

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case
No: 36/2022
WC Case Nos: 4838/2021
3491/2016

In the matter between:

THE CITY OF CAPE TOWN

Applicant

and

**INDEPENDENT OUTDOOR MEDIA
(PROPRIETARY LIMITED)**

First Respondent

**THE BODY CORPORATE OF THE
OVERBEEK BUILDING, CAPE TOWN**

Second Respondent

**THE MINISTER OF TRADE,
INDUSTRY AND COMPETITION**

Third Respondent

THE CITY'S HEADS OF ARGUMENT

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OVERVIEW

1. The City asks this Court, in terms of section 172(2)(a) and (d) of the Constitution, to confirm the invalidity of section 29(8) of the National Building Regulations and Building Standards Act 103 of 1977 (**‘the Building Act’**). Section 29(8) reads:

- (a) A local authority which intends to make any regulation or by-law which relates to the erection of a building, shall prior to the promulgation thereof submit a draft of the regulation or by-law in writing and by registered post to the Minister for approval.
- (b) A regulation or by-law referred to in paragraph (a) which is promulgated without the Minister previously having approved of it shall, notwithstanding the fact that the promulgation is effected in accordance with all other legal provisions relating to the making and promulgation of the regulation or by-law, be void.

2. Section 29(8) came into force on 30 May 1989.¹ The provision reflects its genesis in the pre-democratic era, when the national Parliament was sovereign, executive and legislative power was centrally concentrated and there was no constitutional basis for local government or its legislation. Section 29(8) is unconstitutional for several reasons:

2.1. Section 29(8) impermissibly infringes municipalities’ powers to legislate autonomously by subjecting constitutionally authorised by-laws to veto and content control by the national sphere.

¹ City answering affidavit: vol 1 pp 65-66 para 60. The Building Act came into force on 1 September 1985.

- 2.2. Section 29(8) exceeds Parliament's competence for national law-making in respect of '*building regulations*'. In that regard, national legislation: may only regulate the exercise of a municipality's executive authority; must reflect a '*hands off*' approach to local government; and may go no further than setting norms and guidelines. Section 29(8) does not comply with any of these requirements, as it regulates municipal legislative (rather than executive) powers and does so in an intrusive manner that has no regard for the constitutional principle of municipal autonomy.
 - 2.3. Section 29(8) contravenes the separation of powers by giving a member of the executive, the third respondent ('**the Minister**'), powers reserved exclusively for legislative authorities, and by giving the national sphere unconstitutional power over local government.
 - 2.4. Section 29(8) usurps the powers of the courts, by voiding certain by-laws and so taking away the courts' power to determine a just and equitable remedy once it is concluded that legislation is invalid.
 - 2.5. Section 29(8) infringes section 44 of the Constitution, by regulating subject matter set out in Schedule 5B to the Constitution i.e. subject matter on which only municipalities and provinces may legislate.
3. None of this is disputed. Section 29(8) is inconsistent with the Constitution. Section 172(1)(a) of the Constitution thus requires this Court to declare it invalid.

4. The history of this litigation illustrates the imperative for section 29(8) to be struck from the statute books. The first respondent ('IOM') erected outdoor advertising signs on a prominent building in Cape Town with five-year approvals under the City's outdoor advertising law. But IOM refused to remove the signs after the approvals expired. When the building's body corporate, the second respondent ('Overbeek'), sought a High Court order to require IOM to remove the unlawful signs, IOM asked the Court to declare the Advertising By-Law² void under section 29(8).³ IOM's attitude is that section 29(8) renders outdoor advertising '*completely unregulated*'.⁴
5. Section 29(8) does not confine its harm to the Advertising By-Law. Section 29(8) voids every by-law that '*relates to the erection of a building*' and which lacks Ministerial approval. This includes by-laws such as fire-safety by-laws, building-regulation by-laws and environmental-protection by-laws. Every of these essential, constitutionally-authorized by-laws in Cape Town, and others throughout the Republic, is void so long as section 29(8) remains.
6. Accordingly, the Western Cape High Court (Wille J) declared section 29(8) constitutionally invalid. The City asks the Constitutional Court to confirm that

² The Cape Town Outdoor Advertising and Signage By-Law, 2001 (By-Law No. 10518). A copy of the Advertising By-Law is at vol 1 p 1 of the record before the Constitutional Court.

³ IOM amended notice of motion: vol 1 p 35 prayer 2 (Part B).

⁴ IOM answering affidavit: vol 1 pp 43-47 paras 14.5, 27.4, 32.

declaration, as contemplated in section 172(2)(a) and (d) of the Constitution. The City's confirmation application is unopposed:

6.1. Although the Minister has filed an explanatory affidavit, he expressly does not oppose the confirmation application.⁵

6.2. Although IOM has purported to appeal against the High Court's order,⁶ its grounds of appeal have nothing to do with, and do not dispute, section 29(8)'s invalidity.

6.3. No party has filed a notice of opposition, or any opposing affidavit, in respect of the City's confirmation application. Similarly, no party opposed the City's direct challenge to the validity of section 29(8) in the High Court.

7. We therefore submit that the Constitutional Court should declare section 29(8) unconstitutional and invalid. In the rest of these heads of argument, we deal with:

7.1. the relevant factual background and litigation history;

7.2. the reasons why section 29(8) is constitutionally invalid; and

7.3. the reasons why section 29(8) cannot remain in operation.

⁵ Minister explanatory affidavit: vol 3 p 268 para 13.

⁶ IOM notice of appeal: vol 3 pp 260-262.

BACKGROUND

8. The Overbeek Building is a tall and prominent structure in the Cape Town CBD.⁷ One of the building's facades faces south-west over the city and another looks down Long Street.⁸
9. Overbeek leased advertising space on those facades to IOM during 1999 and 2000.⁹ Acting in terms of the then applicable advertising by-law, on 4 March 1999 the City authorised IOM to erect advertising on one of the facades and on 6 November 2000 it authorised IOM to erect advertising on the other facade. The authorisations were subject to a five-year term such that, by 6 November 2005, both had expired.¹⁰
10. For decades IOM has displayed advertising for various third parties on those facades, in exchange for lucrative compensation. In 2016, the City estimated that IOM earned approximately R4,140,000 per annum from advertising on the Overbeek Building.¹¹
11. Because the five-year authorisations for the advertising on the two Overbeek facades lapsed on 3 March 2004 and on 5 November 2005 respectively,¹²

⁷ City opposing affidavit: vol 3 p 279 para 22.

⁸ High Court judgment: vol 3 pp 239 and 257 paras 1 and 59.

⁹ High Court judgment: vol 3 p 240 para 3.

¹⁰ High Court judgment: vol 3 p 240 para 3. City opposing affidavit: vol 3 p 280 para 23.

