi* when the Court in *Gauteng Development Tribunal* said that "[i]n the context of the Schedules 4 and 5 functional areas, this Court has held that the purposive interpretation must be conducted in a manner that will allow the spheres of government to exercise their powers 'fully and effectively'".[154]

[187] Moreover, the approach in *Amakhosi* was retained in *OUTA* where this Court summarised the effect of the four judgments that it analysed as follows:[155]

> "It is clear from the jurisprudence of this Court as reflected in the cases discussed above that, in order to determine whether a piece of legislation falls within a particular functional area in either Schedule 4 or Schedule 5 of the Constitution, a court is required to determine the subject-matter of that legislation and then see within which sphere of government's functional area it falls. Determining the subject-matter of legislation entails considering its substance, purpose and effects. It entails determining what the legislation is about or determining its character."

[188] This approach, which is laid down under the final Constitution, is entirely consistent with that adopted under the interim Constitution in *Amakhosi* and *DVB Behuising*. Accordingly, there is no difference in the principles to be applied, or

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[152] *Amakhosi* above n 59 at para 19.

[153] *DVB Behuising* above n 14 at para 37 and *Liquor Bill* above n 31 at para 62.

[154] *Gauteng Development Tribunal* above n 51 at para 49.

[155] *OUTA* above n 53 at para 87.

in the approach to be adopted, in determining whether legislation falls within or outside a listed area of functional competence, as between the interim Constitution and the final Constitution. Cases dealing with the distribution of legislative authority between the national and provincial spheres of government under the interim Constitution remain good authority.

[189] The only relevant difference for present purposes between the interim Constitution and the final Constitution is that the area of legislative competence for municipalities in the interim Constitution was determined differently from the final Constitution. Section 175 of the interim Constitution provided for "[t]he powers and functions of local government" as follows:

> "(1) The powers, functions and structures of local government shall be determined by law of a competent authority.
>
> (2) A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.
>
> (3) A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.
>
> (4) A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.
>
> (5) A local government shall have such executive powers as to allow it to function effectively."

[190] Broadly speaking, for municipalities the system operated on the basis of statutory assignment of legislative and executive power. There was no schedule in the interim Constitution itemising the competences of municipalities, as is to be found in Part B of each of Schedules 4 and 5 to the final Constitution.

[191] Importantly, however, the provincial competences were set out in a schedule to the interim Constitution in a manner very similar to that in the final Constitution. Thus section 126 dealing with "[l]egislative competence of provinces", provided in relevant part as follows:

> "(1) A provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.
>
> (2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence."

[192] Schedule 6 to the interim Constitution then itemised the specific "legislative competences of provinces" in a manner very similar to that adopted in Schedules 4 and 5 to the final Constitution, with many of the items in the former being identical to those in the latter.

[193] Accordingly, it is entirely appropriate to apply the principles and approach adopted by this Court in delineating legislative competence in the interim Constitution as between the provincial and national spheres of government, to the schedule-based system operating under the final Constitution in respect of both the provincial and local spheres of government.

[194] The second observation is this. Referencing *Gauteng Development Tribunal*, the first judgment identifies what it perceives to be "a scheme of exclusivity running through the [final] Constitution".[156] It does so on the basis of the following dictum in *Gauteng Development Tribunal*:

[156] First judgment at [55].

> "The constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise."[157]

[195] However, this Court in *Gauteng Development Tribunal* went on in the next sentence to characterise the constitutional scheme as one based on "the principle of *relative and limited* autonomy of the spheres of government" (emphasis added).[158] This follows on the observation in the preceding paragraph in *Gauteng Development Tribunal* that "[i]t is, however, true that the functional areas allocated to the various spheres of government are *not contained in hermetically sealed compartments*" (emphasis added), yet "remain distinct from one another".[159] *Gauteng Development Tribunal* therefore does not provide a basis for a scheme of exclusivity, but rather one of relative and limited autonomy.

[196] In *OUTA*, the High Court had adopted what it termed a "bottom-up" approach, which was akin to a scheme of exclusivity, at least insofar as Schedule 5 competences were concerned. This Court held as follows in this regard:

> "[T]he . . . 'bottom-up' approach . . . in essence, requires a court confronted with such a matter to determine the functional areas that fall within the exclusive legislative competence of provinces, ie Schedule 5. Once those have been determined, then whatever remains is said to fall under concurrent national and provincial legislative competence under Schedule 4. The [High Court] based this approach on the following passage of this Court's judgment in *Liquor Bill*:
>
> > 'It follows that, in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under section 44(2), and possibly to incidental intrusion only under section 44(3), the Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5

[157] *Gauteng Development Tribunal* above n 51 at para 56.

[158] Id.

[159] Id at para 55.

> competences. *That the division could never have been contemplated as being absolute is a point to which I return in due course.*' . . .
>
> However, *Liquor Bill* is no authority for this 'bottom-up' approach. The above passage must be understood in the context of the entire judgment. In particular, it must be understood in the light of the overall reasoning of the Court. In *Liquor Bill* this Court determined the scope of the functional area listed under Schedule 4 (via a process of interpretation of the wording of the functional area), without 'carving out' — as the High Court would have us do — areas of exclusive provincial competence and assigning the remaining areas to the national sphere of government." (Emphasis in the original.)[160]

[197] The Court in *OUTA* went on to draw attention to the following part of the judgment in *Liquor Bill*:

> "Since, however, no national legislative scheme can ever be entirely water-tight in respecting the excluded provincial competences, and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation and hence to ascertain in what field of competence its substance falls; and, this having been done, what it incidentally accomplishes. This entails that a Court determining compliance by a legislative scheme with the competences enumerated in Schedules 4 and 5 must at some stage determine the character of the legislation."[161]

[198] Based on these dicta, one must accept that there will be penumbral areas of overlap in the competences of the national, provincial and local spheres of government. This outcome arises both as a result of the application of the substance, purpose and effect test to the legislation in question and the inclusion in a municipality's powers of a "matter reasonably necessary for, or incidental to, the effective performance of its functions".[162] The foregoing considerations, in my view, do not allow for the application of a scheme of exclusivity.

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[160] Id at paras 9-10.

[161] *OUTA* above n 53 at para 10, quoting *Liquor Bill* above n 31 at para 62 (the last sentence of the extract from *Liquor Bill* does not appear in *OUTA*. See also *OUTA* above n 53 at paras 69 and 82(g).

[162] Section 156(5) of the Constitution.

[199] The third observation emanating from *OUTA* and the decisions that it analysed is that it is possible for legislation to have more than one substance, purpose and effect. As this Court said in *Liquor Bill*:

> "It seems apparent that the substance of a particular piece of legislation may not be capable of a single characterisation only and that a single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence."[163]

[200] The legislation in question in *Liquor Bill*, and the outcome of the case, illustrate what this Court had in mind in acknowledging the possibility of more than one substantial character. There the President referred to this Court, in terms of section 79(4)(b) read with section 84(2)(c) of the Constitution, the constitutionality of the Liquor Bill.[164] Parliament sought, through the Liquor Bill, comprehensively to regulate the manufacture, distribution and sale of liquor on a national basis.

[201] The Western Cape Provincial Government challenged the validity of the Liquor Bill on the basis that it encroached upon the exclusive provincial legislative competence of "liquor licences" in Part A of Schedule 5. This item, it argued, encompassed "all legislative means and ends appurtenant to the liquor trade at all levels of production, manufacture and sale."[165] The Minister of Trade and Industry argued that the Liquor Bill fell under "industrial promotion" and "trade", items of concurrent national and provincial competence in Part A of Schedule 4. To the extent that it encroached upon the liquor licensing competence, this was purely incidental and therefore permissible.

[163] *Liquor Bill* above n 31 at para 62.

[164] B131B – 98.

[165] *Liquor Bill* above n 31 at para 57.

[202] This Court held that the true substance of the Liquor Bill was directed at three objectives, namely—

> "(a) the prohibition on cross-holdings between the three tiers involved in the liquor trade, namely producers, distributors and retailers; (b) the establishment of uniform conditions . . . for the national registration of liquor manufacturers and distributors; and . . . (c) the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms."[166]

[203] The components of the Liquor Bill giving effect to objective (a) permissibly fell under "trade" and "industrial promotion".[167] The components of the Liquor Bill giving effect to objective (b) seemingly fell under "trade", but were in any event justified as a measure to maintain economic unity in terms of section 44(2)(b).[168] But the attempt to regulate intra-provincial retail licensing mechanisms was an unlawful intrusion into the exclusive area of provincial legislative competence, "liquor licences", in Part A of Schedule 5.

[204] From this it follows that where legislation is characterised as having more than one substance or identity, each would have to constitute a significant component of the legislation aimed at achieving a distinctive and identifiable objective or purpose. A corollary of this is that, in assessing whether legislation is compliant with the constitutional scheme for distribution of legislative authority, it may be inappropriate to parse the statute, testing it section-by-section. Rather, the substance, purpose and effect of that component of the legislation directed at a particular objective must be considered holistically.

[205] The fourth observation arising from *OUTA* is this. In its analysis of the principles relating to the allocation of legislative power between the three spheres of government, it does not treat local government as being subject to a different set of principles from

[166] Id at para 69.

[167] Id at para 70.

[168] Id at paras 71-5.

those applicable to the national and provincial spheres. In this regard *OUTA* does not suggest that in the exercise of its legislative authority under the Constitution the local sphere occupies an inferior or subordinate position to the national and provincial spheres; nor does it suggest that the local sphere's legislative power is inferior or subordinate or incidental only to its executive power; nor does it suggest that in relation to its allocated sphere of legislative authority, the local sphere is subject to a hermetic seal. Yet the first judgment seeks to characterise the legislative authority of the local sphere of government as being inferior to that of the national and provincial spheres in all of these respects.

[206] To the contrary, in this Court's analysis in *OUTA* of the legislative authority of the three spheres of government, the local sphere is treated, within its legislative allocation, as an equal partner.[169] This it was bound to do by its earlier decision in *Robertson*,[170] which insists that—

> "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'[171] subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere 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*." (Emphasis added.)

