CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 41/13
[2013] ZACC 39

In the matter between:

MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING OF THE WESTERN CAPE	Applicant
and	
LAGOONBAY LIFESTYLE ESTATE (PTY) LTD	First Respondent
GEORGE MUNICIPALITY	Second Respondent
CAPE WINDLASS ENVIRONMENTAL ACTION GROUP AND 24 OTHERS	Third to Twenty-seventh Respondents

Heard on : 20 August 2013

Decided on : 20 November 2013

JUDGMENT

MHLANTLA AJ (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This case concerns a challenge to the validity of the applicant's decisions to refuse applications by the first respondent for the rezoning and subdivision of certain properties in the Southern Cape. The rezoning and subdivision approvals were sought for purposes of a large-scale property development. The matter comes before us by way of an application for leave to appeal against a decision of the Supreme Court of Appeal.

Parties

[2] The applicant is the Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape Provincial Government (Provincial Minister). The first respondent is Lagoonbay Lifestyle Estate (Pty) Ltd (Lagoonbay), a private company promoting the proposed property development in relation to which the approvals are sought. The second respondent is the George Municipality (Municipality), a local government authority located in the Western Cape. Although the proposed development will abut the boundary of the Mossel Bay Local Authority, the properties sought to be developed are located within the Municipality's area of jurisdiction. The Municipality has played no significant role in these proceedings. The third respondent is the Cape Windlass Environmental Action Group (Cape Windlass), a local environmental organisation formed by concerned residents to protect the environmental integrity of the Garden Route. Cape Windlass was involved in the proceedings before the Western Cape High Court, Cape Town (High Court) and

the Supreme Court of Appeal. The fourth to twenty-seventh respondents did not participate in the proceedings before this Court.

Background

[3] Lagoonbay is the promoter of a large development incorporating some 655 hectares of land in the Southern Cape. The development is expected to include two golf courses, a hotel, a private park and a gated residential community. The developers also intend to relocate farm workers who currently live and work on the land to a nearby village.

[4] In order to undertake the development, Lagoonbay must secure various approvals. These include—

(a) the amendment of the applicable regional structure plan;[1]

(b) an environmental authorisation under the National Environmental Management Act;[2]

(c) authorisations for certain necessary changes in land use; and

(d) approval of the relevant building plans under the National Building Regulations and Building Standards Act.[3]

[1] In terms of sections 5 and 6(1) of the Physical Planning Act 125 of 1991 (PPA), a structure plan provides guidelines for the future development of a particular region and has as its object the promotion of "the orderly physical development of the area to which that [structure] plan relates to the benefit of all . . . inhabitants [of the region]". Even though structure plans only provide guidelines, in terms of section 27(1)(a) and (b) of the PPA no land may be developed in a manner inconsistent with the relevant structure plan and no land may be used other than in a manner provided for by the structure plan's zoning prescriptions.

[2] 107 of 1998 (NEMA).

[3] 103 of 1977.

This matter concerns the first and the third of these approvals. The George and Environs Urban Structure Plan (Structure Plan) initially designated the land sought to be developed as "Agriculture/Forestry". In order to proceed with the realisation of its development vision, Lagoonbay was therefore required to apply for an amendment to the Structure Plan that would change the designation of the land to "Township Development". The land-use approvals sought relate to the rezoning and subdivision of the affected properties and fall to be determined in terms of the Cape Land Use Planning Ordinance.[4]

[5] Lagoonbay submitted its application for the amendment of the Structure Plan to the Municipality and the Western Cape Department of Environmental Affairs and Development Planning in terms of section 4(7) of LUPO[5] and section 18(1) of the PPA.[6] The Municipality recommended that the application be approved. On 17 July 2007 a previous Provincial Minister, Ms Essop (Minister Essop), approved the application in terms of section 4(7) of LUPO, subject to certain conditions. These included condition 1.3, which provides that "the associated future zoning application in respect of the land concerned shall be subject to the approval by the Provincial

[4] 15 of 1985 (LUPO).

[5] Section 4(7) reads as follows:

> "A structure plan so approved may at any time, on application to or on the direction of the Administrator, be amended or withdrawn, with the approval of the Administrator, by a local authority or joint committee concerned or the director, in such manner as may be determined by the Administrator and subject to inhabitants of the area of jurisdiction of any local authority concerned and other interested parties being afforded an opportunity of lodging objections or making representations."

[6] Section 18(1) provides:

> "Any person who has an interest in a [structure] plan, or any department of State, provincial administration or regional or local authority, may apply in writing to the Planning Authority concerned for the amendment of the relevant [structure] plan."

Government as the location and impact of the proposed development constitutes 'Regional and Provincial Planning'."

[6] On 4 August 2009 Lagoonbay submitted applications for rezoning and subdivision in respect of the land sought to be developed to the Municipality.[7] The applications were approved on 14 July 2010. The Municipality then referred those applications to the Provincial Minister "for the necessary further attention." On 28 April 2011 the Provincial Minister refused the applications for subdivision and rezoning in terms of sections 16[8] and 25[9] of LUPO, pursuant to his view that he was "the competent authority for the administration of [LUPO]".[10]

---

[7] The land incorporates portions of properties described as "Hoogekraal No. 238" and "Buffelsdrift No. 227", located in Glentana, George. From the Provincial Minister's correspondence it appears that subdivision was sought in relation to "Portions 5, 66, 69 and 80 of the Farm Hoogekraal No. 238" as well as of the "consolidated project site". The same source indicates that rezoning was sought in relation to "Portions 42, 82, 122, Portion A of Portion 5 of Hoogekraal 238, Portion 6, 17-19, 23, 41, 52, 53, 55, 64, Rem 65, Rem 67, Rem 68, 70, 72, 74-76, 79, 85, Rem 88, Rem 90, 102, 160, 168, 179, 180, Portion A of Portion 66, Portion A of Portion 69 and Portion A of Portion 80 of the Farm Hoogekraal No. 238". It is not clear whether the rezoning and subdivision applications were sought in relation to all of the same properties.

[8] Section 16 provides:

> "**Rezoning on application of owner of land**
>
> (1) Either the Administrator or, if authorised thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof.
>
> (2) (a) A rezoning in respect of which the application has been granted by virtue of the provisions of subsection (1) shall lapse—
>
> (i) if the land concerned is not, within a period of two years after the date on which the application for rezoning was granted, utilised as permitted in terms of the zoning granted by the said rezoning;
>
> (ii) where it has been granted for the purposes of section 22, if a relevant application for subdivision in accordance with the rezoning concerned is not made in terms of section 24 within a period of two years after the date on which the application for rezoning was granted; or
>
> (iii) where such application for subdivision was indeed so made, but the subdivision concerned or part thereof is not confirmed,
>
> unless either the Administrator or, if authorised thereto by the provisions of the structure plan concerned, the council extends the said period of two years, which extension may be granted at any stage.

[7] Aggrieved by the Provincial Minister's decisions, Lagoonbay launched an application in the High Court for an order setting them aside.

High Court

[8] Lagoonbay's primary challenge was based on the contention that, in the light of the constitutional division of power between provinces and municipalities, the Provincial Minister did not have the functional competence to decide rezoning and subdivision applications.[11] In the alternative, Lagoonbay argued that, when refusing the applications, the Provincial Minister acted in contravention of the Promotion of Administrative Justice Act[12] in that his refusals were: unreasonable; biased; in bad

---

(b) Subject to the applicable provisions of section 7, 14(2), 14(4)(a) or 14(4)(b), land in respect of which a zoning has lapsed in terms of subsection (2) of this section shall be deemed to be zoned in accordance with the utilisation thereof as determined by the council concerned.