¹¹ High Court judgment: vol 3 p 240 para 3. City opposing affidavit: vol 3 p 280 para 24.

¹² High Court judgment: vol 3 p 240 para 4. City opposing affidavit: vol 3 p 280 para 23.

continued advertising thereafter was unlawful under the Advertising By-Law.¹³ Furthermore, the advertising structures were always unlawful because they were never approved under the Building Act.¹⁴ Nevertheless, even after 2005, IOM continued advertising on both facades.¹⁵

12. The City took various steps to have IOM comply with the law, including issuing compliance notices and initiating criminal prosecutions.¹⁶ Those steps were unsuccessful: even if IOM paid a fine or removed a particular advertisement, the unlawful structures remained in place and the removed graphic was replaced with a new advertisement.¹⁷
13. In March 2016, the City launched enforcement proceedings in the High Court to have the unlawful advertising removed.¹⁸ In March 2021 Overbeek initiated further High Court proceedings against IOM, also seeking an order to have IOM remove the unlawful advertising.¹⁹ The High Court directed that the two applications should be heard together.²⁰

¹³ City answering affidavit: vol 1 p 93 para 153. High Court judgment: vol 3 pp 252-256 paras 44-56.

¹⁴ City answering affidavit: vol 1 p 89 para 128 (unanswered). High Court judgment: vol 3 p 255 para 53.

¹⁵ City opposing affidavit: vol 3 p 280 para 24.

¹⁶ City opposing affidavit: vol 3 pp 281-283 para 28.

¹⁷ City opposing affidavit: vol 3 p 283 para 29.

¹⁸ City answering affidavit: vol 1 p 87 para 121. High Court judgment: vol 3 p 240 para 5.

¹⁹ High Court judgment: vol 3 p 241 para 6.

²⁰ High Court judgment: vol 3 p 241 para 5.

14. IOM brought a counter-application to declare the Advertising By-Law void²¹ on the basis that, in contravention of section 29(8), the City did not obtain the approval of the Minister before promulgating the Advertising By-Law.²²
15. Because the Minister had not yet been joined to the proceedings, the City lodged a “*collateral defence*” to IOM’s counter-application, setting out why section 29(8) was invalid. The City engaged with the Minister in the spirit of cooperative governance and took the necessary steps to have him joined to the proceedings before the High Court.²³ The City then brought a direct challenge to the constitutionality of section 29(8), stating why the provision is invalid.²⁴ The direct challenge overtook the collateral defence, rendering it unnecessary for the High Court to deal with the collateral defence.
16. Faced with the City’s application to declare section 29(8) constitutionally invalid, IOM abandoned its counter-application.²⁵ None of the parties opposed the City’s direct challenge.
17. On 21 January 2022 the High Court handed down judgment *inter alia*²⁶ –

²¹ IOM amended notice of motion: vol 1 p 35 prayer 2 (Part B).

²² High Court judgment: vol 3 p 241 para 7.

²³ High Court judgment: vol 3 p 241 para 8. City opposing affidavit: vol 3 p 284 para 35. CFAA1: vol 2 p 135.

²⁴ City amended notice of motion: vol 2 p 110.

²⁵ City opposing affidavit: vol 3 p 285 para 39.

²⁶ High Court judgment: p 257-258 para 59. The order is at vol 3 from p 236.

- 17.1. upholding the City's direct challenge and declaring section 29(8) inconsistent with the Constitution and invalid;
 - 17.2. dismissing IOM's counter-application; and
 - 17.3. declaring the Overbeek Building advertising unlawful and directing IOM to remove it.
18. The City duly applied to the Constitutional Court to confirm the declaration of invalidity.²⁷ The City has not sought relief in respect of any of the other orders issued by the High Court. Accordingly, in terms of the City's application, the sole issue before this Court is whether this Court should confirm that section 29(8) is constitutionally invalid.
19. IOM has purported to appeal against the High Court's order.²⁸ Some of the defects of that appeal have been set out in the City's objection.²⁹ Should IOM persist with its purported appeal, the City will file written argument in response to IOM's submissions. The City has applied in terms of rule 11(4) for further directions regarding heads for IOM's appeal.

²⁷ City notice of application in terms of section 172(2)(d) of the Constitution: vol 3 pp 212-213.

²⁸ IOM notice of appeal: vol 3 p 260.

²⁹ City opposing affidavit: vol 3 from p 274.

SECTION 29(8) IS CONSTITUTIONALLY INVALID

Section 29(8) impermissibly infringes municipalities' legislative autonomy

20. Section 29(8) is irredeemably inconsistent with the Constitution's provisions concerning local government. Section 29(8) reflects its origins in the bygone age of parliamentary supremacy: it treats municipal by-laws on the same footing as subordinate legislation or administrative decision-making, and allows a national Minister to control content and exercise a veto over constitutionally-authorized local legislation.³⁰ That may have been permissible when municipalities were creatures of statute and derived all their powers from provincial or national governments. However, section 29(8) is untenable under our modern constitutional framework which establishes local government as one of three co-equal spheres of government, with independent and original legislative powers.
21. The Building Act and section 29(8) were enacted before 1994, when municipalities were subordinate to provincial and national authorities and exercised no original powers. The Building Act came into force on 1 September 1985 and section 29(8) operated from 30 May 1989.³¹ Section 29(8) therefore constitutes '*old order legislation*' as defined in item 1 of Schedule 6 to the Constitution i.e. legislation that was enacted before the Interim Constitution took

³⁰ City replying affidavit: vol 2 p 207 para 20.

³¹ City answering affidavit: vol 1 pp 65-66 para 60.

effect on 27 April 1994. Under the old order, municipalities exercised only delegated powers and all municipal by-laws were subordinate legislation.

22. However, the advent of constitutional democracy in South Africa ushered in a complete transformation in the organisation of public power and legislative authority. As the Constitutional Court explained in *Fedsure*:

Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself... The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order... and are entitled to certain powers, including the power to make by-laws...³² (Emphasis added.)

23. Moseneke J (as he then was) expressed the following in *Robertson*:

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... [A municipality’s] power may derive from the Constitution or from legislation of a competent authority or from its own laws.³³ (Emphasis added, references omitted.)

³² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (*‘Fedsure’*) paras 26 and 38. See also *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) (*‘Robertson’*) paras 53-59.

³³ *Robertson* n 32 above para 60.