[169] *OUTA* above n 53 at paras 21-7 and 82(g). See also section 43 of the Constitution, quoted at [172], which draws no hierarchical distinction between the national, provincial and local spheres of government in the distribution of legislative authority.

[170] *Robertson* above n 39.

[171] Here citing Pimstone "Local Government" in Chaskalson et al *Constitutional Law of South Africa* (1996) (Revision Service 5, 1999) at 5A-26 to 5A-27.

[207] The first judgment asserts the local sphere's inferior legislative status primarily on the basis of its interpretation of section 156(2) of the Constitution, suggesting that it confers legislative power in less expansive terms than the equivalent conferral of powers on the national and provincial legislatures in sections 44(1)(a)(ii) and 104(1)(b) respectively of the Constitution.[172] The first judgment suggests further that the conferral of the legislative power "for the effective administration of the matters which [a municipality] has the right to administer" points to a legislative power inferior still to a municipality's executive power, so much so that the power in section 156(2) confers only limited legislative power that is incidental to its predominantly executive functions.[173] This in turn means that section 156(5), which confers upon a municipality "the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions," does not apply to legislative powers.[174] Section 156(3) is also referred to in support, insofar as it renders a by-law that conflicts with national or provincial legislation invalid.[175]

[208] Consequent upon this reasoning, the first judgment says that this Court's case law on the characterisation of national and provincial legislation under the interim and final Constitutions, and of municipal executive authority under the final Constitution, does not apply to questions of municipal legislative authority.[176]

[209] Implicit in all of this is that a municipality's legislative power is hermetically sealed within its functional areas of express executive authority. Consequent upon this reasoning, *DVB Behuising*, amongst other decisions of this Court, is considered by the first judgment not to be an appropriate "reference point" in deciding this matter.

[172] First judgment at [50].

[173] Id.

[174] Id at [52].

[175] Id at [50].

[176] Id at [61] to [62].

[210] I have the following difficulties with this conception of a municipality's legislative power—

(a) It is in conflict with the authority of this Court in, amongst others, *Robertson* and *OUTA* and the four judgments of this Court discussed in *OUTA*. As I have pointed out above, these judgments treat the local sphere of government, once functioning within its functional lane, as an equal partner. *OUTA* applies the four judgments of this Court on characterisation of legislation in exactly the same way to the national, provincial *and local* spheres' legislative authority. It does so under the heading "[t]he question of exclusive legislative competence". If the local sphere was to be treated differently, in the manner suggested in the first judgment, this Court would have said as much in this part of *OUTA*.

(b) The fact that legislative power is conferred in section 156(2) for the "effective administration" of the matters in respect of which it has executive authority does not reflect a legislative purpose of narrowing municipal legislative power. Nor does it reflect that it is secondary to its executive power. The mechanism and wording of section 156(2) is designed to reflect the unique nature of municipal councils, which exercise both executive and legislative authority.[177] That is why it differs from the conferral of legislative authority on Parliament and provincial legislatures. The conferral of legislative power on Parliament is of necessity broad because it is residual and includes all functional areas not specifically provided for in Schedules 4 and 5. However, an examination of the conferral of legislative authority on provincial legislatures in terms of section 104(1)(b) is as circumscribed as its conferral on municipalities in section 156(1) and (2).

(c) Section 44(1)(a)(iii) provides for the assignment by the National Assembly of legislative powers to "any legislative body in another sphere of government". That includes a municipal council. Section 104(1)(c)

[177] Section 151(2) of the Constitution.

provides for the assignment by a provincial legislature of any of its legislative powers to a municipal council in that province. In exercising such legislative powers, a municipality would inherit as wide a legislative power as the national or a provincial legislature. It would be incongruous if a municipality's primary legislative power in section 156(2) were then to be construed narrowly and interpreted on the basis of a different test.

(d) Chapter 7 of the Constitution also includes provisions designed to protect the autonomy, including legislative autonomy, of municipalities. Section 151(4) lays down that "[t]he national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions". Section 156(3), relied on in the first judgment as narrowing local legislative authority,[178] is expressly qualified by reference to section 151(4).

(e) The interpretation of section 156(5) as excluding the exercise by a municipality of reasonably necessary and incidental legislative powers is against the authority of this Court in *Mazibuko*.[179] It relied on this provision in holding that a water services by-law conferring the power to install prepaid water meters was reasonably incidental to the effective performance of its functions.[180]

[211] The fifth observation arising from *OUTA* is that there will be an unconstitutional exercise of the legislative competence of another sphere of government where there is an actual intrusion into, or an encroachment upon, its exclusive sphere of competence. Something must be usurped or subtracted from the legislative authority of the impacted sphere of government. Thus, in upholding the validity of national legislation aimed at establishing a national framework to improve road safety and encourage safe driving, this Court in *OUTA* observed that the law in question did not "interfere in any way with

[178] First judgment at [50].

[179] *Mazibuko* above n 31.

[180] Id at para 111.

the competence of a municipality to make by-laws relating to municipal roads or to traffic and parking" and left "the finer details to the provincial and municipal spheres of government".[181] It was for this reason, amongst others, that this Court was, in both *OUTA* and *Liquor Bill*, at pains to assess whether national legislation impacted intra-provincially or inter-provincially in determining whether national legislation had stayed within its lane.[182]

[212] That there must be actual encroachment to found a complaint of intrusion is apparent also from section 41(1)(f) of the Constitution, which requires that "[a]ll spheres of government and all organs of state within each sphere must . . . exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere."

[213] Against the backdrop of those five observations, it is appropriate to consider the substance, purpose and effect of the by-laws under scrutiny in this matter, including whether each is capable of more than one characterisation.

How are the GM and EM By-Laws to be characterised?

[214] The two by-laws under consideration are in the greater part identically arranged and worded. Their titles are the "Govan Mbeki Spatial Planning and Land Use Management By-law" and the "Emalahleni Municipal By-Law on Spatial Planning and Land Use Management". Neither has a preamble, a long title or a dedicated section setting out its objects.

[215] Chapter 1 of each by-law provides for definitions, the application of the by-law and for conflict of laws. Section 2(1) of the respective by-laws renders each applicable to all land within the municipality's area of jurisdiction and section 2(2) records that

[181] *OUTA* above n 53 at paras 114-6.

[182] Id at paras 65-6; *Liquor Bill* above n 31 at paras 51-3.

each by-law "binds every owner and their successor-in-title and every user of land, including the state".

[216] Chapter 2 of each by-law is entitled "Municipal Spatial Development Framework". Section 4 of that chapter obliges the municipality to draft a municipal spatial development framework in accordance with sections 20 and 21 of SPLUMA, read with sections 23 to 25 of the Systems Act.[183]

[217] Chapter 3 of each by-law deals with land use schemes. Section 15 in each by-law records the applicability of sections 24 to 28 of SPLUMA to any land use scheme adopted by a municipality.[184] Further, Chapter 3 of each by-law supplements the provisions of SPLUMA in relation to the content of the land use scheme,[185] the manner in which it is prepared and brought into force,[186] reviewed and amended,[187] including public participation requirements.[188]

[218] Chapter 4 of each by-law is entitled "Institutional Structure for Land Use Management Decisions". Included in this chapter is provision for the designation of a

[183] Section 20 of SPLUMA independently imposes an obligation on every municipality to prepare a spatial development framework. Section 21 details its content. section 23 of the Systems Act requires a municipality to undertake development-oriented municipal planning aimed at achieving identified constitutional objectives, including the progressive realisation of socio-economic rights. section 24 of the Systems Act requires that municipal planning give effect to the principles of co-operative government contained in section 41 of the Constitution. section 25 of the Systems Act requires that each municipality adopt an integrated development plan and lays down the requirements for it. These include that the plan "is compatible with national and provincial development plans".

[184] In terms of section 24(1) of SPLUMA, each municipality must adopt a land use scheme for its entire area of jurisdiction. The scheme must in terms of section 24(2)(a) "include appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme". sections 25 to 28 deal respectively with the purpose and content of a land use scheme, its legal effect, the review and monitoring of a land use scheme and the amendment of a land use scheme by rezoning.

[185] Section 28 of both the GM and EM By-Laws.

[186] Section 18 of both the GM and EM By-Laws.

[187] Section 19 of both the GM and EM By-Laws.

[188] Section 21 of both the GM and EM By-Laws.

land development officer[189] and the establishment, administration and functioning of a municipal planning tribunal.[190]

[219] Chapter 5 of each by-law is entitled "development management". Here the wording is not in all respects identical, but the subject matter is. Chapter 5 of each by-law regulates the different kinds of land development applications, including applications for the establishment of a township, applications to amend the land use scheme,[191] applications to remove or amend restrictive conditions of title limiting the use of land, applications to subdivide and consolidate land parcels, applications for closure of public places and applications in terms of the land use scheme.[192]

[220] Part K of Chapter 5 of both the GM and EM By-Laws is titled "General Matters". This part includes the transfer embargoes in section 74 of the GM By-Law and section 84 of the EM By-Law, which are not subject to challenge, and the impugned section 76 in the GM By-Law and section 86 in the EM By-Law. There is also provision in Part K of both by-laws for the vesting of ownership of public places in the municipality in terms of an approved subdivision plan,[193] compliance with conditions in land development applications requiring transfer of land to the municipality, an owners' association[194] or a non-profit company,[195] and applications under Chapter 5 which affect national or provincial interests.[196]

[221] Chapter 6 of each of the by-laws deals with application procedures, Chapter 7 with engineering services and development charges, Chapter 8 with appeal procedures

[189] Section 33 of the GM By-Law and section 32 of the EM By-Law.

[190] Sections 34-48 of the GM By-Law and sections 33-51 of the EM By-Law.

[191] In the EM By-Law this is described as applications for rezoning.

[192] In the EM By-Law this is described as applications for departures from the land use scheme.

