

A CONSTITUTIONAL PERSPECTIVE ON THE VALIDITY OF THE KWAZULU-NATAL POUNDS LEGISLATION

**Zondi v Member of the Executive Council
CCT 73/03**

1 Introduction

The Constitution of the Republic of South African, 1996 (“the Constitution”) is a tool seen to be the mechanism for the eradication of the injustices of the past faced by many South Africans. This includes, amongst others, the denial of access to courts that would enable ordinary citizens to protect their rights.

The recent decision in *Zondi v Member of the Executive Council* (CCT 73/03) highlights core elements of constitutional and administrative justice in that the supremacy of the fundamental rights enshrined in the Constitution was upheld while simultaneously striking down conflicting provisions of the contentious Natal Pound Ordinance 32 of 1947 (“Ordinance”). This Ordinance was assigned to the KwaZulu-Natal Provincial Government in terms of Proclamation 107 of 1994. The KwaZulu-Natal Executive transferred the administration of the 1947 Ordinance from the MEC for Agriculture to the MEC for Local Government (KZN Proclamation 5 of 13 June 2003).

2 Background

The *Zondi* case primarily revolves around the constitutional validity of the Pound Ordinance, 32 of 1947 (specifically ss 8, 10(2), 12, 16(1), 29(1), 33, 34, 37 and 41(4) thereof). The contents of these sections are explained below. These sections also raise questions regarding the limitation of the right of access to courts (s 24), the right to equality (s 9) and the right to administrative action (s 33) as determined by the Constitution.

This case note discusses relevant sections of the Natal Pound Ordinance, the facts, *ratio decidendi* and *obiter dicta* of the *Zondi* case within the context of relevant sections of the Constitution. This is followed by a discussion of the implications of the *Zondi* case in terms of legislation applicable to local government, traditional community areas and land reform. In conclusion, a proposal on the legislative way forward and recommendations will be made with a view to the drafting of new legislation and the repeal or amendment of old legislation. Reference is also made to the constitutionality of pending draft legislation.

3 Discussion

The facts of the *Zondi* case are as follows:

The applicant was the owner of livestock and resided on a farm owned by the fourth respondent. She had resided on the farm with her husband, who had been a labourer on said farm and was now deceased, for the past 25 years. She subsequently received notice (“a letter of demand”) from the fourth respondent that her livestock had to be removed from the farm or they would be impounded. The livestock was her only source of income and sustenance. She did not have the resources to sustain herself without the livestock, nor could she afford to have them removed from the pound. Such deviation from a 25-year-old *status quo* created disastrous consequences for the appellant.

The applicant made an urgent application to the court *a quo*, the Natal High Court, for nine provisions of the 1947 Pound Ordinance to be declared inconsistent with the Constitution and therefore invalid. These sections were: sections 8, 10(2), 12, 16(1), 29, 33, 34, 37 and 41(4).

The Natal Provincial Division used a two-pronged approach, which was adopted and preceded by the Constitutional Court in *S v Zuma* (1994 4 BCLR 401 (CC)). In the first stage, it should be established whether there had been a violation of an entrenched right. The second stage would be to ascertain whether such violation could be limited in terms of section 36 of the Constitution (the “limitations clause”).

In this specific case, the action of the poundkeeper was found to constitute administrative action as described in section 1(b) of the Promotion of Administrative Justice Act 3 of 2000 and section 34 of the Constitution. The court referred to *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* (2000 1 SA 1 (CC)) [141], which confirms the above-mentioned statement:

“[T]he test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not ... The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.”

This precedent formed the basis of the applicant’s argument.

The court *a quo* found that the ordinance “materially and adversely” affected the applicant’s rights (*Zondi v Member of the Executive Council for Traditional and Local Government Affairs* (2004 1 All SA 467 (N))). She was entitled to procedural fairness in terms of the Constitution. Thus, the impounding of the livestock was deemed procedurally unfair and a violation of section 25(1) of the Constitution, which states that:

“No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property [8].”

The Natal High Court held that the provisions of the ordinance did not promote good governance and were undemocratic. The relevant provisions of the ordinance therefore could not be justified in terms of section 36 of the Constitution, as the deprivation of property as specified in the ordinance was procedurally unfair. It therefore found that sections 8, 10(2), 12, 16(1), 29, 33, 34, 37 and 41(4) and 37 of the Pound Ordinance were unconstitutional and therefore invalid and the matter was referred to the Constitutional Court for confirmation.