(3) Where an application for rezoning is granted under subsection (1) or a rezoning has lapsed in terms of subsection (2), the local authority concerned shall as soon as practicable amend the zoning map concerned and, where applicable, a register in its possession accordingly."

[9] Section 25 states:

"**Granting or refusal of application**

(1) Either the Administrator or, if authorised thereto by scheme regulations, a council may grant or refuse an application for the subdivision of land.

(2) In granting an application under section (1) either the Administrator or the council concerned, as the case may be, shall indicate relevant zonings in relation to the subdivision concerned for the purpose of the application of section 22(2)."

[10] Section 16 of LUPO empowers a province to grant or refuse rezoning applications and section 25 empowers a province to grant or refuse subdivision applications. This is the general position unless a structure plan has, or provincial regulations have, authorised a municipal council to undertake those functions.

[11] The functional competences of provinces and municipalities are set out in the Fourth and Fifth Schedules to the Constitution, read with sections 104(1)(b), 104(4), 125(2)(a)-(c) and 156(1)(a). In relation to Lagoonbay's functionality challenge, the argument centred on whether deciding rezoning and subdivision applications falls within the municipal competence of "municipal planning" (Part B of the Fourth Schedule) or within the provincial competences of "regional planning and development" (Part A of the Fourth Schedule) and "provincial planning" (Part A of the Fifth Schedule).

[12] 3 of 2000 (PAJA).

faith; arbitrary and capricious; and based on irrelevant considerations, an ulterior motive or an error of law. Lagoonbay sought a declarator to the effect that the Municipality was the final decision-maker in relation to rezoning and subdivision decisions and that the approvals granted by the Municipality on 14 July 2010 constituted the final land-use approvals required.

[9] In answer the Provincial Minister contended that: (a) he was empowered by condition 1.3 to refuse Lagoonbay's applications; (b) he was empowered by sections 16 and 25 of LUPO to refuse those applications; and (c) the constitutional scheme of powers allows for provincial involvement in certain rezoning and subdivision decisions. Regarding the PAJA challenge, the Provincial Minister argued that his refusals should not be set aside as they were rational, reasonable and supported by relevant facts.

[10] Cape Windlass joined forces with the Provincial Minister and raised concerns relating to the environmental authorisation granted to Lagoonbay by the provincial authorities,[13] as well as certain doubts regarding the socio-economic benefits that Lagoonbay had indicated would flow from the proposed development.

[11] The High Court (in a judgment by Griesel J)[14] dismissed the application with costs. It held that section 42(1) of LUPO specifically authorised Minister Essop to

[13] See the approval referred to in [4](b) above.

[14] Reported as *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Others* [2011] ZAWCHC 327; [2011] 4 All SA 270 (WCC) (High Court judgment).

impose such conditions as she deemed fit – including condition 1.3 – when authorising the amendment of the Structure Plan.[15]

[12] The Court accepted that zoning is generally a municipal competence. However, it concluded that there is a category of cases where land-use planning decisions exceed the bounds of municipal planning, and therefore require provincial oversight, because of the scope of the interests they affect.[16] It further held that the applications brought by Lagoonbay fall into that category and that the impugned rezoning and subdivision decisions therefore fell within the Province's competence for planning. On this additional basis it was permissible and appropriate for Minister Essop to have reserved the final rezoning and subdivision approvals for her office.[17]

[13] The High Court concluded that sections 16 and 25 of LUPO, insofar as they grant authority to the Provincial Minister to approve applications for rezoning and subdivision, are not inconsistent with the Constitution. The Provincial Minister was thus entitled to rely on those provisions, in addition to the condition imposed by Minister Essop, as the source of his power to decline the rezoning and subdivision applications.[18]

[15] Id at para 7.

[16] Id at paras 10-2.

[17] Id at para 15.

[18] Id at para 18.

[14] Finally, the High Court rejected the various challenges to the Provincial Minister's decision brought in terms of PAJA.[19] The Court thus upheld the validity of the Provincial Minister's refusals and dismissed the application with costs.

Supreme Court of Appeal

[15] The Supreme Court of Appeal (per Ponnan JA)[20] upheld Lagoonbay's appeal with costs. The Court did not deal with the Provincial Minister's powers under LUPO, but relied on the provisions of the Constitution regarding the division of functions and competences between spheres of government,[21] as well as the interpretation of those provisions by the Supreme Court of Appeal in *Gauteng Development Tribunal (SCA).*[22] Ponnan JA held that under the Constitution rezoning and subdivision applications fall to be dealt with by municipalities and therefore that the Provincial Minister lacked the power to refuse Lagoonbay's applications.[23] He accordingly declared the Provincial Minister's rezoning and subdivision decisions unlawful and set them aside.

[16] Regarding the amendment of the Structure Plan in 2007, the Court held that the approval by Minister Essop was ineffective and the condition she imposed incapable

[19] Id at para 22.

[20] *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* [2013] ZASCA 13 (Supreme Court of Appeal judgment).

[21] Above n 11. See the Supreme Court of Appeal judgment above n 20 at paras 7-8 and 10-1.

[22] *Johannesburg Municipality v Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) (*Gauteng Development Tribunal (SCA)*).

[23] Supreme Court of Appeal judgment above n 20 at para 11.

of fulfilment.[24] It therefore remitted the application for amendment to the Provincial Minister for reconsideration.[25] Having found against the Provincial Minister on the issue of functional competences, it was unnecessary for the Supreme Court of Appeal to consider the PAJA challenges.[26]

Submissions in this Court

[17] Where necessary I shall set out particular arguments advanced by the parties in greater detail. For now it suffices to give a broad overview.

[18] In support of his application to have the Supreme Court of Appeal's order overturned, the Provincial Minister advances three arguments. First, Lagoonbay has not challenged condition 1.3 and sought to have it set aside. The imposition of condition 1.3 was an administrative act that continues to have legal consequences,

[24] Id at para 10.

[25] It should be noted that the Structure Plan has been withdrawn. As such, it is unnecessary to consider the correctness of the Supreme Court of Appeal's decision to remit the application.

[26] The full order granted by the Court reads as follows:

> "1. The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel to be paid jointly and severally by the respondents.
>
> 2. The order of the court below dismissing the application with costs is set aside and in its stead is substituted the following:
>
> '(a) It is declared that the purported decision by the first respondent dated 28 April 2011 refusing the applicant's application for rezoning and subdivision in respect of the proposed Lagoonbay development is unlawful and is accordingly set aside.
>
> (b) It is declared that the second respondent is the competent authority to consider and determine the applicant's application for rezoning and subdivision in respect of the proposed Lagoonbay development and its decision to approve that application on 17 July 2010 is confirmed.
>
> (c) The applicant's application for the amendment of the George and Environs Urban Structure Plan from agriculture/forestry to township development in respect of the farm Hoogekraal 238 is remitted to the first respondent for reconsideration.
>
> (d) The respondents are ordered to pay the costs of the application jointly and severally such costs to include those of two counsel.'"

including the consequence of empowering the Province to decide rezoning and subdivision applications. Accordingly, the Provincial Minister was lawfully empowered to refuse Lagoonbay's applications in April 2011. Second, sections 16 and 25 of LUPO empower provincial functionaries to make rezoning and subdivision decisions. Because there has been no attack on the validity of LUPO, Lagoonbay is not entitled to attack the Provincial Minister's exercise of his powers under that Ordinance. Third, even if the first two arguments do not succeed, the rezoning and subdivision applications sought by Lagoonbay fall within the Province's constitutional competence to determine provincial planning issues.[27] In addition, the Provincial Minister maintains that his decisions are substantively defensible and therefore not susceptible to being set aside under PAJA.