[193] Section 73 of the GM By-Law and section 83 of the EM By-Law.

[194] Transfer to an owners' association is provided for only in the EM By-Law, not the GM By-Law.

[195] Section 75 of the GM By-Law and section 85 of the EM By-Law. Transfer to a non-profit company is provided for only in the GM By-Law, not the EM By-Law.

[196] Section 77 of the GM By-Law and section 87 of the EM By-Law.

(including the establishment, functioning, management and procedures of municipal appeal tribunals), Chapter 9 with compliance and enforcement, Chapter 10 with transitional provisions, and Chapter 11 with general provisions.

[222] In *Gauteng Development Tribunal*, this Court held as follows regarding the meaning of "municipal planning" in Schedule 4, Part B to the Constitution:

> "Returning to the meaning of 'municipal planning', the term is not defined in the Constitution. But '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. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use 'planning' in the municipal context, they were aware of its common meaning. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs 'planning' in its commonly understood sense."[197]

[223] From this extract one may discern that "municipal planning" means the control and regulation of the use of land, including matters pertaining to the zoning of land and the establishment of townships.

[224] Taking into account the content of the GM and EM By-Laws as set out above in some detail, their substance, purpose and effect is overwhelmingly the regulation of the use of land, with a strong focus on township development, the related process of subdivision of land and the zoning of land, which regulates how identified areas of land within a municipality may or may not be used. On the authority of *Gauteng Development Tribunal*, those squarely constitute municipal planning.

[197] *Gauteng Development Tribunal* above n 51 at para 57.

[225] The contention advanced by Glencore and accepted in the first judgment is that the transfer embargo in each of sections 76 and 86 of the GM and EM By-Laws respectively is constitutionally invalid because it falls within the functional area of deeds registration, which is an area of national legislative competence.[198]

[226] For that contention to hold, it must be that there is a sufficiently distinctive and significant component of the GM and EM By-Laws that allows for separate characterisation as regulating the registration of transfer of immovable property. That must be its substance, purpose and effect. And to be considered offensive to the constitutional scheme for distribution of legislative authority, that distinctive component of the GM and EM By-Laws must encroach upon and subtract from the national competence of deeds registration.

[227] This cannot, in my view, be said of the transfer embargo provisions in question. They do not form any part of a distinctive component of the by-laws that stands outside its municipal planning objective, and which has the substance, purpose and effect of regulating deeds registration. There is no discernible purpose within the by-laws to assume control over any component of the regulation of the transfer of immovable property.

[228] This is so even if the focus is kept on sections 76 and 86 of the GM and EM By-Laws respectively, which represent very small components of both by-laws, insufficient to constitute distinctive components with unique substance, purpose and effect. For ease of reference, I quote the extant part of section 76 of the GM By-Law, taking into account the findings of invalidity made earlier in the judgment:

> "(1) A person may not apply to the Registrar of Deeds to register the transfer of a land unit, unless the Municipality has issued a certificate in terms of this section.

[198] First judgment at [76], [85] and [93].

> (2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—
>
> . . .
>
> (b) proof of payment of any contravention penalty or proof of compliance with a directive contemplated in Chapter 9;
>
> (c) proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme".

[229] The EM By-Law in its extant part is identical.[199]

[230] Subsection (1) is directed at regulating the conduct of an owner of land, or that of her agent, not the conduct of the Registrar of Deeds, at least directly. The owner is prohibited from applying to transfer land without the required certificate. Subsection (1) also regulates the conduct of the municipality. The municipality is impliedly authorised to issue a certificate if the conditions laid down in subsection (2) are satisfied.

[231] Subsection (2) is also directed at regulating the conduct of the owner of land who wishes to transfer ownership of it, and that of the municipality, which may only issue a certificate in terms of that provision if the owner provides the proof required in paragraphs (b) and (c).

[232] Each of paragraphs (b) and (c) of subsection (2) is specifically directed at regulating the use of land in accordance with the GM and EM By-Laws and the relevant land use scheme, a function that, on the authority of *Gauteng Development Tribunal* forms part of municipal planning. Paragraph (b) enhances the effectiveness of the by-laws' compliance and enforcement provisions, as set out in Chapter 9. These provisions, in turn, are designed to ensure compliance with the regulation of land use provided for in the by-laws and the land use scheme. Paragraph (c) is aimed at ensuring

[199] See section 86(1)-(2)(c) of the EM By-Law. This is subject to the use of the words "may" and "must" in the respective By-Laws discussed at [112] to [113] and n 102 above.

that the use of land and the construction of buildings on land are compliant with the land use scheme.

[233] Neither the promulgation nor the implementation of sections 76 and 86 of the GM and EM By-Laws respectively encroaches upon or subtracts from the national competence of legislating for the registration of transfer of immovable property. Nothing whatsoever is taken from or added to, or contradicted in, the Deeds Registries Act.[200] There is no usurpation by the municipalities of the functions of the Registrar of Deeds under national legislation. Seamless implementation of the transfer embargo is possible under the Deeds Registries Act, within the normal functioning of the deeds registry. No statutory powers are wrested from the Deeds Registries or their Registrars. In this regard, section 3(1)(b) of the Deeds Registries Act provides in relevant part as follows:

> "3. Duties of registrar
>
> (1) The registrar shall, subject to the provisions of this Act—
>
> . . .
>
> (b) examine all deeds or other documents submitted to him for execution or registration, and after examination reject any such deed or other document the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exists."

[234] "Law" is defined in the Interpretation Act[201] as including, amongst others, "any . . . other enactment having the force of law."[202] That would include a by-law. Section 3(1)(b) of the Deeds Registries Act thus allows the Registrar of Deeds in the ordinary course of her functions to prevent transfer being passed in the absence of the certificate required by sections 76 and 86 of the GM and EM By-Laws respectively.

[200] 47 of 1937.

[201] 33 of 1957.

[202] Id at section 1.

This would have the consequence of allowing a transfer embargo in a by-law to operate effectively without any intrusion upon the Registrar of Deeds' statutory function at national level. It would no more interfere with her jurisdiction or that of the national sphere of government than a testator who in her will imposes a limitation, for example, on which of her immovable properties may be realised by the executor and which must be retained for purposes of generating an income. If there is such a limitation, then the Registrar of Deeds is bound by section 3(1)(b) to reject the deed of transfer.[203] One would not in that circumstance speak of the testator having usurped the legislative authority of Parliament.

The significance or otherwise of DVB Behuising

[235] Glencore argues that *DVB Behuising* is authority for the invalidity of sections 76 and 86 of the GM and EM By-Laws respectively on the basis that they constitute the impermissible regulation of the registration of deeds by the local sphere of government, when it is a competence of the national sphere of government.

[236] *DVB Behuising* was a case dealing with the effects of an assignment of old-order legislation under section 235 of the interim Constitution. The legislation in question was Proclamation 293 of 1962 (the Proclamation),[204] which was an instrument of apartheid urban planning that provided for the establishment and disestablishment of townships in what its apartheid authors described as "Bantu areas". The North West Local Government Laws Amendment Act[205] (NW Amending Act) purported to repeal chapters 1, 2, 3 and 9 of the Proclamation. However, the North West Province did not have legislative competence to repeal old-order legislation unless the administration of that legislation had validly been assigned to it.[206] So this Court had to decide whether

[203] *Estate Gouws v Registrar of Deeds* 1947 (4) SA 403 (T), especially at 408-9.

[204] Proc R293 GG 373 of 16 November 1962.

[205] 7 of 1998.

[206] Section 239 of the Constitution defines "provincial legislation" to include "legislation that was in force when the Constitution took effect and that is administered by a provincial government".

the parts of the Proclamation targeted for repeal in the NW Amending Act had validly been assigned to the North West.[207]

[237] Acting under section 235(8) of the interim Constitution, on 17 June 1994 the President had assigned the administration of the whole of the Proclamation to the North West "excluding those provisions of the said laws which fall outside the functional areas specified in Schedule 6 to the Constitution[208] or which relate to . . . matters referred to in paragraphs (a) to (e) of section 126(3) of the [interim] Constitution".[209] Section 235 was a transitional provision of the interim Constitution which sought to regulate the exercise of executive authority under laws which had been enacted prior to the commencement of the interim Constitution but which remained in force under section 229 of that Constitution to prevent a legal vacuum on the first day of democracy.[210]

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[207] *DVB Behuising* above n 14 at para 20.

[208] Schedule 6 listed "legislative competences of provincial government", which included: amongst others, "local government", "regional planning and development", and "urban and rural development".

[209] Proc R110 GG 15813 of 17 June 1994. Section 126(3) reads—

> "(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as–
>
> (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
>
> (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;
>
> (c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
>
> (d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
>
> (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies."

[210] The context of section 235 was described in the judgment of Chaskalson P in *Executive Council, Western Cape Legislature* above n 37 at paras 7-9. In relevant part section 235, which is headed "Transitional arrangements: Executive authorities", stated the following:

> "(1) A person who immediately before the commencement of this Constitution was—

(a) the State President or a Minister or Deputy Minister of the Republic within the meaning of the previous Constitution;

(b) the Administrator or a member of the Executive Council of a province; or

(c) the President, Chief Minister or other chief executive or a Minister, Deputy Minister or other political functionary in a government under any other constitution or constitutional arrangement which was in force in an area which forms part of the national territory,

shall continue in office until the President has been elected in terms of section 77(1)(a) and has assumed office: Provided that a person referred to in paragraph (a), (b) or (c) shall for the purposes of section 42(1)(e) and while continuing in office, be deemed not to hold an office of profit under the Republic.

. . .

(5) Upon the assumption of office by the President in terms of this Constitution—

(a) the executive authority of the Republic as contemplated in section 75 shall vest in the President acting in accordance with this Constitution; and

(b) the executive authority of a province as contemplated in section 144 shall, subject to subsections (8) and (9), vest in the Premier of that province acting in accordance with this Constitution, or while the Premier of a province has not yet assumed office, in the President acting in accordance with section 75 until the Premier assumes office.