4 Relevant sections of the Constitution

The pertinent rights which are entrenched in the Constitution and which were infringed upon by the ordinance are:

4.1 Right of access to courts

In terms of section 34 of the Constitution, every person has the right to have a dispute determined by the operation of a court of law. In terms of *Chief Lesapo v North West Agricultural Bank* (2000 1 SA 409 (CC); 1999 12 BCLR 1420 (CC)) (“Lesapo”), a person’s property may only be adjudicated upon by a third person after a direction from a court of law. *Lesapo* also stated that the right of access to courts is the foundation of an orderly and stable society.

From the point of where the livestock was captured to the point of auction or disposal after auction, there was, according to the ordinance, no room for judicial intervention. The livestock was impounded and notification given to owners to pay for their release. If no payments were made, the livestock would be auctioned and, if offered unsuccessfully, otherwise disposed of. Where animals were wrongfully impounded or the owner could not afford, or contested, the impoundment fee, the judiciary simply did not feature.

The offending sections of the ordinance were sections 16(1), 29(1), 33 (dealing with the advertising of livestock to be auctioned in the Gazette and newspaper) and 34 (dealing with the sale of impounded animals) as they permitted self-help and conversely restricted access to a court of law as guaranteed by section 34 of the Constitution, as well as section 37 (animals unsuccessfully offered for sale; the magistrate may give whatever instruction (including destroying or otherwise disposing of it) to the poundkeeper).

From a practical point of view, the above sections may be argued to be possibly justified to the extent that animals were dangerous and destructive, posing a threat to crops and other forms of agriculture. The rights of a landowner, however, cannot be prioritised above the rights of a livestock owner. These rights must be balanced and it is therefore imperative that the judicial process is included.

4.2 Right to equality

Section 9(3) of the Constitution ensures that the state may not discriminate unfairly against anyone based on the listed grounds; race being a listed ground. Section 29(1) of the ordinance directly contravened the right to

equality enshrined in section 9(3) of the Constitution as it required a person eligible to vote in terms of the Electoral Act 45 of 1979 or a landowner to assess damages incurred by the impoundment of animals, and was unconstitutional in effect. In terms of the Electoral Act, only white South Africans could be classified as voters and according to the Black Land Act 27 of 1913, black South Africans were not allowed to own land. Therefore, black South Africans were excluded from determining damages incurred from the impoundment of animals. This provision is deemed to be discriminatory, as discrimination based on race and landlessness is unconstitutional [48].

Where such legislation is unconstitutional, it follows that it must therefore be declared invalid [90]. Such a contravention of the Constitution is not justifiable in any manner.

4 3 Right to fair administrative action

The right to fair administrative action is entrenched in section 33 of the Constitution and is read with section 3(1) of the Promotion of Administrative Justice Act 3 of 2000. The Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The relevant sections of the ordinance amount to administrative action because a pound master administers a public function (see above).

Sections 8, 10(2), 12, 16(1), 29(1), 37 and 41(4) (authorising a police officer to order the destruction or disposal of animals that are dangerous in his/her opinion) violate sections 33 and 34 of the Constitution as they do not make any provision for prior notice to be given to the owner of the animals impounded [134].

Ordinance sections 12 and 37, which deal with the death of impounded animals and animals unsuccessfully offered for sale, respectively, could be read as requiring notice to the livestock owners due to their silence on the matter.

Ordinance sections 8, 10(2) and 41(4), which deal with dangerous animals and notice to owners, do not exclude the possibility that, where the livestock owner is unknown, reasonable steps should be taken to ascertain information pertaining to such person (the identity of the livestock owner). These sections therefore cannot be invalid [116].

4 4 Right to property

Section 16(1) of the ordinance permits arbitrary deprivation of property, which goes directly against the grain of section 25 of the Constitution [118].

5 Outcome

The court held that where legislation is rooted in apartheid principles, it is imperative that the statute books are cleansed of such pieces of legislation. The ordinance was found to be based on apartheid-driven principles as it promoted discrimination based on race and landlessness; in addition, it

further denied citizens access to their rights as entrenched in the Constitution [36].

Sections 16(1), 29(1), 33, 34 and 37 were found to be inconsistent with the Constitution and particularly with section 34 thereof, while section 29(1) was held to be inconsistent with section 9(3) of the Constitution. The other sections of the ordinance that were challenged could be read as consistent with the Constitution and are therefore still valid [78].

