

Reconciling mining and land-use planning law: challenges facing cooperative governance in South Africa.

By □

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Reconciling mining and land-use planning law: challenges facing cooperative governance in South Africa.

By: Ian Michael Brumfitt

This minor dissertation completes the requirements of the Master of Philosophy Degree specializing in Environmental Law offered by the Institute of Marine and Environmental Law, University of Cape Town. The views and opinions expressed here are the author's own and should not be attributed to the Institute of Marine and Environmental Law or the University of Cape Town.

Abstract

This research paper examines the challenges faced by mining and planning law against the backdrop of co-operative governance in South Africa. Chapter 3 of the South African constitution sets out the procedures for co-operative governance, but it will be shown that many challenges need to be addressed before the constitutional ideals are realised. This is done by outlining and examining recent case law, including the *City of Cape Town v Maccsand* and *Swartland Municipality v Louw NO* cases¹ which were heard together in the constitutional court, and the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* cases.² The contemporary case-study of the proposed Tungsten, Molybdenum and Rare Earth Elements open pit mine in the Moutonshoek Valley, Piketberg, Western Cape, sort by Bongani Minerals (Ltd), will also be used to demonstrate ongoing regulatory tensions despite the ground-breaking constitutional court *Maccsand* rulings. These fundamental rulings are however subject to the Land Use Planning Ordinance 15 of 1985 (LUPO) and only apply to the Western Cape which is by no means a mining hub. Subsequently, a comparison of the different legislative and administrative procedures will be assessed in two key provinces of South Africa, that of the Western Cape and Gauteng which is an area of high mining activity. The breakdown of co-operative governance in the mining and land-use planning areas is assessed using case law and case-study in terms of both constitutional ideals and in terms of current practice. It is put forth that fundamental agendas are in conflict between the Departments of Mineral Resources and Land Use Planning in terms of the former seeking to centralised powers of authorisation while the latter seeks to decentralise these powers; and that this core conflict needs to be addressed in order for the proper functioning of co-

¹ *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (3) SA 63 (WCC); *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2011 (6) SA 633 (SCA); *Maccsand (Pty) Ltd and another v City of Cape Town and Others* *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC).

² *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae* (05/6181) 2008 (4) SA 572 (W); *City of Johannesburg v Gauteng Development Tribunal & others* 2010 (2) SA 554 (SCA); and. *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 1 82 (CC)

operative governance and in turn for sustainable development of the mining sector and proper environmental management to be achieved.

* Note, this thesis discussion reflects the law as of the 31 May 2013.

Table of Contents

Chapter 1: Introduction	[9 – 17]
1.1 Introduction and Background	9
1.2 Rationale for study	11
1.3 Case Study: Moutonshoek Valley, Piketberg, Western Cape	12
1.4 Research question	14
1.5 Hypothesis	14
1.6 Value of the study	15
1.7 Methodology	16
1.8 Chapter outline	16
Chapter 2: Constitutional setting	[18 - 37]
2.1 Introduction	18
2.2 Cooperative Governance	18
2.3 Constitutional structure of Government	25
2.3.1 National government	27
2.3.2 Provincial government	29
2.3.3 Local government	30
2.4 Mining Law	32
2.5 Planning Law	35
2.6 Summary	37
Chapter 3: Mining Law	[38 - 59]
3.1 Introduction	38
3.2 National Mining Governance	41
3.3 National mineral regulation and administration	42
3.4 MPRDA and the NEMA	44
3.4.1 Environmental Management Plans/programmes	45
3.4.2 Challenges to the MPRDA and its EMP	47
3.5 Regulations for search, mining and rehabilitation phases	48

3.5.1 Search Phase	50
3.5.2 Mining Phase	54
3.5.3 Rehabilitation and closure phase	57
3.6 Summary	58
Chapter 4: Land-use planning law	[60 - 82]
4.1 Introduction	60
4.2 A brief history of planning law in South Africa	60
4.3 Current and future Land Use Planning law in South Africa.	63
4.3.1 National legislation	64
4.3.1.(i) Development Facilitation Act 67 of 1995	65
4.3.1.(ii) Local Government: Municipal Systems Act 32 of 2000. ('MSA')	66
4.3.1.(iii) Physical Planning Acts 88 of 1967 and 125 of 1991.	67
4.3.1.(iv) National Environmental Management Act 107 of 1998 (the NEMA)	68
4.3.1.(v) The Spatial Planning and Land Use Management Bill of 2012	69
4.3.1.(vi) Other National Acts	70
4.3.2 Provincial legislation:	71
4.3.3 Zoning similarities and differences: Gauteng vs Western Cape legislation	74
4.3.3.1 LUPO and zoning/rezoning	75
4.3.3.2 Town-planning and Townships Ordinance No.15 of 1986 (T)	77

4.3.4 Municipal legislation:	80
4.4 Summary	81
Chapter 5: Challenges for cooperative governance	[83 - 102]
5.1 Introduction	83
5.2 The Gauteng Development Tribunal cases	83
5.3 The Maccsand cases	90
5.4 Case study: Moutonshoek, Piketberg, Western Cape	96
5.4.1 Introduction	96
5.4.2 Regulation applicable to case study: Moutonshoek	96
5.4.3 Case study: Moutonshoek in light of the Maccsand and Gauteng Development Tribunal cases	97
5.5 Commentary	99
5.5.1 The ‘one-stop shop’	99
5.5.2 Centralization vs decentralization of powers	101
5.6 Summary	101
Chapter 6: Conclusion	[103 - 109]
6.1 Introduction	103
6.2 Cooperative governance and the Constitution	103
6.3 Mining Law	104
6.4 Planning law	105
6.5 Challenges of cooperative governance	107
Chapter 7: Bibliography	[110 - 116]
A. Table of abbreviations	110
B. Primary sources.	111
7.1 Case law.	111
7.2 Statutes	112
7.3 Ordinances, Government Notices and Proclamations	113
7.4 International Conventions	113

C. Secondary sources.	114
7.5 Books	114
7.6 Journal articles.	114
7.7 Other	115

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Chapter 1: Introduction

1.1 Introduction and Background

Mining is an established industry that has a long history, large infrastructure, has made a sizable economic contribution and exerts a powerful political pressure, and thus is indeed still a major force to be reckoned with in the modern South Africa. However, it has like most other sectors in the country undergone dramatic transformation since the advent of democracy in 1994, and is still struggling to find its place in the new South Africa, despite firm governmental and corporate backing. A global awareness of the anthropogenic pressures on the planet has caused sustainable development notions to penetrate many areas of life, and mining is perhaps on the forefront of this development with its massive socio-economic and environmental impacts. South African legislation has attempted to incorporate these global trends along with its main goals of transformation and rectification of historical injustices. Mining legislation in particular has attempted to incorporate sustainable development principles including the philosophies of the public trust doctrine amongst others. Many problems have been identified and noble goals set, yet there are still inconsistencies with these philosophies such as the application of co-operative governance provided for in chapter 3 of the Constitution; and abiding by other laws outside of mining legislation.

Historically mining has been the mainstay of the South African economy and has brought the country much wealth and a level of development relatively unequalled on the African continent. It has however brought with it an array of socio-economic and environmental problems. Socio-economically, these include informal settlements and migrant labour issues, while environmental problems include issues such as Acid Mine Drainage and air pollution.¹ Mining has therefore had an enormous impact on our country as a whole and shaped much of the modern day political, socio-economic and of interest to this study, the environment landscape, directly and indirectly, proximally and distally. Mining activities therefore require the utmost care in land use planning, regulation and management from various departments working together. This however has not been the case with mining activities being regulated largely by entities of itself in terms of the Minerals and Petroleum Resources Development Act²(MPRDA), under the authority of the Department of Mineral Resources (DMR) with a

¹ Fuggle, RF & Rabie, MA. Environmental Management in South Africa: Chapter 15.3 Mining Methods. Second edition (Editors: Strydom, HA & King ND). Juta Law 2009.

² Act 28 of 2002

much lesser degree of regulation stemming from Environmental and Planning departments and legislation.

Recent conflicts and cases in South Africa have however, brought to a head the issues that exist with regards to land planning and mining law, and more broadly with cooperative governance between national, provincial and municipal entities. Of particular relevance to this study, and which will be examined in chapter 3, is the provincial difference that exists with regards to these conflicts and the different relevant laws that raise these concerns.

The two case study provinces that will be discussed are Gauteng and the Western Cape. Gauteng has a thriving, and ever expanding mining industry and is subject to land use authorization governed by the Gauteng Department of Agriculture and Rural Development and local municipalities in terms of the Gauteng Planning and Development Act 3 of 2003. The Western Cape is by no means a mining hub but has had its fair share of important constitutional debates regarding land use and mining of which the most recent and vitally important are the *Maccsand*³ and *Swartland*⁴ cases. The cases involve the use of a fairly dated land use ordinance, the Land Use Planning Ordinance⁵ (LUPO) under the authority of the Department of Environmental Affairs and Development Planning and local municipalities in the Western Cape.

Due to the nature of the South African economy and the contribution of mining towards the present and historical Gross Domestic Product (GDP); a central theme is that the national DMR is seen to ride this wave of historical inertia and often dominates departmental debate and trumps many other areas of legislation, development and administration. This flies in the face of co-operative governance and violates the constitutional layout of government, which should function as a multi-leveled organization with equal powers and responsibilities rather than a tiered organization with a pinnacle power.

³*Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC). Referred to hereafter as *Maccsand*.

⁴*Ibid*, The *Swartland Municipality v Louw NO* and *City of Cape Town v Maccsand* cases were heard together in the constitutional court due to the fact that they raised very similar issues in the same period of time.

⁵Ordinance 15 of 1985

Despite this, the fact remains that authorization for mining associated rights lie at the national level. However, the approval of such a right is subject to decentralized powers in that it (should) require(s) provincial and municipal approval as well as a national authorization, in accordance with cooperative governance and the notions of separation of powers. Land-use zoning schemes are part of Provincial and municipal planning mandates and as such cannot be superseded by administrative decisions made by the national government. Cooperative governance holds with it the notion that the national government or beneficiaries of administrative decisions made by the national government may not implement decisions that conflict with a land-use zoning schemes without first seeking a use of departure or applying for rezoning from the municipality concerned and therefore the granting of a mining related right or license, for example, does not mean that mining operations may automatically take place, regardless of whether or not the land-use zoning scheme allows mining on that land.⁶ Provincial or more importantly, municipal level authorisation must be acquired in terms of local government level spatial planning and development. On an idealised and constitutional level these are indeed grand and workable models, yet practice shows that the system is not working and a breakdown in intergovernmental relations has become a major area of concern. This will be elaborated on in the following chapters, particularly chapter 5.

1.2 Rationale for study

This study will be set against the recent reported Maccsand Constitutional Court rulings relating to mining rights and cooperative governance with references to a imminent similar litigation currently unfolding in the Piketberg, Western Cape.

The recent Constitutional Court Maccsand rulings noted that the MPRDA is indeed subject to the requirements of the LUPO. Essentially this deals with the fact that in order for the land in question to have any mineral industry activity on it, it must be zoned for such use and in most cases has to be rezoned for such use under sections 16-19 of LUPO. This is a fundamental ruling in terms of co-operative governance and is a victory indeed for sustainable development as a whole. It essentially means that development, especially development in the mineral sector, does not lie solely in the hands of one government department and still places some form of power in the hands of the land owner.

⁶ Tinashe Chigwata Doctoral intern, From the courts, LGB vol 14(2).

Recent events in the Piketberg, Western Cape highlight that these issues are by no means settled and the outcomes of them are of great significance to many important environmental issues that currently face South Africa. These include current controversial issues such as the application for prospecting rights by Shell (Ltd) to conduct Hydraulic fracturing of the Karoo for shale gas. The numerous situations of similar theme and substance is leading to a breakdown in intergovernmental relations and the development of a number of inappropriate loop holes in legislation. These include making use of a departure of land use in order to activate a mining or prospecting right, which surely is not the intended use of a departure. This is taken up in chapter 5.

1.3 Case Study: Moutonshoek Valley, Piketberg, Western Cape

An important follow up case study to the Maccsand rulings is currently unfolding in the Moutonshoek Valley of the Piketberg, Western Cape where Bongani Minerals (Ltd) seek to prospect for an open-pit mine of Tungsten, Molybdenum and Rare Earth Elements mineral deposit on important agricultural land in an environmentally sensitive area.

Bongani Minerals was granted a prospecting license by the Minister of Mineral Resources on the July 1, 2011 and it is valid for three years.

It was granted despite raising questions around the efficacy of the public process. These questions were raised in most part by the Moutonshoek Valley farmers and community who are largely employed in agriculture and who stand to lose their livelihood if mining activities destroy the fertility of the land. It was also granted despite warnings from environmental organisations such as Cape Nature, the statutory conservation authority in the Western Cape mandated to comment on the biodiversity and ecological aspects of proposed development activities in the Province. Cape Nature commented on the 6 May 2009 during the initial scoping processes to mine the area, that in its opinion ‘the proposed open cast mining activity in Piketberg on the West Coast is entirely inappropriate for the area and could have significant and irreversible impacts on the environment’.⁷

⁷ Cape Nature comments on proposed open cast mining activity, 6 May 2009.

Cape Nature was of this stance due to a number of environmentally sensitive issues that would be disturbed by the mining activities. The properties in question (Piketberg Farm 297 - Portion 1 and Farm Namaquesfontein 76 - Portion 1 and 6) fall within the Greater Cederberg Biodiversity Corridor (GCBC), an area established as a successful landscape initiative through the voluntary participation of land owners, communities and the private sector with noble aims of conservation and minimization of the effects of climate change. The area contains critically endangered vegetation types such as Leipoldtville Sand Fynbos and Swartland Shale Renosterveld and contains endemic species such as *Diascia caitliniae*.⁸

While the vegetation is indeed a major concern, an even greater concern is the threat of the mining activities of the water systems of the area. The 50 hectare, 200m deep open-pit mine would lie essentially at the source of the Verlorenvlei with the pit being situated above two large aquifers that feed the Krom Antonies River which supplies the Verlorenvlei with its fresh water. The Verlorenvlei is not only one of the largest wetlands along the West Coast of South Africa and one of the few coastal fresh water lakes in the country but is also, due to these facts, one of South Africa's sixteen RAMSAR⁹ wetlands and as such has international importance. An environment such as this is naturally home to an abundance of wildlife providing a source of food, water, nesting habitats, and acting as a migratory stop-over to a large variety of bird species, many of which are threatened as the number of wetlands in the world disappear.

Although the environmental issues were argued extensively, prospecting did indeed begin in March 2012. On March 9, 2012 the Bergrivier Municipality issued a letter to Bongani Minerals and to the owners of the property, Johannes and Gesina Coetzee, where prospecting activity was occurring to demand that the activities be halted as the property was not zoned for prospecting but rather for cultivation of crops, animal breeding or the operation of a game farm (Agriculture 1). Bongani and the land owners ignored these letters and continued prospecting activities. The Bergrivier Municipality then approached the Cape High Court for an interim interdict in terms of the LUPO which notes that the landowner needs to rezone the land to allow for prospecting activities before they can occur. This interdict was awarded and

⁸ Steiner, K.E (2011). A new endemic *Diascia* (Scrophulariaceae) threatened by proposed tungsten mining in the Western Cape. *South African Journal of Botany* 77 (2011) 777–781.

⁹ 1971 Ramsar Convention (The Convention on Wetlands of International Importance, especially Waterfowl Habitat)

Bongani Minerals and the Coetzee's were forced to stop prospecting. This has led Bongani Minerals and the Coetzee's to now seek a departure of land use in terms of LUPOs.¹⁵

1.4 Research Question

The research question considers the extent to which administrative decision-making in the mining sector meets the objectives of cooperative governance as produced in Chapter 3 of the Constitution¹⁰. It does so against the backdrop of planning law (national and provincial) and recent case law in the area, in particular the *City of Cape Town v Maccsand* and *Swartland Municipality v Louw NO* cases,¹¹ which were heard together in the constitutional court, and the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* cases.¹²

To address these questions, a comparison will be sort between the situation in Gauteng and that of the Western Cape Provinces.

1.5 Hypothesis

It is hypothesised that the conflicts observed between governmental departments regarding mining and planning law are the result of contrasting overarching agendas with the Department of Mineral Resources seeking to centralise authorisation powers, while planning and land use departments seek to decentralise authorisation power and call for multiple authorisations. These conflicting agendas create problems that filter down in practice and make co-operative governance on mining related projects a difficult task. It is advanced that cooperative governance institutions in the mining sector are not meeting their constitutional requirements, and that a breakdown in intergovernmental relations is not only harming the political and governing status of the South Africa, but also indirectly harming the

¹⁰ The Constitution of the Republic of South Africa, 1996 (hereafter cited as the Constitution)

¹¹ *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (3) SA 63 (WCC); *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2011 (6) SA 633 (SCA); *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC).

¹² *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae (05/6181)* 2008 (4) SA 572 (W); *City of Johannesburg v Gauteng Development Tribunal & others* 2010 (2) SA 554 (SCA); and. *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 1 82 (CC)

environment via ill-authorized decisions, lack of regulation and bias monitoring and reporting.

1.6 Value of the study

This study comes at an opportune time due to the value and importance of the constitutional court Maccsand rulings. This is set alongside important prospecting activities that face South Africa both on a local or regional scale (Moutonshoek Valley) and on a much larger multi-regional scale with regards to the hydraulic fracturing of the Karoo by Shell (Ltd). Furthermore, headlines still feature frequently in the media of a lack of cooperative governance within the minerals sector. A topical example featured recently in the *Business Day* entitled “Ministers squabble amid mining law maze”, where it was quoted ‘[t]he departments are at war. They don’t speak to each other, and that doesn’t help anyone’.¹³ This is in relation to the recent MPRDA Amendment Bill,¹⁴ which purports to bring into force and simultaneously amend the Mineral and Petroleum Resources Amendment Act, 49 of 2008. The amendment seeks to bring mining regulation more into line with the environmental regulation of the National Environmental Management Act (NEMA) 107 of 1998. This is a topic that has caused intractable tensions within and between the departments of Mineral Resources and Environmental Affairs.

This study proposes to both to highlight fundamental areas of concern that may need to be addressed in terms of aligning conflicting overarching agendas between departments, and also seeks to highlight the regional contrasts between two key provinces of South Africa in terms of the interplay between mining and planning law and regulatory systems. It is proposed that by highlighting both broad scale conflicts and by zooming in on differences that exist regionally, a discussion may be advanced in this study that may be furthered elsewhere by government, industry and Non-Governmental Organisations (NGOs) that will lead to the proper functioning of cooperative governance institutions and thus the implementation of sustainable development.

¹³ Sue Blaine. Ministers squabble amid mining law maze: Turf war between ministers adds to already significant burden posed by SA’s mining-related laws. *Business Day*. 5 June 2013.

¹⁴ GN 1066 of 2012, 27 December 2012.

1.7 Methodology

This is to be a desktop study using both primary and secondary sources to analyse the applicable legislation and workings of the relevant regulatory domains of the Western Cape and Gauteng provinces including discussion on relevant case law and case studies.

1.8 Chapter outline

With the context and challenges now introduced, Chapter 2 will briefly discuss the Constitutional structure of government and their powers in terms of cooperative governance as set out in Chapter 3 of the Constitution and its schedules 4 and 5. An outline of other relevant laws of constitutional weight, such as the NEMA¹⁵ and the Intergovernmental Relations Framework Act,¹⁶ will also be discussed. Thereafter the constitutional settings of mining and planning law within the context of cooperative governance will be outlined in relation to national, provincial and local mandates. There will also be a discussion on the relevant cooperative governance institutions and their idealized roles and functions in cooperative governance within the context of conflicts between land use planning and mining.

Chapter 3 will assess the relevant laws, authorizations and authorization authorities needed in terms of mining legislation for a mining activity to occur. This mainly falls under the MPRDA.

Chapter 4 will involve a discussion of the evolution of planning law, past, present and future, setting the context for the current 'multiple authorizations system'. Subsequently, the relevant planning laws and authorization authorities needed for a mining activity to occur will be assessed. This will be assessed for both the Western Cape and Gauteng provinces and national legislation will be discussed when applicable.

Chapter 5 will focus in on the challenges facing co-operative governance between mining and planning authorities. These challenges will be highlighted using case law to depict a number of problems between departments, and within a fragmented and convoluted regulatory system. It will be discussed how mining law and planning law have different overall agendas about centralization versus decentralization of power and how this affects intergovernmental relations.

¹⁵National Environmental Management Act 107 of 1998.