24. Municipalities are no longer limited to subordinate legislation.³⁴ They now have original law-making powers, on similar footing with those of the national and provincial legislatures.³⁵
25. Section 156(2) of the Constitution provides that a ‘*municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer*’. Under section 156(1)(a) of the Constitution, a municipality has the ‘*right to administer*’ any local-government matter listed in Schedules 4B and 5B.
26. One of the functional areas in Schedule 4B in respect of which a municipality has original and independent legislative power is ‘*building regulations*’.³⁶ The City and any other municipality are therefore directly empowered by the Constitution to make by-laws concerning ‘*building regulations*’, which powers they may exercise ‘*fully and effectively*’.³⁷

³⁴ City answering affidavit: vol 1 pp 57-58 paras 24-25.

³⁵ *Fedsure* n 32 above. See also *Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) (‘*Liebenberg*’) paras 147-148.

³⁶ City answering affidavit: vol 1 p 58 paras 26-27. Section 156(2) of the Constitution read with section 156(1)(a).

³⁷ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) (‘*Gauteng Development Tribunal*’) para 49. Schedules 4 and 5 of the Constitution must be interpreted purposively and ‘*in a manner that will allow the spheres of government to exercise their powers “fully and effectively”*.’

27. In the exercise of its ‘*building regulations*’ law-making function, the City has adopted several such by-laws including the Community Fire Safety By-Law,³⁸ the Coastal By-Law,³⁹ and the Cape Town Building By-Law.⁴⁰ It is not disputed that each of those by-laws ‘*relate to the erection of a building*’.⁴¹ Since the City did not obtain Ministerial approval under section 29(8) before promulgating those by-laws,⁴² they would be ‘*void*’ unless section 29(8) is declared invalid. Absent the confirmation of the High Court’s declaration of invalidity, the City and the public will be deprived of important fire safety and other laws which, under the Constitution, the City has the right and duty to administer.
28. In this Court, the Minister contends that there is no constitutional harm if section 29(8) is construed so that it does not apply to by-laws dealing with billboards and public advertising.⁴³ However, the undisputed evidence is that section 29(8) applies far beyond the City’s Advertising By-Law. It voids many other critical, public-interest by-laws. The Minister’s contention is therefore untenable.
29. Section 29(8)’s infringement of municipalities’ autonomous legislative powers is inconsistent with several provisions of the Constitution.

³⁸ *Provincial Gazette* No 5832, 28 February 2002. CFAA2: vol 2 pp 136-165. City answering affidavit: vol 2 pp 126-128 para 23.1.

³⁹ *Provincial Gazette* No 8301, 31 July 2020. CFAA3: vol 2 pp 166-182. City answering affidavit: vol 2 p 128 para 23.2.

⁴⁰ *Provincial Gazette* No 4672, 23 November 1990. CFAA4: vol 2 pp 183-190. City answering affidavit: vol 2 pp 128-129 para 23.3.

⁴¹ City answering affidavit: vol 2 pp 126-129 para 23.

⁴² City answering affidavit: vol 2 pp 126-129 para 23.

⁴³ Minister answering affidavit: vol 3 p 269 para 19.

30. First, section 29(8) infringes the constitutional autonomy of Municipal Councils to make by-laws. The Constitution bestows this legislative autonomy in the following provisions.

30.1. Section 43 of the Constitution allocates the legislative authority of South Africa as follows:

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. (Emphasis added.)

30.2. The legislative authority of Municipal Councils is reinforced by section 151(2) of the Constitution, which provides that '*[t]he executive and legislative authority of a municipality is vested in its Municipal Council.*'

30.3. So important is a Municipal Council's legislative authority that it may not be delegated. It may only be exercised only by the full Municipal Council sitting in a plenary session (section 160(2)(a) of the Constitution).

30.4. Sections 43(c), 151(2) and 160(2)(a) are unqualified: no provision in the Constitution empowers anyone other than a Municipal Council to make a by-law or authorises anyone to approve a by-law made by a Municipal Council.

30.5. In short, under the Constitution, a Municipal Council needs nobody's permission to promulgate legislation authorised by the Constitution and no entity other than a Municipal Council may make a municipal by-law.

31. However, section 29(8) infringes the autonomous legislative authority of Municipal Councils: under paragraph (a), the Minister must receive a draft of any by-law which relates to the erection of a building before its promulgation '*for approval*' – ie to exercise content control; and under paragraph (b), the by-law is '*void*' if the Minister does not approve the by-law before its promulgation.

32. Second, in undermining municipal autonomy, section 29(8) encroaches on municipalities' functional and institutional integrity, in breach of sections 41(1)(e), 41(1)(g) and 151(4) of the Constitution:

32.1. Section 41(1)(e) requires that all spheres of government and all organs of state within each sphere, which include Parliament and Ministers in the national executive, '*must ... respect the constitutional status, institutions, powers and functions of government in the other spheres*'. In breach of this mandate, section 29(8) is disrespectful of the constitutional status of municipal councils and their powers and functions.

32.2. Section 41(1)(g) requires that Parliament and the Minister '*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'. Section 29(8) disables the Minister from complying with this duty because it requires him to perform a function which encroaches on the functional and institutional integrity of Municipal Councils. Parliament is likewise in breach of section 41(1)(g).

32.3. Fundamental to the protection of the constitutional status of local government is the guarantee of municipal autonomy in section 151(4) which provides: *'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'*.⁴⁴ This autonomy must inform any interpretation of municipal powers, whether under the Constitution or otherwise.⁴⁵ Section 29(8) compromises and impedes a municipality's ability and right to exercise its powers and perform its functions by requiring municipalities to obtain ministerial approval for by-laws relating to the erection of buildings, which the Constitution empowers them to make independently, and by voiding by-laws which lack such approval.

⁴⁴ *Gauteng Development Tribunal* above n 37 paras 43-44 and 50.

⁴⁵ *Gauteng Development Tribunal* above n 37 paras 49-50. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*'Certification'*) para 364. See also the emphasis on *'robust municipal powers'* in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) (*'Habitat Council'*) para 12.

33. Third, section 29(8) contravenes the right of municipalities to discharge their functions ‘*fully and effectively*’.⁴⁶
34. Ultimately, section 29(8) makes provision for the Minister to receive a copy of the by-law so that he can exercise content control; requires him to approve a by-law for it to have legal force; and grants him the power to prevent the by-law from ever coming into force i.e. a legislative veto. Therefore, section 29(8) is constitutionally impermissible.

Section 29(8) exceeds Parliament’s competence

35. Section 29(8) is a law concerning ‘*building regulations*’, which is a Schedule 4B functional area. Section 156(2) the Constitution, read with subsection (1), gives municipalities the power to make by-laws for the effective administration of building regulations. As a Schedule 4B functional area, building regulations is an area in respect of which there may also be national (and provincial) legislation.⁴⁷ However, several constitutional provisions narrowly circumscribe the ambit of permissible national legislation about building regulations. As we show below, section 29(8) exceeds those constraints and for that reason is beyond the competence of Parliament.