[19] In response to the Provincial Minister's first argument, Lagoonbay contends that Minister Essop could not have performed any act that would allow her to usurp functions that the Constitution reserves for municipalities, which functions include responsibility for deciding rezoning and subdivision applications. In response to the Provincial Minister's contentions regarding LUPO, Lagoonbay argues that the relevant provisions of LUPO have been impliedly amended or repealed by the Constitution, and in any event do not authorise provincial authorities to decide rezoning and subdivision applications. With regard to constitutional competences, Lagoonbay submits that the term "provincial planning" in the Fifth Schedule to the Constitution does not include responsibility for rezoning and subdivision decisions. In

[27] See n 11 above.

this regard much reliance is placed on *Gauteng Development Tribunal (SCA)* and this Court's subsequent decision in that matter.[28] The impugned decisions are inconsistent with the Constitution and, so the argument goes, the Supreme Court of Appeal was correct to set them aside. Finally, Lagoonbay maintains its alternative challenge (under PAJA) to the substance of the Provincial Minister's decisions, albeit on narrower grounds than those pursued in the High Court.

[20] Cape Windlass makes two submissions. First, it seeks an order granting it a right of appeal in terms of section 44 of LUPO[29] in the event of the Provincial Minister's refusals being overturned. However, during oral argument, counsel for Cape Windlass rightly conceded that such an order was not necessary for the entitlement in section 44 to be exercised. I need say nothing more on this issue. Second, Cape Windlass requests this Court to overturn the costs order made against it by the Supreme Court of Appeal, arguing that, as a member of civil society that has acted in good faith in this matter, it ought not to be mulcted in costs.

Issues

[21] Determination of this case requires us to consider—

(a) whether leave to appeal should be granted;

---

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

[29] Section 44(1)(a) provides:

> "**Appeal to Administrator**
>
> An applicant in respect of an application to a council in terms of this Ordinance, and a person who has objected to the granting of such application in terms of this Ordinance, may appeal to the Administrator, in such manner and within such period as may be prescribed by regulation, against the refusal or granting or conditional granting of such application."

(b) if so, whether sections 16 and 25 of LUPO were impliedly amended or repealed such that they no longer authorise provincial authorities to make rezoning and subdivision decisions;

(c) if not, whether this Court may consider the constitutionality of LUPO in these proceedings;

(d) if not, whether, in the light of the various delegations of planning powers that have occurred since LUPO's commencement, the Provincial Minister was competent under that Ordinance to decide Lagoonbay's rezoning and subdivision applications;

(e) if so, whether the Provincial Minister's refusals fall to be reviewed and set aside under PAJA; and

(f) an appropriate costs order.

Leave to appeal

[22] This matter raises constitutional issues regarding the division of powers and competences between different spheres of government, as well as the proper approach to challenging public power that has been exercised under a particular statutory framework. Furthermore, the application relates to matters of great practical import and, as is evident from what follows, the appeal bears prospects of success. It is therefore in the interests of justice that leave to appeal be granted.

Implied repeal of select portions of LUPO

[23] Placing heavy reliance on the decision in *CDA Boerdery*,[30] Lagoonbay argues that sections 16 and 25 of LUPO have been impliedly amended or repealed by the Constitution,[31] section 8 of the Local Government: Municipal Systems Act[32] and section 83(1) of the Local Government: Municipal Structures Act,[33] such that they no longer empower provincial authorities to decide rezoning and subdivision applications.

[24] In *CDA Boerdery*, the Supreme Court of Appeal was faced with a challenge to a municipality's power to levy rates on immovable property within its area of jurisdiction. The Cape Municipal Ordinance[34] provided that the Premier of the Western Cape had to approve the imposition of certain rates, including the rates under challenge. The respondent municipality contended that this requirement should be treated as having been impliedly repealed because it was repugnant to section 229 of the Constitution read with section 10G(6), (6A) and (7) of the Local Government

[30] *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* [2007] ZASCA 1; 2007 (4) SA 276 (SCA) (*CDA Boerdery*).

[31] The provisions referred to in n 11.

[32] 32 of 2000 (Systems Act). Section 8 provides:

> "**General empowerment**
>
> (1) A municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution, and must exercise them subject to Chapter 5 of the Municipal Structures Act.
>
> (2) A municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers."

[33] 117 of 1998 (Structures Act). Section 83(1) states:

> "A municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution."

[34] 20 of 1974.

Transition Act.[35] It is not necessary to replicate those legislative provisions here. Suffice it to say that section 229 of the Constitution grants municipalities an original power to levy rates on properties, while the Transition Act set out in detail the mechanisms and processes through which municipalities were required to value properties and levy rates. None of these constitutional or statutory provisions envisaged any provincial role in the levying of such rates. The Supreme Court of Appeal found in favour of the respondent municipality.

[25] On Lagoonbay's construction, *CDA Boerdery* is authority for the contention that sections 16 and 25 of LUPO were impliedly amended or repealed because they are inconsistent with the municipal and provincial competences delineated in the Constitution, the Systems Act and the Structures Act,[36] at least to the extent that they purport to empower provinces to decide rezoning and subdivision applications. This is because *CDA Boerdery* decided that where an old-order ordinance is clearly repugnant to the present constitutional scheme, it could be said that the ordinance has been impliedly repealed.

[26] Lagoonbay's reliance on *CDA Boerdery* is misplaced. As a matter of general principle, old-order legislation remains in force until the necessary steps are taken to have it set aside.[37] No such steps have been taken with regard to sections 16 and 25 of

[35] 209 of 1993 (Transition Act).

[36] Above n 11, n 32 and n 33 respectively.

[37] See, for example, *S v Thunzi and Another (Minister for Justice and Constitutional Development joined)* [2010] ZACC 27; 2011 (3) BCLR 281 (CC) at paras 25 and 51.

LUPO, whether in the form of legislative revision or in the form of a court granting just and equitable relief pursuant to a direct challenge to those provisions.

[27] Furthermore, the Schedules to the Constitution are framed in broad terms and the cited sections of the Structures Act and the Systems Act simply echo or refer to the Constitution. These provisions speak only of "provincial planning", "municipal planning" and "regional planning and development". Even if we accept that legislative provisions may be impliedly amended or repealed, there is no obvious and direct contradiction between those broad phrases and the language employed in LUPO such that the provisions of the latter can or should be taken to have been amended or repealed by implication. This is in stark contrast to *CDA Boerdery*, where the unequivocal provisions of the Constitution and the detailed prescripts of the Transition Act were inescapably incompatible with the Cape Municipal Ordinance.