¹⁶Act 13 of 2005

Chapter 6 will seek to summarize and conclude on key areas of concern and provide an overview of the core challenges that need to be addressed in order to eliminate or minimize intergovernmental conflicts within the area of mining activities and hence increase the ability to manage South Africa's environment in line with the principles of sustainable development more effectively.

Chapter 2: Constitutional Setting

2.1 Introduction

This chapter outlines the the conflicts that exist between mining law and land-use planning law against the backdrop of the constitutional imperative of cooperative governance. This involves an assessment of the constitutional positioning of where and how mining law and land-use planning law fit into the principles of the chapter 3 of the Constitution entitled, Co-operative Government, and also which spheres of government are assigned authority and executive powers over these different realms as provided for in schedules 4 and 5.

2.2 Cooperative Governance

The system of cooperative governance is a philosophy that governs all aspects and activities of government and is a partnership between the three spheres of government, where each sphere is distinctive and has a specific role to fulfil.¹ It is however, not a closed system and is affected by many external stimuli and interactions on a political, financial and institutional arrangement level and therefore ‘intergovernmental relations is one of the means through which the values of cooperative government may be given institutional expression’.²

Chapter 3 of the Constitution entitled ‘Co-operative Governemnt’ contains important principles such as those mentioned in section 40 which ‘all spheres of government must observe and adhere to’. Thee principles are also set out in section 41 in an extensive and wide-reaching list dedicated to the realisation of functional intergovernmental relations. This list includes, amongst other principles, the obligation to ‘preserve the peace, national unity and the indivisibility of the Republic’;³ ‘be loyal to the Constitution, the Republic and its people’⁴; ‘respect the

¹ Edwards, T. Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations. *Politeia* Vol 27 No 1 2008 © Unisa Press pp 65-85.

² Ibid.

³ s41(1)(a)

constitutional status, institutions, powers and functions of government in the other spheres’;⁵ ‘not assume any power or function except those conferred on them in terms of the Constitution’;⁶ and ‘exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere’.⁷

Malan notes that ‘the system of intergovernmental relations and co-operative government in South Africa is rapidly evolving, not only because of its constitutional/legal framework but also because of the statutory commitment of the various spheres of government to the implementation of the principles of co-operative government and intergovernmental relations’.⁸ The Constitutional framework referred to by Malan is of course Chapter 3 of the constitution, but in particular s41(2)-s41(4)⁹ which provide the obligation for parliament to create mechanisms to put into practice

⁴ s41(1)(d)

⁵ s41(1)(e)

⁶ s41(1)(f)

⁷ s41(1)(g)

⁸ Malan, L. Intergovernmental relations and co-operative government in South Africa: The ten-year review. 24 (2) (2005) *Politeia* 226.

⁹ s41(2) An Act of Parliament must-

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

the principles laid out in s41(1) and create internal remedies that give intergovernmental disputes out of the courts as far as possible.

The act that materialized out of the parliamentary obligation imposed by section 41 of the Constitution, was the Intergovernmental Relations Framework Act 13 of 2005. On an administrative level, a Department of Co-operative Government was established in 2009, under the Minister of Co-operative Governance and Traditional Affairs with objectives which include ‘the enhancement of the governance system in order to enable sustainable development and service delivery, and strengthening the capability and accountability of provinces and municipalities in the implementation of their constitutional mandates’.¹⁰

The Intergovernmental Relations Framework Act has as its objective ‘to provide within the principle of co-operative government set out in Chapter 3 of the Constitution a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including- (a) coherent government; (b) effective provision of services; (c) monitoring implementation of policy and legislation; and (d) realisation of national priorities’.¹¹ The manner in which the spheres of government are to achieve the objectives of this act are set out in section 5 and include ‘by taking into account the circumstances, material interests and budgets of other governments and organs of state in other governments, when exercising their statutory powers or performing their statutory functions’¹²; consulting other affected organs of state in accordance with formal procedures, as determined by any applicable legislation, or accepted convention or as agreed with them or, in the absence of formal procedures, consulting them in a manner best suited to the circumstances, including by way of, (i) direct contact; or (ii) any relevant

¹⁰ Glazewski, J and Rumble, O. ‘Environmental Law in South Africa’. Chapter 6: Administration and Governance. Looseleaf Service (Issue 1), 2013, LexisNexis. At section 6.3.

¹¹ s4, Act 13 of 2005.

¹² s5(a), Act 13 of 2005.

intergovernmental structures'¹³; 'avoiding unnecessary and wasteful duplication or jurisdictional contests'¹⁴; and 'participating, (i) in intergovernmental structures of which they are members; and (ii) in efforts to settle intergovernmental disputes'¹⁵.

The Act envisions this occurring in terms of, and utilization of, a President's Co-ordinating Council,¹⁶ and national,¹⁷ provincial,¹⁸ and municipal intergovernmental forums¹⁹.

Among the most important forums that operate under this act, and exist alongside the Department of Co-operative Government are the MINMECs which are 'inter-ministerial committees comprising national Ministers and members of the provincial Executive Committees (MECs) such as the "MINMEC: Environment and Nature Conservation", comprising the national environmental Minister and Deputy Minister, as well as the provincial MECs of the nine environmental and nature conservation departments which functions to co-ordinate nature conservation and environmental management issues between national and provincial levels of government'²⁰. A similar forum exists in the form of MINTECs, 'consisting of the national Director-General of the Department of Environment Affairs (the DEA) and the nine Directors of the provincial nature conservation departments'.²¹

¹³ s5(b), Act 13 of 2005.

¹⁴ s5(d), Act 13 of 2005.

¹⁵ s5(f), Act 13 of 2005.

¹⁶ Chapter 2: Part 1, Act 13 of 2005. Also see Edwards, T (2008). Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations. Chapter 4.

¹⁷ Chapter 2: Part 2, Act 13 of 2005.

¹⁸ Chapter 2: Part 3, Act 13 of 2005.

¹⁹ Chapter 2: Part 4, Act 13 of 2005.

²⁰ Glazewski, J and Rumble, O. 'Environmental Law in South Africa'. Chapter 6: Administration and Governance. Looseleaf Service (Issue 1), 2013, LexisNexis. At section 6.3.

²¹ Ibid.

Other examples of MinMECs include specific fields such as, education, health, welfare, agriculture or the development of local government. The interaction creates an environment for Provincial Councils to interact with the relevant Ministers and hence ‘active participation at MinMECs has significant advantages’... ‘for provinces to influence legislative processes at an earlier stage’.²²

For the purpose of this dissertation, there is perhaps one committee in particular that needs to be mentioned, namely the Regional Mining Development and Environmental Committee (RMDEC) which was established in terms of section 64(1) of the MPRDA in 2004.²³ The committee is composed of not more than 14²⁴ members and all nine regional DMR offices have a RMDEC.²⁵ The members of RMDEC may stem from national, provincial and/or local levels and naturally must be from a relevant government department or organs of State.

²² Edwards, T (2008). Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations. Chapter 4.

²³ GN No.R.527, 23 April 2004.

²⁴ s39(3), GN No.R.527, 23 April 2004.

Mineral and Petroleum Resources Development Act (No. 28 of 2002): Mineral and Petroleum Resources Development Regulations.

²⁵ DMR website (13 January 2013)

In terms of Section 64 of the MPRDA the committee can/must/may establish sub-committees as follows;

- (1) The Board must establish a Regional Mining Development and Environmental Committee (RMDEC) for each region as contemplated in section 7 of the MPRDA.
- (2) The Board may establish such other permanent or ad hoc committees as it deems necessary to assist it in the performance of its functions, and any such committee may include members who are not members of the Board.
- (3) A committee established under subsection (2) may, subject to the approval of the Board, establish ad hoc working groups to assist it in the performance of its functions, and any such working group may include persons who are not members of such committee or the Board.
- (4) If a committee or working group consists of more than one member, the Board must designate a member of such committee or working group as chairperson thereof.
- (5) A committee or working group of the Board

Section 39(2)²⁶ of the Mineral and Petroleum Resources Development Regulations under Chapter 2 entitled ‘Mineral and Petroleum, Social and Environmental Regulations, Part 1: Mineral and Petroleum Regulation’ notes the following about the composition:

‘The composition of a Regional Mining Development and Environmental Committee must ensure competency and expertise in minerals and mining development, petroleum exploration and production, social and labour issues pertaining to the Act and mining environmental management.’

The committee plays the important role of an advisory body to the DMR on objections raised against prospecting and mining applications, as well as functioning to promote co-operative governance and ‘assist with compensation disputes between rights holders and landowners’.²⁷

The DMR lists these functions as follows, ‘including but not limited to’:

The promotion of co-operative governance as contemplated in terms of section 41 of the Constitution, 1996 (Act No 108 of 1996);
 Handle objections received regarding any application in terms of the MPRDA;
 To advise the Minister, the Regional Manager, the Designated Agency and the Board with regard to any matter referred to it in terms of this Act;
 Deal with conflict regarding compensation between the holder of the right and the landowner and make recommendations to the Regional Manager.

Other important intergovernmental relations structure includes the, The National Council of Provinces (NCOP), The Forum of South African Directors-General (FOSAD), The Budget Council and Local Government Budget Forum and several inter-ministerial committees of both national and provincial sphere set out under the

²⁶ GN No.R.527, 23 April 2004.

²⁷ http://www.miningtoolkit.ewt.org.za/mining_process_roleplayers.html

The Intergovernmental Relations Framework Act (Act 13 of 2005), one of the most significant being the Premier's Intergovernmental Forum (PIF).

The National Environmental Management Act²⁸ (the NEMA) also contains principles and procedures of co-operative governance in its Chapter 3: 'Procedures for Co-operative Governance'. The main focus of the Chapter revolves around compiling environmental implementation plans (EIPs) and environmental management plans (EMPs) on the national and provincial government department level so that the notions of Chapter 5 (Integrated Environmental Management) can be achieved. The procedures of Co-operative governance draw on the foundation created by the functioning of the institutes created by Chapter 2, namely the National Environmental Advisory Forum²⁹ and the Committee for Environmental Co-ordination³⁰. Glazewski and Rumble note that the functioning of these institutes has had the effect of 'streamlining and co-ordinating'... 'both horizontally, that is between national departments, and vertically, that is between national and provincial spheres of government'.³¹

However, as Glazewski and Rumble note later, 'the difficulty in co-ordination arises because environmental management encompasses such a broad array of concerns'... 'namely, natural and cultural resources, pollution control and waste management, as well as land-use planning and development, and [are] by nature is cross-sectoral'.³² This in essence means that a wide variety of pressures act on administrative decisions and differences of interest and view-points are bound to arise. For these reasons both the Intergovernmental Relations Framework Act (Chapter 4: Settlement of Intergovernmental Disputes), and the NEMA (Chapter 4: Fair Decision-Making and

²⁸ Act 107 of 1998

²⁹ s3-6, Act 107 of 1998

³⁰ s7-10, Act 107 of 1998

³¹ Glazewski, J and Rumble, O. 'Environmental Law in South Africa'. Chapter 6: Administration and Governance. Looseleaf Service (Issue 1), 2013, LexisNexis. At section 6.3.

³² Ibid, at section 6.6.

Conflict Management) set out guidelines for the resolution of intergovernmental and other disputes.

On a local government level, the Local Government Municipal Systems Act 32 of 2000 has its own section of Co-operative governance.³³ It states that ‘municipalities must exercise their executive and legislative authority within the constitutional system of co-operative government envisaged in section 41 of the Constitution’,³⁴ and ‘the national and provincial spheres of government must, within the constitutional system of co-operative government envisaged in section 41 of the Constitution, exercise their executive and legislative authority in a manner that does not compromise or impede a municipality’s ability or right to exercise its executive and legislative authority’.³⁵ These are of course essentially carbon copies of the constitution just reiterated in this ‘Systems Act’. Section 3(3), however brings home the notion of co-operative governance to the local level stating:

- (3) For the purpose of effective co-operative government, organised local government must seek to—
- (a) develop common approaches for local government as a distinct sphere of government;
 - (b) enhance co-operation, mutual assistance and sharing of resources among municipalities;
 - (c) find solutions for problems relating to local government generally; and
 - (d) facilitate compliance with the principles of co-operative government and intergovernmental relations.

2.3 Constitutional Structure of Government.

Under the new constitution, the government is no longer structured in a hierarchical

³³ S3, Act 32 of 2000.

³⁴ S3(1), Act 32 of 2000.

³⁵ S3(2), Act 32 of 2000.

structure with an omnipotent central and ‘supreme government and parliament’³⁶ that simply divulges orders down to the provincial and local level. Chaskalson J notes that ‘[p]arliament is no longer supreme...[and that] [i]ts legislation, and the legislation of all organs of state, is now subject to constitutional control’.³⁷ He further notes that ‘[t]he constitutional status of a local government is thus materially different to what it was when parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures’.³⁸

The new constitutional system, as defined by section 40³⁹ of the Constitution, models government as three distinct, yet interdependent and interrelated spheres which function alongside each other to perform functions which are best suited to their adequate level of need i.e. National, Provincial or Local (municipal) Government. This means that ‘each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space’⁴⁰ and that ‘each sphere must respect the status, powers and functions of government in the other spheres and not assume any power or function except those conferred on [it] in terms of the Constitution’.⁴¹ These principles have been recognized by the courts in cases

³⁶ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) Para 38 at 1477.

³⁷ *Ibid*, at [32].

³⁸ *Ibid*, at [38].

³⁹ Section 40 provides:

—(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

⁴⁰ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 1 82 (CC), para [43].

⁴¹ *Ibid*. Also:

Section 41(1) of the Constitution provides, in relevant part: —All spheres of government and

such as *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁴² and the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* cases.⁴³

2.3.1 National government

In terms of the separate powers vested by the Constitution, it is provided that national Parliament may pass legislation on any matter, including those referred to in Schedule 4, but not those referred to in Schedule 5⁴⁴ except under certain conditions of intervention.⁴⁵ This is described by Glazewski and Rumble, as the national Parliament enjoying ‘residual competence’... ‘in that it has exclusive legislative competence with respect to all matters which are not expressly assigned to the concurrent or exclusive competence of provincial legislatures or local authorities’.⁴⁶ This is particularly evident in the case of both water and minerals, which are not listed in either schedule 4 or 5 and thus fall under the national governments exclusive competence.

all organs of state within each sphere must—

....

- . (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- . (f) not assume any power or function except those conferred on them in terms of the Constitution.

⁴² 1998 (12) BCLR 1458 (CC) (the Fedsure Life Assurance case).

⁴³ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae (05/6181) 2008 (4) SA 572 (W); City of Johannesburg v Gauteng Development Tribunal & others 2010 (2) SA 554 (SCA); and. City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others 2010 (6) SA 1 82 (CC)*

⁴⁴ s44(1), Constitution.

⁴⁵ s 44 (2), Constitution.

⁴⁶ Glazewski, J and Rumble, O. ‘Environmental Law in South Africa’. Chapter 6: Administration and Governance. Looseleaf Service (Issue 1), 2013, LexisNexis. At section 6.2.3.2

While the legislative competence lies nationally for unlisted functional areas, the functional day to day service delivery still lies on the Provincial and particularly at the municipal level. For this reason and in terms of schedules 4 and 5, the Constitution requires national legislation to define the different types of municipality that may be established under three different categories of municipalities outlined in the Constitution.⁴⁷ The act that met this requirement is the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) which amongst other objectives seeks to define the types of municipality that may be established within each category and to provide for an appropriate division of functions and powers between categories of municipality.⁴⁸ This was followed by the Local Government: Municipal Systems Act 32 of 2000 which gave effect to the designated powers and set out important guidelines bringing in, importantly the notions of Integrated Development Planning (IDP) and public participation. The acts principles, mechanisms and processes seek to provide municipalities with the tools to ‘move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all’.⁴⁹ It does so by outlining the legal nature of municipalities which it views as ‘including the local community within the municipal area, working in partnership with the municipality’s political and administrative structures’.⁵⁰ The act importantly, sets out a ‘framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government’⁵¹ in essence providing the skeleton for the functioning and service delivery of and by the municipal structures created by the structures Act of 1998. While this is of importance to mining law, it is particularly important for planning law which operates at all levels of government as seen in s2.5 below and in Chapter 4.

⁴⁷ s 155(1) and (2) of constitution.

⁴⁸ Preamble, act 117 of 1998.

⁴⁹ Preamble, act 32 of 2000.

⁵⁰ Ibid.

⁵¹ Ibid.

2.3.2 *Provincial Government*

Provincial legislative competence is set out in section 104 of the Constitution, and allows any of the nine Provinces to pass legislation in terms of Schedules 4 and 5 and also in regard to ‘. . . any matter outside those functional areas and that is expressly assigned to the province by national legislation’⁵² as assigned in terms of section 44(1)(a)(iii), or on a matter that the ‘constitution envisages the enactment of provincial legislation’.⁵³ Section 104(1)(c) notes that the Province has the power ‘to assign any of its legislative powers to a Municipal Council in that province’.

The provinces therefore exercise concurrent competence with national government regarding the items enumerated in Schedule 4⁵⁴ and enjoy exclusive competence in respect of those items listed in Schedule 5. This exclusive competence is however subject to exceptions in which national government may intervene and/or legislate in these functional areas. National parliament may pass interventional legislation in terms of constitutional procedures set out in section 76(1), with regard to a matter falling within a functional area listed in schedule 5, and in line with a list of scenarios of plausible intervention as produced in s44(2).⁵⁵ The constitution also provides for national government to override a conflicting provincial law in matters of the schedule 4 functional areas, in terms of section 146. The purpose of the override is to establish ‘uniformity’ in ‘norms and standards, frameworks, and national policies’⁵⁶

⁵² s 104(1)(b).

⁵³ Ibid.

⁵⁴ s 104(4).

⁵⁵ s44(2) Parliament may intervene, by passing legislation in accordance with section 76 (l), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

⁵⁶ s146(2)(b)

in order to ‘...[maintain] national security, economic unity, the protection of the common market in respect of the mobility of goods, services, capital and labour, [promote] economic activities across provincial boundaries, [promote] equal opportunity or equal access to government services, or [protect] the environment’.⁵⁷

While provincial legislation competence is set out in section 104 of the constitution, its executive authority is produced in section 125 which is vested in the Premier of the respective province together with Executive Council members. This authority is exercised by, among others: ‘implementing provincial legislation in the province, implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise; administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament; and developing and implementing provincial policy’.⁵⁸

2.3.3 Local government

Municipal (Local) government’s authoritative position is produced in chapter 7 of the Constitution and has been influential and topical in a number of important recent case such as the *Fedsure Life Assurance, Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*,⁵⁹ and *Maccsand*⁶⁰ cases. For example

⁵⁷ s 146(2)(c)

⁵⁸ s125(2), Constitution

⁵⁹ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC). (2010 (9) BCLR 859); *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) (2010 (2) BCLR 157) (cited hereafter as the *Johannesburg Metropolitan Municipality case*).

⁶⁰ 2010 (3) SA 63 (WCC) and 2011 (6) SA 633 (SCA), *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC)

overlapping mandates was clarified by the Constitutional Court Maccsand, ruling with Jafta J noting that:

‘It is true that mining is an exclusive competence of the national sphere of government. It is also true that the MPRDA is concerned with mining and that LUPO does not regulate mining nor does it purport to do so. LUPO governs the control and regulation of the use of all land in the Western Cape Province. This function constitutes municipal planning, a functional area which the Constitution allocates to the local sphere of government’⁶¹...‘These laws, as the Supreme Court of Appeal observed, serve different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs due to the fact that mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments’.⁶²

Chapter 7 of the Constitution: Local government covers the status of municipalities noting their legislative and executive powers vested in the Municipal Council, and the right of a municipality ‘to govern, on its own initiative, [and] the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution’.⁶³ The chapter notes the objects of local government including among others, ‘to promote social and economic development; to promote a safe and healthy environment; and to encourage the involvement of communities and community organisations in the matters of local government’.⁶⁴

⁶¹ Maccsand (Pty) Ltd and another v City of Cape Town and Others 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC), at para 42.

⁶² Ibid, at para 43.

⁶³ s151, constitution.

⁶⁴ s152, constitution.

