



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 05/15

In the matter between:

**PROVINCIAL MINISTER FOR LOCAL
GOVERNMENT, ENVIRONMENTAL AFFAIRS
AND DEVELOPMENT PLANNING, WESTERN CAPE**

Applicant

and

**MUNICIPAL COUNCIL OF THE
OUDTSHOORN MUNICIPALITY**

First Respondent

OUDTSHOORN MUNICIPALITY

Second Respondent

**NATIONAL MINISTER OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS**

Third Respondent

**SOUTH AFRICAN LOCAL
GOVERNMENT ASSOCIATION**

Fourth Respondent

Neutral citation: *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* [2015] ZACC 24

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ

Judgment: Molemela AJ (unanimous)

Heard on: 21 May 2015

Decided on: 18 August 2015

Summary: Local Government: Municipal Structures Act 117 of 1998 — constitutional validity of section 30(4)— section is constitutionally invalid

Wide language in section 30(4)— any question— inconsistent with section 160(3)(b) of the Constitution

ORDER

Application for confirmation of the order of the Western Cape Division of the High Court, Cape Town (Davis J):

- (1) The order granted by the High Court is confirmed.
- (2) There is no order as to costs.

JUDGMENT

MOLEMELA AJ: (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Theron AJ and Tshiqi AJ concurring):

Introduction

[1] This is an application for confirmation of an order of the High Court of South Africa, Western Cape Division, Cape Town (High Court) declaring section 30(4) of the Local Government: Municipal Structures Act¹ (Structures Act) constitutionally

¹ 117 of 1998. Section 30(4), entitled “quorums and decisions”, reads:

“ . . .

If on any question there is an equality of votes, the councillor presiding must exercise a casting vote in addition to that councillor’s vote as a councillor.”

invalid as contemplated in section 172(2)(a) of the Constitution of the Republic of South Africa, 1996² (Constitution).

The parties

[2] The applicant is the Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape (Provincial Minister), duly appointed as such in terms of section 42 of the Constitution of the Western Cape, 1998. The first respondent is the Municipal Council of the Oudtshoorn Municipality (Council) as contemplated in section 18 of the Structures Act.³ The second respondent is the Oudtshoorn Municipality (Municipality), a local municipality established in terms of section 12 of the Structures Act.⁴

² Section 172(2) reads:

- “(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
- (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
- (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
- (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.”

³ Section 18 reads:

- “(1) Each municipality must have a municipal council.
- (2) A municipal council must meet at least quarterly.
- (3) A municipal council consists of a number of councillors determined by the MEC for local government in the province concerned by notice in the *Provincial Gazette*.
- (4) A municipality has the power to designate councillors determined by the MEC for local government as full-time. An MEC’s determination must be in accordance with a policy framework as may be determined by the Minister after consulting the MECs for local government.”

⁴ Section 12, entitled “MECs to establish municipalities”, reads in relevant part:

- “(1) The MEC for local government in a province, by notice in the *Provincial Gazette*, must establish a municipality in each municipal area which the Demarcation Board demarcates in the province in terms of the Demarcation Act.
- (2) The establishment of a municipality —
 - (a) must be consistent with the provisions of this Act; and

[3] The third respondent is the National Minister of Co-operative Governance and Traditional Affairs (National Minister) cited in his official capacity as the member of the national executive responsible for the administration of the laws relating to the governance of Municipal Councils and Local Government Affairs in general. The fourth respondent is the South African Local Government Association (SALGA), a voluntary association representing the interests of 278 municipalities across the country.

Factual background

[4] This application arose out of a dispute between the Municipality and the Provincial Minister over whether the Municipality's budget for its 2014/15 financial year was validly approved. The Council's vote on the budget on 28 May 2014 had resulted in a deadlock, with 12 councillors voting in favour of the approval of the budget and 12 councillors voting against it. The deadlock was broken when the Speaker of the Council (Speaker), who had already voted in favour of the budget, exercised a casting vote, thus voting for the second time in order to secure the approval of the budget. When exercising his casting vote, the Speaker purported to act in terms of section 30(4) of the Structures Act.

[5] Having become aware of the Council's decision, the Provincial Minister asserted, in a letter addressed to the Municipality, that the approval of the budget brought by the Speaker's exercise of a casting vote violated section 160(3)(b)⁵ read with section 160(2)⁶ of the Constitution. The Municipality's stance was that the

(b) takes effect at the commencement of the first election of the council of that municipality.

...”

⁵ Section 160(3)(b) reads:

“All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.”

