

# Outdated ordinances – A constitutional headache?

*Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)*

This case highlights the need for provincial governments to carefully re-evaluate all ordinances predating the constitutional dispensation because in all likelihood, many of their provisions are unconstitutional.

## Facts

Such a situation arose in *Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)*. Zondi was the widow of a farm labourer. She lived on the farm where he worked for more than 25 years. Her only asset was some livestock on the farm. In February 2003, the farm owner sent Zondi a letter of demand calling on her to remove her livestock from the farm within a month, failing which it would be impounded.

In the High Court, Zondi successfully challenged the constitutionality of several sections of the KwaZulu-Natal Pound Ordinance 32 of 1947, which allowed for the immediate seizure and impoundment of trespassing animals by a landowner without notice to the livestock owner. It also made provision for the assessment of damages by two 'disinterested persons,' who had to be voters, for the payment of impoundment fees and damages by the livestock owner, as well as for the sale in execution of the impounded animals if the livestock owner could not pay the fees and damages. Moreover, it provided for the disposal of the animals not sold after the auction and for notice to be given to livestock owners who were known.

At no stage did the judicial process intervene.

The case was then sent to the Constitutional Court (the Court) to confirm the High Court order of unconstitutionality.

## Decision

The Court noted that section 34 of the Constitution, which guarantees the right of access to the courts, was an express constitutional recognition of the importance of fair resolution of social conflict by impartial and independent institutions. It thus required not

only that individuals should not be permitted to resort to self-help, but also that potentially divisive social conflicts had to be resolved by courts or other independent and impartial tribunals.

The Court held further that although the need to take immediate action against trespassing animals was important, measures taken had

to strike a balance between the rights of landowners and the rights of livestock owners. Once the animals were impounded, the judicial process had to be allowed to supervise the execution as there would then no longer be any need for immediate action.

The Court said that the Ordinance put in place an unconstitutional impounding scheme

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**A balance must be struck between the rights of landowners and the rights of livestock owners.**

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## key point

- There is a need for provincial governments to carefully re-evaluate all ordinances predating the constitutional dispensation to ensure alignment with the Constitution.

and was therefore unconstitutional. However, it directed that the order of invalidity be suspended to allow the KwaZulu-Natal provincial government the opportunity to correct the inconsistency.

The Court held further that section 29 (1) of the Ordinance, by requiring the right to vote (under the Electoral Act of 1979) as one of the qualifications for eligibility to assess damages, was manifestly and fundamentally racist in its purpose and effect, and was therefore irreconcilable with section 9(3) of the Constitution. Section 29 (1) accordingly fell to be struck down with immediate effect.

Section 33 of the Constitution guarantees everyone “the right to administrative action that is lawful, reasonable and procedurally fair”. The Court reiterated the well-established principle that when the validity of a statute is challenged on the grounds of section 33, the proper approach is to consider first whether the provisions in question could be read in a manner consistent with the Constitution, in which case they would ordinarily pass constitutional scrutiny. In applying this principle, the Court held that sections 8, 10 (2) and 41 (4) of the Ordinance had to be construed consistently with the Constitution to require notice to stockowners where the stockowners could, with reasonable diligence, be found. Through this rather

generous interpretation, the Court therefore saved the three provisions.

In addition, the Court found that both section 12 and 37 of the Ordinance were capable of being read in a manner consistent with the Constitution, so that prior notice had to be given to the stockowner where (s)he was known or could, with reasonable diligence, be found. This construction was not inconsistent with their language and was therefore constitutional.

The Court held, however, that all persons who were required to implement the *saved* provisions had to do so in a manner consistent with a constitutionally sound interpretation. The order of the High Court was therefore confirmed in part and reversed in part.

### Comment

This case illustrates that the Constitutional Court is prepared to go quite far to save legislation from unconstitutionality where there is even the slightest possibility that it could be read in a manner consistent with the Constitution. In my view, however, the Court goes too far in this instance. To leave the *consistent constitutional interpretation* of sections 12 and 37 to those persons who are responsible for its implementation is dangerous. The Court could simply have directed the provincial government to correct the inconsistency by requesting notice to be expressly included in the legislation and thereby still avoid the dreaded reading-in of a clause to that effect.

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**The Constitutional Court is prepared to go quite far to save legislation from unconstitutionality.**

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