(6) The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows:

(a) All laws with regard to matters which—

(i) do not fall within the functional areas specified in Schedule 6; or

(ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126(3) . . . shall be administered by a competent authority within the jurisdiction of the national government . . .

(b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3) shall—

(i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1)(a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or

(ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1)(c), subject to subsections (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies . . ..

(c) In this subsection and subsection (8) ‘competent authority’ shall mean—

[238] The transition of executive authority under section 235 of the interim Constitution drew on section 126 and Schedule 6 to the interim Constitution, which defined the limits of the concurrent legislative competence of the provinces, and regulated conflicts between national and provincial laws under the interim Constitution. The broad scheme of section 235 was that executive authority would be assigned to the provinces if that executive authority arose out of laws on matters falling within the provincial legislative competence (Schedule 6 matters), but not if the laws in question dealt with matters falling within the national legislative override categories of section 126(3)(a) to (e) of the interim Constitution.[211]

(i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President; and

(ii) in relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province.

. . .

(8)(a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the Gazette assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may—

(i) amend or adapt such law in order to regulate its application or interpretation;

(ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and

(iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to Sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution.

. . .

(d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of paragraph (a) be deemed to be a reference *mutatis mutandis* [(with the necessary changes having been made)] to the appropriate authority of the province concerned."

[211] See *DVB Behuising* above n 14 at paras 33-4.

[239] The question for this Court in *DVB Behuising* was therefore how to categorise the Proclamation (and its component parts) for the purposes of Schedule 6 to the interim Constitution and section 126(3)(a) to (e), so as to decide whether the administration of all parts of the Proclamation could validly have been assigned to the North West. In answering this question, the majority of this Court concluded that, for the most part, Chapters 1, 2 and 3 of the Proclamation dealt with regional planning and development, urban and rural development and local government, all of which were Schedule 6 matters. Certain provisions of Chapters 2 and 3, and the whole of Chapter 9 of the Proclamation, however, stood on a slightly different footing. The relevant provisions of Chapters 2 and 3 concerned the granting of a limited form of "ownership" rights in land in townships established under the Proclamation and Chapter 9 provided a system for the registration of those "ownership" rights. As this Court pointed out,[212] on their face these provisions concerned land tenure and registration which were not Schedule 6 matters. This Court concluded, however, that because the provisions were essential to the scheme of the Proclamation as a whole, they should be treated as Schedule 6 matters.[213] Ngcobo J stated:

> "I am satisfied that the 'tenure' and deeds registration provisions of the proclamation were inextricably linked to the other provisions of the proclamation and were foundational to the planning, regulation and control of the settlements. These provisions were an integral part of the legislative scheme of the proclamation and accordingly fell within Schedule 6."[214]

[240] Although not relevant for present purposes, *DVB Behuising* went on to conclude that the deeds registration provisions of Chapter 9 of the Proclamation were nevertheless invalidly assigned to the North West because they dealt with "the registration of deeds of grant, a matter that is required to be regulated by uniform norms

[212] Id at para 55.

[213] Id at paras 55-8.

[214] Id at para 58.

and standards, and thus a matter referred to in paragraph (b) of section 126(3) of the interim Constitution".[215]

[241] It is important to bear in mind that in *DVB Behuising* the High Court had declared the purported repeal of Chapters 1, 2, 3 and 9 of the Proclamation by the NW Amending Act to be constitutionally invalid on the grounds that their "predominating features" were "land, land tenure or ownership, the registration of deeds and the establishment and abolition of townships", which it considered to be "matters which are not provincial but national competences".[216] The High Court reached this conclusion on the basis that "[p]rovincial legislatures have 'a clearly defined and very limited legislative authority' and have to operate 'within the strict parameters' of that authority'".[217]

[242] On this basis the High Court considered that –

> "[t]he assignment of the administration of the proclamation by the President to the North West did not include the provisions contained in Chapters 1, 2, 3 and 9 thereof, because the assignment expressly excluded any provisions of the regulations falling outside the functional areas specified in Schedule 6 to the interim Constitution."[218]

[243] The *DVB Behuising* majority judgment of Ngcobo J deals with this reasoning of the High Court as follows:

> "I would point out immediately that I respectfully disagree with the view expressed by Mogoeng J to the effect that the functional areas of provincial legislative competence set out in the Schedules should be 'given a strict interpretation'. In the interpretation of those Schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in

[215] Id at para 72.

[216] *DVB Behuising* above n 14 at paras 5 and 16(d).

[217] *DVB Behuising* above n 14 at para 16(a), quoting the High Court's judgment. See also para 16(b), which is to similar effect.

[218] Id at para 16(e).

> a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively."[219]

[244] The majority judgment went on to set out the test for determining whether the legislation falls within a schedule containing a list of legislative competences as follows:

> "[36] The inquiry into whether the proclamation dealt with a matter listed in Schedule 6 involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the proclamation is about. In determining the subject-matter of the proclamation it is necessary to have regard to its purpose and effect. The inquiry should focus beyond the direct legal effect of the proclamation and be directed at the purpose for which the proclamation was enacted. In this inquiry the preamble to the proclamation and its legislative history are relevant considerations, as they serve to illuminate its subject-matter. They place the proclamation in context, provide an explanation for its provisions and articulate the policy behind them.
>
> . . .
>
> [38] The purpose and effect of the legislation may equally be relevant to show that although the legislation, in some of its provisions, purports to deal with a matter which falls outside the functional areas listed in Schedule 6, its true purpose and effect is to achieve a different goal which falls within the functional areas listed in Schedule 6. In such event, a court would have to hold that the province has acted within its competence and then consider whether those provisions which fall outside of the provincial competence are reasonably necessary for, or incidental to give effect to, the object of the legislation.
>
> [39] The determination of the subject-matter of the proclamation, therefore, requires an understanding of its legislative scheme. Ordinarily, legislation is the embodiment of a single legislative scheme. A law may, however, have more than one subject-matter."

[245] The majority judgment proceeded to apply this approach and, on that basis, held as follows:

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[219] Id at para 17.

> "[51] On a view of the proclamation as a whole, I am satisfied that its legislative scheme was in substance within the functional areas of regional planning and development, urban and rural development and local government. These are functional areas listed in Schedule 6. It now remains to consider whether the impugned provisions of the proclamation dealt with a matter listed in Schedule 6."

[246] The majority then considered the content of each of the impugned chapters in some detail and summarised those aspects relevant to the enquiry as follows:

> "[54] Chapter 3 dealt with trade and prescribed conditions under which trade in the township might be carried out. In addition, it made provision for the allocation of trading sites, and the granting of deeds of grant in respect of the trading sites. Chapter 9 made provision for the registration of deeds of grant. It established special deeds registries in the offices of the Chief Bantu Affairs Commissioners and set out the duties of the officers in charge of these deeds registries."

[247] Through detailed provisions, Chapter 9 of the proclamation established a substantial deeds registration system of its own that operated separately from and in parallel with the national deeds registration system operating under the Deeds Registries Act.[220] Despite this, the majority in *DVB Behuising* held as follows:

> "[55] The provisions of Chapter 2 and Chapter 3 that related to the granting of a limited form of 'ownership' rights in land in the township and those that related to the registration of those rights in Chapter 9 dealt, on their face, with a form of land tenure, a matter not listed in Schedule 6. However, as appears from what follows, they were essential to the scheme of the proclamation.

[220] Regulations 1 to 13 of Chapter 9 of the Regulations for the Administration and Control of Townships in Bantu Areas Proc R293 GG 140 of 16 November 1962. The chapter heading is "Registration of Deeds". The section headings include "Establishment of Deeds Registries in Offices of Chief Bantu Affairs Commissioners", "Registrar of Deeds to be Advised of Establishment of Townships", "Duties of Officers in Charge of Deeds Registry", "Powers of Officer in Charge of Deeds Registry", "Inspection of Records and Supply of Information", "How Ownership Units shall be Transferred", "Registration of Bonds", "Substitution of Debtor in Respect of a Bond", "Taxes and Fees to be Paid before a Transfer of Land", "Rectification of Title by Endorsement" and "Copies of Deeds".

[56] The purpose of establishing a township was to create and sell sites to Africans. In *Broadacres Investments Ltd v Hart*[221] it was also said:

> 'To establish a township necessarily involves creating sites and selling them to the public or allowing that to be done.'

At 932E-F, it was further noted:

> 'The establishment of a township necessarily involves both the creation of the township on paper, the lay-out of the land and the acquisition of sites by purchasers. In my view the provisions contained in section 36(2) of the Ordinance [27 of 1949] to expedite the process of changing a private township into an approved private township and the protection of purchasers who buy sites before such approval is given, are incidental to the establishment of a township and they are reasonable both in the interests of the Province and of prospective owners.'

[57] The proclamation made provision for the creation of sites and their acquisition by purchasers. It created a special form of 'tenure' for those who acquired sites in the township in the form of deeds of grant. This title was available only to purchasers of sites in the townships. In addition, the proclamation established special deeds registries in the offices of Chief Bantu Affairs Commissioners to register these special forms of tenure and created special procedures for the registration of the deeds of grant. These special provisions applied only to deeds of grant issued in respect of sites in the township. They were well integrated into the scheme of the proclamation and they were important for the efficacy of the proclamation.

[58] I am satisfied that the 'tenure' and deeds registration provisions of the proclamation were inextricably linked to the other provisions of the proclamation and were foundational to the planning, regulation and control of the settlements. These provisions were an integral part of the legislative scheme of the proclamation and accordingly fell within Schedule 6."

[248] In my view, the following conclusions flow ineluctably from the above paragraphs of the majority's judgment in *DVB Behuising*:

[221] *Broadacres Investments Ltd v Hart* 1979 (2) SA 922 (A) at 931H.

(a) Just as in *DVB Behuising* the province's list of specific competences was not to be interpreted narrowly or strictly, but rather purposively, allowing each sphere to exercise its legislative authority fully and effectively, so too should the municipalities' legislative competences in Part B of Schedule 4 be understood in this matter.