⁶ Section 160(2) reads:

Speaker's exercise of the casting vote was lawful as it was in accordance with section 30(4) of the Structures Act. The Provincial Minister advised the Council that section 30(4) did not give the Speaker a casting vote in matters listed in section 160(2) of the Constitution, which included approval of a municipal budget. The Provincial Minister further advised the Council that the budget had not been lawfully approved.

Litigation history

[6] The Provincial Minister approached the High Court seeking a declarator relating to the interpretation of section 30(4) of the Structures Act and an order setting aside the 2014/15 budget. The crisp issue in those proceedings was whether a Speaker of a municipal council could, where there was a deadlock in respect of a motion to pass a budget, exercise a casting vote in order to approve such council's budget. The Provincial Minister contended that the section, properly interpreted, ought not to apply to issues set out in section 160(2) of the Constitution.

[7] The Council and the Municipality initially opposed the application but later reached an agreement with the Provincial Minister. The agreement was that the Provincial Minister would not persist with the relief of setting aside the budget as it would not be practical to do so without adversely affecting the continued functioning of the Municipality.

[8] For this reason, the only issue before the High Court was the proper interpretation of section 30(4) of the Structures Act. The Provincial Minister considered the issue important because it could also affect all municipalities within the Western Cape Province.

“The following functions may not be delegated by a Municipal Council:

- (a) The passing of by-laws;
- (b) the approval of budgets;
- (c) the imposition of rates and other taxes, levies and duties; and
- (d) the raising of loans.”

[9] No relief was sought against the National Minister and SALGA as they were joined only by virtue of their interest in the relief sought. At the High Court, the National Minister filed no papers and did not participate in the proceedings. SALGA filed a notice to abide.

[10] The High Court granted an order in these terms:

- “(1) It is ordered that section 30(4) of the [Structures Act] is unconstitutional and invalid to the extent that it allows a councillor, presiding over the meeting of a municipal council, to exercise a casting vote in addition to his or her deliberate vote as a councillor, also in respect of any matters referred to in section 160(2) of the [Constitution].
- (2) It is declared that the following words be read into section 30(4): ‘other than a matter mentioned in section 160(2) of the Constitution’ after the word ‘question’ in the first line of that section.
- (3) It is declared that the orders made in paragraphs (1) and (2) shall have no bearing on passed decisions in respect of matters referred in section 160(2) of the Constitution that have already been adopted as at the date of this order, including the first respondent’s decision to approve the second respondent’s budget on 28 May 2014.”⁷

Since an order of constitutional invalidity that pertains to an Act of Parliament has no force unless it is confirmed by this Court, the High Court’s order was referred to this Court for confirmation in terms of section 172(2)(c) of the Constitution.

The issues

[11] The central issues are (a) whether section 30(4) of the Structures Act is inconsistent with section 160(3)(b) of the Constitution and therefore invalid, and if so, (b) what is the appropriate remedy?

⁷ This is the version of the order that was embodied in the signed transcript of the High Court judgment.

The correct approach to statutory interpretation

[12] This Court has previously stated that when interpreting a statute, Judicial Officers must consider the language used as well as the purpose and context and must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant.⁸

[13] In *Bertie Van Zyl*, this Court stated that “[t]he purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law”.⁹ It pointed out that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute.¹⁰

[14] In *National Coalition*, it was held that legislation must be interpreted in a way that promotes the spirit, purport and objects of the Bill of Rights but limited to what the text of the statute is reasonably capable of meaning.¹¹ This position was echoed in *Hyundai*, where Langa DP stated that “judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section”.¹² He, however, warned against an unduly strained interpretation.¹³ These statements were quoted with approval by this Court in *Democratic Alliance*.¹⁴

⁸ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

⁹ *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) at para 21.

¹⁰ *Id* at para 22.

¹¹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at paras 23-4.

¹² *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 23.

¹³ *Id* at para 24.

¹⁴ *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (*Democratic Alliance*) at para 41.

The meaning of section 30(4)

[15] Section 30 of the Structures Act, entitled “Quorums and decisions”, provides as follows:

- “(1) A majority of the councillors must be present at a meeting of the council before a vote may be taken on any matter.
- (2) All questions concerning matters mentioned in section 160(2) of the Constitution are determined by a decision taken by a municipal council with a supporting vote of a majority of the councillors.
- (3) All other questions before a municipal council are decided by a majority of the votes cast, subject to section 34.
- (4) If on any question there is an equality of votes, the councillor presiding must exercise a casting vote in addition to that councillor’s vote as a councillor.”

[16] Section 160 of the Constitution provides, in relevant part, as follows:

“ . . .