These objects are to be achieved suitably by the three categories of municipalities as established by the above mentioned 'Structures act',⁶⁵ in terms of section 155(1) of the constitution, namely:

Category A: A municipality with exclusive municipal executive and legislative authority in its area; Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality; and Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

Section 156 of the Constitution sets out the powers and functions of municipalities, stipulating that municipalities have executive authority and the right to administer, local government matters listed in Part B of both Schedule 4 and Schedule 5⁶⁶ and those matters assigned to it by national or provincial legislation'.⁶⁷ An important point to note is that s156(4) of the constitution recognises that some areas of Parts A of schedules 4 and 5, may be more effectively administered at a local level and should be assigned as such by national and provincial government must assign, if a capacitated municipality is available and in agreement.⁶⁸

Municipalities also has the constitutional right to make and administer by-laws for the effective administration of the matters which it has the right to administer⁶⁹ which can be interpreted as 'a municipality's legislative competence [in that] it can legislate for Part B matters of Schedules 4 and 5'.⁷⁰

2.4 Mining Law

Mining activities or mineral resources are not specifically mentioned as a functional

⁶⁵ Act 117 of 1998

⁶⁶ s 156(1)(a).

⁶⁷ s 156(1)(b).

⁶⁸ s 156(4).

⁶⁹ s 156(2).

⁷⁰ Glazewski, J and Rumble, O. 'Environmental Law in South Africa'. Chapter 6: Administration and Governance. Looseleaf Service (Issue 1), 2013, LexisNexis. At section 6.2.3.4

area in the constitution or in Schedules 4 and 5. This therefore means that like water resources, minerals fall under the executive competence of the national sphere. The legislative tool with which the mineral resources are regulated within this national competency is the Mineral and Petroleum Resources Development Act (MPRDA).⁷¹

The Act has six core objectives, 'first is to recognize state custodianship of all mineral resources in the country. Second is to promote equitable access to the country's mineral resources, especially amongst historically disadvantaged South Africans. Third is to promote investment, growth and employment opportunities in the minerals industry and thereby, contribute to the country's welfare. Fourth is to provide security of tenure in respect of existing prospecting and mining operations. Fifth is to ensure that the country's mineral resources are developed in an orderly and ecologically sustainable manner. Sixth is to ensure that holders of mining rights contribute towards the socio-economic development of the localities and areas in which they operate'.⁷²

The MPRDA seeks to provide a three-tier administration structure, namely (a) the Minister of Minerals and Energy; (b) the Director-General of the DME; and (c) Regional Managers designated for the specific regions.⁷³

Under this administrative structure, a range of permits and rights can be applied. The DMR uses the MPRDA as its principal regulatory legislation on both national and provincial levels in accordance with the Acts regulations.⁷⁴ The Act and its regulations are very comprehensive in the type of permits and rights that are available and the order and process of applications with their respective requirements. Section

⁷¹ South Africa: Mineral and Petroleum Resources Development Act No.28 of 2002

⁷² Rogerson, C.M. Mining enterprise, regulatory frameworks and local economic development in South Africa. *African Journal of Business Management* Vol. 5(35), pp. 13373-13382, 30 December, 2011.

⁷³S 8. MPRDA.

⁷⁴ Government Notice, Government Gazette 23 April 2004. Mineral and Petroleum Development Regulations. *Regulation Gazette* No. 7949 Vol. 466 Pretoria 23 April 2004 No. 26275

five of the Act clearly states the legal powers vested in the acquisition of a successful application: Legal nature of prospecting right, mining right, exploration right or production right and rights of holders thereof.⁷⁵

While the act claims to be of a Public Trust Doctrine nature as per the first objective mentioned above, there are a number of complexities that exist and it is an area of high contention.⁷⁶ Other areas of contention exist with regards to exercising the national powers of mineral resources against the powers that exist on a provincial and local government level. Authors such as Willemien du Plessis,⁷⁷ comment that the national DMR usurps the powers of environmental and land use planning authorities. She notes that the DMRs legislation, for example, ‘indicates a strong trend in monopolizing issues regarding the environment within their own departmental sphere, excluding the final decision-making from other departments. This is naturally highly contested by Environmental Departments who feel they should have a strong placement in the issuing and monitoring of mining activity permits under in terms of: section 24 of the constitution, the NEMA, the National Water Act⁷⁸ and the range of

⁷⁵MPRDA, s5.

⁷⁶ See for example:

Van der Schyff, E “Unpacking the public trust doctrine: a journey into foreign territory” [2010] PER 41

Van den Berg, H.M “Ownership of minerals under the new legislative framework for mineral resources” 2009 Stellenbosch Law Review Vol 20, Pages: 139-158.

⁷⁷ Du Plessis, W. Legal Mechanisms for Cooperative in South Africa: Successes and Failures. SA Public Law, vol 23, issue 1, pp 87 – 110, 2008.

⁷⁸ Act No.36 of 1998.

sectoral environmental laws (SEMA).⁷⁹ The primary regulatory tool of course being that of the EIA process as set out in the NEMA, and in accordance with environmental management plans and environmental management programmes prepared in terms of chapter 2, 3 and 5 of the NEMA.

2.5 Planning Law

Planning involves all three spheres of government and as Glazewski and Du Toit note 'it is extremely difficult conceptually to isolate specific aspects thereof as being exclusive to any one of these spheres in practice, although certain practical responsibilities and procedures are clear'.⁸⁰

The Constitution and its Schedules 4 and 5 do not list 'land-use planning' as a specific functional area of its own but does list the general umbrella entity of 'planning' under which 'land-use planning' falls. In this light planning powers are mandated to all three government entities with 'Regional planning and development' being assigned in terms of part A of schedule 4, to both national and provincial government. 'Provincial planning' on the other hand has been exclusively assigned to provincial government in terms of part A of schedule 5 while 'municipal planning' has been exclusively assigned to local government in terms of part B of schedule 4 but with a condition of 'restricted oversight'⁸¹ from provincial and national government if necessary.

Planning is a broad and far reaching term and presumably extends to include land-use planning. However, this broadness and associated assumption has come under fire particularly in terms of to whom the powers of planning such as land-use planning are

⁷⁹ For example: National Environment Management: Protected Areas Act 57 of 2003, National Environment Management: Biodiversity Act 10 of 2004, NEM:AQA No. 39 of 2004: National Environment Management: Air Quality Act, 2004, National Environment Management: Waste Act 59 of 2008 and the National Environment Management: Integrated Coastal Management Act 24 of 2008.

⁸⁰ Glazewski, J and Du Toit, L. 'Environmental Law in South Africa'. Chapter 9: Planning Law and the Environment. Looseleaf Service (Issue 1), 2013, LexisNexis. At section 9.2.2.1.

⁸¹ s 155(6) and (7) of Constitution.

assigned. This was highlighted in the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* cases⁸² which examined the term 'municipal planning' in particular and showed how the interpretation of the term is subject to debate even at the judiciary level. It has also been examined in the recent *Maccsand* cases.

The Ministry of Rural Development and Land Reform administers planning laws on a national level using as its fundamental tools the Development Facilitation Act 67 of 1995 and its notion on Integrated Development Planning (IDP), and more recently the Spatial Development Bill.⁸³ These are however, frameworks that need generally to be initiated on a local and provincial level as seen above by the Schedule 4 and 5 functional areas. Planning is thus regulated in terms of day to day functioning by provincial legislation and applicable ordinances which remain in effect,⁸⁴ and by municipal by-laws. For the purpose of this thesis, the provincial planning departments, and their respective procedures, that will be focussed on will be the Gauteng Department of Agriculture and Rural Development and the Western Cape Department of Environmental Affairs and Development Planning. At local levels, each metro and municipality will have its own planning department.⁸⁵

⁸² See the following series of judgments involving the City of Johannesburg Metropolitan Municipality and the Gauteng Development Tribunal:

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae (05/6181) 2008 (4) SA 572 (W); City of Johannesburg v Gauteng Development Tribunal & others 2010 (2) SA 554 (SCA); and. City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others 2010 (6) SA 1 82 (CC)

⁸³ Spatial Planning and Land Use Management Bill, 2012 N 357 in Government Gazette No.35293 of 2012.

⁸⁴ For example and of relevance to this thesis. The 1985 Land Use Planning Ordinance, 15 of 1985, (LUPO) of the then Cape Province, and the Town Planning and Township Ordinance 15 of 1986 (Transvaal), the Division of Land Ordinance 20 of 1986 (Transvaal), and the Transvaal Board for the Development of Peri-Urban Areas Ordinance 20 of 1943. These Ordinances will be repealed by the Gauteng Planning and Development Act (No. 3 of 2003) once it comes into force.

⁸⁵ Glazewki, J and Du Toit, L. 'Environmental Law in South Africa'. Chapter 9: Planning Law and the Environment. Looseleaf Service (Issue 1), 2013, LexisNexis. At section 9.2.2.2.

2.6 Summary

In the new constitutional system of government with a non-hierarchical structure of government, it is essential that the different entities of government co-operate with each other under the cooperative ideals of the Constitution. In particular, cooperative governance needs to be exercised between the National Department of Mineral Resources and the various levels of government that deal with planning law. Of particular importance is the role that local government plays in planning law under the new constitution. Local government is at the coalface of planning and needs to recognise and take responsibility for its constitutional obligations in that role. National Department must also recognise and respect that role and work with local government on a level playing field to achieve cooperative governance and sustainable mineral practices. A range of legislation and institutions have been provided for this to be successful as seen above and in the following two chapters 3 and 4 on mining and planning law.

Chapter 3: Mining Law

3.1 Introduction

This chapter outlines and examines the regulatory regime for mining activities in South Africa. In particular this outline will focus on the Provinces of Gauteng and the Western Cape.

Mining activities are broad, ranging from reconnaissance surveys to prospecting, from shallow underground mining to opencast pit mining, and from deep underground mining to offshore mining. These activities have varying degrees of environmental and socio-economic impact. Fuggle and Rabie list the different forms of mining as: surface mining, strip mining, open-pit mining, dredge mining, dump reclamation, shallow underground mining and deep underground mining.¹ Fuggle and Rabie also note the environmental impacts associated with the different forms of mining.

Surface mining is performed when ‘a mineral occurs fairly close to the surface in a massive or wide tabular body, or when the mineral is itself part of the surface soil or rock’.² Fuggle and Rabie note that ‘[c]omplete disruption of the surface always occurs, which affects the soil, surface water and near-surface groundwater, fauna, flora and all types of land use’.³ This means that an ‘understanding of the pre-mining environment...[and]....an understanding of the mining method employed is essential’ in order for rehabilitation to properly managed and ‘planned’.⁴ Fuggle and Rabie note that ‘[t]he most important aspect of [the] planning process is to set, and agree on, the overall objective for rehabilitation’...which in essence means deciding on what use the land will be returned to.⁵ This involves considering the ‘macro-environment of the region or the whole country...in the interest of creating wealth or jobs or in providing for a strategic commodity’.⁶ This means that while the land may have a ‘lower capability’ after mining, it may still have a strategic land use such as ‘waste disposal sites’ as

¹ Fuggle, RF & Rabie, MA. *Environmental Management in South Africa: Chapter 15.3 Mining Methods*. Second edition (Editors: Strydom, HA & King ND). Juta Law 2009.

² *Ibid*, at 15.3.1.1, p518.

³ *Ibid*.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *Ibid*.

an extreme example.⁷ Ideally, if the land is capable of being returned to its original use i.e. wilderness or agricultural land, this would be the best possible outcome.

Strip mining⁸ or ‘opencast mining’ is ‘used when the deposit is horizontal or gently dipping within about 60m of the surface such as shallow-lying South African coal seams’.⁹ ‘The method involves removing and stockpiling the soil, drilling and blasting the rock (overburden)..., removing the blasted overburden by draglines in long parallel strips to uncover the [deposit], then drilling, blasting and removing the [sort after mineral]’.¹⁰ Once the mineral is removed, rehabilitation can take place, which involves returning the ‘spoil piles’ into the affected area and ‘landscaping’ it into the desired or previously designed ‘shape and slope’.¹¹ Thereafter, the landscape can be vegetated with ‘conventional agricultural’ methods ‘by fertilizing, liming and sowing to pastures’.¹²

This method has major polluting impacts on both groundwater and rainwater, which encounter the exposed pit and the spoil piles.¹³ This ‘dirty’ water must then be pumped, collected in ‘dirty water collection circuits’, and treated; or ‘used for activities that do not require good-quality water, such as dust control and coal washing’.¹⁴

Open-pit mining¹⁵ is ‘used if the near-surface ore body is massive and it occurs in a steeply dipping seam or seams or a pipe’.¹⁶ This method involves the removal of the ‘whole body...with no overburden to put back in the void’.¹⁷ Waste rock is ‘separated from the

⁷ Ibid, at p519.

⁸ Ibid, at 15.3.1.2

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid, at p520

¹⁴ Ibid.

¹⁵ Ibid, at 15.3.1.3

¹⁶ Ibid, at p521

¹⁷ Ibid.

ore...and dumped on the surface away from the pit'.¹⁸ Rehabilitation for the re-use on the land after open-pit mining is 'more limited than strip mining, because there is almost always insufficient waste or even tailings to fill the pit', and thus the common action is simply to make the 'pit walls safe and to landscape the waste rock dumps'.¹⁹ Occasionally pits are used as waste disposal sites or as water storage dams for recreation, water supply, or nature conservation.²⁰ This is the type of mining proposed for Moutonshoek, the case study of this thesis.

Shallow underground mining²¹ is mainly used in coalmines (but may be used in gold and other metals)²² and is sometimes termed room-and-pillar mining. A shaft is sunk to the coal seam and the seam is then extracted from the bords or rooms, leaving a regular pattern of pillars behind to support the overlying strata (the roof).²³ The environmental impacts of this form of mining can be severe and dangerous and include spontaneous underground fires and collapse of the mines. Water pollution can also be a massive problem whereby the water becomes contaminated with heavy metals, and acidic and high salt concentration, which may cause AMD and acid seepages at outcrop.²⁴ Air pollution due to sulphurous fumes may also occur.²⁵

Deep underground mining²⁶ methods are concerned with mineral deposits at depth, which '[i]n general...have little or no effect on the environment directly, the one exception being increased-extraction coal mining'.²⁷ There are, however, indirect impacts which are associated with mine residue deposits, surface subsidence as a result of dewatering and the

¹⁸ Ibid, at p522

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid, at 15.3.2, p524

²² Ibid, at 15.3.2.2, p526

²³ Ibid, at 15.3.2, p524

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid, at 15.3.3, p526

²⁷ Ibid.

disposal of water pumped from underground to enable mining to take place safely'.²⁸ Fuggle and Rabie discuss three areas of impact related to water, namely increased-extraction coal mining, surface subsidence as a result of dewatering, and disposal of water pumped from underground. Essentially these issues concern water pollution concentrations and Acid Mine Drainage (AMD); sink holes and the usage or treatment of 'dirty water', respectively.²⁹

Other methods of mining include dredge mining³⁰ on 'alluvial deposits and deposits of heavy metals in dune sands' and dump reclamation³¹ referring to the reprocessing of old mine dumps that were deposit in times when mining methods were not as efficient as today's methods. Both these methods have good rehabilitation reputations.

Mining regulation in South Africa is multileveled and influenced by international and domestic pressures. Mining is essentially subject to three areas of regulation, namely: mineral regulation, environmental regulation and land-use planning regulation. However, a problem begins where in South Africa, mining is exclusively of national competence while planning is a concurrent matter at all levels of government.

3.2 National mining governance

The national government governs mining in terms of the MPRDA and the regulations under it. The purpose of the Act is stated in its preamble:

'To make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith.'

Clearly sustainable development is of the utmost importance. The MPRDA defines "sustainable development" as 'the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations'.³² There is thus a clear focus on development in terms of intergenerational equity, with an

²⁸ Ibid.

²⁹ See 15.3.3.2 – 15.3.3.4 for further reading.

³⁰ Ibid, at 15.3.1.4, p522

³¹ Ibid, at 15.3.1.5, p523.

³²MPRDA, Chap 1: Defintions.

emphasis that 'planning, implementation and decision making' are key to achieving this.

3.3 National mineral regulation and administration

Mining operates in terms of essentially three phases when one takes into account interdepartmental interactions. These are essentially i) the search phase, ii) the mining phase, and iii) rehabilitation and closure phase. Interdepartmental interactions are between the Department of Mineral Resources (DMR), Department of Environmental Affairs (DEA) and the local or provincial planning departments. In the case of this thesis, this would be the provincial Western Cape Department of Environmental Affairs and Development Planning and local Western Cape municipalities using the Land Use Planning Ordinance³³ (LUPO), and the provincial Gauteng Department of Agriculture and Rural Development and local Gauteng municipalities in terms of the Town Planning and Township Ordinance 15 of 1986 (Transvaal), the Division of Land Ordinance 20 of 1986 (Transvaal), and the Transvaal Board for the Development of Peri-Urban Areas Ordinance 20 of 1943. These Ordinances will be repealed by the Gauteng Planning and Development Act (No. 3 of 2003) once it comes into force.

While land use planning laws differ between the provinces of Gauteng and the Western Cape, the Mining Regulations and associated environmental regulations are both national mandates under the MPRDA and NEMA and thus are the same for both provinces. Therefore, the administration and regulation of these two areas will be discussed in this chapter for the above mentioned phases, while land use requirements for the phases will be discussed in the following chapter 4.

Historically mining has been governed by the Mines and Works Act 12 of 1911, which was succeeded by the Mines and Works Act 27 of 1956, which in turn was replaced by the Minerals Act 50 of 1991. However, currently, mineral regulation and administration is governed by the DMR using the MPRDA and its regulations. Therefore all mining and related activity applications are to be directed through this department initially. While mining

³³Ordinance 15 of 1985

is a national matter, regional offices are based in each province.³⁴The MPRDA provides for a three-tier administration, namely: (a) the Minister of Minerals and Energy; (b) the Director-General of the Department of Minerals and Energy; and (c) Regional Managers designated for the specified regions.

Any person or entity wishing to extract mineral resources from the environment must apply to the State for the right to do so. The application will be considered in terms of the MPRDA which sets out a comprehensive regulatory regime governing the exploitation of a mineral resource which is applied through the administration of various rights, permissions and permits.³⁵ These are limited real rights in terms of section 5 of the Act. The granting, refusal and administering of these rights is empowered to the Minister under section 3(2)(a) of the Act but these powers may also be delegated in writing by the Minister to the Director-General, the Regional Manager or any officer of the Department of Minerals and Energy along with any other of his/her duties³⁶, but this does not divest the Minister of his/her powers and/or duties.³⁷ These delegations can be withdrawn by the Minister and/or the Minister may withdraw or amend any decision made by a delegate.³⁸

In terms of the assigned rights, no person may utilize these limited rights i.e. 'prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without-

- a) an approved environmental management programme or approved environmental management Plan, as the case may be;
- b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be;
- c) notifying and consulting with the land owner or lawful occupier of the land in question.'³⁹

³⁴List 1.MPRDA regulations. GNR 527,23 April 2004.

³⁵s3.2(a). MPRDA.

³⁶s103 (1), MPRDA.

³⁷s103(5), MPRDA.

³⁸s103(4), MPRDA.

³⁹s5(4). MPRDA.

Taking the above criteria into account, the role players in an application are thus (1) the applicant (i.e. mining company, (2) the DMR, (3) the DEA, (4) the provincial and/or municipal land-use planning department, and (5) the RMDEC (if conflict arises).

3.4 MPRDA and the NEMA

The MPRDA specifically refers to sustainable development of mineral resources and the NEMA in its sections 37 and 38. It notes that the NEMAs principles ‘apply to all prospecting and mining operations, as the case may be, and any matter relating to such operation’;⁴⁰ and ‘...serve as guidelines for the interpretation, administration and implementation of the environmental requirements of this Act’.⁴¹

The MPRDA aligns itself with Chapter 5 of the NEMA entitled ‘Integrated Environmental Management’ noting in section 38 that ‘[t]he holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit...must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998)’.⁴² Section 39 of the MPRDA then sets out specifics on the Environmental Management Programmes and Plans as mentioned in s38.

An important point to note is that the MPRDA prescribes for its own Environmental Management Programmes and Plans and Environmental Impact Assessments (EIAs) which are different from that of the NEMA EIA regulations. ‘The DMR... maintains that the EMP process (as established first through an amendment to the Minerals Act 50 of 1991 and then through the MPRDA) constitutes a prior EIA process that therefore justifies the exclusion of prospecting and mining from the general EIA regime’.⁴³ In fact the MPRDA regulations define an EIA as ‘an assessment as contemplated in section 39(1) of the Act’⁴⁴ (the Act being the MPRDA). This is so even though the National Environmental Management Act Amendment Act 62 of 2008 and the Mineral and Petroleum Resources Development

⁴⁰ MPRDA, s37(1)(a)

⁴¹ Ibid, at s37(1)(b)

⁴² Ibid, at s38(1)(a)

⁴³ Humby, T. The Environmental Management Programme: Legislative design, administrative practice, and environmental activism. *The South African Law Journal*, 130. (2013).