⁴⁶ *Gauteng Development Tribunal* n 44 above. *Habitat Council* n 45 above paras 17-19 explains that it is impermissible for legislation to provide for a national or provincial veto in a Schedule-4B functional area.

⁴⁷ City answering affidavit: vol 1 pp 59-60 para 31. Section 44(1)(a)(ii) of the Constitution.

36. The national and provincial powers to legislate on Schedule 4B matters are ‘*concurrent*’ with each other, as is evident from the title to the Schedule. That means that national and provincial legislatures have the same or similar powers, and that national and provincial legislation may overlap and might conflict.⁴⁸
37. However, those national and provincial powers are not concurrent with municipalities’ legislative powers: national and provincial governments do not have *the same* legislative competency as local government. While Parliament has certain legislative powers in relation to local government matters such as ‘*building regulations*’, its legislative authority is limited.⁴⁹ Municipalities are the primary repositories of legislative authority in relation to Schedule 4B matters, whereas the national and provincial governments are secondary repositories of legislative authority.
38. It follows that legislative competence regarding any aspect of ‘*building regulations*’ outside the limited powers of the national and provincial spheres vest exclusively in municipalities.
39. The introduction to Schedule 4B provides that any national or provincial legislation in respect of a Schedule 4B functional area may only be ‘to the extent

⁴⁸ *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng and Another* 2016 (4) SA 546 (CC) para 26.

⁴⁹ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 25. City replying affidavit: vol 2 p 204 para 14.

set out in section 155(6)(a) and (7)’ of the Constitution (our emphasis). Section 155(6)(a) does not apply to national legislation.⁵⁰ Section 155(7) reads:

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).’ (Emphasis added.)

40. Section 155(7) empowers the national government to regulate only the exercise of a municipality’s executive authority. It does not authorise any intrusion on the municipality’s legislative authority. For this reason alone, section 29(8) exceeds Parliament’s competence: it clearly and substantially interferes with the ability of the City and all other local governments to enact municipal legislation.
41. Furthermore, the section 155(7) power is confined to ‘*the supervision, monitoring and support of municipalities*’.⁵¹

41.1. The power of supervision is ‘*fully captured*’ by the constitutional provisions regarding provincial and national interventions in local government, pursuant to section 139 of the Constitution.⁵² Section 139 sets out extreme circumstances wherein a provincial executive may take

⁵⁰ Section 155(6)(a) applies only in respect of provincial governments, obliging them to ‘*provide for the monitoring and support of local government in the province*’.

⁵¹ *Certification* n 45 above para 367: the Constitutional Court was concerned with construing section 155(3)(b) of the proposed text of the Constitution, which was for all intents and purposes identical to the currently applicable section 155(7). In *Habitat Council* n 45 above from paras 22, the Constitutional Court confirmed this interpretation of the power under 155(7).

⁵² *Certification* n 45 above para 370.

over some or all of a municipality's executive powers. Notably, there is no power to intervene in a municipality's legislative powers.

41.2. The power of support '*can be employed by provincial governments to strengthen existing [local government] structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions ... the provinces must assert legislative and executive power to promote the development of [local government] capacity to perform its functions and manage its affairs and may assert such powers, by regulating municipal executive authority, to see to the effective performance by municipalities of their functions in respect of listed [local government] matters.'*⁵³ (Emphasis added.)

41.3. The monitoring power '*corresponds to "observe", "keep under review" and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control [local government] affairs ... It is unlikely therefore that provincial governments could seek to underpin a legislative intervention to promote the performance and management*

⁵³ Certification n 45 above para 371. See also *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) ('*Johannesburg Metro*') paras 34-37: section 155(7) of the Constitution empowers the national government to do no more than capacitate local government to discharge its Schedule 4B functions – the national government's legislative powers do not allow it to arrogate to itself powers that '*are the sole preserve of municipalities*'. See also section 154(1) of the Constitution, which provides that '*[t]he 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.*'

capacity of [local government] or recast the manner in which [local government] matters are administered by relying on a broad monitoring power.’⁵⁴ (Emphasis added.)

41.4. Ultimately:

What the [Constitution] seeks hereby to realise is a structure for [local government] that, on the one hand, reveals a concern for the autonomy and integrity of [local government] and prescribes a hands-off relationship between [local government] and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor [local government] functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy.⁵⁵ (Emphasis added.)

42. In *Habitat Council*, a provincial minister argued that he should be allowed to exercise a veto over municipal matters using his oversight responsibilities. That was rejected by the Constitutional Court, which emphasised that section 155(7) must be interpreted to confer ‘*hands-off*’ powers that go no further than ‘*creating norms and guidelines for the exercise of a power or the performance of a function*’.⁵⁶ The Minister accepts that national legislative competence is concerned with setting ‘*building norms and standards*’.⁵⁷

⁵⁴ *Certification* n 45 above para 372.

⁵⁵ *Certification* n 45 above para 372-373, quoted in *Habitat Council* n 45 above para 21.

⁵⁶ *Habitat Council* n 45 above para 22. City replying affidavit: vol 2 p 205 para 15. See also *Certification* n 45 above para 373: the monitoring power is limited to ‘*perhaps the power to measure or test at intervals [local government] compliance with national and provincial legislative directives or with the [Constitution] itself*’.

⁵⁷ Minister answering affidavit: vol 2 p 195 para 10.

43. In respect of ‘*building regulations*’, the Constitutional Court has confirmed that ‘*[t]here is no constitutional provision that allows a member of Cabinet to intervene in the exercise of constitutional powers by municipalities.*’⁵⁸ Instead, the ‘*only interference permissible in the exercise of municipal executive authority is the one contemplated in s 139 of the Constitution.*’ As mentioned, section 139 does not permit intervention in a municipality’s legislative powers.
44. Section 29(8) is outside Parliament’s competence in respect of a Schedule 4B functional area.
- 44.1. Section 29(8) exceeds ‘*the extent set out in ... section 155(7)*’: section 29(8) voids or at least subjugates municipalities’ powers, rather than supervising, monitoring or supporting them; it applies to legislative powers rather than executive ones; it is not the ‘*hands-off*’ regulation of norms and guidelines which is permitted; it curtails municipalities’ ability to manage their own affairs and exercise their own functions as, in this case, it invalidates several constitutionally valid by-laws and leaves critical matters unregulated.
- 44.2. Section 44(4) of the Constitution requires that Parliament must exercise its legislative authority ‘*in accordance with, and within the limits of, the*

⁵⁸ *Johannesburg Metro* n 53 above para 26.

Constitution'.⁵⁹ These '*limits*' include those in section 155(7) discussed immediately above and in paragraphs 30-33 above.