[28] In addition, the statutory provision requiring the Premier's assent in *CDA Boerdery* was an isolated and excisable requirement. In this case, the provisions of LUPO (including sections 16 and 25) depend on an intricate scheme that delegates rezoning and subdivision to municipalities through provincial oversight responsibilities. There is no offending provision which may readily and easily be removed in order to address the unconstitutionality alleged by Lagoonbay. And as counsel for the Provincial Minister stated during oral argument, the general terms contained in the Constitution, the Systems Act and the Structures Act cannot be said to have impliedly repealed LUPO when they do not offer an equivalent to the

framework currently provided by that Ordinance. Whatever its flaws, LUPO remains legislation that is of fundamental practical importance – it is the critical statute governing planning processes in various provinces. As such, any mode of addressing its unconstitutionality should be undertaken either by the appropriate legislative authority, or by a court exercising its discretionary remedial powers under section 172(1) of the Constitution.

[29] The implied repeal argument must therefore fail. If sections 16 and 25 of LUPO were not impliedly amended or repealed, may this Court nevertheless resolve this dispute with direct reference to the prescripts of the Constitution regarding municipal and provincial functional competences? I now proceed to answer this question.

What was pleaded regarding LUPO's validity?

[30] Absent an appropriate justification for a more expansive approach, in these proceedings we are limited to considering the grounds of review contained in the original application challenging the rezoning and subdivision refusals. Fundamental to this case, therefore, is a proper understanding of what has been pleaded by Lagoonbay.

[31] In its founding affidavit in the High Court, Lagoonbay acknowledged the centrality of sections 16 and 25 of LUPO to this matter. In express terms the deponent averred that "[t]he empowering provisions authorising the designated functionary to

approve the rezoning and subdivision are, accordingly, firstly section 16 and, secondly, section 25 of LUPO." Notwithstanding this acknowledgement, and the fact that sections 16 and 25, at least on their face, empower the Provincial Minister to make rezoning and subdivision decisions, Lagoonbay did not seek to impugn the validity of those statutory provisions. The founding papers contain no more than the throwaway line that "any purported reliance by the [Provincial Minister] on any purported legislative empowering provision would . . . fall foul of the constitutional scheme and would be constitutionally invalid."

[32] In his answering affidavit the Provincial Minister asserted that sections 16 and 25 of LUPO were the source of his powers to make the impugned rezoning and subdivision decisions. He accordingly argued that Lagoonbay's attack had to fail as the validity of those sections had not been challenged.

[33] In reply Lagoonbay sought to counter the Provincial Minister's response by means of—

(a) the "either-or" argument: LUPO provides that either the Province or the Municipality may exercise the listed functions, not both, and it was the Municipality that was the competent authority to decide the rezoning and subdivision applications;[38]

[38] I deal with this argument in detail at [49] to [56] below.

(b) the contentions regarding the implied amendment or repeal of sections 16 and 25, which I have set out and dealt with above;[39] and

(c) an invalidity attack: as set out in the founding affidavit,[40] any authorisation for the provincial exercise of rezoning and subdivision functions contained in the Ordinance is constitutionally invalid.

[34] Regarding its invalidity argument, Lagoonbay indicated that the notice of motion would be amended to include an application for the relevant provisions of LUPO to be declared constitutionally invalid. Importantly, this proposed amendment never took place, and there was never a direct challenge to the constitutional validity of LUPO before the High Court. Of similar importance, Lagoonbay never sought to amend its pleadings to introduce such a challenge on appeal, whether before the Supreme Court of Appeal or before this Court.

Effect of Lagoonbay's failure to challenge the constitutionality of LUPO

[35] This Court enjoys a wide jurisdiction and, when deciding a constitutional matter within its power, is obliged to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".[41] That being said, this Court has time and again reiterated the importance of challenging the constitutional validity of legislation in a manner that is accurate, timeous and comprehensive. Unless considerations of justice and fairness require otherwise,

[39] [23] to [29] above.

[40] Reliance here was placed on the throwaway line referred to in [31] above.

[41] Section 172(1)(a) of the Constitution.

parties must be held to their pleadings. It is not for this Court to trawl through the record and submissions in the hope of finding a means of assisting a particular litigant.

[36] As Skweyiya J put it in *Phillips*,[42] appellate courts are hesitant to pronounce on the constitutional validity of a statute where the issue has not been properly pleaded and ventilated in lower courts. Departure from this general rule occurs only in exceptional cases:

> "It is not ordinarily permissible to attack statutes collaterally. The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if necessary, be led and that the requirements of the separation of powers are respected.
>
> This is not to say that circumstances could never exist where the interests of justice required that a constitutional matter be raised for the first time on appeal before this Court. They would, however, be rare and the circumstances would have to be exceptional."[43] (Footnotes omitted.)

[37] In *Prince I*[44] this Court was required to decide certain evidentiary issues. During the course of argument, a point regarding the composition of the court a quo arose in that it appeared that the Supreme Court of Appeal had considered the matter

[42] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) (*Phillips*).

[43] Id at paras 43-4. See also *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at paras 23-5.

[44] *Prince v President, Cape Law Society, and Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (*Prince I*). This was an antecedent to *Prince II*, which dealt with the validity of the Cape Law Society's refusal to register the applicant's contract of community service on the basis of his consumption of marijuana: *Prince v President, Cape Law Society, and Others* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) (*Prince II*).

without the quorum prescribed by section 12(1)(b) of the Supreme Court Act.[45] Section 12(1)(b), in turn, appeared to be inconsistent with the interim Constitution. Notwithstanding the absence of a formal challenge to the offending provision, this Court nevertheless evaluated section 12(1)(b) and declared it constitutionally invalid. Ngcobo J noted that—

> "[t]he Minister was not represented in this Court, but abided its decision. As the validity of section 12(1)(b) arose in the course of the hearing and the Minister was not aware that this Court would consider the validity of the section, he was invited to make representations on the validity of the section. The Minister declined to do so."[46]

[38] However, he explained that—

> "[p]arties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. . . . I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal."[47] (Footnote omitted.)

[45] 59 of 1959.

[46] *Prince I* above n 44 at para 40.

[47] Id at para 22.

[39] It is sufficient for present purposes to conclude with a consideration of this Court's decision in *DPP v Minister of Justice*.[48] The High Court raised the constitutionality of certain provisions of the Criminal Procedure Act[49] of its own accord during criminal proceedings. On appeal this Court laid down the following principles:

(a) A court may, of its own accord, raise the unconstitutionality of a law that it is called upon to enforce.[50] This ensures the supremacy of the Constitution and further ensures that we have a coherent system of law based on the Constitution as a foundational document.[51]

(b) In an instance where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law actually is, then a court should, of its own accord, raise the point of law and require the relevant parties to deal therewith.[52]

(c) "Courts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the Legislature. Ordinarily, therefore, they should raise and consider the constitutionality

[48] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) (*DPP v Minister of Justice*).

[49] 51 of 1977.

[50] *DPP v Minister of Justice* above n 48 at para 34.

[51] Id at para 36; section 2 of the Constitution.