⁴⁴ MPRDA regulations GNR 527, 23 April 2004, at section 1: Definitions.

Amendment Act No. 49 of 2008 anticipates to bring the minerals industry into line and list mineral activities as those that trigger the need for an EIA in terms of the NEMA. This however, was met with resistance from the DMR and thus at this time of writing, has yet to come into effect.

While the MPRDA is still seen to insulate itself from the EIA regulations of the NEMA and provide for its own environmental procedures, it is however subject to other relevant legislature such as the Mining Titles Registration Act 16 of 1967, the Mine Health and Safety Act 29 of 1996, the National Water Act 36 of 1998 (the Water Act), the National Heritage Resources Act 25 of 1999 and the National Environmental Management: Air Qualities Act 39 of 2004 (NEM:AQA).

3.4.1 Environmental Management Plans/programmes

The MPRDA regulations,⁴⁵ set out the requirements for the environmental management plan in regulation 52 and note that the frequency of the submission is 'in accordance with the period specified in the approved environmental management programme or plan;⁴⁶ or every two years;⁴⁷ or as agreed to in writing by the Minister.⁴⁸

is a single submission. An environmental management programme⁴⁹ on the other hand, also requires the submission of a scoping report,⁵⁰ and an environmental impact assessment report.⁵¹

Humby notes that '[a]n environmental management plan or programme ('EMP') under the MPRDA is regarded as the linchpin for entrenching more environmentally sustainable mining practices in South Africa'.⁵² This is of course subject to the requirement that the EMP is compiled and processed correctly.

⁴⁵ GN R527 GG 26275 of 23 April 2004

⁴⁶ Ibid, regulation 55(2)(a)

⁴⁷ Ibid, regulation 55(2)(b)

⁴⁸ Ibid, regulation 55(2)(c)

⁴⁹ s51, MPRDA regulations GNR527

⁵⁰ s49, MPRDA regulations GNR527

⁵¹ S50, MPRDA regulations GNR527

⁵² Humby, T. The Environmental Management Programme: Legislative design, administrative practice, and environmental activism. *The South African Law Journal*, 130. (2013).

An EMP in terms of the MPRDA should include the following attributes:⁵³

- (a) establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives;
- (b) investigate, assess and evaluate the impact of his or her proposed prospecting or mining operations on—
 - (i) the environment;
 - (ii) the socio-economic conditions of any person who might be directly affected by the prospecting or mining operation; and
 - (iii) any national estate referred to in section 3(2) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999), with the exception of the national estate contemplated in section 3(2)(i)(vi) and (vii) of that Act;
- (c) develop an environmental awareness plan describing the manner in which the applicant intends to inform his or her employees of any environmental risks which may result from their work and the manner in which the risks must be dealt with in order to avoid pollution or the degradation of the environment; and
- (d) describe the manner in which he or she intends to—
 - (i) modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;
 - (ii) contain or remedy the cause of pollution or degradation and migration of pollutants; and
 - (iii) comply with any prescribed waste standard or management standards or practices.’

If all of the above requirements are met, the EMP must be approved by the Minister within 120 days from the lodgement.⁵⁴ This is however subject to compliance with the ‘Financial provision for remediation of environmental damage’ as set out in section 41⁵⁵ and that the applicant has shown the capacity to rehabilitate and manage the negative impacts it has demonstrated in its EMP.⁵⁶ Notably, ‘[t]he Minister may not

⁵³ MPRDA, s39(3)

⁵⁴ MPRDA, s39(4)

⁵⁵ Ibid, at s39(4)(a)(ii)

⁵⁶ Ibid, at s39(4)(a)(iii)

approve the environmental management programme or the environmental management plan unless he or she has considered—

- (i) any recommendation by the Regional Mining Development and Environmental Committee; and
- (ii) the comments of any State department charged with the administration of any law which relates to matters affecting the environment.⁵⁷

This latter subsection (ii) is certainly in reference to the Department of Environmental Affairs.

In terms of s39(5) the Minister can request further information from the applicant and may adjust the EMP as seen fit and in terms of s39(6) approve an amended, previously approved, EMP at any time.

3.4.2 Challenges to the MPRDA and its EMP

The approval of the EMP and/or the granting of the prospecting right have accordingly been challenged in a number of cases i.e. Bengwenyama, Mapungubwe and Xolobeni cases.⁵⁸ These challenges are raised either through an internal appeal in terms of s 96 of the MPRDA or through judicial review in terms of the Promotion of Administrative Justice Act 3 of 2000. Humby notes that these cases have raised ‘a number of uncertainties...about the status of the EMP approval in relation to the decision to grant the prospecting or mining right’. Humby discusses these issues and tries to assess whether or not the EMP is ‘an administrative action distinct from, or integrated with, the grant of the right’. In accordance with this, Humby attempts to find what the appropriate method of challenge to an EMP and/or right would be. Humby does so by trying firstly to determine ‘the relationship between the approval of the EMP and the granting of the prospecting/mining right set up by the legislative design of the MPRDA and, secondly, the administrative practice behind the approval of the EMP’. Humby

⁵⁷ Ibid, at s39(4)(b)

⁵⁸ Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC); Mapungubwe Action Group and Others v Limpopo Coal (PTY) Ltd and Minister of Mineral Resources, Case no: 10/30146 [2010] South Gauteng High Court; See http://www.lrc.org.za/images/stories/Desktop/2011_06_07_Minister_Shabangu_withdraws_mining_rights.pdf for Xolobeni case: Letter from Minister of Mineral Resources in response to the Appeal.

See also: Humby, T. The Environmental Management Programme: Legislative design, administrative practice, and environmental activism. *The South African Law Journal*, 130. (2013).

argues that an approval of an EMP is indeed an an ‘administrative action’ in terms of the PAJA and thus qualifies as an ‘administrative decision’ under s96 of the MPRDA. Despite this, Humby notes that the appropriate grounds of appeal and review and the approach to be followed when a challenge is brought to both the approval of the EMP and the granting of the relevant right, are still hazy. Humby notes that ‘[the] approach taken in the *Mapungubwe* case, where separate appeals were lodged against the granting of the mining right and the approval of the EMP, would thus appear to be the correct one’. Humby also notes that there are many faults in the legislative design of the EMP process in the MPRDA, in particular, its grant of a right to an applicant before the approval of an EMP. The right, however, is only activated when the EMP is approved. Humby notes that this process of approval has some major flaws, with the only delay to formal approval essentially being that of the applicant’s provision of the promised financial provision. A further flaw described by Humby is in the relationship between s 37 and the criteria for the approval of the EMP in s 39(4). Similarly, the granting of the prospecting or mining right in ss 17(1)(c) and 23(1)(d) is flawed. Section 37 is noted to be too broad in its reference to NEMA principles and thus has little effect on clarifying for example ‘unacceptable’ pollution.

3.5 Regulations for search, mining and rehabilitation phases

Applicable to all mining activity phases are regulations 2 and 3 of the MPRDA regulations,⁵⁹ which contain the manner in which the application and plan must be lodged. Applications require the use of allocated forms in the regulations Annexure I⁶⁰ and the manner in which consultation should be conducted⁶¹ which has been raised in cases such as *Bengwenyama Minerals and others (Pty) Ltd v Genorah Resources and others*⁶² and the *Save the Vaal* case⁶³. It is noted in the *Bengwenyama* case that the multiple stages of different notices and consultation requirements as stipulated by section 10⁶⁴ of the MPRDA are ‘indicative of a

⁵⁹ MPRDA regulations, GNR 527. Entitled: 2. Manner of lodging application and plan; and 3. Consultation with interested and affected persons.

⁶⁰ MPRDA regulations, GNR 527, s2

⁶¹ *Ibid*, s3.

⁶² Case CCT 39/10 [2010] ZACC 26

⁶³ *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).

⁶⁴ MPRDA section 10:

Consultation with interested and affected parties

serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights’.

Importantly, from the perspective of the public participation process, which is a pillar of both sustainable development and co-operative governance, regulation 3(3) of the MPRDA regulations notes that:

‘In addition to the notice referred to in regulation (1), the Regional manager or designated agency,⁶⁵ as the case may be, must also make known the application by at least one of the following methods-

- (a) Publication in the applicable Provincial Gazette;
- (b) Notice in the Magistrate’s Court in the magisterial district applicable to the land in question; or
- (c) Advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates, is situated.’

The notice must meet certain requirements as set out in regulation 3(4).

A further noteworthy point is that applications are processed on a ‘first-come, first- serve’ basis as per section 9 of the MPRDA.⁶⁶

10. (1) Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner—

- (a) make known that an application for a prospecting right, mining right or mining permit has been received in respect of the land in question; and
 - (b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.
- (2) If a person objects to the granting of a prospecting right, mining right or mining permit, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon.

⁶⁵ These designated powers are also noted in GN387, 21 April 2006 (list of competent authorities in terms of the NEMA s42(1))

⁶⁶ s9. (1) If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on—

3.5.1 Search Phase

The search phase includes reconnaissance, technical co-operation, exploration and/or prospecting and therefore involves one of: a reconnaissance permission⁶⁷ or permit,⁶⁸ permission to remove,⁶⁹ technical co-operation permit,⁷⁰ exploration right,⁷¹ prospecting right⁷² and/or a retention permit.⁷³

In terms of the MPRDA regulations, the above search phase components are dealt with in the following sections: a reconnaissance permission⁷⁴ or permit,⁷⁵ technical co-operation permit,⁷⁶ exploration right,⁷⁷ prospecting right⁷⁸ and/or a retention permit.⁷⁹

The application processes for ‘search phase activities’ are similar, with the most common application being for a prospecting right. Therefore, for the purposes of this thesis, and due to the fact that the case study focuses on a prospecting right, this will be focused on in this chapter. It is however important to note the following points. Firstly, reconnaissance permits, technical cooperation permits and exploration rights are for petroleum resources while reconnaissance permissions, permission to remove, prospecting rights and retention permits are for mineral resources.

(a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);

(b) different dates must be dealt with in order of receipt.

(2) When the Minister considers applications received on the same date he or she must give preference to applications from historically disadvantaged persons.

⁶⁷ MPRDA, at s13 – 15 and 21

⁶⁸ MPRDA, at s74 – 75

⁶⁹ MPRDA, at s20

⁷⁰ MPRDA, at s76 – 78

⁷¹ MPRDA, at s79 – 82

⁷² MPRDA, at s16 – 19 and 21

⁷³ MPRDA, at s31 – 36

⁷⁴ MPRDA regulations, GNR 527, reg 4.

⁷⁵ MPRDA regulations, GNR 527, reg 17 – 22

⁷⁶ MPRDA regulations, GNR 527, reg 23 – 27

⁷⁷ MPRDA regulations, GNR 527, reg 28 – 33

⁷⁸ MPRDA regulations, GNR 527, reg 5 – 9

⁷⁹ MPRDA regulations, GNR 527, reg 16 – 17

Secondly, Environmental Management Programmes and Plans (EMPs) for ‘search phase operations’ have been prescribed for by the MPRDA and in section 39 (2) it states that ‘[a]ny person who applies for a reconnaissance permission, prospecting right or mining permit must submit an environmental management plan as prescribed’. Notably here, mining permits are issued to operations of such a scale as to be on par with ‘search phase operations’ and thus EMPs for these operations falls within a ‘search phase’ order rather than the larger, more onerous mining rights EMPs.

Thirdly, section 39 (7) states that ‘[t]he provisions of subsection (3)(b)(ii) [*state department comments on environmental impacts*] and the subsection (3)(c) [*environmental awareness plan*] do not apply to the applications for reconnaissance permissions, prospecting rights or mining permits’ [*my inputs*].

An application for a prospecting right must be lodged at the office of the appropriate Regional Manager.⁸⁰ The Regional Manager must accept a lodgement of an application for a prospecting right if the requirements for lodgement are met, and if no other person holds a relevant right in the same mineral and land.⁸¹ If the application does not comply with such requirements, the Regional Manager must notify the applicant in writing within 14 days of receipt of the application.⁸² Alternatively, the Regional Manager must notify the applicant in writing of acceptance of the lodgement of the application.⁸³

Before a prospecting right may be granted, requirements regarding financial resources, technical ability, estimated expenditure, prevention of pollution, and health and safety must also be met.⁸⁴ Upon compliance thereof and additional requirements (*inter alia*, regarding an environmental management plan and notification and consultation with owners and affected parties), the Regional Manager has to forward the application to the Deputy Director General for consideration.⁸⁵ If all the statutory requirements are met, the Deputy Director-General: Mineral Development is obliged to grant a prospecting right.⁸⁶

⁸⁰s16(1), MPRDA

⁸¹s16(1) and (2), MPRDA

⁸²s 16(3), MPRDA

⁸³s 16(4), MPRDA

⁸⁴s17(1), MPRDA

⁸⁵s 16(5), MPRDA

⁸⁶s 17(1), MPRDA

If and when the prospecting right is granted it ‘becomes effective on the date on which the environmental management programme is approved in terms of section 39’⁸⁷ and valid for ‘the period specified in the right, which period may not exceed five years’⁸⁸. The right is ‘subject to this Act, *any other relevant law* and the terms and conditions stipulated in the right’⁸⁹(*my emphasis*).

An applicant whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to: (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or (b) the Minister, if it is an administrative decision by the Director-General.⁹⁰

The acquisition of a prospecting right comes with certain rights and duties as set out in section 19 of the MPRDA. These include among others the ‘the exclusive right to apply for and be granted a renewal of the prospecting right in respect of the mineral and prospecting area in question’;⁹¹ ‘the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question’;⁹² and the right ‘to remove and dispose of any mineral to which such right relates and which is found during the course of prospecting’,⁹³ subject to s20 of the act.

The holder of the right has the duty to ‘lodge such right for registration at the Mining Titles Office within 30 days of the date on which the right or renewal of the right becomes effective.’⁹⁴ The right holder must begin ‘prospecting activities within 120 days from the date on which the prospecting right becomes effective in terms of section 17(5) or such an extended period as the Minister may authorise’.⁹⁵ The right holder must conduct these

⁸⁷S17(5), MPRDA.

⁸⁸S17(6), MPRDA.

⁸⁹ibid.

⁹⁰s 96(1), MPRDA

⁹¹s19(1)(a), MPRDA

⁹²s19(1)(b), MPRDA

⁹³ s19(1)(c), MPRDA

⁹⁴ s19(2)(a)

⁹⁵ s19(2)(b)

activities in accordance with the relevant provisions of the act⁹⁶ and ‘in accordance with the prospecting work programme’.⁹⁷

An application for a renewal of a prospecting right as mentioned above must be conducted as set out in section 18 of the MPRDA and is to include among others, reasons for the renewal and the period to be extended. The application is to ‘be accompanied by a detailed report reflecting the prospecting results, the interpretation thereof and the prospecting expenditure incurred’,⁹⁸ as well as a report of compliance to the previous prospecting periods EMP⁹⁹. The prospecting right may be renewed once for a period not exceeding three years.¹⁰⁰

If the holder of a prospecting, or renewed prospecting right finds him/her-self in a position where a resource has been located, yet for certain reasons (i.e. market reasons) should not at that particular time be exploited, the right holder can apply for a retention permit. The application is subject to section 31 of the act in accordance with the ‘prescribed manner’,¹⁰¹ as set out in regulation 16 of the MPRDA regulations. Reasons for the application and the period applied for must also be supplied.¹⁰² The Minister can then award the retention permit which ‘suspends the terms and conditions of the prospecting right held in respect of the land to which the retention permit relates’,¹⁰³ if the conditions of s31(1) of the MPRDA are met which includes, amongst others, that the applicant has ‘completed the prospecting activities and a feasibility study’,¹⁰⁴ ‘established the existence of a mineral reserve which has mining potential’,¹⁰⁵ and has ‘studied the market and found that the mining of the mineral in question would be uneconomical due to prevailing market conditions’.¹⁰⁶ Importantly, even though the right is suspended the ‘environmental management programme approved in respect of the prospecting right remains in force as if the prospecting right had not lapsed’.¹⁰⁷ The retention

⁹⁶ s19(2)(d)

⁹⁷ s19(2)(c)

⁹⁸ s18(2)(b)

⁹⁹ s18(2)(c)

¹⁰⁰ s18(4)

¹⁰¹ s31(1)(b), MPRDA.

¹⁰² s31(1)(d)

¹⁰³ s32(2), MPRDA

¹⁰⁴ s32(1)(b), MPRDA

¹⁰⁵ s32(1)(c), MPRDA

¹⁰⁶ s32(1)(d), MPRDA

¹⁰⁷ s32(4), MPRDA

permit awarded can be any specified period that does not exceed three years¹⁰⁸ and is not transferrable.¹⁰⁹ The retention permit may be renewed for a period not exceeding two years¹¹⁰ under section 34 of the MPRDA in accordance with the procedure set out in regulation 17 of the MPRDA regulations. The Minister may refuse a retention permit application in terms of section 33 of the MPRDA if the requirements of section 32 are not met or if research by the minerals Board suggests that the permit should not be awarded. The retention permit holder has certain rights and obligations as per section 35 of the MPRDA which include the 'exclusive right to be granted a mining right in respect of the retention area and mineral in question'.¹¹¹ The holder, however has responsibilities to 'give effect to the approved environmental management programme' and 'submit a six monthly progress report to the Regional Manager indicating 'the prevailing market conditions'....and...'efforts undertaken by such holder to ensure that mining operations commence before the expiry period'.¹¹²

3.5.2 Mining Phase

The mining phase includes either a mining permit¹¹³ for small scale (less 1.5 Ha) operations or a mining right¹¹⁴ for larger scale mining, and a production right for petroleum resources.¹¹⁵

In terms of the MPRDA regulations, the above mining phase components are dealt with in the following regulations: a mining permit¹¹⁶ and a mining right,¹¹⁷ and a production right.¹¹⁸

Environmental Management Programmes and Plans for mining have been prescribed for by the MPRDA and in section 39 (1) it states that '[e]very person who has applied for a mining right in terms of section 22 must conduct an environmental impact assessment and submit an

¹⁰⁸ s32(5), MPRDA

¹⁰⁹ s36, MPRDA

¹¹⁰ s34(3), MPRDA

¹¹¹ s35(1), MPRDA

¹¹² s35(2), MPRDA.

¹¹³ MPRDA, at s27 and 28

¹¹⁴ MPRDA, at s22 – 25, and 28.

¹¹⁵ MPRDA, at s83 - 86

¹¹⁶ MPRDA regulations, GNR 527, reg 14

¹¹⁷ MPRDA regulations, GNR 527, reg 10 – 13

¹¹⁸ MPRDA regulations, GNR 527, reg 34 – 38

environmental management programme within 180 days of the date on which he or she is notified by the Regional Manager to do so.’

Notably, in terms of the MPRDA, all prospecting and mining rights applicants must prepare an EMP and submit it for approval in addition to their application for a specific right. An EMP refers to one of two things, either a EM plan or an EM programme. Mining rights applicants must conduct an environmental impact assessment and submit an environmental management programme (s 39(1) of the MPRDA); while prospecting right, reconnaissance permission and a mining permit applicants must only submit an environmental management plan (s 39(2) of the MPRDA). The EM programme is naturally a more onerous submission and requires a more extensive range of information, and is in addition to/inclusive of a scoping process.

The application for the mining right itself must be compiled in terms of section 22 of the MPRDA and submitted to the Minister via the relevant regional office in the prescribed manner.¹¹⁹ The application will be accepted by Regional Manager if these requirements are met and if ‘no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land’.¹²⁰ If these requirements are not met the Regional Manager ‘must notify the applicant in writing of that fact within 14 days of the receipt of the application and return the application to the applicant’.¹²¹ A notification within 14 days must also be issued by the Regional Manager if he/she accepts the application. This notification serves to inform the applicants to proceed to ‘to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39’,¹²² and ‘to notify and consult with interested and affected parties within 180 days from the date of the notice’.¹²³ The Minister can approve or refuse the application subject to the requirements in section 23(1) and (2) of the MPRDA.¹²⁴ A requirement that is not met must

¹¹⁹ s22(1), MPRDA

¹²⁰ s22(2)(b), MPRDA

¹²¹ s22(3), MPRDA

¹²² s22(4)(a), MPRDA

¹²³ s22(4)(b), MPRDA

¹²⁴ **Granting and duration of mining right**

23. (1) Subject to subsection (4), the Minister must grant a mining right if—

(a) the mineral can be mined optimally in accordance with the mining work programme;

trigger a refusal by the Minister¹²⁵, which must be conveyed to the applicant in writing within 30 days of the decision with reasons.¹²⁶ If the Minister approves the application, the right only comes into effect on the date that the EMP is approved.¹²⁷ Importantly the right is subject to both the MPRDA and any relevant law.¹²⁸ It is valid for a period not exceeding 30 years, the specifics of which appear on the right.¹²⁹ The right may be renewed if it meets the requirements of section 24 of the MPRDA, for a further term not exceeding 30 years.