44.3. The Constitutional Court is emphatic that the constitutional vision of municipal autonomy means that national and provincial authorities may not interfere in, usurp or replicate municipal powers.⁶⁰

45. In summary, Parliament has no authority to empower a National Minister to make or determine the content of a municipal by-law. It also has no power to make a law about building regulations that concerns anything beyond creating norms and guidelines for the supervision, monitoring and support of municipalities' executive powers. Section 29(8) far exceeds this competence of Parliament and is thus constitutionally invalid.

⁵⁹ The Constitutional Court explained in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, Kwazulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC) para 25 that '[t]he legislative power vested in Parliament by s 44(1)(a)(ii) "to pass legislation with regard to any matter ... excluding, subject to ss (2), a matter within a functional area listed in Schedule 5" must be exercised, in terms of ss (4), "in accordance with, and within the limits of, the Constitution". Thus, where on a proper construction of the Constitution such limits exist, they constrain the residual power of Parliament.'

⁶⁰ *Gauteng Development Tribunal* (n 44 above); *Habitat Council* n 45 above paras 12, 13 and 22; *Johannesburg Metro* n 53 above para 44; *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) paras 26-31 and *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC) para 46.

Section 29(8) infringes the separation of powers

46. As stated above, the Constitution allows municipalities to make by-laws autonomously. Only a municipal council – i.e. a local legislature – may make a by-law.
47. The Minister is not a member of a municipal council, much less the City’s Municipal Council. When the Minister acts in terms of section 29(8), he acts as a Cabinet Minister in terms of sections 85(2) and 91 of the Constitution i.e. as a member of the National Executive.⁶¹
48. The doctrine of separation of powers means that the branches of government should be prevented from ‘*usurping power from one another*’.⁶² In breach of this doctrine, section 29(8) inserts the Minister into the municipal legislative process, equips him with a veto and usurps the legislative autonomy of municipal councils.
49. The Constitutional Court is clear that this is impermissible.
- 49.1. In *Executive Council*,⁶³ a national statute empowered the President (i.e. the head of the National Executive), through proclamation, to amend an Act of Parliament.⁶⁴ This is known as a Henry VIII clause, following the

⁶¹ City answering affidavit: vol 1 p 61 para 37.

⁶² *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) para 35.

⁶³ *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (*‘Executive Council’*).

⁶⁴ *Executive Council* n 63 above para 50.

historical example of the English Parliament delegating to the monarch the power to change legislation that he had not made.⁶⁵

- 49.2. The Constitutional Court was satisfied that legislatures could delegate the power to make regulations, because it was necessary for effective law-making.⁶⁶ However, it emphasised that there is ‘*a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body*’.⁶⁷
- 49.3. Prior to 1994, South African courts had ‘*given effect to Acts of Parliament which vested wide plenary power in the executive*’.⁶⁸ However, the Constitution ‘*shows a clear intention to break away from that history*’.⁶⁹ The new order subjects the exercise of legislative power to constitutional control.⁷⁰ The Constitution specifies that designated bodies must make original legislation in accordance with specified

⁶⁵ *Executive Council* n 63 para 218.

⁶⁶ *Executive Council* n 63 para 51.

⁶⁷ *Executive Council* n 63 para 51.

⁶⁸ *Executive Council* n 63 para 52.

⁶⁹ *Executive Council* n 63 para 61.

⁷⁰ *Executive Council* n 63 para 62.

procedures, and a member of the executive is not allowed to make legislation (unless in exceptional cases of war or emergency).⁷¹

49.4. The President sought to justify his powers on the basis that he was ultimately subject to parliamentary control as Parliament could withdraw the delegation of its legislative powers. This was given short shrift by the Constitutional Court:

[I]f Parliament does not have the constitutional authority to delegate this power to the Executive or to any other body, the reasonableness of the delegation or the absence of objection is irrelevant. The only way in which Parliament can confer power on itself to act contrary to the Constitution is to amend the Constitution. And this was not done in the present case.⁷² (Emphasis added.)

50. Section 29(8) is unconstitutional because it imposes a different legislative process and legislator other than what sections 43(c), 151(4) and 160(2) of the Constitution authorise; that is, it gives the Minister powers which, under the Constitution, belong exclusively to municipal councils. As explained in *Executive Council*, Parliament would only have been able to impose such a process and decision-maker if it amended the Constitution. It did not do so.

⁷¹ *Executive Council* n 63 para 62 (Chaskalson P). See also para 151 (Ackermann and O'Regan JJ), para 160 (Kriegler J), para 192 (Langa J; Didcott J concurring) and para 212 (Madala J and Ngoepe AJ).

⁷² *Executive Council* n 63 above para 64.

51. Worse still, section 29(8) exceeds the contravention dealt with in *Executive Council*. It does not only replace a legislature with an executive functionary. It compromises the legislative autonomy of municipal councils by giving a legislative veto to an executive functionary in a different sphere of government (i.e. the National Minister). Unlike the minister in *Executive Council*, who was accountable to Parliament, the Minister acting under section 29(8) is not accountable to municipal councils.
52. In *Johannesburg Metro* this Court explained how the doctrine of separation of powers applies among the spheres of government:

The constitutional scheme gives effect to the principle of separation of powers among the spheres of government. In addition, this scheme abolishes the notion that municipalities are creatures of statute entrusted to provincial councils to administer. On the contrary the Constitution establishes and entrenches the status and autonomy of municipalities which constitutes the local sphere of government. It confers on them original constitutional powers that are exercised exclusively by municipalities.⁷³

53. The Court concluded that '*[t]here is no constitutional provision that allows a member of Cabinet to intervene in the exercise of constitutional powers by municipalities.*'⁷⁴

⁷³ *Johannesburg Metro* n 53 above para 21.

⁷⁴ *Johannesburg Metro* n 53 above para 26.

54. Section 29(8) of the Building Act is therefore unconstitutional because it infringes the separation of powers between both different branches and different spheres of government.

Section 29(8) usurps the powers of the courts

55. Section 29(8) usurps the role of the courts under the Constitution to adjudicate the validity of legislation and decide on a just and equitable remedy, including the limitation of retrospectivity and the suspension of invalidity, in the interests of justice.

56. In terms of section 165(1) of the Constitution, the judicial authority of the Republic is vested in the courts. Section 172(1) of the Constitution – under the heading ‘*Powers of courts in constitutional matters*’ – reads:

When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

57. The courts have an exclusive and essential constitutional role: only they determine when an exercise of public power is invalid and only they determine the consequences thereof. The courts are therefore the sole arbiters of legality.⁷⁵

⁷⁵ *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 147.