[52] *DPP v Minister of Justice* above n 48 at para 35. See also *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68 and *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67.

of laws that are properly engaged before them and where this is necessary for the proper resolution of the dispute before them."[53]

(d) A court may, of its own accord, decide a constitutional issue if "it is necessary for the purpose of disposing of the matter before it".[54]

(e) A court may also, of its own accord, decide a constitutional issue if it is in the interests of justice to do so. Determining the interests of justice entails, inter alia, considerations of public interest and whether the matter has already been fully and fairly aired.[55]

[40] In the light of this jurisprudence and for the reasons that follow, I am of the view that we cannot consider the constitutionality of LUPO in these proceedings. First, as a point of distinction from *DPP v Minister of Justice*, this Court does not have a declaration of constitutional invalidity before it – there is no such order with which we are presently required to engage. Indeed, the Supreme Court of Appeal did not consider the constitutional validity of sections 16 and 25 of LUPO at all. If we were to evaluate LUPO's validity in these proceedings, we would be forced to do so without the valuable insights and analysis of that Court – a situation that should be avoided where possible.[56]

[53] *DPP v Minister of Justice* above n 48 at para 39. See also *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) and *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[54] *DPP v Minister of Justice* above n 48 at para 40.

[55] Id at paras 40-1. See also *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11.

[56] *Minister of Police and Others v Premier of the Western Cape and Others* [2013] ZACC 33 at para 20.

[41] Second, Lagoonbay can never have been under any doubt regarding the statutory source from which the Provincial Minister purported to draw his powers to make the impugned decisions: the refusal letter explicitly cites sections 16 and 25 of LUPO. And sections 16 and 25, on their face, quite clearly contemplate provincial responsibility for deciding rezoning and subdivision applications. The division of powers and competences between the Municipality and the Provincial Minister lies at the heart of this case. The Provincial Minister's powers under LUPO, and the constitutionality of that Ordinance's arrangement of functional competences, are not a set of ancillary concerns that could reasonably have been overlooked when Lagoonbay sought to challenge the impugned refusals. This notwithstanding, Lagoonbay elected to proceed with the present dispute without challenging the validity of LUPO. The present matter is therefore distinguishable from *Prince I*, where the Court *mero motu* considered the validity of a statute on a preliminary point, in order to deal with the main dispute between the parties.

[42] Third, as pointed out during oral argument, LUPO is premised on the understanding that it is competent for provinces to exercise rezoning and subdivision functions – this understanding runs throughout the Ordinance, beyond the provisions we would consider for purposes of this case. And this is important because LUPO regulates many interconnected aspects of land-use planning apart from rezoning and subdivision applications, including structure plans, town-planning schemes, zoning maps and departure applications. However, we have received no submissions on the

implications that a declaration of constitutional invalidity regarding sections 16 and 25 would have for these other aspects.

[43] For example, under the Ordinance a structure plan is subject to the approval of provincial authorities[57] and a structure plan may deal with rezoning.[58] If we were to find that section 16 of LUPO is invalid because it unconstitutionally assigns the municipal function of rezoning to provinces, we would nevertheless, without submissions from the affected parties, be hard-pressed to determine the implications for structure plan approvals flowing from such a finding. In other words, if we are to consider the constitutionality of LUPO, it is insufficient for us to have been presented only with argument regarding the content of provincial and municipal planning competences. In addition, we would require submissions (which we do not have) on how those competences affect the specific provisions of LUPO and how we are to give effect to those competences without creating a practical catastrophe in the planning processes of the North West, Western Cape and Eastern Cape provinces. It would therefore be inappropriate for this Court to consider the constitutionality of the provisions without, at the very least, a full, proper and direct challenge before it. Any *mero motu* declaration regarding sections 16 and 25 could well have implications extending far beyond those provisions, and we should certainly hesitate to make any declaration without a proper understanding of those implications.[59]

[57] Section 4(1)(a) of LUPO.

[58] Id section 5(2).

[59] See the discussion at [27] to [28] above.

[44] It would have been a prudent and reasonable course of action for Lagoonbay to seek an amendment of its notice of motion in order to place the issue of LUPO's constitutionality squarely before the High Court, the Supreme Court of Appeal and this Court. This is particularly the case given that the Provincial Minister has repeatedly raised LUPO as a central component of his defence. And yet, Lagoonbay failed to seek an appropriate amendment in any of the courts that have considered this matter. Indeed, in this Court it sought to amend its notice of motion to add an additional challenge, but the proposed addition did not relate to the constitutionality of LUPO. That being so, there are no reasons of justice or equity that require us to depart from the case as Lagoonbay has pleaded it. Indeed, it would be unjust to the Provincial Minister if this Court were to allow the introduction of a new challenge at this late stage of proceedings.

[45] LUPO was clearly and unambiguously the stated source of the Provincial Minister's power to make the April 2011 decisions. Hence, any challenge to those decisions must take cognisance of the content of the provisions of LUPO. In the absence of a proper and direct attack on the constitutionality of LUPO, this Court is constrained to determine any challenge to the Provincial Minister's decisions on the basis that LUPO is constitutionally valid.

[46] It is tempting to follow the approach adopted by the Supreme Court of Appeal.[60] This Court's jurisprudence quite clearly establishes that: (a) barring

[60] See [15] above.

exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government;[61] (b) the constitutional vision of autonomous spheres of government must be preserved;[62] (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are *different* planning responsibilities, based on "what is appropriate to each sphere";[63] (d) "'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning *which includes the zoning of land and the establishment of townships*" (emphasis added);[64] and (e) the provincial competence for "urban and rural development" is not wide enough to include powers that form part of "municipal planning".[65] At the very least there is therefore a strong case for concluding that, under the Constitution, the Provincial Minister was not competent to refuse the rezoning and subdivision applications.

[47] However, for the reasons set out above,[66] the *Gauteng Development Tribunal (CC)* findings do not avail us. LUPO has not been impliedly amended or repealed, and its provisions authorise, as a matter of general principle, provincial involvement in rezoning and subdivision applications. It was not open to the Supreme Court of Appeal to adopt the approach it did because, in the circumstances of this case, it is

[61] *Gauteng Development Tribunal (CC)* above n 28 at para 44.

[62] Id at para 50.

[63] Id at paras 53 and 55-6.

[64] Id at para 57.

[65] Id at para 63.

[66] [40] to [45] above.

simply inappropriate to ignore the provisions of the Ordinance that lie at the heart of the dispute between the parties.

[48] With this in mind, I shall now consider Lagoonbay's contention that LUPO does not authorise provincial authorities to decide rezoning and subdivision applications.

Lagoonbay's reliance on sections 16 and 25 of LUPO

[49] Lagoonbay contends that the Provincial Minister acted ultra vires LUPO[67] when he issued the impugned refusals. The argument runs thus:

(a) Sections 16 and 25 of LUPO clearly indicate that it is *either* the Province *or* the Municipality (if so authorised) which is to decide rezoning and subdivision applications. LUPO does not contemplate that deciding such applications should be a duplicated function, performed at both local and provincial level.

(b) In 1988 the Structure Plan was amended pursuant to section 16 of LUPO, and the Scheme Regulations were amended pursuant to section 25 of LUPO,[68] to empower the Municipality as the final decision-maker in relation to rezoning and subdivision applications. As is apparent from an explanatory circular issued by the Provincial Administration in 1988 which accompanied these amendments

[67] That is, beyond the powers that LUPO confers.

[68] The amended Scheme Regulations were promulgated by means of Provincial Notice 1047/1988, published in the *Extraordinary Gazette of the Province of the Cape of Good Hope* 4563 of 5 December 1988 (Scheme Regulations).