(b) Given the similarity between the interim Constitution's constitutional scheme for allocation of legislative authority between the provincial and national spheres, and the scheme in the final Constitution for both provinces and municipalities, *DVB Behuising* remains good authority for the approach to the legislative competence of municipalities under the final Constitution.

(c) The approach of the High Court in *DVB Behuising* on both the interpretation and application of principles for the allocation of legislative power between spheres of government aligns with that contended for by Glencore. Whilst that approach enjoyed some *obiter* (in passing) support in the *DVB Behuising* minority judgment of Goldstone J, O'Regan J and Sachs J,[222] it was squarely rejected by the majority of this Court.

(d) *DVB Behuising* certainly cannot, on a full consideration of the paragraphs quoted, be cited as authority for the proposition that the transfer embargoes in this matter fall under the national legislative competence of deeds registration. The provisions dealing with forms of land tenure and deeds registration in *DVB Behuising* were far more wide-ranging and potentially intrusive than the transfer embargoes in the present matter. Yet the majority in *DVB Behuising* considered that because the land tenure and deeds registration provisions were "well integrated into the scheme of the proclamation" and important for its efficacy, they were to be treated as falling within Schedule 6. If that is so, then even more so do the substantially less impactful transfer embargoes in this matter fall

[222] *DVB Behuising* above n 14 at paras 102-3.

within the scheme of the GM and EM By-Laws and therefore within the legislative competence of the municipalities.

(e) The transfer embargoes are well integrated into the legislative scheme of the by-laws and will render them effective. Their effect is that each transferor and transferee of immovable property becomes a participant in the enforcement of the by-laws and in the implementation and enforcement of the legal regime governing the use of land in compliance with land use schemes made in terms of the by-laws. Why should our Constitution not be interpreted so as to allow municipalities to draw citizens into enforcing the rule of law at local level within the confines of their own properties?

(f) That the transfer embargoes are important to the efficacy of the by-laws is apparent from the fact that they are widely used in by-laws around the country and have been used in by-laws and other legislation over a long period of time.[223]

(g) The effect of striking down the transfer embargoes in this case on the basis set out in the first judgment would be that every one of these transfer embargoes found in a by-law would become susceptible to striking down on the basis that municipalities around the country had no authority to impose them. This would be most unfortunate, because town and municipal planning is an instrument for the creation of orderly societies based on the rule of law. Such planning promotes development, the realisation of socio-economic rights and the improvement of the social conditions of all residents of South Africa. This much is recognised in section 23(1) of the Systems Act.[224]

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[223] See the discussion at [126] to [128] above.

[224] The section is headed "Municipal planning to be developmentally oriented", and provides as follows:

> "(1) A municipality must undertake developmentally-oriented planning so as to ensure that it—
>
> (a) strives to achieve the objects of local government set out in section 152 of the Constitution;

(h) The first judgment criticises the Municipalities on the basis that there are other enforcement mechanisms available to enforce the GM and EM By-Laws, such as the appointment of inspectors. It seeks to demonstrate that the five inspectors Govan Mbeki claims to require are affordable. Emalahleni is criticised for failing to put up evidence in this regard. But if transfer embargoes are efficacious, why not have both?

[249] Accordingly, *DVB Behuising* is good authority that there is no impermissible intrusion on the legislative authority of the national sphere of government by the transfer embargoes contemplated in paragraphs (b) and (c) of the respective by-laws. Properly characterised, they are integral to the regulation and exercise by the municipalities of their municipal planning function in Part B of Schedule 4 and do not stray outside of it.

Reasonably necessary or incidental

[250] There are three sources of municipal legislative authority contemplated in section 156 of the Constitution. The first is section 156(2) read with section 156(1)(a), which is that linked to the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. It is that source which has formed the subject matter of discussion of legislative competence thus far in this judgment. Establishing it as a valid source requires characterising any impugned legislation and testing whether it falls within those local government matters.

[251] The second source is section 156(2) read with section 156(1)(b), which includes matters assigned to a municipality by national or provincial legislation. We are not concerned here with such an assignment.

(b) gives effect to its developmental duties as required by section 153 of the Constitution; and

(c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution."

[252] The third source is section 156(5), which affords a municipality "the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions". I have already indicated why I differ from the first judgment in holding that this affords an independent source of municipal *legislative* power. Additionally, the word "any" preceding the word "power" points to the inclusion of legislative power, not just executive power. In *Mazibuko*, this Court interpreted the word "reasonable" as qualifying both the words "necessary" and "incidental".[225]

[253] This third source of power is a conditional one. It must be reasonably necessary for, or reasonably incidental to, the effective performance of the municipality's functions. Provided that this condition is satisfied, the section 156(5) legislative power is not limited to the functional areas in Part B of Schedule 4 or Part B of Schedule 5. The reasonably necessary or incidental power may in itself be one which falls outside those functional areas. This is confirmed in the judgments of this Court referred to earlier, which recognise that the three spheres' areas of legislative competence are not hermetically sealed and may overlap.[226]

[254] The Supreme Court of Appeal viewed the matter somewhat differently. It considered that the powers in section 156(5) were those that were "indispensable for the effective administration" of the primary power and that they "may not be used to increase the functional areas of local government's powers, but rather to enhance the efficacy of administrating an existing functional area".[227] This is not entirely correct. "Indispensable" does not align with "reasonably necessary" and "reasonably incidental". They are broader concepts. And if a municipality can demonstrate that a power is reasonably necessary or reasonably incidental for the effective performance of

[225] *Mazibuko* above n 31 at para 111. See also *Liquor Bill* above n 31 at para 81.

[226] *Maccsand* above n 35 at para 47 and *Gauteng Development Tribunal* above n 51 at para 55, as well as the authorities cited by the first judgment at n 53.

[227] Supreme Court of Appeal judgment above n 20 at paras 18-9.

its functions, a municipality may exercise it even though it may result in a limited expansion of its powers and a consequential intrusion into those of another sphere.

[255] Applying this analysis to the present matter, even if it were to be concluded that the transfer embargo contemplated by paragraphs (b) and (c) of the respective by-laws fell outside of the legislative authority conferred by section 156(2), read with section 156(1)(a) and Part B of Schedule 4 in respect of municipal planning, and to a limited extent engaged the national function of deeds registration, they would at the very least be reasonably incidental to the exercise by the Municipalities of their municipal planning power.

Conclusion on legislative competence

[256] I accordingly conclude that the legislative competence challenge to section 76(2)(b) and (c) of the GM By-Law and 86(2)(b) and (c) of the EM By-Law has not been established. I should add that even if the analysis were applied to the full provisions, without taking into account the other successful challenges to the remaining paragraphs (a) and (d) to (f) of section 76(2) of the GM By-Law and paragraphs (d) to (e) of section 86(2) of the EM By-Law, the outcome on legislative competence would, in my view, be the same.

SPLUMA

[257] Glencore founds a separate challenge to the impugned provisions on SPLUMA. It points out that, as section 2(1)(a) of SPLUMA records, it was enacted in terms of section 155(7) of the Constitution, which affords national and provincial governments the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5.[228]

[228] Section 155(7) reads as follows:

> "(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

This section, Glencore argues, makes substantial inroads into municipal legislative competence.

[258] Glencore argues that SPLUMA provides no authority for the imposition of transfer embargoes by municipalities in their by-laws. Absent that, it argues that because SPLUMA has legislated comprehensively for municipal planning, there is no such power.

[259] The short answer to these arguments is that I have already found that the transfer embargoes in section 76(2)(b) and (c) of the GM By-Law and 86(2)(b) and (c) of the EM By-Law fall directly within the legislative competence of the municipalities under section 156(1)(a) and 156(2), read with Schedule 4 and, if not under those provisions, under section 156(5) of the Constitution.

[260] SPLUMA cannot usurp the Municipalities' original constitutional legislative competence in respect of municipal planning.[229] Nor does it seek do so. If regard is had to the fact that SPLUMA has its genesis in the setting aside of earlier legislation because of national and provincial overreach into municipalities' original legislative authority,[230] it would be surprising if it did.

[261] If regard is had to its long title, its preamble and section 3, SPLUMA's objects are, amongst others, to provide for uniformity and effectiveness in spatial planning and land use management, to lay down development principles and norms and standards,

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[229] See *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) at para 46.

[230] The history was referred to by the majority in *Chairperson of the Municipal Appeals Tribunal, City of Tshwane v Brooklyn and Eastern Areas Citizens Association* [2019] ZASCA 34; [2019] 2 All SA 644 (SCA); 2012 JDR 0670 (SCA) at para 36 as follows:

> "SPLUMA was the second legislative attempt to create a uniform town planning regime for South Africa. The first attempt was the Development Facilitation Act 67 of 1995, but Chapters V and VI thereof were found by the Constitutional Court to be invalid because they infringed the autonomy of municipalities to regulate the land use and municipal planning within their areas of jurisdiction. These defects were remedied by SPLUMA."

See also *Ex Parte Whitfield and Similar Matters* 2017 (5) SA 161 (ECP) at paras 12-7.

and to provide for cooperation between national, provincial and local spheres of government. It seeks to achieve a measure of consistency in how municipalities exercise their planning powers, rather than trying to narrow those powers.

[262] Accordingly, even if SPLUMA does not itself authorise municipalities to introduce transfer embargoes,[231] it provides no basis for overturning them if they are made in terms of powers given to them by the Constitution. There is accordingly no merit in the challenge based on SPLUMA.

Administrative justice review

[263] Glencore sought the judicial review of the administrative decisions reflected in the requirements set out in the application forms and standard affidavits that a transferor must complete to apply for the certificates contemplated in sections 76 and 86 of the GM and EM By-Laws respectively that will allow transfer to proceed. This it sought by way of alternative relief in the event of its constitutional review failing. Glencore's constitutional review has failed in part, so the judicial review must be considered. The judicial review is sought in terms of the Promotion of Administrative Justice Act[232] (PAJA), alternatively, under the principle of legality.