58. Under section 172(1)(b) of the Constitution, if a by-law is invalid, the courts have a broad discretion to grant any just and equitable remedy when invalidity is proven, including limiting retrospectivity and deciding whether a declaration of invalidity should be suspended to give the relevant municipal council an opportunity to correct the defect. Such orders are commonly given when the immediate or retrospective operation of a declaration would result in a *lacuna* in the law that creates uncertainty, administrative confusion or potential hardship.
59. Section 29(8) negates those judicial functions.⁷⁶ By stipulating that any contravention renders the offending by-law ‘void’, the provision prevents a court from evaluating whether the non-compliance should result in invalidity⁷⁷ and, if so, whether that invalidity should be suspended and not retrospective.⁷⁸ IOM insists that, because of section 29(8), the Advertising By-Law ‘*has been a nullity from the moment it was promulgated*’ and ‘*nothing done in terms of this By-Law can ever have any effect.*’⁷⁹ This shows how section 29(8) excludes the power of the courts to adjudicate invalidity and grant a just and equitable remedy.

⁷⁶ City answering affidavit: vol 1 pp 62-63 paras 46-47. City further answering affidavit: vol 2 pp 122-123 para 17.4.

⁷⁷ *Liebenberg* n 35 above paras 22-26.

⁷⁸ *Moise v Transitional Local Council of Greater Germiston* 2001 JDR 0757 (CC) paras 11-13.

⁷⁹ IOM answering affidavit: vol 1 pp 43-44 paras 14.6 and 14.7.

60. Section 29(8) of the Building Act is therefore unconstitutional because it ousts the exclusive and essential role of the courts as arbiters of the validity of laws and the consequences thereof.

Section 29(8) impermissibly regulates Schedule 5B matters

61. Section 29(8) voids not just by-laws made under a municipality's Schedule 4B '*building regulations*' competence (discussed above), but also any by-law concerning a Schedule 5B matter which '*relates to the erection of a building*' and which was promulgated without ministerial approval.
62. As mentioned, the Constitution gives a municipality the original power to make a by-law in respect of all functional areas listed in Schedule 5B to the Constitution (section 156(2) read with section 156(1)(a) of the Constitution).
63. Among the Schedule 5B functional areas which entail the erection of buildings and would therefore fall within the scope of section 29(8) are: '*amusement facilities*'; '*facilities for the accommodation, care and burial of animals*'; '*fencing and fences*'; '*local amenities*'; '*local sports facilities*'; '*markets*'; '*municipal abattoirs*'; and '*pounds*'.⁸⁰ Section 29(8) voids any by-law '*which relates to the erection of a building*' and is promulgated without Ministerial approval, including those about Schedule 5B matters.

⁸⁰ City further answering affidavit: vol 2 p 124 para 21.2.

64. For example, the undisputed evidence on record is that section 29(8) imperils the City's Coastal By-Law which, among other things, was promulgated pursuant to the City's Schedule 5B competencies for amusement facilities and local amenities.⁸¹
65. Given the wide range of Schedule 5B functional areas for which the City is responsible, there are many more examples of by-laws that will be affected – indeed voided – if section 29(8) is allowed to remain in force.⁸²
66. Section 44 of the Constitution regulates national legislative authority. Section 44(1)(a)(ii) grants Parliament the power to '*pass legislation with regard to any matter, but excluding... a matter within a functional area listed in Schedule 5*' (our emphasis). The rule that Parliament may not legislate on Schedule 5 matters is subject to some exceptions which do not apply.⁸³
67. A functional area listed in Schedule 5B which arises in this case is '*billboards and the display of advertisements in public places*' (**billboards and public**

⁸¹ City further answering affidavit: vol 2 p 128 para 23.2; vol 2 p 168. Preamble to annexure CFAA3.

⁸² City further answering affidavit: vol 2 p 129 para 23.4.

⁸³ Section 44(2) of the Constitution permits national legislation to intervene in a Schedule 5 functional area if it is necessary to maintain national security or economic unity, ensure national or service-delivery standards, or prevent one province from harming another. See *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) para 52. None of those exceptions applies: section 29(8) has nothing to do with national security, economic unity or possible harm by one province to another, and it does not prescribe any standards. Section 29(8)'s validity must therefore be determined based on the general rule in section 44(1)(a)(ii).

advertising’). The Advertising By-Law regulates that functional area, both in respect of visual impact and safety.⁸⁴

67.1. Both the Western Cape High Court⁸⁵ and the Johannesburg High Court⁸⁶ have concluded that billboards and public advertising are subject to regulation under the Building Act and that their structures and components fall within the definition of a ‘*building*’. Section 29(8) of the Building Act applies to ‘*any ... by-law which relates to the erection of a building*’.

67.2. The Minister argues that section 29(8) should be interpreted such that it does not apply to the Advertising By-Law. However, that interpretation would not address any of the constitutional issues raised in the preceding sections. Furthermore, the interpretation would not even render section 29(8) consistent with Schedule 5B to the Constitution, because it would still void Schedule 5B by-laws that do not deal with billboards and public advertising (such as the Coastal By-Law).

⁸⁴ City answering affidavit: vol 1 p 56 para 20. The City adopted the Advertising By-Law under its original legislative competence, and not as subordinate legislation (City answering affidavit: vol 1 p 73 para 72).

⁸⁵ *City of Cape Town v Independent Outdoor Media (Pty) Ltd* 2012 JDR 0109 (WCC) (‘**Independent Outdoor Media**’) paras 16-20.

⁸⁶ *South African Property Owners Association and Others v City of Johannesburg Metropolitan Municipality and Others* unreported case number 19656/18 (undated) (ZAGPJHC) (‘**SAPOA**’) paras 58-65.

67.3. An attempt to read section 29(8) in the restrictive fashion mooted by the Minister would serve no purpose: the provision is simply too riddled with constitutional invalidity. Its sole object is to give a member of the National Executive powers of approval, content control and veto in respect of constitutionally-authorized municipal legislation. That objective itself is constitutionally offensive, for the reasons set out above. Section 29(8), in its entirety, must therefore be deprived of any lawful effect.

68. Section 29(8) is unconstitutional because it constitutes impermissible national legislation on Schedule 5 functional areas: the provision infringes both section 44(1)(a)(ii) of the Constitution and the section 41(1)(f) injunction to ‘*not assume any power or function except those conferred on [the national sphere] in terms of the Constitution*’.⁸⁷

⁸⁷ It is permissible to have different spheres of government legislating on and regulating the same activity pursuant to different competences: in *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) (*‘Maccsand’*), the Constitutional Court accepted that mining could require the national government to issue a licence under national legislation pursuant to its exclusive competence for mining, while simultaneously requiring the local government to issue an approval under a by-law pursuant to its exclusive competence for municipal planning (paras 42-43). However, the present case is entirely distinguishable: section 29(8) does not regulate the building-regulations aspect of billboards and public advertising (that is covered by sections 4, 7 and 13 of the Building Act). Instead, it regulates that Schedule 5 functional area in its entirety: it applies to the whole of any by-law that ‘*relates to the erection of a building*’. Section 29(8) therefore does not constitute the legitimate coordinate exercise of a ‘*building regulations*’ competence.