(1988 Circular), this was a transfer of power from the Province to the Municipality, rather than an expansion of the Municipality's powers such that it would be able to perform the same planning functions as the Provincial Minister.

(c) Condition 1.3 directly contravenes the Constitution insofar as it seeks to usurp for the Provincial Minister a power that falls within the ambit of "municipal planning". It is therefore an unconstitutional nullity that had no legal effect. Put differently, the Provincial Minister's power to decide rezoning and subdivision applications in 2011 depended on the substantive validity of the condition imposed by Minister Essop in 2007. Because the imposition of the condition was unconstitutional and invalid, it could never have clothed the Provincial Minister with the authority to issue the impugned refusals in 2011.

(d) Because condition 1.3 had no legal effect, the division of competences under LUPO remains as set out in the 1988 Circular. It follows that the Provincial Minister was not competent under LUPO to decide Lagoonbay's applications in 2011, and his decisions in that regard fall to be set aside.

Provincial Minister's rezoning decision

[50] Lagoonbay's argument on rezoning cannot be sustained. The introduction to the 1988 Circular indicates that it concerns the "transfer of powers to local authorities by means of a general structure plan and the amendment of local authorities' zoning

scheme regulations to authorise councils to perform certain functions". The first paragraph of the 1988 Circular includes the following:

> "It is, therefore, gratifying to inform you that the Administrator-in-Executive Committee has, at a recent meeting, resolved to transfer its powers . . . to all local authorities in the Cape Province, *subject to certain conditions*." (Emphasis added.)

Paragraph 11 of the 1988 Circular explains that the "transfer of powers [contemplated in the Circular] will come into operation on 1 January 1989, and any application received by [the Cape Provincial Administration] after 6 January 1989 will be returned to councils for disposal." The 1988 Circular thus contemplates the transfer of certain planning functions from the Province to municipalities by means of the necessary amendments to the Structure Plan and the applicable Scheme Regulations. However, that transfer was clearly qualified, and it is those qualifications which undo Lagoonbay's argument.

[51] Section 16(1) of LUPO provides that a structure plan may authorise a municipal council to decide rezoning applications. The 1988 amendment to the Structure Plan clearly "authorises [municipal] councils to grant or refuse rezoning applications in terms of sections 14(4), 16(1) or 18 [of LUPO]". However, it expressly states that "the said authorisation shall not be applicable . . . where *a state institution . . . is not in favour [of the rezoning]*." (Emphasis added.)

[52] It is clear that the 1988 amendment to the Structure Plan only empowers the Municipality to make the final decision regarding rezoning applications to the extent

that relevant "state institutions" do not oppose the rezoning. And though LUPO does not define "state institution", the term is broad enough to include provincial functionaries (barring any statutory indications to the contrary, and there are none). On the facts of this case it is readily apparent that, at the very least, one such state institution – the Provincial Minister – did oppose the rezoning decision. The 1988 Structure Plan amendment therefore did not empower the Municipality to act as the final decision-maker in relation to Lagoonbay's application. In the result Lagoonbay's challenge to the rezoning refusal as being ultra vires LUPO must fail. This in no way implies that the Provincial Minister was competent under the Constitution to exercise rezoning functions. My finding here is limited to a rejection of Lagoonbay's argument that the impugned decision was ultra vires LUPO.

Provincial Minister's subdivision decision

[53] The position regarding the Provincial Minister's subdivision decision is somewhat different. Section 25(1) of LUPO provides that scheme regulations may authorise a municipal council to decide subdivision applications. Pursuant to sections 7(2) and 9 of LUPO,[69] the Province issued scheme regulations in 1988. Regulation 3.1 provides that a municipal council—

[69] Section 7(2) reads as follows:

> "The Administrator shall with effect from the date of commencement of this Ordinance make scheme regulations as contemplated in section 9, supplementary to all scheme regulations existing under subsection (1) of this section, in order to give effect to section 9(1)."

Section 9, in turn, provides:

> "**Scheme regulations**
>
> (1) Control over zoning shall be the object of scheme regulations, which may authorise the granting of departures and subdivisions by a council.

> "may grant or refuse an application for the subdivision of land in terms of section 25(1) of [LUPO] within, and subject to the conditions applicable to, a subdivisional area, as well as an application for the subdivision of land involving no change in zoning."

Unlike the 1988 amendment to the Structure Plan, the Scheme Regulations do not qualify a local authority's power to decide subdivision applications, or limit its competence to instances when there is no disagreement from the Provincial Minister. Rather, they embody a broad authorisation for municipalities in relation to making subdivision decisions.

[54] In 2009 the Scheme Regulations were amended, which amendment included the following revision to regulation 3.1:

> "The [Municipal] Council may grant or refuse an application for the subdivision of land in terms of section 25(1) of [LUPO] within, and subject to the conditions applicable to, a subdivisional area, as well as an application for the subdivision of land involving no change in zoning: *provided that the [Municipal] Council may elect not to exercise its power to grant or refuse an application for subdivision where such an application forms part of a land-use proposal which includes other applications in terms of [LUPO], which require approval by the competent authority at Provincial Government sphere. In such cases all the applications forming part of the land-use proposal may be referred to the competent authority at Provincial Government sphere, for decision. Any comments and/or recommendation[s] submitted by the [Municipal] Council to the competent authority at Provincial Government sphere shall receive consideration*".[70] (Amendment in italics.)

> (2) Scheme regulations may be amended or replaced by the Administrator by notice in the *Provincial Gazette* after the proposed amendment or replacement has, if deemed necessary by the director, been made known in such manner as the director may think fit."

[70] Para 2.1 of Provincial Notice 177/2009, published in the *Provincial Gazette of the Province of the Western Cape* 6631 of 29 May 2009 at 795.

While the amendment authorises provincial authorities to make subdivision decisions, it only grants that authorisation if a municipality has elected not to decide the subdivision application itself. In other words, it falls within a municipality's discretion, when a subdivision application is accompanied by requests for other land-use approvals, to refer all of the approval requests to the relevant provincial functionaries as a composite bundle, or to decide the subdivision application and to leave the other land-use authorisations in the hands of competent authorities in other spheres.[71]

[55] In the present case, the Municipality elected to decide Lagoonbay's subdivision application. I therefore agree that, under LUPO, the Provincial Minister was not the competent authority to grant or refuse that application. This conclusion is bolstered by the wording of section 25(1), which provides that *either* the Province *or* a duly authorised municipality may refuse the application. There is nothing in the text of the provision to suggest that the Ordinance contemplates both provincial and municipal authorities deciding the same subdivision applications. Indeed, only a strained reading of LUPO could support such an impractical duplication of functions.

[56] What then of condition 1.3? Did it empower the Provincial Minister to refuse Lagoonbay's subdivision applications? I think not. First, the condition refers only to

[71] It is worth noting that the Scheme Regulations were amended as recently as 2013, and even that amendment retains municipalities as the primary organs of state responsible for deciding subdivision applications. See para 2.1 of Provincial Notice 257/2013, published in the *Provincial Gazette of the Province of the Western Cape* 7157 of 8 August 2013 at 1790.