A holder of a mining right has certain rights and obligations under section 25 of the MPRDA including the ‘exclusive right to apply for and be granted a renewal of the mining right in respect of the mineral and mining area in question’.¹³⁰ A broad list of obligations is set out in s25(2) and includes ‘[commencing] with mining operations within one year from the date on which the mining right becomes effective in terms of section 23(5) or such extended period as the Minister may authorise’,¹³¹ ‘[complying] with the requirements of the approved environmental management programme’,¹³² and ‘[submitting] the prescribed annual report,

(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(c) the financing plan is compatible with the intended mining operation and the duration thereof;

(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment;

(e) the applicant has provided financially and otherwise for the prescribed social and labour plan;

(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);

(g) the applicant is not in contravention of any provision of this Act; and

(h) the granting of such right will further the objects referred to in section 2(d) and

(f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

(2) The Minister may, having regard to the nature of the mineral in question, take into consideration the provisions of section 26 (Mineral beneficiation).

¹²⁵ s23(3), MPRDA.

¹²⁶ s23(4), MPRDA

¹²⁷ s23(5), MPRDA

¹²⁸ s23(6), MPRDA

¹²⁹ *Ibid.*

¹³⁰ s25(1), MPRDA

¹³¹ s25(2)(b), MPRDA

¹³² s25(2)(e), MPRDA

detailing the extent of the holder's compliance with the provisions of section 2(d) and (f), the charter contemplated in section 100 and the social and labour plan'.¹³³

3.5.3 Rehabilitation and closure phase

Rehabilitation is essentially an ongoing process during the search/mining phase but also involves possible large remediation at the end of the phases. The ongoing nature of rehabilitation is noted in the very definition of an "environmental management plan" in the MPRDA which 'means a plan to manage and rehabilitate the environmental impact as a result of prospecting, reconnaissance, exploration or mining operations conducted under the authority of a reconnaissance permission, prospecting right, reconnaissance permit, exploration right or mining permit, as the case may be'.¹³⁴ Rehabilitation is closely linked to 'financial provision' which 'means the insurance, bank guarantee, trust fund or cash that applicants for or holders of a right or permit must provide in terms of sections 41 and 89 guaranteeing the availability of sufficient funds to undertake the agreed work programmes and to rehabilitate the prospecting, mining, reconnaissance, exploration or production areas, as the case may be'.¹³⁵

Importantly, this financial provision is kept current by way of section 41(3) which states '[t]he holder of a prospecting right, mining right or mining permit must annually assess his or her environmental liability and increase his or her financial provision to the satisfaction of the Minister'. This provision is in place until a closure certificate is issued by the Minister in terms of section 43 of the MPRDA, but a portion may be retained by the Minister 'as may be required to rehabilitate the closed mining or prospecting operation in respect of latent or residual environmental impacts'.¹³⁶

Section 43(1) is very clear in noting that '[t]he holder of a prospecting right, mining right, retention permit or mining permit remains responsible for any environmental liability, pollution or ecological degradation, and the management thereof, until the Minister has issued an closure certificate to the holder concerned' unless stipulated in an EMP that a

¹³³ s25(2)(h), MPRDA

¹³⁴ s1, MPRDA.

¹³⁵ *Ibid.*

¹³⁶ s42(5), MPRDA.

transfer of responsibility for environmental rehabilitation will take place in terms of s43(2), and in terms of s58 (application) and 59 of the MPRDA regulations (stating the qualifications needed by a person to have such responsibilities transferred to them). Either way, a right holder must apply for a closure certificate 'upon...' the lapsing, abandonment or cancellation of the right or permit in question',¹³⁷ 'cessation of the prospecting or mining operation',¹³⁸ 'the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate',¹³⁹ 'or completion of the prescribed closing plan to which a right, permit or permission relate',¹⁴⁰ within 180 days of any of these situations to the Regional manager.¹⁴¹ The application must be set out in accordance with regulation 57 of the MPRDA regulations, and follow the Principles for mine closure,¹⁴² and be accompanied by an Environmental Risk report as set out in regulation 60 of the MPRDA regulations.¹⁴³ Regulation 61 of the MPRDA regulations set the closure objectives, which include to 'provide broad future land use objective(s) for the site',¹⁴⁴ while regulation 62 sets out the contents of a closure plan. Importantly on a co-operative governance note 'no closure certificate may be issued unless the Chief Inspector and the Department of Water Affairs and Forestry have confirmed in writing that the provisions pertaining to health and safety and management of potential pollution to water resources have been addressed'.¹⁴⁵

3.6 Summary

One of the most noteworthy points of the chapter is that the application process has historically been insulated within the DMR and only really subject to the mining law, the most recent being the MPRDA. Even in recent years, the environmental programmes and plans are subject to the MPRDA and not the NEMA EIA regulations. It is true that the

¹³⁷ s43(3)(a), MPRDA

¹³⁸ s43(3)(b), MPRDA

¹³⁹ s43(3)(c), MPRDA

¹⁴⁰ s43(3)(d), MPRDA

¹⁴¹ s43(4), MPRDA

¹⁴² section 56, MPRDA regulations (GNR527)

¹⁴³ s43(4), MPRDA

¹⁴⁴ S61(b), MPRDA regulations (GNR527)

¹⁴⁵ s43(5), MPRDA

NEMA is heeded to by the MPRDA but only in terms of its principles rather than its core environmental regulations and processes. Arguably the DMR seek to centralize regulation at a national level of competence and within one department. This is in contrast to the agenda of planning regulation in South Africa, which seek to decentralise regulation and empower provincial and municipal government, as we shall see in the following chapter 4. Historically the pattern seems to be one of mining law dominance but recent case law, as seen in chapter 5, may have opened gaps for an increasing involvement of the environmental departments in accordance with the Constitutional notions of cooperative governance.

Chapter 4: Land-use planning law

4.1 Introduction

Mining, as we saw in chapter 3, is governed on a national level. Land-use planning of the other hand is governed by a very different set of laws at the different levels of government, and which vary between provinces. This can be seen in schedules 4 and 5 of the Constitution as discussed in chapter 2. Historically planning law has operated within provinces where planning laws varied. Currently, however, with the new Constitution and structure of government, this looks to change. Land use planning is critical to the proper functioning of an area, and in turn a province, and a country. It is a legal sector of much controversy and debate and one which is regularly revisited in many environmental cases in terms of misuse, degradational use or inappropriate use of land.

This chapter will look at the land use planning regulations at a national level and thereafter focus in on the provincial regulations of two case study provinces, namely Gauteng and the Western Cape. This will be done under the background of cooperative governance between land use departments at provincial and local government level and their relationship with other departments, in particular the Department of Mineral Resources (DMR). Land use planning can also not be discussed without bringing in the principles of sustainable development.

4.2 A brief history of planning law in South Africa

Although land use management certainly existed before colonisation of African,¹ South African planning law (as we know it) extends essentially back to the Dutch colonisation of the Cape in 1652. Colonial laws would go on to influence South African law and therefore planning law in the form of initially Dutch and later British law, from 1814 onwards; right up until independence in 1910. Thereafter an American influence would penetrate planning law with the introduction of zoning and spatial planning in 1931 into the 1925 Physical Planning

¹ See for example: Mitchell, P. *The archaeology of southern Africa*. Cambridge University Press (2002). Also see Milton, J. R. L. "Planning and property." *Acta Juridica* (1985): 267; and Van Wyk, J. *Planning Law: principles and procedures of land-use management*, Kenwyn: Juta (1999). s3.2 where she notes the existence of planning in Biblical, Egyptian, Roman and Greek times. And s3.4.1 where he notes planning in terms of the Bushmen and Hottentots as well as the Zulu.

Act.²

Despite South Africa's independence from Britain, the United Kingdom's influence would be deeply set into the 1900's planning legislation.³ These influences were deeply entrenched in the South African provincial town-planning Ordinances of the four provinces which came into existence with the Act of Union 1910. The Ordinances were as follows: Firstly, and in no particular order, the Townships Ordinance, Cape Province 33 of 1934 (replaced later by the Land Use Planning Ordinance 15 of 1985. This ordinance is still in effect and is the subject of much debate in this very thesis). Second, the Town Planning Ordinance, Natal 27 of 1949; (3) the Townships Ordinance. Third, the Orange Free State 9 of 1969; and fourth, the Town Planning and Townships Ordinance, Transvaal 15 of 1986, which is still in effect and will be discussed later in this chapter.

Spatial planning was furthered by the introduction of the 1975 in the Physical Planning and Utilisation of Resources Amendment Act, with a legacy that much of the 1900's was dominated by racially biased planning laws that sort to segregate society along racial lines in the Apartheid era.

Planning with regard to the greater physical environment first found a place in the Natural Resources development Act 51 of 1947 which generally focussed on efficient and coordinated efforts to exploit natural resources in South Africa.⁴ The Act developed the Natural Resources Council for this purpose and made use of 'controlled areas' where certain 'black:white' employee ratios had to be maintained within these industrially developed 'controlled areas'.⁵ Major parts of the Act were amended in 1955, but the Act remained in

² Mac Carron, G M (2009). The relationship between planning and environmental management in Gauteng. Master of Science in Development Planning thesis. University of the Witwatersrand, Johannesburg. p20.

³ By embedding its own British planning concepts into RSA legislature. These include the British 1909 Housing Act (later replaced by the Town Planning Act), and the 1947 Town and Country Planning Act and its amendment in 1976.

⁴ See Van Wyk, J. Planning Law. Juta (2012). s3.4.7.1 and Geyer 'Apartheid in South Africa and industrial deconcentration in the PWV area' 1989 Planning Perspectives 251-69, 256.

⁵ Ibid.

force until 1986.⁶ Despite its racial connections, this Act was important because it ‘officially recognized that land-use planning was national in character and had to be controlled and coordinated at the highest level if effective and orderly planning were to ensue’.⁷ In 1967, the Physical Planning and Utilization of Resources Act 88 of 1967, which later became the Physical Planning Act 88 of 1967, was passed to repeal and replace the Natural Resources Development Act even though it re-enacted the provisions relating to controlled areas (s5 – 8). Section 4 of the 1967 Act evolved into the Physical Planning and Utilization of Resources Act 73 of 1975 where section 4 of this Act regarding specific purposes for certain land is important as well as the fact that environmental provisions were introduced, which meant also that the 1967 Act had to undergo a name change to the Environmental Planning Act 88 of 1967.⁸ However, Van Wyk notes that even though the Act ‘laid down specific purposes for which land could be reserved, its most important insertion was that pertaining to guide plans, a development which was to become a significant planning device in South Africa’.⁹ These Guide plans were initiated by the Department of Planning and Environment and were ‘aimed at being a broad-scale organizational framework with statutory backing which was intended to coordinate the planning of and policies for the land use, transportation and infrastructure of regions or sub-regions for a period of up to 25 years’¹⁰ Guide plan committees were set up from 1971 onwards, to operate with ministerial and Cabinet authority, even though the guide plans themselves had no statutory authority behind the concept. Despite this, ‘[f]rom 1971 onwards the guide-plan committees initiated and formulated the policy and *modus operandi* for all future guide plans’.¹¹

The phasing out of guide plans was initiated by section 37 of the Physical Planning Act 125 of 1991. Provisions in this section noted that the plans will be replaced by regional or urban structure plans or other future planning devices. The 1991 Act also partially repealed the

⁶ *ibid.*

⁷ Van Wyk, J. Planning Law. Juta (2012). s3.4.7.1

⁸ Van Wyk (2012): Planning Law. s3.4.7.1

⁹ *ibid.*

¹⁰ See Van Wyk, J. Planning Law. Juta (2012). s3.4.7.2, and Jaspan ‘A critical evaluation of the guide plan procedure’ 1979 Municipal Engineer 9-11).

¹¹ Van Wyk, J. Planning Law. Juta (2012). s3.4.7.2

Physical Planning Act 88 of 1967 (formally known as the Environmental Planning Act 88 of 1967). This meant that physical planning took on a very different shape and form 'with provisions being made for national and regional developmental plans and regional structure plans, all of them being policy plans and urban structure plans.'¹² This Act is still on the statute books, its negative features from its Apartheid birth and its lack of compatibility with the current Constitution make it an Act with an uncertain future and it will surely soon be repealed by the Spatial Planning Land Use Management Bill (SPLUMB) 2012 when/if it is enacted.

4.3 Current and future Land Use Planning law in South Africa.

With the advent of a new Constitutional democracy, planning law in South Africa has undergone a big overhaul. Glazewski and Du Toit note that '[t]he advent of the democratic South Africa in 1994, which included the establishment of nine new provinces, has resulted in the need to fundamentally re-assess the planning laws structures and laws of the country'.¹³ It is no secret that the post-1994 government inherited a 'fragmented, unequal and incoherent planning system which developed under apartheid'.¹⁴ This makes the present government's job undoubtedly more difficult. The amalgam of laws that governs planning law is anything but user-friendly, not to mention that many provisions are either outdated and/or constitutionally invalid. The future of planning law needs, undoubtedly, to be simplified, unified and progressive in terms of the ideals set out in the Constitution. This was noted by the Cape High Court in *Camps Bay Ratepayers and Residents Association and Others v The Minister of Planning, Culture and Administration (Western Cape) and Others*,¹⁵ making reference to a 'fragmented and cumbersome in the extreme...framework regulating town

¹² Van Wyk, J. *Planning Law*. Juta (2012). s3.4.7.2

¹³ Glazewski, J and Du Toit, L. 'Environmental Law in South Africa'. Chapter 9: Planning Law and the Environment. Looseleaf Service Issue 1, 2013, LexisNexis. At section 9.1.2, p 9-7.

¹⁴ See Glazewski, J and Du Toit, L. 'Environmental Law in South Africa'. Chapter 9: Planning Law and the Environment. Looseleaf Service Issue 1, 2013, LexisNexis. And *The Green Paper on Development and Planning* GN 626 in *Government Gazette* No. 20071 dated 21 May 1999 (the Green Paper).

¹⁵ 2001 (4) SA 301 CPD.

planning and building regulations... contained in at least three major separate yet inter-related pieces of legislation, viz the present Act 84 of 1967, the National Building Regulations and Building Standards Act 103 of 1977 and the Land Use Planning Ordinance (LUPO), 15 of 1985, together with the zoning schemes promulgated in terms of the latter. It requires a vast bureaucratic machine to administer all these provisions . . . The system also frequently – as in the present case – gives rise to conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels of local and provincial government. It would be of great assistance to everyone involved in the process, from ordinary ratepayers to developers to officials, if the administrative machinery required to regulate these matters could be consolidated, simplified and streamlined by the legislature . . .¹⁶

The process of consolidation, simplification and streamlining has already begun with the Spatial Planning Land Use Management Bill¹⁷ which looks on track to be enacted in the near future.

4.3.1 National legislation:

National planning legislation includes legislation dealing with planning issues, but also legislation dealing with the local government, the environment, heritage resources and transport.

Currently, the Ministry of Rural Development and Land Reform oversees planning laws on a national level using as its fundamental tools the Development Facilitation Act 67 of 1995 and its notion on Integrated Development Planning (IDP). In the near future the notions of the Spatial Development Bill will also be used.¹⁸

¹⁶ Per Griessel J at 329B–F.

¹⁷ Spatial Planning and Land Use Management Bill 2011: Government Notice 280 of 2011, 6 May 2011. And the Spatial Planning and Land Use Management Bill, 2012 N 357 in Government Gazette No.35293 of 2012.

¹⁸ Spatial Planning and Land Use Management Bill, 2012 N 357 in Government Gazette No.35293 of 2012.

4.3.1.(i) Development Facilitation Act 67 of 1995 (DFA)

The flagship (and the earliest) planning law statute passed by post-1994 government is the DFA,¹⁹ which superimposed a national governance component on planning law in South Africa. However, despite this and while the Act is still in force, it has come under considerable fire in recent times, and its chapters V and VI and their provisions on the establishment of land development areas, have been ruled unconstitutional.²⁰ The act looks to be replaced by the Spatial Development Bill,²¹ and should have been either corrected or replaced by June 2012 (24 months after the judgement).²² Van Wyk notes that '[t]he declaration of invalidity will seriously hamper the development application processes in those provinces that no longer employ the ordinances and other old order legislation'.²³

Van Wyk notes that the DFA was promulgated to provide a fast track by which housing can be speedily provided...[with an aim] to eliminate some of the burdensome provisions of township establishment as set out in the Ordinances, [but that] new legislation in some provinces and an altered role for the DFA as set out in the *Green Paper on Development and Planning* have already changed this purpose.²⁴

Van Wyk notes that 'the DFA was meant as an interim measure only, to be phased out on the promulgation of a proposed Land Use Management Act [which is]...clear from the fact that the DFA never repealed any of the pre-1994 apartheid planning legislation.²⁵ This may indeed be the very reason for the existence and persistence of LUPO.

¹⁹ Glazewski, J and Du Toit, L. 'Environmental Law in South Africa'. Chapter 9: Planning Law and the Environment. Looseleaf Service Issue 1, 2013, LexisNexis. At section 9.4.1

²⁰ Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)

²¹ Spatial Planning and Land Use Management Bill, 2012 N 357 in Government Gazette No.35293 of 2012., section 57 read with Schedule 3.

²² 2010 (6) SA 182 (CC), para 95.

²³ Van Wyk, J. Planning Law. Juta (2012). s4.2.2

²⁴ GN 626 GG 20071 dated 21 May 1999. And see Van Wyk, J. Planning Law. Juta (2012). s3.4.7.2

²⁵ Van Wyk, J. Planning Law. Juta (2012).s4.2.2 and Wise land use: White paper on spatial planning, land use management and land development GG 22473 (20 July 2001) 68-69

Chapters I to IV are still in force. Chapter I of the DFA, in Van Wyk's opinion is, '[p]erhaps the most significant contribution [in] that it introduced principles of land development and general principles for decision-making and conflict resolution, bringing about a new planning ethos in South Africa and creating a framework for decision-making'.²⁶ Provincial development tribunals are established under chapter III of the DFA. These tribunals consider and approve or refuse land development applications...as well as resolving conflicts, conducting investigations and imposing conditions.²⁷ Chapter IV introduced land development objectives (LDOs) which in essence lead to the principles in the Local Government: Municipal Systems Act 32 of 2000 which replaced LDOs. The idea is that local government establish a policy framework that would guide land development in municipalities.

4.3.1.(ii) Local Government: Municipal Systems Act 32 of 2000. ('MSA')

The MSA is seen within the context of a range of Local Government Acts which work as a unit to regulate the many different aspects of Local Government responsibility. These include for example the Local Government: Municipal Structures Act 117 of 1998 ('Structures Act'). Van Wyk notes, with regard to the MSA and Structures Act, that [t]he most important aspect for planning is the system of integrated development planning introduced by the Structures Act and expanded by the MSA'.²⁸ The Structures Act contains a definition of an integrated development plan (IDP) as 'a plan aimed at the integrated development and management of a municipal area'.²⁹ The different categories of municipalities as set out in s155(1) of the Constitution is given effect by the Structures Act. Without it, powers such as 'Municipal Planning' as set out in Part B of schedule 4 and Part B Schedule 5 of the Constitution would have no structural organisation.

The MSA, was also enacted to give effect to chapter 7 of the Constitution and deals with local government.³⁰ The long title notes that it provides for core principles, mechanisms and

²⁶ Van Wyk, J. Planning Law. Juta (2012). s 4.2.2

²⁷ Ibid.

²⁸ Ibid.

²⁹ Municipal Structures Act 117 of 1998, s1

³⁰ Van Wyk, J. Planning Law. Juta (2012). s 4.2.2

processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of communities and to ensure universal access to essential services that are affordable to all. Importantly, the MSA ‘provides for the legal nature and rights and duties of municipalities, municipal functions and powers, performance management, local public administration, municipal services, and credit control and debt collection’.³¹ However, where planning is concerned, chapter 5 is of the most significance as it deals with Integrated Development Plans (IDPs) which are a component of spatial development frameworks (SDFs). Van Wyk notes that from a planning perspective, it is important that the MSA ‘also includes a chapter on community participation...where, in certain circumstances, people affected by planning measures have the right to be involved in the determination of those measures and decisions’.³²

The MSA in essence provides the workings and groundings for a local government integrated approach towards planning and development.

4.3.1.(iii) Physical Planning Acts 88 of 1967 and 125 of 1991.