Conclusion regarding the invalidity of section 29(8)

69. Each of the grounds discussed above constitutes a separate and sufficient basis for declaring section 29(8) constitutionally invalid.
70. The Minister admits that if section 29(8) applies to billboards and public advertising it would be unconstitutional (for impermissibly regulating a Schedule 5B matter).⁸⁸ He does not deny or question any other ground of invalidity discussed above.⁸⁹ IOM does not dispute any ground and maintains the non-oppositional stance it adopted in the High Court.⁹⁰ Overbeek did not oppose the City's arguments in the High Court and elected not to participate in these proceedings.
71. Under item 2(1)(b) of Schedule 6 to the Constitution, section 29(8), as old-order legislation, only '*continues in force, subject to consistency with the new Constitution.*' In terms of section 172(1)(a) of the Constitution, this Court '*must declare that any law ... that is inconsistent with the Constitution is invalid*'.
72. The City, therefore, asks this Court to confirm that section 29(8) is invalid.

⁸⁸ Minister's explanatory affidavit: vol 3 p 269 para 19.

⁸⁹ Minister's explanatory affidavit: vol 3 p 268 para 13.

⁹⁰ IOM's notice of appeal: vol 3 from p 260.

NEED TO DECLARE SECTION 29(8) INVALID

73. The Minister accepts the High Court’s reasons for finding 29(8) unconstitutional.⁹¹ He abided the constitutional challenge in the High Court,⁹² and does so in this Court.⁹³ The Minister expressly does not oppose this Court’s confirmation of the High Court’s declaration of invalidity.⁹⁴ However, the Minister seeks to still preserve section 29(8) by arguing for a restrictive interpretation.⁹⁵ He contends that if section 29(8) can be interpreted to not apply to billboards and public advertising, then it will be constitutionally compliant. This is because, so the argument goes, ‘*[s]ection 29(8) of the Building Standards Act is only constitutionally offensive if a billboard or outdoor advertisement is a “building” for purposes of the Act.*’⁹⁶

74. With respect, the Minister’s position is difficult to understand. He asks this Court to preserve a provision which is constitutionally invalid even on his interpretation and which he accepts is very harmful and serves no good purpose. The City submits that the duty of good constitutional citizenship required the City to bring, and the Minister to support, this application for the invalidation of a constitutionally-offensive law. The Minister’s proposed avoidance rests on a

⁹¹ Minister explanatory affidavit: vol 3 p 268 para 14.

⁹² Minister answering affidavit: vol 2 p 193 para 6. Minister’s explanatory affidavit: vol 3 p 266 para 6.

⁹³ Minister’s explanatory affidavit: vol 3 p 266 para 14.

⁹⁴ Minister explanatory affidavit: vol 3 p 268 para 13.

⁹⁵ Minister explanatory affidavit: vol 3 pp 267-268 and 272, paras 10-11 and 30.

⁹⁶ Minister explanatory affidavit: vol 3 pp 269-272 paras 19, 27-30.

doctrine which is no longer part of our law and would waste judicial resources given that this issue has been fully litigated.

75. We address each of these aspects in turn.

Restrictive interpretation does not save section 29(8)

76. Interpreting section 29(8) as suggested by the Minister would only have addressed the unconstitutional regulation by national legislation of billboards and public advertising. It is not disputed that such an interpretation cannot address any of the other constitutional defects: it will not prevent section 29(8) from impermissibly (a) infringing municipalities' power to legislate autonomously, (b) exceeding Parliament's competence, (c) infringing the separation of powers, (d) usurping the powers of the courts, and (e) impermissibly regulating Schedule 5B matters other than billboards and public advertising.⁹⁷ The Minister's approach does not address section 29(8)'s wide-ranging constitutional defects,⁹⁸ and it does not '*suitably*' revolve the dispute.⁹⁹

⁹⁷ City further answering affidavit: vol 2 p 124-125 para 21.

⁹⁸ City replying affidavit: vol 2 p 206-207 paras 18-19.

⁹⁹ *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) paras 110-111: section 172(1)(b) confers '*wide remedial powers*' to ensure that courts can '*craft orders suitable to the resolution of actual disputes between parties*' and to address the real issues that have arisen in a particular set of proceedings.

Section 29(8) is very harmful

77. If section 29(8) were allowed to remain in force, it would void not only the Advertising By-Law. It would also imperil other existing by-laws – both of the City and municipalities across the country – and compromise their current and future law-making.¹⁰⁰
78. The City’s challenge to section 29(8) also aims to protect legislation other than Advertising By-Law. The concerns regarding voidness and legal uncertainty apply to all by-laws which ‘*relate to the erection of a building*’ including the City’s Community Fire Safety By-Law, the Coastal By-Law and the Building By-Law mentioned in para 27 above.¹⁰¹ Those statutes govern critical areas of operation, which would be unregulated if section 29(8) remains – even with the Minister’s restrictive reading.
79. The Minister’s approach would undermine the rule of law.
80. The impact on other municipalities is exemplified by the *SAPOA* judgment,¹⁰² where the High Court invalidated City of Johannesburg by-laws on the strength of section 29(8)¹⁰³ (without considering that provision’s invalidity).

¹⁰⁰ City further answering affidavit: vol 2 pp 129-131 paras 24-25.

¹⁰¹ See also City opposing affidavit: vol 3 pp 299-300 paras 97-99.

¹⁰² *SAPOA* n 86 above.

¹⁰³ *SAPOA* n 86 above paras 46-69.

81. If section 29(8) remains, it is likely that, as happened in *SAPOA*, and as IOM attempted in the present case, private parties will continue to abuse it to avoid legitimate regulation.¹⁰⁴

Section 29(8) serves no good purpose

82. It is undisputed that section 29(8) serves no legitimate purpose: its sole function is to confer on the Minister powers that he may not constitutionally exercise and which no municipality needs him to exercise.¹⁰⁵

83. Yet, the Minister is asking this Court to leave in operation an admittedly invalid provision which lacks any valid purpose. The Minister has never offered any reason why section 29(8) should be retained: neither before the High Court nor in this Court has he suggested a legitimate purpose for section 29(8).¹⁰⁶ The Minister's position is that a declaration of invalidity should operate '*without more*' since '*[i]t is not necessary for the court to order Parliament to remedy any constitutional defect, in terms of section 172(1)(b) of the Constitution*'.¹⁰⁷

¹⁰⁴ City further answering affidavit: vol 2 pp 130-131 para 25.6-25.7.