"zoning" – it in no way purports to reserve for the Province a power to decide subdivision applications. Second, in terms of section 25(1) of LUPO, competence for deciding subdivision applications is determined by the Scheme Regulations rather than by the Structure Plan, and the Scheme Regulations stipulate that the Municipality was the authorised functionary. It was simply not within Minister Essop's powers to reallocate responsibility for subdivision applications by imposing a condition on a Structure Plan amendment. To my mind it is unnecessary to determine whether the imposition of condition 1.3 could, theoretically, have had legal consequences – whatever consequences it could have had, they could not have related to the power to decide subdivision applications. In the result, the Provincial Minister's decision to refuse Lagoonbay's subdivision application was unlawful and falls to be set aside.

[57] That is, however, not the end of the matter: we must still determine whether the Supreme Court of Appeal was correct to confirm the Municipality's decision to grant the subdivision application.[72] Inasmuch as the Scheme Regulations empower municipalities rather than provincial authorities to decide subdivision applications, section 22(1) of LUPO places a temporal restriction on a local authority's ability to grant or refuse such applications:

> "**Zoning to precede subdivision**
>
> (1) (a) No application for subdivision involving a change of zoning shall be considered in terms of this Chapter, unless and until the land concerned has been zoned in a manner permitting of subdivision, in terms of Chapter II.

[72] See paragraph 2(b) of that Court's order, above n 26.

(b) The provisions of paragraph (a) shall not preclude applications for rezoning and for subdivision from being considered simultaneously."

[58] Thus in terms of LUPO as read with the Scheme Regulations—

(a) the Municipality was the competent authority to decide Lagoonbay's subdivision application;

(b) to the extent that the properties sought to be subdivided were also sought to be rezoned, subdivision decisions in relation to those properties could only be decided after the accompanying rezoning approvals had been granted;[73] and

(c) the Provincial Minister was the competent authority under LUPO to decide the rezoning application.[74]

[59] At the time that the Municipality purported to approve the subdivision application (that is, July 2010), Lagoonbay's accompanying rezoning authorisation had not been granted by the Provincial Minister (the rezoning application was only referred to him in August 2010). Indeed, that authorisation was subsequently refused. To the extent that the properties sought to be subdivided also required rezoning, it was therefore not open to the Municipality, on 14 July 2010, to approve the subdivision of those properties. As I have set out above,[75] it is not apparent from the record before us whether the subdivision applications and the rezoning applications were lodged in relation to all of the same properties. From the Provincial Minister's refusal letter, it

[73] In terms of section 22(1)(a) of LUPO.

[74] See the conclusion reached in [52] above.

[75] Above n 7.

seems that subdivision was sought with regard to some erven and rezoning with regard to others, with a degree of overlap between the two. I therefore consider it appropriate to remit Lagoonbay's subdivision application to the Municipality for reconsideration in the light of this judgment. If subdivision of a particular property was not dependent on the rezoning of that same property, the Municipality would have been – and remains – competent to grant or refuse the subdivision application. If, however, subdivision and rezoning were sought in relation to the same properties, the former will depend on the latter. The Municipality is best placed to make these determinations.

PAJA challenges

[60] Despite an absence of any reference thereto in Lagoonbay's written submissions in this Court, we were informed during oral argument that it persists with its alternative challenges under PAJA (although those challenges have narrowed considerably). In the light of the conclusions reached above, it remains for us to consider these arguments in relation to the Provincial Minister's rezoning decision. In this Court Lagoonbay contends that—

(a) the Provincial Minister committed material errors of law[76] by

(i) ignoring or revisiting decisions made during the amendment of the Structure Plan and during the environmental approval process, and

(ii) attaching significance to the agricultural potential of the land sought

[76] In terms of section 6(2)(d) of PAJA, a court may review administrative action if that "action was materially influenced by an error of law".

to be developed when the designation of that land had already been changed from "Agriculture/Forestry" to "Township Development";

(b) the Provincial Minister's decision was based on erroneous facts[77] insofar as he failed to appreciate the benefits of Lagoonbay's water plan; and

(c) to the extent that the Provincial Minister's decision was based on concerns about the socio-economic impact of the proposed development, it was "misconceived, speculative and unreasonable".[78]

[61] In deciding to refuse Lagoonbay's rezoning application, the Provincial Minister considered inter alia (a) the proposed development's likely adverse effects on the affected area's water supply; (b) the agricultural importance of the land sought to be developed; (c) certain inadequacies in the economic and financial information supplied by Lagoonbay; (d) the possibility that the benefits listed as likely to accrue to the local community may have been misstated; (e) the inconsistency of the proposed development with the goals of the Western Cape Provincial Spatial Development Framework, as well as other policy documents and draft documents; (f) the potential adverse effects on vehicle dependencies and travelling costs in the area; and (g) the potential adverse effects on the landscape. The Provincial Minister contends that his decision was therefore rational, reasonable and fully in accordance with the prescripts of LUPO, and accordingly not susceptible to being set aside in these proceedings.

[77] In terms of section 6(2)(e)(iii) of PAJA, a court may review administrative action if that "action was taken because irrelevant considerations were taken into account or relevant considerations were not considered".

[78] This challenge could either lie in terms of section 6(2)(e)(iii) of PAJA, or in terms of section 6(2)(h), which provides that a court may review administrative action if "the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function".

[62] Assuming that the Provincial Minister's rezoning refusal was administrative action within the meaning of PAJA, for the reasons that follow I am of the view that Lagoonbay's aforementioned challenges must fail. The point of departure for evaluating the substantive validity of the refusal must be section 36 of LUPO,[79] which stipulates that the Provincial Minister had to determine the rezoning applications based on whether the proposed development was "desirable", alternatively based on an evaluation of its effect on existing rights. The standard of "desirability" grants the decision-maker a wide discretion when evaluating rezoning applications.[80]

[63] The challenges based on the Provincial Minister having committed a material error of law cannot be sustained. With regard to the first error-of-law challenge, it is not readily apparent which decisions were supposedly ignored and which were impermissibly revisited. However, the essence of the contention seems to be that the Provincial Minister was, when deciding Lagoonbay's rezoning application, obliged to avoid making decisions that conflicted with those of earlier decision-makers. He therefore committed a reviewable error when he "deliberately and on spurious

[79] Section 36(1) provides:

> "**Basis of refusal of applications and particulars applicable at granting thereof**
>
> Any application under Chapter II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition)."

Chapter III of LUPO regulates subdivision applications.

[80] See, for example, *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another* [2013] ZAWCHC 47; 2013 (4) SA 519 (WCC) (*Booth*) at paras 47-9, for an indication of the breadth of the discretion.

grounds, ignored and/or rejected the positive recommendations and approvals by other functionaries/decision-makers forming part of the broader total process."

[64] This must be rejected. Indeed, an almost identical argument was dismissed in forceful terms by this Court in *Fuel Retailers*:[81]

> "It is no answer by the environmental authorities to say that had they themselves considered the need and desirability aspect, this could have led to conflicting decisions between the environmental officials and the town-planning officials [who had also considered desirability]. If that is the natural consequence of the discharge of their obligations under the environmental legislation, it is a consequence mandated by the statute. It is impermissible for them to seek to avoid this consequence by delegating their obligations to the town-planning authorities."[82]

[65] It is quite possible that different decision-makers may consider some of the same factors during different approval processes. Thus, for example, when evaluating a rezoning application a decision-maker must, in terms of section 36(2) of LUPO, have regard to such considerations as the "safety and welfare . . . of the community" and "the preservation of the natural and developed environment", within the context of his or her broad discretion to determine "desirability". And when deciding an application for an environmental authorisation, a decision-maker must have regard to various principles to ensure socially, environmentally and economically sustainable development, including avoiding environmental degradation, preserving cultural heritage, the responsible and equitable use of natural resources, community well-being

[81] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* [2007] ZACC 13; 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC) (*Fuel Retailers*).