Naturally major sections of the 1967 Apartheid era Act have been repealed but there are some that remain relating to the establishment and disestablishment of so-called controlled areas,³³ the restriction on the use of land in these areas,³⁴ and the issue of permits.³⁵

The 1991 Act aims to promote the orderly physical development of South Africa and to prepare national and regional development plans as well as national and regional urban structures plans.³⁶ However, Van Wyk notes that none of its provisions have been implemented and that it was overtaken by notions of national spatial development with the Wise Land Use White Paper on spatial planning and land use management. These notions have been furthered by the recent SPLUMB which proposes spatial frameworks and land use

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Sections 5 and 6 of 1967 Physical Planning Act

³⁵ Ibid, Section 8

³⁶ Van Wyk, J. Planning Law. Juta (2012). s 4.2.2

schemes at many levels (national, regional, provincial and municipal). Both the 1967 and 1991 Acts are listed in Schedule 3 of the SPLUMB as statutes to be repealed as and when the Bill is enacted.

Despite this, Van Wyk notes that perhaps the most significant part of the 1991 Act ‘is that it contains provisions for guide plans to continue in certain circumstances as if their repeal had not taken place’.³⁷ Van Wyk stresses this importance because ‘[g]uide plans did, and in some cases still do, play a significant role in South African planning’.³⁸ They will no doubt play a role in future planning, if not directly, then indirectly in the core principles they have developed.

4.3.1.(iv) National Environmental Management Act 107 of 1998 (the NEMA)

The NEMA is a wide reaching and extensive Act regarding interactions with the environment. Needless to say, it cannot be covered in full in this section. However, with regard to planning it is an essential legislation as planning invariably incorporates land and thus the environment, which is defined widely in the NEMA.³⁹ Van Wyk notes that ‘[i]n a land use context, NEMA is relevant in so far as it contains a definition of environment; sets out principles of environmental management that focus on the requirement that development must be socially, environmentally and economically sustainable;⁴⁰ and provides for

³⁷ Ibid and 1991 Physical Planning Act, section 35.

³⁸ Van Wyk, J. Planning Law. Juta (2012). s 4.2.2

³⁹ Act No. 107 of 1998, s1(1)(xi):

“environment.’ means the surroundings within which humans exist and that are made up of—

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

⁴⁰ NEMA, section 2(3). Also see Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga

environmental management – that area where environment and land use intersect since environmental authorisations must be issued to undertake specified developments’.⁴¹

The NEMA is thus the binding Act that all planners and developers must adhere to when engaging in a land use activity which inevitably impacts the environment.

4.3.1.(v) *The Spatial Planning and Land Use Management Bill (SPLUMB) of 2012*

The SPLUMB⁴² is set to repeal and replace the DFA and the 1967 Physical Planning Act, as well as some other legislation such as the Removal of Restrictions Act 84 of 1967,⁴³ when it is promulgated. Glazewski and Du Toit note that SPLUMB ‘more or less retains the tone and approach of the DFA, but is motivated by a number of factors, including the fact ‘the continued existence and operation of multiple laws at national and provincial spheres of government in addition to the laws applicable in the previous homelands and self-governing territories has created fragmentation, duplication and unfair discrimination’.⁴⁴

Section 34 of the Bill lists the components that shall make up the envisioned spatial planning system. These are, (a) Spatial development frameworks . . . , (b) development principles. . . , (c) the management and facilitation of land, [and] (d) Procedures and processes for the preparation, submission and consideration of land development applications and related processes . . .’.⁴⁵

Province 2007 (6) SA 4 (CC); And see Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited 2008 (2) SA 319 (CC) para 24.

⁴¹ Van Wyk, J. Planning Law. Juta (2012). s 4.2.2

⁴² Spatial Planning and Land Use Management Bill, 2012 N 357 in Government Gazette No.35293 of 2012

⁴³ SPLUMB, s57 read with Schedule 3 and See Van Wyk (2012). Planning Law. s4.2.2

⁴⁴ Glazewski, J and Du Toit, L. ‘Environmental Law in South Africa’. Chapter 9: Planning Law and the Environment. Looseleaf Service Issue 1, 2013, LexisNexis. At section 9.4.2. Also refer to the Preamble to the Spatial Planning and Land Use Management Bill, 2012.

⁴⁵ s 34.

Importantly, the Bill recognizes the status of local government and designates municipalities as the authority of first instance to which all land development applications must be submitted.⁴⁶

The notions of planning tribunals as introduced by the DFA has been filtered into the SPLUMB which notes that each municipality is required to establish a Municipal Planning Tribunal to determine land use and development applications within its municipal area.⁴⁷ There is, however, an alternative to the Tribunal, which is that a municipality may also authorise an official in its employ to determine certain land use and development applications in place of the Municipal Planning Tribunal.⁴⁸ Importantly, the 2011 SPLUMB noted that Provincial Tribunals could be established for each province.⁴⁹ However, this was reassessed due to the *Johannesburg Metropolitan Municipality* case,⁵⁰ and now no provision for the establishment of Provincial Planning Tribunals exists, only Municipal Tribunals.

In essence the SPLUMB seeks to promote greater consistency and uniformity in application procedures and decision-making structures for provincial and municipal authorities responsible for land use decisions, development applications and appeal procedures.⁵¹

4.3.1.(vi) Other National Acts

A number of other national acts exist at a national level that affect planning law but which are beyond the scope of this thesis. These includes the National Heritage Resources Act 25 of 1999, National Environmental Management: Protected Areas Act 57 of 2003 (NEM:PA), Mountain Catchment Areas Act 63 of 1970, Removal of Restrictions Act 84 of 1967 (RORA), the Less Formal Townships Establishment Act 113 of 1991, the National Building Regulations and Building Standards Act 103 of 1977, the National Environmental

⁴⁶ s 33(1).

⁴⁷ s 35(1).

⁴⁸ s35(2).

⁴⁹ Spatial Planning and Land Use Management Bill, 2011, s 38(1).

⁵⁰ 2010 (2) SA 554 (SCA).

⁵¹ Van Wyk, J. Planning Law. Juta (2012). s4.2.2

Management: Integrated Coastal Management Act 24 of 2008, the National Land Transport Act 5 of 2009, the MPRDA 28 of 2002, and of course the recent SPLUMB.⁵²

4.3.2 Provincial legislation:

Planning may find firm roots in national legislation but the multi-faceted nature of planning means that there is a need generally for initiation of national plans at a local and provincial level as seen by the Schedule 4 and 5 functional areas. Planning is thus regulated in terms of day to day functioning by provincial legislation and applicable ordinances which remain in effect,⁵³ and by municipal by-laws. For the purpose of this thesis, the provincial planning departments, and their respective procedures, that will be focussed on will be the Gauteng Department of Agriculture and Rural Development and the Western Cape Department of Environmental Affairs and Development Planning. At local levels, each metro and municipality will have its own planning department.⁵⁴

As per the Constitution, the provincial sphere of government is responsible for 'Provincial planning'. There are an array of planning institutions in the provincial sphere including advisory institutions, decision-making bodies and tribunals and appeal bodies. For the purposes of this thesis, the Gauteng Department of Economic Development and Planning and the Western Cape Department of Environmental Affairs and Development Planning will be considered.

The Development Facilitation Act 67 of 1995 makes provisions for provincial development and planning commissions to be established which are to be appointed 'by the premier who, by notice in the Provincial Gazette, establishes a provincial commission in respect of a province or recognises any body of persons, board or commission established under a law as

⁵² See 4.3.1.(v)

⁵³For example and of relevance to this thesis. The 1985 Land Use Planning Ordinance, 15 of 1985, (LUPO) of the then Cape Province, and the Town Planning and Township Ordinance 15 of 1986 (Transvaal), the Division of Land Ordinance 20 of 1986 (Transvaal), and the Transvaal Board for the Development of Peri-Urban Areas Ordinance 20 of 1943. These Ordinances will be repealed by the Gauteng Planning and Development Act (No. 3 of 2003) if/when it comes into force.

⁵⁴Glazewski, J and Du Toit, L. 'Environmental Law in South Africa'. Chapter 9: Planning Law and the Environment. Looseleaf Service Issue 1, 2013, LexisNexis. At section 9.2.2.2.

a provincial commission'.⁵⁵ These commissions are however subject to certain provisions of the national commission established by the DFA and naturally subject to the laws of the DFA.⁵⁶ While the national commission was established, very few provincial commissions have been established to date.⁵⁷ While this is surprising, it may not be a major issue since 'the legislation that will repeal the DFA, the envisaged SPLUMB, contains no provisions for advisory bodies'.⁵⁸

Van Wyk notes that '[l]and use management and land development management turn on procedures to remove restrictions, subdivide land and establish a township, and similar matters'...[and]...'[i]n most cases, an application must be made to a decision-making body that either grants or does not grant approval'.⁵⁹ The power to make these decisions falls on the Premier in the Western Cape while in other provinces the DFA has empowered development tribunals to make these decisions whose main functions involve all matters relevant to land development applications.⁶⁰ However, as noted above, the DFA will probably be replaced by the SPLUMB which provides for the establishment of a provincial planning tribunal in each province which would then take on the decision-making powers that the tribunals had.⁶¹ According to the SPLUMB 2011, these tribunals must, within prescribed time limits, hear, consider and decide on matters referred to them pursuant to the decisions of a municipal planning tribunal. They must deal, without delay, with development applications as well as applications submitted by applicants in a municipality where the MEC has assumed the responsibility for deciding on land use and land development applications on the grounds of the involvement of provincial interest.⁶² The SPLUMB 2012, however, only makes mention of municipal planning tribunals in passing (in its Chapter 6, Part B and C),

⁵⁵ DFA, section 11(1).

⁵⁶ *Ibid*, section 11(3) (a)-(b)

⁵⁷ Van Wyk, J. *Planning Law*. Juta (2012). s5.5.3

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ DFA, s16(a)

⁶¹ SPLUMB 2011: GN 280 of 2011, 6 May 2011. s38(1)

⁶² Van Wyk, J. *Planning Law*. Juta (2012). s5.5.3. Also see SPLUMB 2011 and 2012.

with similar functions as those mentioned in the SPLUMB 2011, now assigned to provincial planning tribunals. SPLUMB 2012 thus empowers provincial and local government with a wealth of planning decisio-making power.

While national legislature makes provisions to establish commissions, provincial ordinances play a similar role in that they provide for the establishment of advisory boards. For instance, in the Western Cape, the LUPO 15 of 1985 (C) provides for the establishment of a planning advisory boards whereby subcommittees may be appointed to perform the functions of giving advice and making recommendations to the MEC.⁶³

In Gauteng, the Town-planning and Townships Ordinance 15 of 1986 (T) provides for a townships board whose functions include the exercise of any competence and the fulfilment of its responsibilities in terms of the ordinance, reporting to the premier on any relevant matter and hearing appeals.⁶⁴

Van Wyk notes that '[a]ppeals from municipal decision-makers are usually heard by provincial appeal bodies'...[where]...'[e]xpress statutory provision is needed to lodge an appeal against a decision of a decision-making body'.⁶⁵ An example of this sort of appeal body can be found in section 43 of LUPO 15 of 1985 (C) which establishes one or many appeal committees and importantly also makes provision for appeals against the premier in section 44. In Gauteng a townships board was established in terms of the Town-planning and Townships Ordinance 15 of 1986 (T), sections 3 and 139, serve this function.

SPLUMB 2011 states that appeals may be lodged against decisions of a municipal planning tribunal⁶⁶ while '[t]he decision of a provincial planning tribunal is final subject to judicial review by the High Court'.⁶⁷ SPLUMB 2012 provides for internal appeals in s51 which states that: 'Notwithstanding the provisions of section 62 of the Municipal Systems Act, a person

⁶³ LUPO, s33-35

⁶⁴ The provisions relating to the townships board are contained in Chapter I of the Town-planning and Townships Ordinance.

⁶⁵ Van Wyk, J. Planning Law. Juta (2012). s5.5.3.

⁶⁶ SPLUMB 2011, s40(1).

⁶⁷ Ibid, s40(2)

whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision’.

4.3.3 Zoning similarities and differences: Gauteng vs Western Cape legislation

Zoning is an integral part of planning legislation at all levels of governance. Van Wyk notes that ‘[p]olicy plans, structure plans, land use management plans and town planning schemes all determine, identify and allocate specific land uses to specific areas and properties [and thus] [m]ost plans are...based on the principle of zoning’.⁶⁸ ‘Zoning comprises different categories of directions that set out the purpose for which land situated in the area covered by a town planning scheme may be used and the land use restrictions applicable in each category as determined by relevant scheme regulations’.⁶⁹ The way in which uses are decided and allocated is based on ‘types of use’ within the categories of for example residential, commercial or industrial use and thus ‘use areas’ are known as zones and are organised and grouped accordingly within spatial frameworks. These groupings are of course subject to changes and rezonings which can and does cause conflicts of interest as seen in this thesis where mining encroaches on agricultural land.

Zoning of land naturally raises issues of land ownership rights, i.e. the entitlement to use, enjoy and dispose of property that is owned as per the Constitution s25. These entitlements are however restricted by the imposition of the provisions of a zoning scheme.⁷⁰ This is so because land utilisation rights are subject to zoning schemes and thus ‘[z]oning determines the specific uses to which specific land may be put’.⁷¹ Restrictions on land utilisation arise from many areas including town planning and zoning schemes as well as legislation for heritage resources, protected areas, or the coastal zone for example. A variety of zone types exist including (relevant to this paper): ‘Agricultural’ which refers to purposes associated with the use of land for agricultural activities including structures, buildings and dwelling

⁶⁸ Van Wyk, J. Planning Law. Juta (2012). s7.2.1

⁶⁹ See Van Wyk, J. Planning Law. Juta (2012). s7.2.1 and *Camps Bay Residents and Ratepayers Association and Others v Hartley and Others* [2010] ZAWCHC 215 (16 November 2010), para 6.

⁷⁰ See Van Wyk, J. Planning Law. Juta (2012). s7.2.1

⁷¹ See Van Wyk, J. Planning Law. Juta (2012). s7.2.3.1

units reasonably necessary or related to the use of land;⁷² and ‘Mining’ which refers to purposes associated with the use of land for mining.⁷³ Other zone types include ‘business’, ‘commercial’, ‘community’, ‘conservation’, ‘development zone’, ‘educational’, ‘government purpose’, ‘industrial’, ‘institutional’, ‘open space’, ‘public purposes’, ‘recreation purposes’, and ‘residential purposes’.⁷⁴

4.3.3.1 LUPO and zoning/rezoning

The LUPO 15 of 1985 (C) ‘is based around zoning and in [s]ection 14...[it] provides that all land is deemed to be zoned in accordance with its utilization... [which] was promulgated to ensure that every piece of land [in the province] is zoned’.⁷⁵

Section 11 notes that ‘[t]he general purpose of a zoning scheme shall be to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority’.

LUPO adheres previous planning schemes in section 7(1) which notes that ‘[a]ny town-planning scheme in terms of the Townships Ordinance, 1934 (Ordinance 33 of 1934), which in the opinion of the Administrator is in force immediately prior to the commencement of this Ordinance, shall be deemed to be a zoning scheme which is in force in terms of this Ordinance’.

Section 15 is concerned with an application for a departure from land use, which must be applied for by the owner of the land to the town clerk or secretary concerned. Land owners can apply for ‘an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned’,⁷⁶ or ‘to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a

⁷² SPLUMB 2011, schedule 2; and see Van Wyk, J. Planning Law. Juta (2012). s7.2.3.2

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Van Wyk, J. Planning Law. Juta (2012). s7.2.2

⁷⁶ LUPO, s15(1)(a)(i)

particular zone'.⁷⁷ The key terms to note in this regard are that it is an application by the 'owner' for an 'alteration' of 'a particular zone' and that it is on 'a temporary basis'.

Applications are considered and may be approved or refused by '[e]ither the Administrator or, if authorised thereto by scheme regulations, a council...'.⁷⁸

The applications must consider the public participation of those 'adversely affected' and must obtain information from 'any person who in [the said town clerk's opinion] has an interest in the application' in terms of s15(2). An approved departure lapses under certain conditions set out in s15(5) including if the departure is not exercised within two years. If the departure does lapse 'the council concerned may amend the register and zoning map concerned accordingly'.⁷⁹

While departures are of a temporary nature, a landowner may apply for a permanent change of land use under sections 16 and 17 of the LUPO concerning rezoning of land applications. The application is refused or approved by '[e]ither the Administrator or, if authorised thereto by the provisions of a structure plan, a council...'.⁸⁰ and are subject to similar participation procedures as a departure from land use.⁸¹ Rezoning may also lapse in terms of s16(2)(a), including if not utilized within a two year period after being issued and if there are irregularities in subdivision applications in terms of chapter 3 of LUPO. Section 16(b) notes that 'the concerned council' holds the power to zone land that lapses in terms of a rezoning, and that the council must pay attention to section 7 concerning existing zoning schemes; and section 14(2) and (4) concerning use rights and expiration.

Importantly rezonings of land, unlike departures of land use, may be applied for and approved in terms of council or administrative initiatives in terms of s18 of LUPO 'irrespective of whether or not a local authority is the owner of the land'.⁸² An owner of such

⁷⁷ LUPO, s15(1)(a)(ii)

⁷⁸ LUPO, s15(1)(b)

⁷⁹ LUPO, s15(6)

⁸⁰ LUPO, s16(1)

⁸¹ LUPO, s17

⁸² LUPO, s18(1)

an affected area of land is informed of the proposed rezoning and has opportunity to submit comment.⁸³

Subdivision of land is set out in chapter 3 of LUPO and importantly from a zoning perspective, section 22 entitled 'Zoning to precede subdivision' notes, among others, that:

'No application for subdivision involving a change of zoning shall be considered in terms of this Chapter, unless and until the land concerned has been zoned in a manner permitting of subdivision, in terms of Chapter II'.⁸⁴

That does not mean, however, that applications cannot be processed simultaneously.⁸⁵ Subdivision of agricultural land would also naturally have to comply with the provisions of the Subdivision of Agricultural Land Act 70 of 1970.

4.3.3.2 Town-planning and Townships Ordinance No.15 of 1986 (T)

The Transvaal (now Gauteng) ordinance speaks of rezoning land use, in terms of amendments of town planning schemes. Importantly it also notes two different application processes, one to an 'authorised local authority',⁸⁶ and the other to a non-authorised local authority'.⁸⁷ Hence we must consider what this 'authorised local authority' is. The Ordinance defines it as such: 'a local authority declared an authorised local authority in terms of section 2'⁸⁸ which essentially notes that the administrator of the Ordinance has the power to proclaim (and cancel/amend a proclamation certain) local authorities as 'authorised' in the *Provincial Gazette*.

⁸³ LUPO, s18(2)

⁸⁴ LUPO, s22(1)(a)

⁸⁵ LUPO, s22(1)(b)

⁸⁶ Town-planning and Townships Ordinance No.15 of 1986 (T), chapter II, Part C

⁸⁷ Ibid, Part B.

⁸⁸ Town-planning and Townships Ordinance No.15 of 1986 (T), s1.