- (2) The following functions may not be delegated by a Municipal Council:
 - (a) The passing of by-laws;
 - (b) the approval of budgets;
 - (c) the imposition of rates and other taxes, levies and duties; and
 - (d) the raising of loans.
- (3)
 - (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
 - (b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.
 - (c) All other questions before a Municipal Council are decided by a majority of the votes cast.”

[17] Both parties have adopted the position that section 30(4) of the Structures Act is inconsistent with section 160(3)(b) of the Constitution to the extent that it empowers a presiding councillor to have a casting vote on an issue listed in section 160(2) of the Constitution.

[18] As aptly noted in the High Court judgment, it is significant that the original text of section 160 adopted by the Constitutional Assembly was held by this Court to be in breach of the Constitutional Principles in *First Certification*.¹⁵ This Court held the section to be incongruent with Constitutional Principles XXIV and X which demanded a framework for local government powers and functions and which required that formal legislative procedures shall be adhered to by legislative organs at all levels of government.¹⁶ According to this Court, this meant that the Constitution ought to indicate how local governments are to take decisions.¹⁷ The upshot of the decision in that case was a revised section 160.

[19] An analysis of this section in its current form shows a deliberate change in the wording used in section 160(3)(b) and (c). This change in the wording suggests that the Constitution envisaged a bifurcated process in respect of approval of motions which are brought before a council. If the motion concerns the approval of budgets, as contemplated in section 160(3)(b), that decision must be taken with a supporting vote of a majority of that council's members. This would mean that the majority of the total complement of the council members would have to vote in favour of that motion. Thus, where a municipal council has 24 or 25 members, it would be necessary for at least 13 of those councillors to vote in favour of that motion.

[20] On the other hand, the procedure envisaged in section 160(3)(c) is that if the motion does not concern any of the functions which are set out in section 160(2) of the Constitution, a decision can be taken by a majority of the votes cast. This would mean that a mere majority of the quorum required would suffice in order to pass a motion. Following the scenario sketched above, this would mean that if 13 council members out of a complement of 24 or 25 attend a meeting, a motion would then be carried if

¹⁵ *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification*).

¹⁶ *Id* at para 301.

¹⁷ *Id*.

seven of the council members in attendance voted in favour of it. It is clear that the reason behind requiring a higher threshold in respect of resolutions pertaining to the matters listed in section 160(2) is that they are considered to be weighty matters. Such weighty matters should not have to be decided by way of a Speaker exercising a casting vote.

[21] A reading of section 30 of the Structures Act shows that section 30(1) amounts to a re-enactment of what is contained in section 160(3)(a) of the Constitution, namely that a majority of the members of a council must be present before a decision can be taken. Section 30(2) states that all questions relating to section 160(2) of the Constitution are to be determined by a decision taken by a municipal council with a supporting vote of a majority of the councillors. Section 30(2) thus mirrors section 160(3)(b). Section 30(3) largely echoes the provisions of section 160(3)(c).

[22] Section 30(4) of the Structures Act, however, finds no equivalent provision in section 160 of the Constitution. It provides that “[i]f on *any question* there is an equality of votes, the councillor presiding must exercise a casting vote in addition to that councillor’s vote as a councillor”.¹⁸ The section commences with the words: “If on any question there is an equality of votes”. That phrase is couched in wide terms indeed. A plain reading of the language used in section 30(4) suggests that it covers all the matters set out in section 30(2) and (3) and thus covers all motions before a municipal council. To the extent that section 30(4) permits this, it seems to be inconsistent with the broader legislative scheme governing municipalities and the Constitution. This is because section 160(3)(b) of the Constitution plainly sets a threshold that requires decisions in relation to items listed in section 160(2) to be supported by a majority of the members of a municipal council. This means that where there is a tie, the threshold created by section 160(3)(b) requiring the support of the majority of the members of a council is not met.

¹⁸ Emphasis added.

[23] In *Abahlali Basemjondolo*, this Court warned that while it is important to prefer an interpretation of a statutory provision that avoids any constitutional inconsistency, one must be careful not to choose an interpretation that cannot be readily inferred from the text of the provision.¹⁹ The question is whether section 30(4) can be interpreted congruently with section 160 of the Constitution. An order of constitutional invalidity ought not to be granted where words are capable of being interpreted in a manner that renders the provision constitutional. In my view, the ordinary interpretation of the words “any question” in section 30(4) is one that envisages matters listed in section 30(2) of the Structures Act which includes those mentioned in section 160(2) of the Constitution. Because of the usage of the wide phraseology of “any question” in section 30(4), one cannot interpret the section to be applicable only to section 30(3) where the words “a majority of the votes cast” are used. The only meaning that can be inferred from section 30(4) is that the section applies to all issues determined by a municipal council including those mentioned in section 160(2) of the Constitution.