[264] Govan Mbeki asserts that the judicial review is brought outside the 180-day period provided for in section 7(1) of PAJA. Glencore responds on the basis that its challenge is a collateral one and therefore not time-bound. It cites *Merafong City*[233] in support. In my view it was not strictly necessary to characterise the relief as a distinct

[231] The argument that SPLUMA does not contemplate transfer embargoes is in any event difficult to sustain. It contains its own transfer embargo in section 53 to ensure compliance by a developer with the conditions imposed upon approval of a land development application, before the first transfer of land units emanating from the development may take place. Section 32(1), which deals with land use schemes, provides in broad terms that "[a] municipality may pass by-laws aimed at enforcing its land use scheme". There is nothing in section 32 to suggest that this power in section 32(1) is confined to the specific enforcement mechanisms provided for in section 32(2) to (12). Section 5(1)(c), which includes in municipal planning "the control *and regulation* of the use of land" (emphasis added), and section 6(1)(a) which applies the general principles in section 7 to, amongst others, "the preparation, adoption and implementation of any . . . by-law concerning spatial planning and the development and use of land", appear to recognise that municipalities exercise broad, original legislative authority.

[232] 3 of 2000.

[233] *AngloGold Ashanti Ltd* above n 52 at paras 39-44 and 69.

review under PAJA or as a collateral challenge. The relief flows from the assertions made in support of the constitutional review and warrants consideration in terms of section 172(1)(a) and (b) of the Constitution. I would in any event be willing to grant the required extension of time in terms of section 9(1)(b) of PAJA as it is in the interests of justice to do so.

[265] I first deal with each of the complaints in relation to Govan Mbeki. Glencore complains that the application form for the section 76 certificate requires the applicant to provide a Land Use Right Certificate (LURC). This certifies the zoning of the property in question. Glencore says this is unnecessary because the municipality is the repository of this information and can get it itself. This is perhaps bureaucratic silliness, but it raises no issue of lawfulness or any recognised review ground. Glencore is not entitled to relief in this respect.

[266] Glencore objects to the requirement that an occupancy certificate issued in terms of section 14(1) of the National Building Regulations and Building Standards Act[234] (NBRBSA) be furnished with the application. The GM By-Law provides no legal foundation for this request. In terms of section 76(2)(c), certification is required to show that "buildings constructed on the land unit comply with the requirements of the land use scheme", not with the requirements of the NBRBSA. Glencore is entitled to this relief in this respect.

[267] Glencore complains that the standard affidavit that must accompany the application requires the transferor to confirm that all development charges due on the property have been paid. This is a requirement that is imposed on the developer. It should not be demanded of a subsequent transferor to confirm this. Glencore is entitled to relief for this.

[234] 103 of 1977.

[268] Glencore objects to the requirement in the standard affidavit of confirmation of the payment of any contravention penalties. This requirement is linked to section 76(2)(b) of the GM By-Law, which has not been found to be constitutionally invalid. Glencore is not entitled to relief in this respect.

[269] With no small measure of hyperbole, Glencore characterises as a "monstrosity" the requirement that the transferor say on oath that she is familiar with section 26 of SPLUMA and the GM By-Law, and confirms compliant use of the land and buildings on the property. Glencore says that it is arbitrary to require the transferor to familiarise herself with the legislation and to be a "policeman in [her] own case". I disagree. A layperson can do their best to get to grips with the legislation in question or employ a professional person. Glencore is not entitled to any relief in this respect.

[270] Emalahleni has an application form and annexures for a section 86 certificate, including a standard affidavit, that are different from those of Govan Mbeki. For similar reasons to those given in relation to Govan Mbeki, Glencore is entitled to relief in respect of the following requirements which have no legal basis:

(a) Completion of Form A, being the form from a conveyancer confirming that the funds due in terms of section 86(2)(a) of the EM By-Law have been paid. The reason for this is that section 86(2)(a) has been set aside as invalid.

(b) Completion of Form B, insofar as it requires the Chief Building Inspector's confirmation of approved building plans and payment of "building compliance/contravention fines". The reason for this is that this requirement points to requiring compliance with the NBRBSA, for which there is no basis in the EM By-Law.[235]

(c) Completion of Form C, being the affidavit from the transferor confirming compliance with the requirements of section 86(2)(d) and (e) of the

[235] Emalahleni disputed this, saying that the building plans were required only to assess compliance with the land use scheme. But Form B suggests otherwise. It demands approved building plans and it calls for information in relation to payment or non-payment of "building compliance/contravention fines", with the Chief Building Inspector as the official signing off on this part of the form.

EM By-Law. The reason for this is that these subsections have been set aside.

[271] Glencore is not entitled to relief in respect of Form B insofar as it requires the Chief Building Inspector's confirmation of "zoning certificate issued" and payment of "land use compliance/contravention fines" – these are justified by section 86(2)(b) and (c) of the EM By-Law, which were held to be valid.

[272] Relief was also sought by Glencore pertaining to the application fees required to accompany applications for certificates in terms of sections 76 and 86 of the respective by-laws, but this relief was not adequately foreshadowed in either the notice of motion or the founding affidavit. The amounts are not excessive. Glencore is not entitled to relief in this respect.

Mandatory relief

[273] This relief was only sought in the event that "the constitutional attack fails and the administrative law attack succeeds but fails in respect of sub-paragraph (a)". Neither of these conditions were satisfied. The constitutional attack was successful in part and the administrative law attack relating to subparagraph (a) succeeded. This need not be considered.

Relief against the Registrar of Deeds, Mpumalanga

[274] Glencore sought relief against the Registrar of Deeds, Mpumalanga to preclude him from requiring a certificate in terms of sections 76(2) and 86(2) of the respective by-laws as a prerequisite for registration of transfer of immovable property. In view of the fact that I would find these provisions to be valid in part, Glencore is not entitled to this relief.

A response to further aspects of the first judgment

[275] The first judgment suggests that, should the by-laws in this case be found to fall within municipalities' legislative competence, transfer embargoes could be used to enforce compliance with by-laws that regulate outside of municipal planning. For example, a municipality might use a transfer embargo to enforce public nuisance by-laws, or those restricting the sale of food or liquor; or to force the installation of "smart" water and electricity meters.

[276] Such transfer embargoes are not before us. Were by-laws to be passed of this nature, they would each need to be tested for validity on their own merits, *both* with reference to legislative competence *and* compliance with the Bill of Rights. These particular examples may survive scrutiny from a legislative competence perspective, for the same reasons as those given in this judgment in relation to paragraphs (b) and (c) of sections 76(2) and 86(2) of the respective by-laws. There is nothing incongruous about that. The "smart" meter example bears some resemblance to long-established transfer embargoes linked to electrical wiring compliance discussed earlier.

[277] If they were legislatively competent, they would still need to be assessed on the basis of the *FNB* test to see whether they gave rise to an arbitrary deprivation of property under section 25(1). There would have to be a rational connection between means and ends.

[278] In a similar vein, it is suggested that on the approach in this judgment, municipalities might stray into other areas of provincial and national competence by imposing embargoes of different kinds to achieve compliance with a planning by-law. The planning by-law might require a certificate of compliant land use to be produced as a precondition, not for transfer of a property, but for a property owner to be able to apply for an identity document, a passport, or a cell phone SIM card, or as a precondition to export goods manufactured on the property.

[279] These are not reasonable comparators. They contemplate municipal regulation of other spheres' competences, which is very different from the transfer embargo provisions under consideration in this case. Their inclusion in a planning by-law would render it difficult to retain its essential character as such. Unlike the transfer embargoes, they would involve a subtraction by a municipality from the legislative authority of other spheres of government. They would not, in my view, fall within any of the three sources of municipal legislative power. They may well conflict with national legislation, giving rise to invalidity under section 156(3). Embargoing a person from applying for a passport, SIM card or exporting goods is neither reasonably necessary for, nor reasonably incidental to, municipal planning.

[280] And again, they would all be unlikely to survive scrutiny under the *FNB* test. There is an irrational disjunct between means, being the passport, SIM card or export embargo, and ends, being compliance by the applicant or exporter with land use legislation. There is insufficient reason for the particular embargoes posited. This is not so with a transfer embargo aimed at ensuring that the very property subject to it is land use-compliant. Other rights in the Bill of Rights would most likely be breached by such provisions.[236]

[281] The foregoing analysis examines the postulated examples from the perspective of *both* the main grounds of challenge in this case, legislative competence and arbitrary deprivation of property in breach of section 25(1) of the Constitution. That is appropriate for a proper and full assessment of whether the examples proffered in the first judgment operate to justify its overturning of all of the legislation challenged in this case. There is no conflation of the two grounds as the first judgment suggests.

[282] Reflection on the desirability of appropriate transfer embargoes is not irrelevant to the legislative competence inquiry. The presumption that legislation does not contemplate an unreasonable result applies to the analysis of the provisions for

[236] For example, freedom of movement in section 21, freedom of trade in section 22, and, given that a cell-phone gives access to social media, freedom of expression in section 16.

allocation of legislative authority in the Constitution. An interpretation that excludes appropriate transfer embargoes is potentially unreasonable.

Conclusion

[283] To summarise, I agree with the first judgment that paragraphs (a), (d), (e) and (f) of section 76(2) of the GM By-Law and paragraphs (a), (d) and (e) of section 86(2) of the EM By-Law are constitutionally invalid, but on the basis of the challenges founded on sections 25(1) and 156(3) of the Constitution, not on the basis of the legislative competence challenge. Contrary to what is held in the first judgment, I conclude that section 76(2)(b) and (c) of the GM By-Law and section 86(2)(b) and (c) of the EM By-Law survive all of the constitutional challenges, save in relation to the words "in terms of any law, or" in subsection (2) of each of the by-laws. Glencore would, however, have been entitled to further relief that would have required the Municipalities to realign their application documentation with the outcome in this judgment, were it to have commanded a majority. To the extent that my reasoning is at odds with that in the judgment of the Supreme Court of Appeal I believe that it was incorrectly decided.