¹⁰⁵ City further answering affidavit: vol 2 p 132 para 28. City confirmation affidavit: vol 3 pp 232-233 para 62.

¹⁰⁶ City confirmation affidavit: vol 3 pp 232-233 para 62.

¹⁰⁷ Minister answering affidavit: vol 3 p 273 para 33.

Duty of good constitutional citizenship

84. Organs of state are under a duty of good constitutional citizenship. This requires them to obtain judicial clarity when there are serious concerns about the validity of a law and to seek redress through the courts when faced with an unlawful exercise of public power.¹⁰⁸ The duty of good constitutional citizenship requires the constitutional defects that the City has raised in these proceedings to be ventilated in full and not to be avoided.

The Minister's interpretative approach

85. The Minister contends that this Court should avoid declaring national legislation to be inconsistent with the Constitution, and that when interpreting legislation, *'the purpose for which legislation is enacted is instructive when determining whether there is a true conflict'*.¹⁰⁹

86. The Minister is correct that regard should be had for statutory purpose. The purposes of section 29(8) are:

86.1. deprive municipal councils of their legislative autonomy in respect of by-laws which relate to the erection of a building;

¹⁰⁸ *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) para 61; *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading* CC 2010 (1) SA 356 (SCA) para 23.

¹⁰⁹ Minister explanatory affidavit: vol 3 p 272 para 29.

- 86.2. give the national sphere of government power to determine the content of, approve and veto constitutionally-authorized local government legislation;
- 86.3. give a member of the executive powers that the Constitution confers exclusively on legislatures in breach of the separation of powers doctrine;
- 86.4. impermissibly regulate all by-laws that relate to the erection of a building, including by-laws that deal with Schedule 5B functional areas.
- 86.5. provide that, in stipulated circumstances, municipal legislation is void, irrespective of whether a court of law would have determined otherwise.
87. Each one of these purposes is constitutionally offensive.
88. The Minister stated that in the High Court he supported ‘*the primary relief sought by the City*’, viz a declaration in prayer 1 that section 29(8) does not apply to the Advertising By-Law.¹¹⁰ However, that misconstrues the City’s case. As the City explained both in its replying affidavit and during argument, prayer 1 is not the primary relief sought by the City. The City pleaded, and the High Court found, that the City sought the declaration in prayer 2 because the declaration of invalidity is necessary for several reasons.¹¹¹ For instance, prayer 1 allows

¹¹⁰ Minister explanatory affidavit: vol 3 p 267 paras 7-8.

¹¹¹ City further answering affidavit: vol 2 pp 123-132 paras 19-30.

section 29(8) to continue in force, and so invalidate a range of municipal by-laws other than the Advertising By-Law.¹¹²

89. Furthermore, section 172(1)(a) of the Constitution requires a declaration of invalidity. It provides:

When deciding a constitutional matter within its power, a court ... must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. (Emphasis added.)

90. The Constitutional Court has interpreted section 172(1)(a) to mean that where unlawfulness is clear and undisputed, a court seized with the matter must issue a declaration of invalidity.¹¹³
91. The City pleaded the constitutional inconsistency of section 29(8).¹¹⁴ The constitutional inconsistency is undisputed: despite numerous opportunities, none of the parties joined issue on a single of ground of invalidity advanced by the City. Section 172(1)(a) of the Constitution therefore makes a declaration of invalidity necessary.

¹¹² City replying affidavit: vol 2 pp 202-207 paras 10-13, 16-19.

¹¹³ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA331 (CC) paras 63-66.

¹¹⁴ City further answering affidavit: vol 2 pp 121-123 paras 16-18 read with the provisions of the City's answering affidavit referred to in para 17.

Doctrine of avoidance is no longer part of our law

92. In *Jordaan*,¹¹⁵ the Constitutional Court jettisoned the so-called doctrine of avoidance of constitutional issues, which underpins the Minister's approach. Whatever the position under the Interim Constitution may have been, under the Final Constitution, issues of constitutionality enjoy primacy. When interpreting and applying legislation, constitutional issues – particularly where they are large and pressing – must be fully determined.¹¹⁶ On *Jordaan*'s approach, it would be untenable to follow the Minister's preferred route and leave section 29(8) in force, given the extent to which its constitutional inconsistencies are (a) undisputed and (b) unresolved by the Minister's proposed interpretation.

Judicial resources should not be wasted

93. The constitutionality of section 29(8) is ready to be finally determined in this confirmation application. The necessary cooperative-governance engagements have been held, the Minister has been joined to these proceedings, the necessary rule-16A notice was published and both this Court and the High Court have had the full benefit of all relevant evidence and the parties' arguments.¹¹⁷ The Minister – as the member of the national executive responsible for the Building Act – is participating fully in these proceedings and has elected not to oppose any

¹¹⁵ *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC).

¹¹⁶ *Jordaan* n 115 above paras 6-9.

¹¹⁷ City further answering affidavit: vol 2 p 198 para 19.2.

of the grounds of invalidity, which have been fully pleaded by the City. Therefore there is no reason to delay the confirmation of section 29(8)'s invalidity. It would needlessly waste judicial and public resources re-litigate the same issue in separate legal proceedings.

COSTS

94. The application to confirm the High Court's declaration of invalidity in respect of section 29(8) is unopposed. Accordingly, the City does not seek costs against any of the parties.

CONCLUSION

95. The City asks the Constitutional Court to confirm the High Court's declaration that section 29(8) is constitutionally invalid.

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19 August 2022

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2. *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) para 68.
3. *City of Cape Town v Independent Outdoor Media (Pty) Ltd* 2012 JDR 0109 (WCC) paras 16-20 and 46-69.
4. *City of Cape Town v Robertson and Another* 2005 (2) SA 323 (CC) paras 53-59 and 60.
5. *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 147.
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9. *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) paras 50-52, 61-62, 64, 151, 160, 192, 212 and 218.
10. *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng and Another* 2016 (4) SA 546 (CC) para 26.
11. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 26 and 38.
12. *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) para 35.
13. *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 25.
14. *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) paras 26, 34-37 and 44.
15. *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) paras 21, 26, 43-44 and 49-50.

16. *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) paras 6-9.
17. *Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) paras 22-26 and 147-148.
18. *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) paras 42-43.
19. *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) para 61.
20. *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) paras 12-13, 17-19 and 21-22.
21. *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC) para 46.
22. *Moise v Transitional Local Council of Greater Germiston* 2001 JDR 0757 (CC) paras 11-13.
23. *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23.
24. *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC)
25. *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) paras 110-111.
26. *South African Property Owners Association and Others v City of Johannesburg Metropolitan Municipality and Others* unreported case number 19656/18 (undated) (ZAGPJHC) paras 58-65.
27. *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) paras 26-31.