[24] Furthermore, the express wording in section 30(4) cannot be overcome by the fact that the section goes on to refer to “an equality of votes”. Although a section 160(2) matter requires the support of a majority of councillors (rather than votes cast) to pass, it is still possible for a decision to have an equal number of votes. In the case of a section 160(2) matter, however, the decision would just be unable to pass, and the council would have to amend the by-laws or budget and hold a further vote on the decision. This is in line with the import of decisions taken in relation to section 160(2) matters.

[25] The inescapable conclusion is that section 30(4) of the Structures Act is incapable of an interpretation that renders it constitutional and valid. It is inconsistent with section 160(3)(b) of the Constitution and falls to be declared invalid.

¹⁹ *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (*Abahlali Basemjondolo*) at para 120.

Appropriate relief

[26] In terms of section 172(1)(a) of the Constitution, this Court has the power to declare a law that is inconsistent with the Constitution invalid to the extent of its inconsistency. In that event, this Court, in terms of section 172(1)(b), is enjoined to make an order that is just and equitable, including an order suspending a declaration of invalidity to allow a competent authority to correct the defect.

Reading-in

[27] The question that arises is whether this Court should read words into section 30(4) of the Structures Act in order to render it compatible with section 160(3)(b) of the Constitution. The starting point is captured in *Gaertner* where this Court held that “reading- in” should be resorted to sparingly because the “actual act of writing or editing legislation may constitute a possible encroachment by the Judiciary on the terrain of the Legislature and, therefore, a violation of the separation of powers”. This Court, however, held that depending on its nature and extent, reading-in does not unduly encroach on the terrain of the Legislature.²⁰

[28] In this regard, this Court in *National Coalition* summarised principles that are applicable when considering whether or not to employ “reading-in” as a remedial measure.²¹ The principles enunciated are:

- (a) The provision which results from reading words into a statute should be consistent with the Constitution;
- (b) The result achieved should interfere with the laws adopted by the legislature as little as possible;
- (c) A court should be able to define with sufficient precision how the statute ought to be extended in order to comply with the Constitution;

²⁰ *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (*Gaertner*) at paras 82 and 84.

²¹ *National Coalition* above n 11 at paras 74-5.

- (d) A court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution; and
- (e) Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion.

[29] In *C*, this Court held that the legislature may at any time pass an amendment that addresses the reading-in.²² It was stated that “[i]n the ordinary course, where reading-in can provide an effective remedy, it will generally be preferable to a bald declaration of invalidity and to a suspensive order, coupled with interim relief”.²³

[30] The High Court granted an order that the words “other than a matter mentioned in section 160(2) of the Constitution” be inserted after the word “question” in the impugned section. Both parties have submitted that it would be just and equitable for this Court to grant the reading-in remedy adopted by the High Court. The applicant advances persuasive reasons why reading-in is the appropriate remedy. The first one is that the constitutional invalidity of section 30(4) is attributable to an omission of very few words that can be easily read into the section without impermissibly traversing the legislative terrain. The second one is that the wide scope of section 30(4) appears to be an inadvertent error, something confirmed by the fact that the section is inconsistent with section 30(3). The third one is that there are no other options available to cure the unconstitutionality. I endorse these reasons, as they are in line with the guidelines enunciated by this Court in *National Coalition*.

Should the order operate retrospectively?

[31] The National Minister emphasised that it is crucial for this Court to limit the reach of the declaration of invalidity so that it operates prospectively only. In *Cross-Border*, this Court confirmed that the default position when it comes to an order of

²² *C and Others v Department of Health and Social Development, Gauteng and Others* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) (C) at para 57.

²³ *Id* at para 46.

constitutional invalidity is that the order “will have immediate retrospective effect”.²⁴ This is so unless the Court making the declaration declares otherwise for reasons pertaining to justice and equity.²⁵

[32] An order of full retrospective force would render unlawful all decisions taken by Municipal Councils in which section 30(4) of the Structures Act was invoked. The parties submitted that an order that operates retrospectively would be disastrous to the many municipalities that took decisions on matters referred to in section 160(2) of the Constitution through the exercise of a casting vote and subsequently implemented them. That result would also adversely affect third parties who contracted with these municipalities. An appropriate order would therefore be one that prospectively declares section 30(4) inconsistent with the Constitution and invalid.

Order

The following order is made:

- (1) The order granted by the High Court is confirmed.
- (2) There is no order as to costs.

²⁴ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12 (*Cross-Border*) at para 20.

²⁵ *Id* at para 21.

For the Applicant:

P Farlam and M Adhikari instructed by
the State Attorney.

For the Third Respondent:

K Pillay SC and M Lekoane instructed
by the State Attorney.