Relief and costs

[284] I agree with the Supreme Court of Appeal that the High Court's suspension of the order of invalidity was not appropriate, but not with its reasons for arriving at this conclusion. The surviving provisions, read together with section 118 of the Systems Act, are more than sufficient to protect the Municipalities' and the public's interests, as articulated in their respective by-laws. For this reason, suspension is inappropriate.

[285] I agree with Glencore that, where it has demonstrated invalidity of the by-laws, the qualification that was added by the High Court so as to confine its order of invalidity to the offending documents in the application forms was wrong. This represented an incorrect application of section 172(1)(a) of the Constitution, which requires all unconstitutional law and conduct to be declared invalid. The outcome was also neither

just nor equitable as required by section 172(1)(b). This was confirmed when Emalahleni took up the attitude that because it did not require the documents mentioned in the notional severance to be provided, section 86 of the EM By-Law survived the orders of the High Court and the Supreme Court of Appeal intact.

[286] Insofar as costs are concerned, if the order I propose were to have commanded a majority, Glencore would have remained substantially successful in the High Court, particularly once their success in the cross-appeals is taken into account. Glencore would have been entitled to its costs in the High Court. The Municipalities would have been substantially (but not entirely) successful in their applications for leave to appeal and their appeals in both the Supreme Court of Appeal and this Court. They would not have been entitled to any costs, however, because Glencore is protected by *Biowatch*.[237] Glencore would have been successful in its applications for leave to cross-appeal and in the cross-appeals in the Supreme Court of Appeal and in this Court. It would have been entitled to its costs in that regard.

[287] Had this judgment commanded a majority, I would have made the following order in CCT 189/22:

1. Leave to appeal is granted.
2. Leave to cross-appeal is granted.
3. The appeal is upheld in part.
4. The cross-appeal is upheld.
5. The applicant must pay the respondents' costs in the application for leave to cross-appeal and the cross-appeal in the Constitutional Court, including the costs of two counsel.
6. Each party must bear its own costs in the application for leave to appeal and the appeal in the Constitutional Court.
7. The order of the Supreme Court of Appeal is set aside and replaced with the following order:

[237] *Biowatch* above n 93.

"(a) The appeal succeeds in part.

(b) The cross-appeal succeeds.

(c) Each party must bear its own costs in the application for leave to appeal and the appeal in the Supreme Court of Appeal.

(d) The applicant must pay the respondents' costs of the application for leave to cross-appeal and the cross-appeal in the Supreme Court of Appeal.

(e) The order of the High Court is set aside and replaced with the following order:

'(i) Paragraphs (a), (d), (e) and (f) of, and the words "in terms of any law, or" in section 76(2) of the Govan Mbeki Spatial Planning and Land Use Management By-law 2016 (GM By-Law) are declared to be constitutionally invalid and are set aside;

(ii) For purposes of issuing a certificate in terms of section 76 of the GM By-Law, the applicant may not require the production of any document or information relevant to a paragraph declared to be constitutionally invalid in this order, or not relevant to paragraph (b) or (c), including—

(aa) an occupancy certificate issued in terms of section 14(1) of the National Building Regulations and Building Standards Act 107 of 1993;

(bb) confirmation that all development charges due on the property have been paid.

(iii) The application is dismissed in respect of the balance of the relief sought.

(iv) The respondent must pay the applicants' costs, including the costs of two counsel.'"

[288] Had this judgment commended a majority, I would have made the following order in CCT 191/22:

1. Leave to appeal is granted.
2. Leave to cross-appeal is granted.
3. The appeal is upheld in part.
4. The cross-appeal is upheld.
5. The applicant must pay the respondents' costs in the application for leave to cross-appeal and the cross-appeal in the Constitutional Court, including the costs of two counsel.
6. Each party must bear its own costs in the application for leave to appeal and the appeal in the Constitutional Court.
7. The order of the Supreme Court of Appeal is set aside and replaced with the following order:

"(a) The appeal succeeds in part.

(b) The cross-appeal succeeds.

(c) Each party must bear its own costs in the application for leave to appeal and the appeal in the Supreme Court of Appeal.

(d) The applicant must pay the respondents' costs of the application for leave to cross-appeal and the cross-appeal in the Supreme Court of Appeal.

(e) The order of the High Court is set aside and replaced with the following order:

'(i) Paragraphs (a), (d), and (e) of, and the words "in terms of any law, or" in section 86(2) of the Emalahleni Municipal By-law on Spatial Planning and Land Use Management 2016 (EM By-Law) are declared to be constitutionally invalid and are set aside;

(ii) For purposes of issuing a certificate in terms of section 86 of the EM By-Law, the applicant may not require the production of any document or information relevant to a paragraph declared to be constitutionally invalid in this order, or not relevant to paragraph (b) or (c), including—

(aa) Form A, being the form from a conveyancer confirming that the funds due in terms of section 86(2)(a) of the EM By-Law have been paid;

(bb) Form B insofar as it requires the Chief Building Inspector's confirmation of approved building plans and payment of "building compliance/contravention fines";

(cc) Form C, being the affidavit from the transferor confirming compliance with the requirements of section 86(2)(d) and (e) of the EM By-Law.

(iii) The application is dismissed in respect of the balance of the relief sought.

(iv) The respondent is ordered to pay the applicants' costs, including the costs of two counsel.'"

ROGERS J

[289] I have had the pleasure of reading the judgments of my Colleagues Chaskalson AJ (first judgment) and Dodson AJ (second judgment). Save in one respect, I agree with the analysis and conclusions in the second judgment. My disagreement relates to the interpretation of paragraphs (d) to (f) of section 76(2) of the GM By-Law and paragraphs (d) and (e) of section 86(2) of the EM By-Law. In my view, those paragraphs should be interpreted as applying only to the developer on whom the relevant obligations rest. On that interpretation, as I think my Colleague Dodson AJ would agree, they survive the challenge based on an arbitrary deprivation of property.

[290] For ease of reference, I quote the relevant part of section 76 of the GM By-Law:

"76 Certification by Municipality

> (1) A person may not apply to the Registrar of Deeds to register the transfer of a land unit, unless the Municipality has issued a certificate in terms of this section.
>
> (2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with—
>
> . . .
>
> (d) proof that all common property including private roads and private places originating from the subdivision, has been transferred; and
>
> (e) proof that the conditions of approval that must be complied with before the transfer of erven have been complied with;
>
> (f) proof that all engineering services have been installed or arrangements have been made to the satisfaction of the Municipality."

[291] The second judgment interprets paragraphs (d) to (f) of section 76(2) as including an owner who bought from the developer a land unit arising from the subdivision or the establishment of a township. The second judgment says that this is a grossly unreasonable result. I agree. It would be monstrous for the By-Law to stipulate that an individual who has bought a land unit from the developer must, before being able to sell it, furnish proof to the Municipality that all common property originating from the subdivision has been transferred and that all conditions of approval for the subdivision or township have been complied with and that all engineering services have been installed or arrangements made to the satisfaction of the Municipality for their installation. The obligation to do those things does not rest on the individual buyers but on the developer. All such buyers would be precluded from transferring their units unless they brought about the performance of the obligations that rested on the developer.

[292] The second judgment holds that this grossly unreasonable result cannot be avoided by a restrictive interpretation. That is so, the second judgment reasons, because the narrow interpretation would result in superfluity and would require the word

"owner" in the introductory part of section 76(2) to have different meanings in relation to different paragraphs of the subsection. Even if that were so, it would not in my view justify giving the paragraphs the meaning attributed to them in the second judgment, a meaning that inevitably results in those paragraphs being unconstitutional.

[293] The superfluity is said to arise when section 76(2)(d) to (f) is compared with section 74(2). The latter provision provides as follows:

> "No Erf/Erven and/or units in a land development area, may be alienated or transferred into the name of a purchaser nor shall a Certificate of Registered Title be registered in the name of the owner, prior to the Municipality certifying to the Registrar of Deeds that:
>
> (a) all engineering services have been designed and constructed to the satisfaction of the Municipality, including guarantees for services having been provided to the satisfaction of the Municipality as may be required; and
>
> (b) all engineering services and development charges have been paid or an agreement has been entered into to pay the development charges in monthly instalments; and
>
> (c) engineering services have been or will be protected to the satisfaction of the Municipality by means of servitudes; and
>
> (d) all conditions of the approval of the land development application have been complied with or that arrangements have been made to the satisfaction of the Municipality for the compliance thereof within 3 months of having certified to the Registrar in terms of this section that registration may take place; and
>
> (e) that the Municipality is in a position to consider a final building plans; and
>
> (f) that all the properties have either been transferred or shall be transferred simultaneously with the first transfer or registration of a newly created property or sectional title scheme."

[294] In terms of section 39(2) of the Constitution a court must always, when interpreting legislation, promote the spirit, purport and objects of the Bill of Rights. That is particularly so where, of two reasonably available interpretations, one will result

in constitutional invalidity.[238] This is reinforced by other aids in interpretation: upholding rather than nullifying a provision,[239] preferring an interpretation that avoids harshness and injustice[240] and the avoidance of absurdity.[241] And for what it is worth, section 3(2) of the GM By-Law explicitly states that "[w]hen considering an apparent conflict between this By-law and another law, a court must prefer any reasonable interpretation that avoids a conflict over any alternative interpretation that results in a conflict".

[295] As against this, the presumption against superfluity is not absolute and the weight that it carries must depend on the circumstances. Tautology is not uncommon in legislation, and the presumption against superfluity must not be applied to create differences of meaning where they were not intended by the lawgiver.[242] This cautionary note applies with added force to municipal by-laws which do not go through the rigours of the lawmaking process applicable to Acts of Parliament.

[296] A careful analysis of sections 74 and 76 reveals that there is no superfluity:

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[238] *Hyundai* above n 124 at paras 21-4; and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[239] In the pre-constitutional era of parliamentary sovereignty, this principle mainly found application in the interpretation of contracts: see, for example, *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd* 1987 (2) SA 820 (A) at 832F-H.