The effect of a finding of invalidity is stayed for a period of 12 months pending the amendment of the legislation by the provincial department and provincial legislature responsible. In the interim, all sales pursuant to the ordinance must be administered by the magistrate's court with jurisdiction in terms of all the impugned sections, while section 29(1) is struck down with immediate effect [135].

6 Statutory framework pertaining to pounds

In terms of Schedule 6 (transitional arrangements) of the Constitution, provision is made for the continuation of existing law:

- "2 (1) All law that was in force when the new Constitution took effect, continues in force, subject to –
- (a) any amendment or repeal; and
 - (b) consistency with the new Constitution.
- (2) Old order legislation that continues in force in terms of sub item (1) –
- (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
 - (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution."

The Constitutional Court in *Zondi* invalidated the above-mentioned sections of the 1994 Natal Ordinance based on item 2(1)(b) of Schedule 6.

In terms of Schedule 4 (functional areas of concurrent national and provincial legislative competence) (Part A) both agriculture and animal control and diseases are areas in respect of which the national parliament may pass framework legislation (s 146(1) and (3)). Section 104(1)(b) empowers provincial legislatures to pass legislation in respect of functional areas listed in Schedule 4. In similar vein, provincial executives are authorised (s 125(2)(c)) to implement provincial legislation. In addition, Schedule 5 (functional areas of exclusive provincial legislative competence) (Part B) lists "facilities for the accommodation, care and burial of animals" as a local government matter in respect of which provinces must, by legislative or other measures,

- (a) provide for the monitoring and support of local government in the province; and
- (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs."

As far as local government is concerned, its objectives are set out in section 152 of the Constitution that, amongst others, includes the provision of services to communities in a sustainable manner and the promotion of social and economic development. In addition, section 153 obliges municipalities to give priority to the basic needs of the community, to promote the social and economic development of the community as well as to participate in national and provincial development programmes.

The Local Government: Municipal Structures Act 117 of 1998 provides for the provision of functions between district and local municipalities (ss 83 and 84); however, the functional area "Pounds" is not referred to. The Local Government: Municipal Systems Act 32 of 2002 also does not refer to this matter. In similar vein, the Local Government: Municipal Finance Management Act 36 of 2003 does not contain any provisions in this regard.

Item 2 paragraph 1 of Schedule 6 (transitional arrangements) of the Constitution provides for the continued application of old order legislation in respect of the original jurisdictional areas where it had been applied prior to 27 April 1994. This implies that the 1947 Natal Ordinance is only applicable to the former Natal (and possibly South African Development Trust) areas of what is – since 27 April 1994 – the province of KwaZulu-Natal. It follows that the KwaZulu Pounds Act 8 of 1980, the administration of which was assigned to the Provincial Government of KwaZulu-Natal in terms of Proclamation 107 of 17 June 1994, is still applicable (since 27 April 1994) to the jurisdictional area of the former KwaZulu legislative assembly. The 1980 KwaZulu Act provides for the establishment by the then Minister of Justice, of one or more pounds for the area of a traditional council (formerly known as a tribal authority). The minister is also responsible for the disestablishment and control of such pounds. In terms of section 14 of the 1980 KwaZulu Act, impounded stock that was not released within 21 days of the date of its impoundment shall be sold by public auction. At least seven days prior to the holding of a pound auction, such auction must be advertised in the prescribed form in the official languages of the former KwaZulu in a local newspaper by the pound master (s 14(2)). In similar vein to the 1947 Natal Ordinance, the magistrate is empowered to, amongst others, order the destruction and disposal of stock not sold at a pound auction (s 16). In terms of the KwaZulu-Natal Local Government Laws Repeal Bill 2004 (which has not yet been enacted) the 1980 KwaZulu Act will be repealed.

As regards the functional area of land (which is in the exclusive legislative domain of the RSA Parliament, not referred to in Schedules 4 and 5 of the Constitution), no specific provision is made for the right of occupiers of land to graze their cattle. Within this context, the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction From and Unlawful Occupation Of Land Act 19 of 1998 and the Communal Land Rights Act 11 of 2004 do not contain any provisions dealing with the impounding of animals.

