

Constitutional Court

SHOWS DFA THE DOOR

In October 2009, the Supreme Court of Appeal (SCA) declared parts of the Development Facilitation Act (DFA) unconstitutional.

The Gauteng Development Tribunal was making land use management decisions and bypassing municipal land-use planning processes on the basis of the DFA. The SCA held that this violates municipalities' right to administer 'municipal planning', listed in Schedule 4B of the Constitution as a municipal power. The SCA concluded that, when the Constitution provides that municipalities have authority over 'municipal planning', it includes land-use planning and management. Certain sections of the DFA were declared unconstitutional. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11, the Court was asked to confirm the judgment. Gauteng opposed the confirmation. Some other provinces joined Gauteng's efforts to save the DFA. EThekweni Municipality also joined the proceedings but to argue against the DFA. The arguments revolved around the meaning of 'municipal planning' and the effects of striking down the DFA.

Meaning of 'municipal planning'

The key question was whether the term 'municipal planning' in the Constitution includes the power to authorise land rezoning and the establishment of townships, which provincial tribunals are doing in terms of the DFA. Gauteng argued that 'municipal planning' deals with forward planning only. The Constitution also uses the word 'planning' in other powers such as 'regional *planning* and development' and 'provincial *planning*' where it is clear that it does not include town planning. Gauteng argued that the word 'planning' must mean the same throughout the Constitution and therefore does not include rezoning and the establishment of townships. The Court disagreed and held that the word 'planning' in 'municipal planning' is different from the word 'planning' in 'provincial planning' and 'regional planning and development'.

Municipal planning has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land.

The Court also held that none of the provincial powers of 'regional planning and development' 'provincial planning' and 'urban and rural development' (see Schedules 4A and 5A) gave provincial governments the right to authorise land rezoning and establish townships similar to that of municipalities. The Court acknowledged that there is no watertight division between the functional areas but insisted that the provincial powers should not be interpreted so wide that they also include municipal powers. For example, the Court stated, 'provincial roads' does not include 'municipal roads'. In the same vein, 'provincial planning' and 'regional planning and development' do not include 'municipal planning'. The Court thus agreed with the SCA that the DFA is unconstitutional insofar as it empowers provincial tribunals to grant applications for rezoning and establish townships.

Disruptive effects of striking down the DFA

In many parts of the country, the DFA is indispensable. The old-order land use ordinances do not apply to areas of the former Transkei, Bophuthatswana, Venda and Ciskei. Also, in areas where they do apply, many municipalities have insufficient capacity to administer them and rely on their provinces to determine applications for rezoning and the establishment of townships. Striking down the DFA with immediate effect would halt land development in many areas. The Court thus suspended the order for two years, during which time the tribunals may continue to determine applications for rezoning and establish townships. However, they must consider IDPs, SDFs and urban development boundaries and may not use their powers to exclude the operation of certain laws and by-laws in respect of land over which they are deciding. To accommodate the two Cities that successfully challenged the DFA, the Court prohibited the tribunals from exercising their powers in Johannesburg and Ethekeweni (barring those already in the pipeline).



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