[240] *More v Minister of Cooperation and Development* 1986 (1) SA 102 (A) at 116E-F; and *Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad v Strauss* 1991 (3) SA 203 (A) at 214H-J.

[241] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 47; *Shiva Uranium (Pty) Ltd (In Business Rescue) v Tayob* [2021] ZACC 40; 2022 (2) BCLR 197 (CC); 2022 (3) SA 432 (CC) at para 38 and fn 15; and *Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Trade Transporter* 1987(2) SA 583 (A) at 596G-I. In *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) Schutz JA, after referring to *Bhyat v Commissioner for Immigration* 1931 AD 125 at 129, said this (at para 11):

> "The effect of this formulation is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend."

[242] In this Court, see *Municipal Employees Pension Fund v Mongwaketse* [2022] ZACC 9; 2022 (11) BCLR 1404 (CC); 2022 (6) SA 1 (CC) at para 46. See also *Secretary for Inland Revenue v Somers Vines* 1968 (2) SA 138 (A) at 156B-D; *Casey N.O. v Minister of Defence* 1973(1) SA 630 (A) at 639B-C; *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A) at 678E-F; and *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary Schoo*l [2008] ZASCA 70; [2008] 4 All SA 117 (SCA); 2008 (5) SA 1 (SCA) at para 26.

(a) Paragraphs (d), (e) and (f) of section 76(2) require the owner to furnish the Municipality with proof of certain things. Although section 76 contemplates the issuing of a certificate by the Municipality to the Registrar of Deeds, the section does not say what the Municipality must certify. On the face of it, the Municipality must simply certify that the owner has provided the Municipality with the certificate and proofs listed in section 76(2).[243] The emphasis of section 76(2) is on certification and proofs from the owner to the Municipality. The Municipality must merely certify to the Registrar of Deeds that it has received from the owner the specified certification and proofs.

(b) Section 74(2), on the other hand, requires the Municipality itself to certify to the Registrar that there has been compliance with matters listed in that subsection. The emphasis of section 74(2) is thus on certification by the Municipality, not by the owner.

(c) The matters that the Municipality must certify to the Registrar of Deeds in terms of paragraphs (a), (b), (c) and (e) of section 74(2) have no counterpart in the matters that the owner must certify to the Municipality in terms of section 76(2).[244]

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[243] Contrary to paragraph 54 of the second judgment, section 76(2)(d)-(f) does not provide for the giving of a "certificate" by the owner to the Registrar. It provides for the owner to furnish "proof" of the matters listed in paragraphs (d) to (f) to the Municipality. In terms of section 76, it is the Municipality that then issues a "certificate" to the Registrar. The certificate which the Municipality furnishes to the Registrar in terms of section 76, insofar as it relates to paragraphs (d)-(f), is a certificate that the owner has furnished to the Municipality the proofs listed in those paragraphs. In terms of section 76, in contrast with section 74(2), the Municipality does not itself certify the matters which are the subject of the proofs; it merely certifies that it has received proofs from the owner. The "proofs" may be files of documents and/or photographs, and such proof may turn out not to be fully accurate.

[244] Section 74(2)(a) and section 76(2)(f) may be thought to have some overlap though it is not explicit. The former requires the Municipality to certify to the Registrar that all engineering services have been "designed and constructed" to the satisfaction of the Municipality. Section 76(2)(f) requires the owner to furnish proof to the Municipality that all engineering services have been "installed" or that arrangements (presumably, arrangements for the installation) have been made to the satisfaction of the Municipality. I cannot say whether the "construction" of engineering services is the same thing as their "installation". To the extent that there is an overlap, there is then also a contradiction, since section 74(2)(a) requires that all the engineering services should already have been constructed, whereas section 76(2)(f) contemplates that some might not yet have been installed but that arrangements have been made to the satisfaction of the Municipality for their future installation.

(d) Section 74(2), by contrast, does not require the Municipality to certify to the Registrar of Deeds the matter on which the owner must provide proof to the Municipality in terms of paragraph (d) of section 76(2).

(e) To the extent that the subject-matter of paragraphs (d) and (f) of section 74(2) overlaps with the subject-matter of paragraphs (e) and (f) of section 76(2), the important difference remains that the former paragraphs require a certification by the Municipality to the Registrar of Deeds whereas the latter require the provision of proofs by the owner to the Municipality. The provision of proofs by the owner in terms of section 76(2)(e) and (f) might be part of the evidence on which the Municipality relies when issuing a certificate to the Registrar of Deeds in terms of section 74(2)(d) and (f).

[297] I do not understand the second judgment to say that paragraphs (d) to (f) of section 76(2) are inapplicable to an owner which is the developer, only that those paragraphs are not confined to an owner which is the developer. It is perfectly clear that paragraphs (d) to (f) of section 76(2) primarily contemplate the developer, even if they could notionally include a subsequent owner as well. Put differently, a developer seeking to transfer land units to buyers could not claim that it is exempt from furnishing the proofs required by paragraphs (d) to (f) of section 76(2). So if there were an overlap of these paragraphs with some parts of section 74(2), which is the premise of the second judgment's reasoning, then there would – even on the second judgment's interpretation – be superfluity. But in truth, for the reasons I have given, there is no superfluity.

[298] By their very nature, the obligations contemplated by paragraphs (d) to (f) of section 76(2) are obligations resting on the developer, not on the individual buyers of resultant land units. Section 76(2)(e) specifically deals with something that has to be certified before any land units may be transferred to buyers. The lawmaker did not have in mind something that an individual buyer would have to certify before being able to on-sell his or her land unit to a later buyer. The whole scheme of the system of proofs and certification, insofar as they bear on matters relating to land use applications, is that

everything the developer is obliged to do should be done before land units are transferred to individual buyers. Unless there were a serious breakdown in the system, the situation should never exist of buyers owning land units in a development where the developer did not comply with all relevant obligations before transferring the land units to the buyers. There is no reason to suppose that the lawmaker was intending to regulate such a scenario.

[299] Furthermore, and even supposing such a situation could have arisen, there would be no need for section 76(2)(d) to (f) to target the buyers. The system of certification is designed to ensure that the owner with the obligations complies with the obligations before being permitted to give transfer. The certificate requirement prevents the owner from reaping the benefits of sales without first complying with its obligations. Paragraphs (d) to (f) of section 76(2) would not perform that function if they were applied to subsequent buyers, because the embargo on further transfers would not be an inducement to the developer to comply with its obligations. The developer, furthermore, would still be bound to comply with its obligations under the development approval. The Municipality could compel such compliance by the developer even though the latter no longer owned the land.

[300] Development obligations are imposed on the developer, nobody else. There is no reason at all to suppose that the lawmaker intended to use transfer embargoes as a means of forcing subsequent buyers to do things which the developer was meant to have done. Section 47(7) of the GM By-Law states that no conditions may be imposed which affect a third party or which are reliant on a third party for fulfilment. The second judgment's interpretation allows the conditions by which the developer alone is bound to affect third parties, namely the individuals who buy land units in the resultant development. The lawmaker could not have intended such a result.

[301] My interpretation does not lead to inconsistency in the use of the word "owner" in the introductory part of section 76(2). The "owner", that is the person seeking to transfer property, must comply with those paragraphs of section 76(2) that apply to such

owner. For example, the second judgment concludes, correctly in my view, that an owner who is seeking permission to transfer land need only comply with paragraph (b) to the extent that the contravention penalty or directive was issued to that owner or to a person occupying the land under such owner. If the penalty or directive was issued to the current owner's predecessor, the current owner does not have to prove that the penalty was paid or the directive complied with. It is the same with paragraphs (d) to (f) of section 76(2): if the obligations and conditions in question were binding on the current owner's predecessor rather than on the current owner, the current owner does not have to furnish the proofs in question.

[302] When all is said and done, one must ask oneself the question: did the framers of the By-Law intend to impose the obligations in paragraphs (d) to (f) on later owners or only on the developer on which the conditions and obligations in question were binding? If we are sure, as I am, that the framers of the By-Law could not have intended so unreasonable and absurd a result, one is entitled to avoid it by a process of interpretation, even though it does violence to the wording of the provision. This is in line with what Schutz JA said in *Poswa*:[245] one "uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend".

[303] On the assumption, therefore, that in present case the words in their ordinary meaning are not reasonably capable of giving effect to the known intention of the lawmaker (a proposition with which I disagree), a court would be entitled to reject that interpretation, however much it may involve straining language. Interpretation is about arriving at meaning, and the true meaning may be apparent despite contradictory language. As Wallis JA said in *Endumeni*:[246]

[245] Above n 241.

[246] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 25.

> "[W]here the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity."

[304] For these reasons, paragraphs (d) to (f) of section 76(2) of the GM By-Law and paragraphs (d) and (e) of section 86(2) of the EM By-Law apply only to the owner on which the obligation to do the things in question rests, in other words, the applicant which obtained the land development approval and on which the conditions and obligations in question were binding. This being so, these provisions do not fall foul of section 25 of the Bill of Rights.

[305] In paragraph 7(e) of the orders proposed in the second judgment, I would thus confine the declaration of invalidity to paragraph (a) of section 76(2) of the GM By-Law and paragraph (a) of section 86(2) of the EM By-Law. I agree that the present respondents, the applicants in the High Court, are entitled to *Biowatch* protection in all three courts. In my opinion, however, the extent of the relief to which they are entitled, as against that which they claimed, is so attenuated that they should not be awarded any costs to reflect their limited success. So I would order the parties to pay their own costs in all three courts.

For the Applicant in CCT 189/22:	AJ Vorster and DD Swart instructed by Cronje De Waal-Skhosana Incorporated
For the Applicant in CCT 192/22:	O Ben-Zeev and S Luvuno instructed by Ka-Mbonane Cooper
For the Respondents:	SJ Du Plessis SC, K Hopkins and SO Ogunronbi instructed by Norton Rose Fulbright South Africa Incorporated