

ENVIRONMENTAL ALERT

24 April 2013

COURT CONFIRMS THAT MUNICIPALITIES MAY REGULATE ON ENVIRONMENTAL MATTERS TOO

Under the Constitution, the national and provincial legislative authorities are specifically vested with the power to pass legislation regarding environmental issues.

Local government, on the other hand, is given authority to manage related issues, such as air pollution, building regulations, stormwater management services and water and sanitation services.

In the recent case of *Le Sueur and Another v Ethekwini Municipality and Others*, the court noted that the national and provincial legislative powers are not exclusive and municipalities may legislate on environmental matters too.

The Durban Metropolitan Open Space System (D-MOSS) (initially known as the eThekweni Environmental Services Management Plan) was introduced as a policy directive of the Municipal Council. It created a system of open spaces of land and water, consisting of areas of high biodiversity.

As directives do not have the same legislative weight as a town-planning scheme, it was difficult for the first respondent (the eThekweni Municipality) to enforce D-MOSS. Although landowners would undertake work on their properties in accordance with its zoning provisions, they were often ignorant of the provisions of D-MOSS.

To improve enforcement and certainty, the first respondent passed a resolution in 2010 to integrate D-MOSS into its town-planning schemes. Essentially, D-MOSS would overlay the underlying zoning and create controlled areas. Developments within the controlled areas would require environmental authorisation or support from the

IN THIS ISSUE

- **Court confirms that municipalities may regulate on environmental matters too**

Environmental Planning and Climate Protection Department of the eThekweni Municipality, regardless of their underlying zoning.

The applicant opposed the integration and contested, among other things, the first respondent's authority, as local government, to deal with the environmental functional area. The applicant submitted that, in passing the resolution, the first respondent had acted *ultra vires* and unconstitutionally.

The court did not accept the applicant's argument about national and provincial governments' exclusive legislative authority over environmental matters. The court held that, as confirmed in previous cases including *Maccsand (Pty) Ltd v City of Cape Town and Others*, "the Constitution did not intend...to allocate legislative powers amongst the three spheres of Government in hermetically sealed, distinct and water tight compartments." It is therefore possible for two spheres of government to exercise their powers even if this results in an overlap.

Furthermore, in terms of the principles contained in s2 of the National Environmental Management Act, No 107 of 1998 (NEMA), all organs of state, including municipalities, are required to apply the NEMA principles to actions which may significantly affect the environment.

The action taken by the first respondent to integrate D-MOSS into its town-planning scheme was therefore an exercise of the first respondent's authority to protect the environment and was found to be not only consistent with the Constitution and NEMA, but also consistent with the first respondent's Integrated Development Plan. As the actions taken were not inconsistent with any other national or provincial legislation either, the application was dismissed.

The court's confirmation of the municipality's legislative authority on environmental issues will require landowners within the specified area to obtain environmental authorisations not previously required. Due to the far-reaching consequences of this decision, it is likely to be taken on appeal.

Helen Dagut and Li-Fen Chien

CONTACT US

For more information about our Environmental Law practice and services, please contact:



Terry Winstanley
Director
National Practice Head
T +27 (0)21 481 6332
E terry.winstanley@dcladh.com



Sandra Gore
Director
T +27 (0)11 562 1433
E sandra.gore@dcladh.com



Helen Dagut
Consultant
T +27 (0)21 481 6334
E helen.dagut@dcladh.com



Tracy-Lee Erasmus
Associate
T +27 (0)11 562 1590
E tracy-lee.erasmus@dcladh.com



Li-Fen Chien
Associate
T +27 (0)21 481 6475
E li-fen.chien@dcladh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dcladh.com

CAPETOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dcladh.com

www.cliffedekkerhofmeyr.com

©2013