In terms of the Land Reform (Labour Tenants) Act 3 of 1996, the spouse of a labour tenant is entitled to occupy that part of the farm in respect of which a right of occupation and use of thereof has been restored to him or her by law (s 3(1)(b)). On the death of a labour tenant, his or her associates

may be given twelve (12) calendar months notice to leave the farm (s 9(2)). Section 3(1)(a) provides that the person who was a labour tenant on 2 June 1995 shall have the right, with his or her family members, to “occupy or use that part of the farm in question which he or she or his or her associate was using or occupying on that date”. The implications of section 3 are that, if the labour tenant or his family had used the land for grazing his or her own cattle, such right to graze cattle can also be enjoyed by the widow or widower subsequent to the death of the labour tenant. In this case, no evidence was put before the court regarding whether the applicant’s husband (Mr Zondi) had been a labour tenant.

7 KwaZulu-Natal Pound Bill 2005

In compliance with the decision in *Zondi*, the KwaZulu-Natal Department of Local Government and Traditional Affairs has published the KwaZulu-Natal Pound Bill 2005. It envisages the repeal of the 1947 Natal Ordinance and to regulate the establishment of municipal pounds and the impounding of animals, as well as to provide for matters connected therewith. Clause 15 of the bill provides for the obligatory notification in the prescribed manner to the owner of any impounded animal where the name of the owner of such animal is known to the poundkeeper, or can be ascertained with the exercise of reasonable diligence. Clause 23 determines that all sales of impounded animals must be authorised by a court with jurisdiction, which authorisation may only be issued, amongst others, if

“(c) the court is satisfied that notice has been given to the owner, or that the identity of the owner cannot be ascertained”.

Impounded animals not sold must be dealt with in accordance with an instruction of the court (subsequent to such sale) as the court may deem just and equitable: provided that notice of such unsuccessful sale must be given in the prescribed manner to the owner of the impounded animal.

The KwaZulu-Natal Pound Bill 2005 will, in terms of clause 2, apply to all municipalities within KwaZulu-Natal, and is administered by the MEC: provided “that it will cease to be of force and effect in any municipality in which a pound, to the satisfaction of the MEC, is established and operated in terms of the municipal by-law adopted and compliant with this Act”. Clause 3 provides for the compulsory establishment of a pound by each of KwaZulu-Natal’s municipalities.

In terms of section 14(2) of the Local Government: Municipal Systems Act 32 of 2000, Standard Draft By-laws for Pounds have been drafted by the KwaZulu-Natal Provincial Department of Local Government and Traditional Affairs. Once these by-laws have been published, and adopted by the council of a specific municipality (s 14(3)), these municipal by-laws will replace the KwaZulu-Natal Pound Bill 2005 (see the discussion of clause 2 of the 2005 KwaZulu-Natal Pound Bill, above).

Provisions similar to those discussed above as regards the compulsory involvement of the judicial system and the giving of notice to the owner of animals so impounded as are found in the KwaZulu-Natal Pound Bill 2005,

are also contained in the KwaZulu-Natal Standard Draft By-laws for Pounds 2005.

8 Conclusion

Taking into account the invalidation of the old order 1947 Natal Pounds Ordinance, and the obligation imposed by the Constitutional Court on the KwaZulu-Natal Provincial Government to enact amending legislation within 12 months from the date of each judgment, it is incumbent on all provincial governments to rationalise their pre-1994 pounds legislation which was assigned by the President in terms of section 235 of the 1993 Constitution of the Republic of South Africa, and which, in terms of Schedule 6 of the 1996 Constitution, remains in force until such time as amended, repealed or replaced, or invalidated. The same applies to the alignment of post-27 April 1994 provincial pounds legislation, for example, the Limpopo (previously Northern Province) Pounds Act 3 of 2002 has to be aligned with the 1996 Constitution, taking into account the access to administrative justice principles identified by the Constitutional Court in the *Zondi* case. Sections 17 and 18 of the 2002 Limpopo Act do not identify a role for a court of law; powers are vested in the municipal manager.

Taking into account constitutional distribution of legislative and executive powers between the three spheres of government, and the need to implement a uniform approach so as to safeguard the rights of the owner of impounded cattle and to provide for access to the courts, as well as ensuring the core role of the court whenever a deprivation of property is considered, it is recommended that the national Department of Agriculture drafts national framework legislation which the national Parliament, in terms of section 146(1) and (3) of the Constitution, should enact so as to ensure that a standard, constitutionally valid, approach is implemented throughout South Africa.

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