Considering an application in terms of a non-authorised local authority, s45 notes that the land owner must apply in writing to the local authority and that he or she also has a variety of obligations including submitting a copy of the application to the Director; and providing notice of the application to the public in a prescribed manner.⁸⁹ Further notice may also be given by the local authority in areas it sees fit.⁹⁰ Section 45(4) notes an important example of cooperative governance in that a copy of the application needs to be forwarded to various government departments including the Transvaal Roads Department, National Transport Commission, the Director-General: Constitutional Development and Planning, and any other departments or local authorities which may be affected and/or interested in the application. The applicant may also send copies of the application to interested and affected parties in terms of s45(5). These parties then have 60 days to comment.⁹¹ Notably, 'a copy of every objection lodged and all representations made in respect of the application to the applicant, and the applicant shall, within a period of 28 days from the date of receipt of the copy, forward his reply thereto to the local authority'.⁹² The local authority then considers the application with all comments and objections and may inspect the land or ask for further information⁹³ before forwarding the compiled sum of information to the Director with comments and recommendations.⁹⁴ If the local authority does not recommend the application or feels it is in need of an amendment, it must specify this to the director and the applicant with reasons. The applicant may then reply.⁹⁵ The Director then submits the application to a planning Board to decide on issues on conflict, objections, amendments etc.⁹⁶ Representations and objections may be heard before the board in terms of s45(11)-(13) after

⁸⁹ Ibid, at s45(1)

⁹⁰ Ibid, at s45(2)

⁹¹ Ibid, at s45(6)

⁹² Ibid, at 45(4)(b)

⁹³ Ibid, at s45(7)

⁹⁴ Ibid, at s45(8)

⁹⁵ Ibid, at s45(9)

⁹⁶ Ibid, at s45(10)

which a report is compiled which either approves or refuses the application⁹⁷ to which all interested and affected parties are notified of and may request reasons.⁹⁸ The Board then submits the application along with a report, with all comments, reasons, responses and recommendations, to the Administrator⁹⁹ who then considers the application and may then approve¹⁰⁰ or refuse it, or approve it with an amendment.¹⁰¹

An application to an authorised local authority must be performed in terms of Part C of Chapter II of the Ordinance. Section 56(1)-(8) follow the same procedures in terms of the land-owner's and local authorities application obligations, interdepartmental cooperation, and public notification. The difference is that the authorised local authority may then itself approve, refuse or approve the application with an amendment¹⁰² with due notifications to the applicant and any other interested and affected party.¹⁰³

A more current legislation that looked set to replace the Town-planning and Townships Ordinance No.15 of 1986 (T) was the Gauteng Planning and Development Act (No. 3 of 2003). The Gauteng Planning and Development Act provides for planning principles, institutions, development plans, and development procedures that include a variety of past trends as well as incorporating future trends. Glazewski and Du Toit¹⁰⁴ note that these include 'principles to promote spatial restructuring and development;¹⁰⁵ principles to promote sustainable development;¹⁰⁶ principles relating to development in general;¹⁰⁷ principles

⁹⁷ Ibid, s45(14)

⁹⁸ Ibid, s45(15) & (16)

⁹⁹ Ibid, s45(17)

¹⁰⁰ And publish notice in a *Provincial Gazette* in terms of s45(20) at which date the application changed land use scheme becomes effective as per s45(21).

¹⁰¹ Ibid, s45(18)

¹⁰² Ibid, s56(9)

¹⁰³ Ibid, s56(10)

¹⁰⁴ s9.5.4.2

¹⁰⁵ s 3.

¹⁰⁶ s 4.

¹⁰⁷ s 5.

relating to land-use management systems;¹⁰⁸ principles that enhance inter-governmental planning and development;¹⁰⁹ principles on participation and human resource development;¹¹⁰ and principles on administrative fairness, decision making and dispute resolution'.¹¹¹ Despite these grand principles the Act has yet to come into effect in a decade. It seems unlikely that that it ever will.

4.3.4 Municipal legislation:

The municipal sphere of government is perhaps/should be the most active sphere with regards to planning decisions. These decisions are in most cases taken by a town planning committee or urban planning committee. In Gauteng, the Town Planning and Townships Ordinance 15 of 1986 (T) provides that the municipality is the decision-making body where decisions are taken by a town planning committee (so called section 59 or section 60 committees).¹¹² LUPO empowers the 'council' (essentially the municipality or a division thereof)¹¹³ planning decision-making powers. Decisions are aided by advisory boards.¹¹⁴

Some provinces, i.e. Gauteng, have specialised tribunals such as compensation tribunals such as compensation courts to settle disputes relating to compensation payable in terms of the Town-planning and Townships Ordinance 15 of 1986 (T).¹¹⁵

SPLUMB 2011 requires each municipality to, in order to determine land use and development applications within its municipal area, establish a municipal tribunal¹¹⁶ and this is reiterated in SPLUMB 2012.¹¹⁷ The tribunal consists of officials in the full-time service of the municipality and persons who are not municipal officials appointed by the municipal council and who have knowledge and experience of spatial planning, land use management

¹⁰⁸ s 6.

¹⁰⁹ s 7.

¹¹⁰ s 8.

¹¹¹ s 9.

¹¹² Van Wyk, J. Planning Law. Juta (2012). s5.5.4

¹¹³ LUPO, s2: Definitions

¹¹⁴ LUPO, Chapter 4 (s33-35).

¹¹⁵ Van Wyk, J. Planning Law. Juta (2012). s5.5.4

¹¹⁶ SPLUMB 2011, s32(1)

¹¹⁷ SPLUMB 2012, s35

and development or the law related thereto,¹¹⁸ and elected municipal councillors may not be appointed to a municipal planning tribunal.¹¹⁹ Van Wyk notes that '[t]he tribunal has the power to approve, in whole or in part, or refuse any application referred to it in terms of provincial legislation enacted in accordance with the Act, impose any reasonable and relevant conditions, conduct any necessary investigation, decide any question concerning its own jurisdiction and appoint a technical advisor to advise or assist in any performance of its functions'.¹²⁰

4.4 Summary

The above chapter illustrates the complexity of present and past planning law. It is an area of law heavily burdened by colonial and Apartheid inertias which have extended into the many niches of this multi-dimensional area of law. With the advent of a Constitutional democracy in 1994, new legislation sought to address and remedy past injustices and provide for a fair and efficient future of planning law. Amongst others, this was seen in the DFA, and more recently in the SPLUMBs which looks to consolidate and streamline a highly fragmented system. This is of course a national legislation that will need to filter into the provincial and local levels of government. At first glance, provincial legislation between Gauteng and the Western Cape appears quite different with a number of different terminologies, institutions and application/procedural processes. Yet closer inspection shows many similarities in terms of its zoning and rezoning processes and laws. What is quite clear is that landowners still have a large amount of control in maintaining existing zoning schemes and rezoning requires their consent. Municipalities have a major role to play in planning and are heavily involved in the day to day workings of procedural maintenance and conflict resolution. The Provincial and National government have major influence in framework plans and spatial development plans, but the intrinsic workings of planning and land-use management lies in the hands of local government and its zoning schemes and IDPs. The next chapter will however outline the interactions of mining and planning law and look at the challenges within cooperative

¹¹⁸ SPLUMB 2011, 33(1) and SPLUMB 2012, s36

¹¹⁹ SPLUMB 2011, 33(2) and SPLUMB 2012, s36

¹²⁰ Van Wyk, J. Planning Law. Juta (2012). s5.5.4. Also SPLUMB 2011, s34(7) and SPLUMB 2012, Chapter 6, Part B and C.

governance in the fields of mineral resources and land use. Case studies will be used to demonstrate these challenges and show that interdepartmental reconciliation is in order.

Chapter 5: Challenges for cooperative governance

5.1 Introduction

In previous chapters the constitutional government structures, cooperative governance principles, procedures and institutions, and the placement of mining and planning law within this context were discussed. In light of this, there are two fundamental cases which deal with cooperative governance within the minerals sector. These are the Gauteng Development Tribunal cases¹ and the Maccsand cases.² Hence they are important to both this thesis and constitutional law in the broader sense. These cases are discussed briefly in this chapter. The Moutonshoek case study is then assessed within the context of these cases.

5.2 The Gauteng Development Tribunal cases

The question of governmental functions of the different spheres was debated in this series of cases, in particular questioning the functions of the local and provincial government in terms of their land use and development mandates. The legislation that was under question was the Development Facilitation Act 67 of 1995 (the DFA) and

¹ City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae (05/6181) 2008 (4) SA 572 (W); City of Johannesburg v Gauteng Development Tribunal & others 2010 (2) SA 554 (SCA); and. City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others 2010 (6) SA 1 82 (CC)

² City of Cape Town v Macsand (Pty) Ltd and Others 2010 (3) SA 63 (WCC); Maccsand (Pty) Ltd and another v City of Cape Town and Others 2011 (6) SA 633 (SCA); Maccsand (Pty) Ltd and another v City of Cape Town and Others 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC).

specifically its chapters 5 and 6 in terms of their constitutional validity. The chapters were questioned due to the fact that they provide for the establishment of provincial Development Tribunals and empower these tribunals to approve applications for the rezoning of land and the establishment of townships. The specific tribunal under question in this case was the Gauteng Development Tribunal. The powers that had been provided for by the act are the very same powers, it was argued, that are provided for in terms of the constitution, and the relevant Gauteng Municipal Ordinance³ that are awarded to municipalities (local government). Therefore the DFA chapters 5 and 6 are at odds with the constitutional powers awarded to municipalities due to the interference created by the overlapping powers awarded to a Provincial entity (the Tribunals).

The City of Johannesburg Metropolitan contended that these powers are components of 'municipal planning', a function assigned to municipalities by section 156(1) of the Constitution, read with Part B of Schedule 4 to the Constitution. On the other hand, the Gauteng provincial authority argued that the contested powers fall under the auspices of 'urban and rural development' under Part A of Schedule 4 to the Constitution, a functional area falling outside the executive authority of municipalities.

In the High Court Judgement,⁴ Gildenhuis J, interpreted the term 'municipal planning' using definitions of the term 'plan' as being limited to 'planning for it, promoting it

³ Town Planning and Township Ordinance 15 of 1986 (Transvaal)

⁴ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae (05/6181) 2008 (4) SA 572 (W)*.

and participating therein' but did not extend as far as 'implementation of planning'.⁵ This judgement essentially meant that municipalities did not possess an exclusive constitutional power to control and regulate land use within their areas of jurisdiction. Also, in Gildenhuys' J view, the Constitution must be interpreted as awarding development as 'primarily a national and provincial competence'⁶ noting that '[t]he only provision in the Constitution which requires a municipality to involve itself in development in a manner other than by planning for it, is section 153(b), which enjoins a municipality to participate in national and provincial development programmes. This involves a duty. The section does not bestow any exclusive authority on a municipality in respect of development'.⁷

This was viewed as a highly contentious and narrow-viewed judgement and was taken on appeal successfully to the Supreme Court of Appeal⁸ where the DFA chapters 5 and 6 were indeed ruled to be constitutionally invalid and were to be repealed subject to 'suspended period of 18months'.⁹

Nugent J noted that '[i]t will be apparent that that comprehensive land use regime, when viewed as a whole, calls for interrelated and coordinated action on the part of the various departments and functionaries of a municipality if its objectives are to be achieved. To introduce into that ongoing process a third party with the power to intervene and impose its own decisions that might be inconsistent with the decisions

⁵ Ibid at paragraphs 55 and 56.

⁶ Ibid at paragraph 56.

⁷ Ibid at paragraph 58.

⁸ 2010 (2) SA 554 (SCA).

⁹ Ibid at paragraph 50, Order 2.

and objectives of the municipality is a recipe for chaos. That is what is purportedly authorised by chapters V and VI of the Act'.¹⁰

Nugent J goes on to comment that the limited interpretation of the word 'plan' and 'development' was a wrongful way for the high court to go about its judgment.¹¹

Nugent J states:

'It is clear that the word 'planning', when used in the context of municipal affairs, is commonly understood to refer to the control and regulation of land use, and I have no doubt that it was used in the Constitution with that common usage in mind. The prefix 'municipal' does no more than to confine it to municipal affairs. That construction, which gives meaningful effect to the term, has the effect of leaving in the hands of national and provincial government the authority to legislate in the functional area of 'urban ... development', but reserving to municipalities the authority to micro-manage the use of land for any such development. On that construction the functional area of 'urban development' retains considerable scope for national and provincial legislation. One thinks immediately, for example, of the establishment of financing schemes for development, the creation of bodies to undertake housing schemes or to build urban infrastructure, the setting of development standards to be applied by municipalities, and so on'.¹²

¹⁰ Ibid at paragraph 12

¹¹ Ibid at paragraphs 35 and 40.

¹² Ibid at paragraph 41.

The SCA decision was taken on appeal to the Constitutional Court¹³ where Jafta J agreed with the findings of the SCA in terms of the constitutional validity of chapters 5 and 6 of the DFA. Importantly the Constitutional Court confirmed that ‘[t]he constitutional...together with the different contexts in which the term planning is used, indicate clearly, in my view [Jafta J], that the term has different meanings. The Constitution confers different planning responsibilities on each of the three spheres of government in accordance with what is appropriate to each sphere’.¹⁴ Jafta J goes on to note that ‘[t]he Constitution confers planning on all spheres of government by allocating regional planning and development concurrently to the national and provincial spheres, provincial planning exclusively to the provincial sphere, and executive authority over, and the right to administer municipal planning to the local sphere. The first functional area mentioned also indicates the close link between planning and development. Indeed it is difficult to conceive of any development that can take place without planning’.¹⁵ Jafta J does however note the limitations of these ‘hermetically sealed compartments’¹⁶ but emphasised that they ‘remain distinct from one another’ placing an importance of the prefix of the phrase:

‘This is the position even in respect of functional areas that share the same wording like roads, planning, sport and others. The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to “provincial roads” whereas municipalities have authority over “municipal roads”. The prefix attached to each functional area identifies the sphere to which it belongs and

¹³ 2010 (6) SA 182 (CC).

¹⁴ Ibid at paragraph 53

¹⁵ Ibid at paragraph 54.

¹⁶ Ibid at paragraph 55.

distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of “provincial roads” does not include —municipal roads||. In the same vein, “provincial planning” and “regional planning and development” do not include “municipal planning”.¹⁷

As for the meaning of “municipal planning”, Jafta J notes that ‘...the term is not defined in the Constitution. But “planning” in the context of municipal affairs is a term which 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. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use “planning” in the municipal context, they were aware of its common meaning. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs “planning” in its commonly understood sense. As a result I find that the contested powers form part of “municipal planning”’.¹⁸

With that established, the court then had to decide whether the Constitution allocated the same power to the provinces. In this regard, Jafta J found that it did not, ‘holding that the Constitutional Scheme envisages a degree of autonomy for the municipal sphere, in which municipalities exercise their original constitutional powers free from

¹⁷ Ibid.

¹⁸ Ibid at paragraph 57.

undue interference from the other spheres of government'.¹⁹ Essentially it was noted that the National and Provincial government cannot simply award themselves municipal powers²⁰ and must respect the status, powers and functions of government in the other spheres and must not assume any power or function except those conferred on it in terms of the Constitution (section 41(1)).²¹ It was stressed that it is critical that municipalities are not impeded from exercising their powers and authoritative abilities towards their assigned functional areas as per section 151(4) of the constitution.²² One of their areas was "municipal planning" as per its meaning above, which the court concluded was not assigned to Provinces under 'urban and rural development'.

With regards to the conflicts that arose around the words 'planning' and 'development', Jafta J notes:

'The purposive construction of the schedules requires, in the present context, that a restrictive meaning be ascribed to "development" so as to enable each sphere to exercise its powers without interference by the other spheres. This restrictive approach coheres with the functional scheme of the schedules, which vests specific powers in municipalities'.²³

¹⁹ Glazewski, J and Rumble, O. 'Environmental Law in South Africa'. Chapter 6: Administration and Governance. Looseleaf Service Issue 1, 2013, LexisNexis. At section 6.3.1.

²⁰ 2010 (6) SA 182 (CC). See paragraph 59 of CC.

²¹ Ibid, at paragraph 56.

²² Ibid, at paragraph 58.

²³ Ibid, at paragraph 62.

Ultimately it was decided that the SCA order of constitutional invalidity of the DFA chapters stood as they were inconsistent with section 156 of the Constitution read with Part B of Schedule 4 . A declaration of invalidity was thus ordered, but was however, suspended for 24 months from the date of the order to enable Parliament to correct the defects or enact new legislation.²⁴ The likely course of events as it stands is that the invalid DFA will not be remedied by rather repealed and replaced by the Draft Spatial Planning and Land Use Management Bill, 2011.²⁵

5.3 The Maccsand cases

The question of respective governmental powers was again raised in the Maccsand cases²⁶ which again went the distance to the Constitutional Court. This time around it was a conflict and question of powers between that of the national Department of Mineral Resources and the provincial Western Cape MEC for local government, environmental affairs and planning. The main issue before the Court ‘was whether the granting of a mining right under the nationally administered Mineral and Petroleum Resources Development Act (the MPRDA)²⁷ overrode the need to obtain the requisite

²⁴ Ibid at paragraph 95

²⁵ GN 280 of 2011 *Government Gazette* No 34270 dated 6 May 2011.

²⁶ *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (3) SA 63 (WCC); *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2011 (6) SA 633 (SCA); *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC).

²⁷ Act 28 of 2002.

zoning authorisations under the Western Cape's provincial Land Use Planning Ordinance (the LUPO).²⁸

Once again the meaning of "municipal planning" had to be looked in order to reach the conclusion in the High Court that the competence to regulate mining under the national sphere did not trump local government's functional competence of municipal planning. Thus, it was concluded that authorisations under both the MPRDA as well as the LUPO were necessary.

Maccsand (Pty) took the High Court's decision on appeal to the SCA, but was unsuccessful as the SCA upheld the ruling as it examined the position of municipalities within the structures set out under the constitution. In doing so it quoted from *City of Cape Town & another v Robertson & another*,²⁹ noting that 'a municipality under the present constitutional dispensation is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation' but an organ of State that B 'enjoys original and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits'.³⁰

The SCAs decision regarding LUPO was then taken on appeal to the Constitutional Court by Maccsand (Pty) Ltd. The Constitutional court thus had to essentially examine whether a holder of a mining right or permit granted in terms of the MPRDA

²⁸ Glazewski, J and Rumble, O. 'Environmental Law in South Africa'. Chapter 6: Administration and Governance. Looseleaf Service Issue 1, 2013, LexisNexis. At section 6.3.2.

²⁹ 2005 (2) SA 323 (CC) at para 60

³⁰ *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2011 (6) SA 633 (SCA). At para 22.

can only exercise those rights if the zoning scheme made in terms of the LUPO permits mining on the land in respect of which the mining right or permit was issued. In order to do this, the court considered firstly whether the application of LUPO to land in respect of which mining rights have been granted would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government.³¹ To this end the court found that it would not permit an intrusion and emphasised the fact that the LUPO and the MPRDA served different purposes within the competence of the government spheres 'charged with the responsibility to administer each law'.³² The different purposes were noted as mining under the MPRDA and land-use under LUPO. Jafta J went on to note:

'An overlap between the two functions occurs due to the fact that mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments'.³³

The court found that the meaning of any other 'relevant law'³⁴ was not restricted to mining laws as argued by the applicant, but rather, as the phrase was not defined in the MPRDA, that it should be given its wide meaning as thus included the LUPO as a 'relevant law' to which the grant of the mining right was subject.³⁵ It was also noted by Jafta J, that:

³¹ *Maccsand (Pty) Ltd and another v City of Cape Town and Others* (2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC)). At paragraph 41.

³² *Ibid* at para 43

³³ *Ibid*.

³⁴ MPRDA, s23(6).

³⁵ *Maccsand (Pty) Ltd and another v City of Cape Town and Others* 2012(4) SA 181 (CC); 2012(7) BCLR 690 (CC). At paragraph 45.

‘If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to the land which is the subject matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO’s application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws’.³⁶

Another argument by the applicant that was dismissed derisively by Jafta J, was the finding that mining is subject to compliance with LUPO permitted a local authority to usurp the functions of national government in a manner not contemplated by the Constitution. Here again, Jafta J simply notes that the LUPO and the MPRDA serve different functions at different function levels of government and that:

‘This argument is based on a misinterpretation of the judgment of the Supreme Court of Appeal. That Court did not find that LUPO regulates mining. Instead, it held that the MPRDA and LUPO have different objects and that each did not purport to serve the purpose of the other. The MPRDA’s concern, the Court found, was mining and not municipal planning, hence it held that the two laws operate alongside each other. Because LUPO regulates the use of land and not mining, there is no merit in the assertion that it enables local authorities to usurp the functions of national government. All that LUPO requires is that land must be used for the purpose for which it has been zoned’.³⁷

³⁶ Ibid at paragraph 44.

³⁷ Ibid at paragraph 46.

A further argument raised by Maccsand and the Minister of Mineral Resources brought up issues of cooperative governance. They suggested that allowing local government the power of LUPO authorization in terms of mining authorizations, enabled the local sphere to veto national decisions with respect to mining, an area of exclusive competence for the national sphere as in does not appear in Schedules 4 or 5 of the Constitution. To this Jafta J again responded that the spheres of government do not operate in 'hermetically sealed compartments'³⁸ and that the exercise of powers by different spheres could result in an overlap but that this does not necessarily constitute an intrusion on each other powers but should rather be viewed and integrated and interdisciplinary governing and is in line with what the constitution obliges in terms of cooperative governance i.e. 'to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another'³⁹. Taking this into account Jafta J notes that:

'The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary'.⁴⁰

³⁸ Ibid at paragraph 55.

³⁹ Ibid at paragraph 47.

⁴⁰ Ibid at paragraph 48.