[82] Id at para 92. See further paras 84-97.

and empowerment and the beneficial use of environmental resources for the service of the public interest.[83] It seems clear that environmental authorities and planning authorities may therefore consider some of the same factors when granting their respective authorisations. But that cannot detract from their statutory obligations to consider those factors, and indeed to reach their own conclusions in relation thereto.[84]

[66] I am accordingly of the view that Lagoonbay has failed to show that, to the extent that the Provincial Minister may have ignored or revisited some of the conclusions reached during the earlier approval processes, he improperly or unlawfully exercised his discretion in terms of section 36 of LUPO.

[67] The second error-of-law challenge (regarding the Provincial Minister's consideration of the agricultural potential of the land sought to be developed) must be dismissed on the basis of a lack of materiality. As this Court noted in *Gauteng Development Tribunal (CC)*—

> "a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of [PAJA] permits administrative action to be reviewed and set aside only where it is 'materially influenced by an error of law'. An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision, despite the error of law."[85]
> (Footnotes omitted.)

[83] Section 2(3)-(4) of NEMA.

[84] See *Fuel Retailers* above n 81 at paras 88 and 96-7.

[85] Above n 28 at para 91.

[68] And, as is apparent from the reasons for the refusal provided by the Provincial Minister in August 2011, consideration of the prospective effect of the development on the agricultural potential of the land was not material to his ultimate decision. There were many other weighty considerations indicating that the rezoning required by the development was "undesirable", such that the Provincial Minister would, in all probability, still have decided to refuse the rezoning application had he not considered the land's agricultural potential when making his decision:

> "I am of the view that the proposed development does *little to support policies of integration, densification or the improvement of the living conditions especially* of those in the wider areas around Rosemore, Tembalethu and Pacaltsdorp. Furthermore it is an example of *urban sprawl* which will bring about the loss of agricultural land (a scarce natural resource), water resources, biodiversity, vehicle dependencies and high travelling costs for workers, loss of small town character and of the rural cultural landscape". (Emphasis in original.)

[69] Lagoonbay's contention that the refusal should be set aside because it was based on a factual error regarding water supply must fail. One of the reasons for the refusal was the Provincial Minister's informed concern that "local water supply systems are already under pressure".[86] From the record of the decision it is apparent that the Provincial Minister did consider Lagoonbay's water plan, but was concerned about its inadequacies. He noted that "[n]o indication has been given by [Lagoonbay] as to what measures will be put in place should water demand not be met, and what the effects would be on the wider communities of Mossel Bay and George."

[86] The concern arose from a consideration of the provincial guidelines regarding the use of river water for such facilities as golf courses, as well as information provided by municipal engineering authorities regarding desalination options. See *Booth* above n 80 at paras 28-30 and 33 for a useful discussion of the importance and value of reliance on policy documents when making planning decisions.

Lagoonbay cannot seek to have the rezoning refusal set aside simply because the Provincial Minister did not accept its version of the benefits that would flow from the proposed water plan. Indeed, the Provincial Minister would have been remiss had he not applied his mind to the proposal and reached his own conclusion, based on all of the relevant information before him, as to whether or not the proposed development would place an undesirable strain on the region's water resources. Lagoonbay has failed to set out a basis upon which this Court can fault the Provincial Minister's conclusion in this regard.

[70] Finally, Lagoonbay challenges the Provincial Minister's analysis of the socio-economic impact of the proposed development on the basis that it was misconceived, speculative and unreasonable. This cannot be sustained. The record of the Provincial Minister's decision indicates that there were good reasons and relevant considerations supporting his concerns about the socio-economic impact of the proposed development, including (a) its likely adverse effects on the "unique and varied natural beauty and cultural historical resources" of the area, with related implications for the region's tourism potential; (b) its lack of support for "policies of integration, densification or the improvement of the living conditions" in the area; (c) its potential for resulting in "urban sprawl"; and (d) the fact that the proposed development was motivated for on the basis of an economic study undertaken in 2005, which failed to account for material developments in the area occurring after that date. These include several failed or failing golf-estate developments. There is therefore no basis for

concluding that the Provincial Minister's "desirability" determination was unreasonable, or that it was somehow speculative or misconceived.

[71] In sum, the Provincial Minister refused the rezoning application because he considered the proposed development to have many adverse and uncertain consequences and therefore to be undesirable. This determination was based on his consideration of information provided by Lagoonbay and by relevant municipal functionaries, as well as information sourced from relevant provincial planning policies. Accordingly I find myself in agreement with the High Court that Lagoonbay has failed to set out a proper basis upon which this Court may interfere with the Provincial Minister's policy-laden decision.[87] The challenges under PAJA to the substantive validity of the 2011 rezoning refusal cannot succeed.

Costs

[72] The High Court dismissed Lagoonbay's application in its entirety and ordered it to pay the costs of the Provincial Minister and Cape Windlass, including the costs of two counsel. The Supreme Court of Appeal overturned that ruling, upheld the appeal and mulcted both the Provincial Minister and Cape Windlass in Lagoonbay's costs, again including the costs of two counsel. For the reasons set out above, neither the original application nor the appeal should have been decided entirely in favour of one of the parties. I therefore consider it unjust to require the Provincial Minister or Cape Windlass to bear Lagoonbay's litigation costs, and I consider the reverse position

[87] See the High Court judgment above n 14 at para 24.

equally unjust. That is reason enough to overturn the Supreme Court of Appeal's adverse costs order and not to follow the High Court's costs order.

[73] In this Court both the Provincial Minister and Lagoonbay have been partially successful. Lagoonbay has succeeded in showing that, under LUPO, provincial authorities are not competent to decide subdivision applications. The Provincial Minister has succeeded in defending his competence under LUPO to make rezoning decisions. Cape Windlass' limited submissions have not assisted us in deciding these disputes nor have they been vexatious. I therefore consider it to be in the interests of justice and fairness for each of the parties to pay its own costs.

Order

[74] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld to the extent set out below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
    (a) The application challenging the decision by the Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape Provincial Government (Provincial Minister), dated 28 April 2011, to refuse the rezoning application of Lagoonbay Lifestyle Estate (Pty) Ltd (Lagoonbay) is dismissed.

(b) It is declared that the decision by the Provincial Minister dated 28 April 2011, refusing Lagoonbay's application for the subdivision of certain properties, is unlawful and is accordingly set aside.

(c) It is declared that the George Municipality is the competent authority under the Land Use Planning Ordinance 15 of 1985 to determine Lagoonbay's subdivision application.

(d) Lagoonbay's subdivision application is remitted to the George Municipality for reconsideration.

(e) Each party must pay its own costs in the High Court and in the Supreme Court of Appeal.

4. There is no order as to costs in this Court.

For the Applicant:	Advocate S Rosenberg SC, Advocate A Breitenbach SC and Advocate D Borgström instructed by the State Attorney.
For the First Respondent:	Advocate M Maritz SC and Advocate H de Waal instructed by Werksmans Attorneys.
For the Third Respondent:	Advocate T Potgieter SC instructed by Chennels Albertyn.