Another argument raised by Maccsand was that because the LUPO requires the landowner to apply for the rezoning of the land in this case, it would never be rezoned due to the fact that it was the City's land who opposed the rezoning, and thus no application would be filed for a rezoning. The court made note of this as a relevant point but advised Maccsand that it could still request the Provincial Government to intervene and have the rezoning effected.⁴¹

One last argument brought before the court by Maccsand and the Minister for Mineral Resources was that the MPRDA and LUPO conflict should be resolved by section 146 of the Constitution. However, the Court pointed out two aspects, firstly that it felt no conflict existed,⁴² and secondly, it correctly noted that section 146 deals with conflicts of legislation falling within a functional area listed in Schedule 4, and since these were not part of that schedule, should not be resolved using section 146.⁴³

This decision is of importance because it provides clarity on the relationship between the MPRDA (national powers) and the LUPO (provincial and local government powers), and thus also provides clarity on the relationships between the MPRDA or other national legislation and other legislation dealing with land use planning. The main point being that a national legislation i.e. the MPRDA cannot trump a provincial or municipal legislation i.e. the LUPO because they are equal, 'relevant laws'. This term 'relevant law' in s 23(6) of the MPRDA has a wide meaning beyond that of

⁴¹ Ibid at paragraph 49.

⁴² Ibid at paragraph 51.

⁴³ Ibid at paragraph 50

mining legislation and includes planning laws such as the LUPO. The decision also places some form of power back in the hands of the landowner as far as consent for prospecting/mining authorizations to rezone the land, although these are subject to municipal and provincial intervention.

5.4 Case study: Moutonshoek, Piketberg Western Cape

5.4.1 Introduction

A similar interdepartmental dispute may be imminent in the current Moutonshoek situation whereby a Mining company (Bongani Minerals) has been awarded a prospecting right for an area of land still zoned as Agricultural land. The land is currently used as productive arable land and is of high importance to the Verlorenvlei (a RAMSAR site), as it acts as a catchment area for the Krom Antonies River, which feeds the vlei with fresh, clean water. In order for the land to be prospected on and ultimately mined, it must be rezoned for that purpose. This has, however, been met with large resistance from residents of the Moutonshoek area.

5.4.2 Regulation applicable to Case study: Moutonshoek.

Bongani minerals (Ltd) applied for, and were awarded a prospecting right by the DMR in terms of the MPRDA sections 16 – 19, and MPRDA regulations 5 – 9. Bongani Minerals was granted a prospecting license/right by the Minister of Mineral Resources on the July 1, 2011 and it is valid for three years. The right is for the properties Piketberg Farm 297 - Portion 1 and Farm Namaquesfontein 76 - Portion 1 and 6. Prospecting operations began in March 2012 but were halted shortly after they began by a Cape High Court order (interim interdict) as the property was not zoned for prospecting but rather for cultivation of crops, animal breeding or the operation of a game farm (Agriculture 1).

This has led Bongani Minerals and the property owners, Johannes and Gesina Coetzee, to now seek a departure of land use in terms in LUPO section 15 as outlined in Chapter 4.

5.4.3 Case study: Moutonshoek in light of the Maccsand and Gauteng Development

Tribunal cases

The situation clearly raises similar issues as the Maccsand and Gauteng Development Tribunal cases and surely will/must be interpreted in a similar light. In this regard, firstly it should be clear that municipal planning is of the utmost relevance here and that the Bergriver municipality is a key component in the dispute. This is clear in the fact that the municipality brought forward the request for the interdict and was successful in the Cape High Court. Secondly, it should be clear that the rezoning is absolutely pertinent and undoubtedly necessary and relevant before any prospecting take place on the land.

This seems to be the case as indeed the interdict has proved. In this regard, the regulatory system in this situation seems to be working, but it is a worry how indeed similar situations repeated end up in the courts. Paterson noted with regard to the Maccsand cases that, even though these cases should perhaps not have reached the Courts, are evidence of ‘the important role [that] the judiciary [has] in holding spheres of government to account where their actions seek to abrade the constitutional authority of other spheres and the ideal of cooperative governance’.⁴⁴ However,

⁴⁴ Paterson, A. The judiciary’s efforts to erode the mining authority’s aversion to cooperative environmental governance. Vol 26, Issue 2 SAPL (2011), 567 - 577.

Paterson also states that ‘perhaps...the judiciary should be more overt in its criticism of the executive as matters of this nature damage public perception of key government structures, create administrative uncertainty and often ultimately prejudice citizens seeking to survive in this increasingly fragile economic climate’. This criticism may be aided by the enactment of the SPLUMBs and the statutory reform they propose i.e. to: ‘provide for a uniform, effective, efficient and integrated regulatory framework for spatial planning, land use and land use management in a manner that promotes the principles of co-operative government and public interest’.⁴⁵

There is however a third issue of concern in the imminent Moutonshoek situation, and that is the fact that Bongani Minerals have applied for a departure of land use as well as their application for a rezoning of the land. The application is also under the LUPO, but must clearly be a complete misinterpretation and/or misuse of the departure. Referring back to chapter 4.5.2.3.1 (LUPO and zoning/rezoning), it was noted that s15 of the LUPO concerning the departure from land use, is concerned with an application by the ‘owner’ for an ‘alteration’ of ‘a particular zone’ and that it is on ‘a temporary basis’. Most pertinently, the phrase ‘a temporary basis’ surely does not fit the profile of a mining venture. Arguably, it may fit the mold of a prospecting venture. But the intention of a prospecting venture is to find and development a mine, which is by no means on a temporary time scale, nor does it have temporary impacts.

⁴⁵ Draft Spatial Planning and Land-Use Management Bill (2011), GG no 34270 2011-05-06 GN 280. s 1.

5.5 Commentary

5.5.1 The 'one-stop shop'

The Minerals and Mining White Paper⁴⁶ notes that the then 'Department of Minerals and Energy (DME)', now the DMR, has a 'special duty'... 'to the needs of stakeholders and transformation within the industry'....within a national functional area that has 'wide impacts throughout the country'...and therefore must 'co-operate with all spheres of government' with accommodation for 'the principle of tripartitism and consultation, which is necessary for open and inclusive governance'.⁴⁷ Public participation is brought into this equation through the mention that this accommodation 'should include the opportunity for other parties and individuals to constructively engage Government and the main stakeholders on matters of common concern.'⁴⁸

These are grand notions indeed, however, the white paper makes special mention of a system it proposes to achieve these notions of cooperative governance and in turn sustainable development; that of the 'one-stop shop'.

It is a form of cooperative governance in that it is described as interdepartmental coordination in terms of a range of matters including 'access to finance and technology',⁴⁹ as well as consultation in terms of EMPs.⁵⁰ Interestingly, the White

⁴⁶ White Paper: A Minerals and Mining Policy for South Africa (1998)

⁴⁷ Ibid

⁴⁸ Ibid.

⁴⁹s1.4.4.2 (v). White Paper: A Minerals and Mining Policy for South Africa (1998).

'Information on all aspects relating to mineral development and exploitation will be made available by the DME by means of a "one-stop shop" approach.'

Paper makes specific reference to the fact that the then DME (now DMR) should ‘...[act] as a lead agent and [liaise] with other departments, provincial authorities and interested and affected parties’⁵¹ during the coordination of the one-stop shop approach.

The vision of the one-stop shop approach is proposed to be handled within a structured DMR that has, amongst others: ‘separate intra-departmental components and mechanisms to handle mineral resource management and the promotion of the industry on the one hand and mineral resource administration and regulation on the other’⁵²; ‘a separate structure, within the regulatory component, to control environmental management in the mining industry’⁵³; a system for ‘the improvement of administrative procedures in respect of the granting of prospecting and mining rights’⁵⁴; and ‘the provision of a cost-effective "one-stop shop" information and advice service to the minerals industry’.⁵⁵

⁵⁰s4.3.1. (vii). White Paper: A Minerals and Mining Policy for South Africa (1998).

‘The interdepartmental consultation required for approval of environmental management programmes should be facilitated and expedited through a "one-stop shop" approach in which the Department of Minerals and Energy acts as a lead agent and liaises with other departments, provincial authorities and interested and affected parties.’

⁵¹ Ibid.

⁵²s6.1.4 (ii)(a). White Paper: A Minerals and Mining Policy for South Africa (1998).

⁵³ s6.1.4 (ii)(b). White Paper: A Minerals and Mining Policy for South Africa (1998).

⁵⁴ s6.1.4 (ii)(d). White Paper: A Minerals and Mining Policy for South Africa (1998).

⁵⁵ s6.1.4 (ii)(e). White Paper: A Minerals and Mining Policy for South Africa (1998).

While the ‘one stop shop’ idea never quite became legislation under the MPRDA, the ethos of the idea seems to have been adopted by the DMR. The idea is indeed still sought after by the DMR. It is the authors opinion that this ethos shines through in the above mentioned Maccsand and Moutonshoek situations, and that this needs to be addressed and done away with for the future functioning of interdepartmental cooperative governance.

5.5.2 Centralization vs decentralization of powers

Following on from the above, it is the authors opinion that planning law and mining law in South Africa seem to be on two different, and indeed opposite, trajectories with regards to power and governance. Mining law seems to want to centralize governance at a national level, while planning law seeks to decentralize governance and distribute power throughout the different sectors of government. Indeed, planning law seeks to emphasize the importance of planning on the coalface i.e. at the local government level which grapple with the day-to-day issues of planning and hence are the best positioned to plan accordingly.

5.6 Summary

This chapter outlines the essential role of local government and municipal planning as interpreted by the SCA and Constitutional Courts. These found that the Gauteng Development Tribunal and Maccsand cases show that municipal and provincial planning laws and institutions are both necessary and entirely ‘relevant’, particularly in the minerals industry, which is regulated as a national competency. This means that

cooperative governance must be exercised for the proper functioning of interdepartmental disciplines. In this regard, almost all activities involving land-use require interdepartmental cooperation, in particular activities within the minerals industry. Many institutions are available for the proper functioning of cooperative governance in the context of the Constitution, and legislation which creates unnecessary overlaps of competency and being found to be invalid and are being rectified. This is evident in the Gauteng Development Tribunal case with chapters V and VI of the DFA being declared constitutionally invalid.

Despite these groundbreaking and clarifying rulings, conflicts will no doubt continue to occur. The imminent litigation occurring in the Moutonshoek area is proof of this; where similar scenarios are unfolding with added complexities such as the incorrect application of a departure from land-use. It is proposed that conflicts between land-use planning law and mining law is occurring due to the inertial ethos of the DMR proposed model of the 'one stop shop' and also a due to conflicting trajectory paths where governance is concerned. These paths see planning law on a trajectory seeking to decentralize governance amongst the different structures of government while mining law seeks to centralize its governance at the national level within an insulated 'one stop shop'.

Chapter 6: Conclusion

6.1 Introduction

This thesis has shown that planning law is a multi-dimensional area and involves many, if not all, departments of government. In particular, the above survey has outlined the role that planning law plays in the minerals sector and its interaction with mining laws and institutions. This is as a result of a number of truisms in the planning sector highlighted by Van Wyk as follows.¹

- (i) Land plays the main character in the planning law play;
- (ii) South Africa's constitutional, historical and political context is indelibly imprinted on the face of planning law;
- (iii) The foundation of planning law comprises the creation of a spatial planning framework, the management of land use and the management of land development;
- (iv) The purpose of planning law is to be developmentally-oriented and sustainable to ensure the health, safety and welfare of society as a whole;
- (v) Planning law is multi-faceted and intertwined with aspects of administrative law, constitutional property law and environmental law. Land reform, housing, local government, mining and transport issues are intimately tied up with planning law.

6.2 Cooperative governance and the Constitution

It is because of the above complexities that cooperative governance should be implemented with diligence. The new constitutional system of government, with a

¹ Van Wyk, J. Planning Law. Juta (2012). At Chapter 13.1

non-hierarchical structure of government, makes it essential that the three spheres of government co-operate with each other both horizontally and vertically under the principles of cooperative governance set out in chapter 3 of the Constitution.²

In particular, in the current context, cooperative governance needs to be exercised between the National Department of Mineral Resources and the various levels of government that deal with planning law. Of particular importance is the role that local and provincial government plays in planning law under the new constitution. Local government is at the coalface of planning and needs to recognise and take responsibility for its constitutional obligations in that role; while provincial government plays more of an oversight role. In particular national Departments must also recognise and respect that role and work with local government on a level playing field to achieve cooperative governance and sustainable mineral practices. There are a range of national and provincial statutes and institutions that provide the frameworks for this to be successful reality as seen in chapters 2, 3 and 4.

6.3 Mining law

Despite the range of legislation and institutions for cooperative government, conflicts arise due a number of other factors. In particular, within the minerals sector, all mineral related applications have historically been insulated within the Department of Mineral Resources (DMR). This means that historically applications were only really subject to mining law, the most recent of which is the MPRDA. These historical inertias have even found indirect influence in present mining law, which sees environmental programmes and plans subject to the MPRDA and not the NEMA EIA

² s41, RSA Constitution

regulations. It is true that the NEMA is noted by the MPRDA but only in terms of its principles rather than its core environmental regulations and processes. Arguably the DMR seek to centralize regulation at a national level of competence and within one department. This is in contrast to the agenda of planning regulation in South Africa, which seek to decentralise regulation and empower provincial and municipal government, as seen in chapter 4. Historically the pattern seems to be one of mining law dominance but recent case law, as seen in chapter 5, may have opened gaps for an increasing involvement of the environmental departments in accordance with the Constitutional notions of cooperative governance.

6.4 Planning law

Planning law is a highly complex and multi-aspectual area of law. It is an area of law which carries with it heavy burdens left by colonial and Apartheid inertias. These inertias have found many niches to settle into with this multi-dimensional area of law and hence planning law has many areas in need of legislative remedy. With the advent of a Constitutional democracy in 1994, new legislation sought to address and remedy past injustices and provide for a fair and efficient future of planning law. The new legislation has been accompanied by various influential court rulings regarding the minerals sector of which the *Save the Vaal* case³ is highly noteworthy; in particular with its stance on public participation and a right to be heard ('audi alteram partem').

³ Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA).

Amongst other legislation, the Development Facilitation Act (DFA)⁴ was seen to attempt to implement post-1994 change. More recently the Spatial Planning Land Use Management Bill (SPLUMB)⁵ looks to replace the DFA, and looks to consolidate and streamline a highly fragmented system. This is of course a national legislation that will need to filter into the provincial and local levels of government. Provincial planning legislation may be an area where we see much change in the near future. In particular Gauteng and the Western Cape which both had development Acts which did not come in to effect⁶ and hence still operate under pre-1994 legislation. At first glance, provincial legislation between Gauteng and the Western Cape appears quite different with a number of different terminologies, institutions and application/procedural processes. Yet closer examination shows many similarities in terms of its zoning and rezoning processes and laws. What is quite clear is that landowners still have a large amount of control in maintaining existing zoning schemes and rezoning requires their consent. Municipalities have a major role to play in planning and are heavily involved in the day-to-day workings of procedural maintenance and conflict resolution. The provincial and national government have major influence in framework plans and spatial development plans, but the intrinsic workings of planning and land-use management lies in the hands of local government and its zoning schemes and Integrated Development Plans (IDPs). With a firm Constitutional and legislative base, a large degree of planning law (land use management and land development management) 'depends on the decisions taken by

⁴ Act 67 of 1995

⁵ Spatial Planning and Land Use Management Bill, 2012 N 357 in Government Gazette No.35293 of 2012.

⁶ This refers to the Gauteng Planning and Development Act (No. 3 of 2003) and the Western Cape Planning and Development Act (No.7 of 1999)

administrative bodies'.⁷ Van Wyk (2012) states that '[t]he decision-making process must be accountable, and administrative action must be lawful, reasonable and procedurally fair so that the recipients of planning decisions, whether they are decisions on rezoning, the removal of restrictive conditions or the approval of building plans, will know that they are not taken in an *ad hoc* way, and, if they are, that there is recourse to suitable remedies'.⁸

6.5 Challenges of cooperative governance

A number of significant rulings have come from the Supreme Court of Appeal (SCA) and the Constitutional Court in recent years regarding planning law and mining law within the context of cooperative governance as seen in chapter 5. A central theme within these decisions is the emphasis of the roles of provincial and local government. In particular, the Gauteng Development Tribunal and Maccsand cases show that municipal and provincial planning laws and institutions are both necessary and entirely 'relevant', particularly in the minerals industry, which is regulated as a national competency. This means that cooperative governance must be exercised for the proper functioning of interdepartmental disciplines. In this regard, almost all activities involving land-use require interdepartmental cooperation, in particular activities within the minerals industry. Many institutions are available for the proper functioning of cooperative governance in the context of the Constitution, and legislation which creates unnecessary overlaps of competency and being found to be invalid and are being rectified. This is evident in the Gauteng Development Tribunal

⁷ Van Wyk, J. Planning Law. Juta (2012). Chapter 13.3

⁸ Ibid.

case with chapters V and VI of the DFA being declared constitutionally invalid as outlined in chapter 5.

Despite these groundbreaking and clarifying rulings, conflicts will no doubt continue to occur. The imminent litigation occurring in the Moutonshoek area is proof of this; where similar scenarios are unfolding with added complexities such as the incorrect application of a departure from land-use. It is proposed that conflicts between land-use planning law and mining law is occurring due to the inertial ethos of the DMR proposed model of the 'one stop shop' and also a due to conflicting trajectory paths where governance is concerned. These paths see planning law on a trajectory seeking to decentralize governance amongst the different structures of government while mining law seeks to centralize its governance at the national level within an insulated 'one stop shop'.

Cooperative governance is at its core the management of compromises between departments, institutions, developments, activities, and/or essentially people. It has firm groundings within Constitutional principles and needs to be observed and worked at, at all times. The only truly sustainable method to conduct business is within these parameters. This could not be more true than in the minerals sector of South Africa which involves a multitude of different disciplines and is a fundamental component of the country's economy. Historical inertias need to be addressed and remedied and replaced by cooperative governance plans and programmes involving all necessary institutions. Sustainable business within the minerals sector cannot be achieved if all involved entities are pulling in different directions. Neither can it work with an omnipotent dominant entity dictating a direction and pulling all other entities

in its chosen direction. The overhaul of planning law post-1994, and recent SCA and Constitutional court rulings have interpreted and discussed the important role of the different entities of government. This displays an understanding that while national government provides important frameworks and standards; provincial and municipal government play the dominant role in implementation. It is therefore proposed that the centralized (“one-stop shop”), national form of governance sought by the DMR cannot be the best possible method to attain sustainable mineral development in South Africa. A proper use of decentralized cooperative governance with a strong involvement of both provincial and municipal government is instead recommended.

Chapter 7: Bibliography:

A. Table of abbreviations:

- AMD – Acis Mine Drainage
- CC – Constitutional Court
- DEA - Department of Environment Affairs
- DFA - Development Facilitation Act 67 of 1995
- DME - Department of Minerals and Energy (Now the DMR)
- DMR - Department of Mineral Resources
- EIA – Environment Impact Assessment
- EIPs - environmental implementation plans
- EMPs - environmental management plans
- FOSAD - The Forum of South African Directors-General (The Budget Council and Local Government Budget Forum and several inter-ministerial committees of both national and provincial sphere set out under the the Intergovernmental Relations Framework Act (Act 13 of 2005)
- GCBC - Greater Cederberg Biodiversity Corridor
- GDP - Gross Domestic Product
- IDP - Integrated Development Planning
- LDOs - land development objectives
- LUPO - Land Use Planning Ordinance (Ordinance 15 of 1985)
- MINMECs - inter-ministerial committees comprising national Ministers and members of the provincial Executive Committees (MECs)
- MINTECs - ‘consisting of the national Director-General of the Department of Environment Affairs (the DEA) and the nine Directors of the provincial nature conservation departments’.
- MPRDA - Minerals and Petroleum Resources Development Act (Act 28 of 2002)
- MSA - Local Government: Municipal Systems Act 32 of 2000.
- NCOP - The National Council of Provinces
- NEM:AQA - National Environmental Management: Air Qualities Act 39 of 2004 (which is a SEMA)

- NEM:PA - National Environmental Management: Protected Areas Act 57 of 2003 (A SEMA)
- NEMA - National Environmental Management Act (107 of 1998)
- NEMA - National Environmental Management Act 107 of 1998
- NGOs - Non-Governmental Organisations
- PIF - Premier's Intergovernmental Forum
- RAMSAR - 1971 Ramsar Convention (The Convention on Wetlands of International Importance, especially Waterfowl Habitat)
- RMDEC - Regional Mining Development and Environmental Committee
- RORA - Removal of Restrictions Act 84 of 1967
- SCA – Supreme Court of Appeal
- SDFs - spatial development frameworks
- SEMAs - Sectoral Environmental Management Acts under NEMA laws
- SPLUMB -Spatial Planning Land Use Management Bill

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