



IMEL

INSTITUTE OF MARINE
& ENVIRONMENTAL LAW

LAND USE PLANNING MANDATES

A quest for legal certainty

By

Jonathan Eugene van der Westhuizen (VWSJON002)

Submitted to: **The University Of Cape Town**

Date of submission: 17 February 2014

Supervisor: Professor Alexander Paterson
Institute of Marine and Environmental Law

Research thesis presented for the approval of Senate in fulfilment of part of the requirements for the Masters of Law in approved courses and a minor thesis. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Masters of Law thesis, including those relating to length and plagiarism, as contained in the rules of this University, and that this thesis conforms to those regulations.

Word Count: 24316

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Abstract

This thesis focuses on the lack of legal certainty with regard to the exercise of planning law mandates of the respective spheres of government in South Africa. An attempt is made to uncover the reasons for the lack of legal certainty by looking at the pre-1994 planning regime and the regulatory framework inherited by the new dispensation.

Thereafter, the subsequent Constitutional and legislative developments are outlined and areas of confusion are identified. Reasons are given for why co-operative governance has failed to allay such confusion. Lastly, the subsequent attempts by the judiciary and the legislature are analysed to see whether they have successfully provided for the legal certainty needed.

Table of Contents

1	Chapter 1: Introduction	5
2	Chapter 2: Planning mandates in the pre-constitutional era	12
2.1	Pre- 1910.....	12
2.2	A call for new national policy.....	13
2.3	Growing fragmentation under the apartheid regime: 1950-1976	14
2.4	Democracy- an era of reconstruction.....	18
2.5	Conclusion	19
3	Chapter 3: planning law in the post-1996 constitutional era and its planning regulatory framework.....	22
3.1	The legislative and administrative autonomy of each sphere	24
3.1.1	National government’s administrative and legislative functions	24
3.1.2	Provincial government’s legislative and administrative functions	25
3.1.3	Local government’s legislative and administrative functions	26
3.2	The resulting legal framework governing land-use planning	28
3.2.1	Planning legislation	28
3.2.2	Planning tools- strategic planning.....	30
3.2.3	The reshaping of jurisdictional boundaries and resulting legislative overlapping	31
3.3	Conclusion	33
4	Chapter 4: Constitutional tools for promoting certainty and cooperation	36
4.1	Monitoring, support and intervention.....	36
4.1.1	Monitoring of local government.....	37
4.1.2	Support.....	38
4.1.3	Intervention	39
4.2	Constitutional conflict resolution	41
4.2.1	Schedule 4 conflicts	41
4.2.2	Schedule 5 conflicts	43
4.2.3	Intervention by courts- conflicts that cannot be resolved	43
4.3	Co-operative governance (interdependence).....	44
4.3.1	Unpacking the confines of co-operative governance.....	45
4.3.2	Function of co-operative governance	47
4.3.3	Constitutional co-operative governance provisions	48
4.4	Co-operative non-statutory mechanisms and the Intergovernmental Relations Framework Act.....	50
4.5	Conclusion	55
5	Chapter 5: the role of the judiciary in clarifying planning mandates ..	58
5.1	Defining the bounds of “municipal planning”	60
5.1.1	The unravelling of municipal planning by the courts.....	60
5.1.2	Retrospective and national implications of the Maccsand Judgements’.....	66
5.2	Defining the bounds of “provincial planning”, “regional planning and development”, and “urban and rural development”	68
5.3	Clarifying the planning domain of statutory planning authorities and local planning authorities	71
5.4	Resolving conflicts between environmental mandates and planning mandates	73
5.4.1	Local authorities legislative powers over the environmental sphere ..	75

5.5	Drawing a line between “provincial planning mandates” and “local planning mandates”	77
5.5.1	Intervention and supervision by provincial government in local government affairs.....	77
5.5.2	Extra-municipal issues	84
5.5.3	Provincial government basing decisions on “municipal planning”- a false dichotomy.....	85
5.6	Providing clarity on the form, nature and status of planning tools	90
5.7	Conclusions	93
6	Chapter 6: Legislative attempt at legal certainty- SPLUMA	95
6.1	Introduction.....	95
6.2	The ambit of SPLUMA.....	95
6.3	Planning functions of the spheres of government	96
6.4	Development principles, norms and standards.....	97
6.5	Spatial planning	98
6.6	Intergovernmental support.....	99
6.6.1	National government obligations.....	99
6.6.2	Provincial government obligations.....	100
6.6.3	Municipal differentiation.....	101
6.7	Land use management	101
6.8	Land development	103
6.8.1	Municipal planning tribunal as the appeal authorities	103
6.8.2	Provincial legislative appeal process for local government.....	104
6.8.3	Land development applications that affect national interests.....	105
6.9	Conclusion	107
7.	Chapter 7: Conclusion.....	109
8	Bibliography.....	111

1 Chapter 1: Introduction

The advent of the Constitution of the Republic of South Africa, 1996 (the Constitution) sparked the birth of a new era in and a unified commitment to change. Yet the planning law¹ regime, which was in desperate need of change, received little attention. The reason behind the regime being so recalcitrant to change cannot be attributed to a single factor.²

Nevertheless, the overriding factor is certainly fragmentation, which permeates through the entire planning law regime.³ The reason for such fragmentation includes the fact that a fragmented and cumbersome planning law regime was inherited from the apartheid government.⁴

Numerous attempts have been made at reworking the land-use planning law regime to alleviate this fragmentation, albeit unsuccessfully. However, all spheres of government are now in agreement that failure is no longer an option. What brought about this unanimity was the Constitutional Court declaring chapters V and VI of the Development Facilitation Act 67 of 1995 (DFA) unconstitutional.⁵ The DFA was promulgated to serve as a quick fix to

¹ "The designation 'planning law' has been sanctioned by the Constitutional Court; it is the most uncomplicated term to use; it derives from English law, which is part of South Africa's planning heritage; and it is wide enough to accommodate the strong, ever-increasing social element which manifests itself in the principles and purposes of planning law, which is to improve the quality of life of those affected by planning." (Van Wyk J *Planning Law* 2 ed (2012) Juta Cape Town 14).

² For a detailed discussion on the windows of opportunity for change within the land use planning regime and an evaluation of why success was so difficult to attain see Berrisford S "Unravelling Apartheid Spatial Planning Legislation in South Africa: A Case Study" 2011 (22:3) *Urban Forum* 247-263.

³ The Court has held that "the statutory framework regulating town planning and building regulations in its present form is fragmented and cumbersome in the extreme ... It requires a vast bureaucratic machine to administer all these provisions ... The system also frequently ... gives rise to conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels [sic] of local and provincial government. It would be of great assistance to everyone involved in the process... if the administrative machinery required to regulate these matters could be consolidated, simplified and streamlined." (*Camps Bay Ratepayers and Residents Association and Others v The Minister of Planning, Culture and Administration (Western Cape) and Others* 2001 4 SA 301 (CPD)).

⁴ The inheritance of a fragmented planning law regime will be showcased in greater detail in Chapter 3.

⁵ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).

the major problem in South Africa, namely the urgent need for development.⁶ Accordingly, with essential chapters of the DFA being declared unconstitutional the raw fragmentation in the planning regime was revealed for all to see. The fragmentation between the respective spheres of government over planning mandates was showcased. Due to the inability, or unwillingness, to resolve these land-use planning mandate conflicts, various land-use planning authorities looked to the courts for recourse. This resulted in a plethora of fresh jurisprudence.⁷ Moreover, this occasioned the legislature being charged with the duty to provide urgent remedy to the situation. The proposed remedy is the enactment of a national planning framework, which has come in the form of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

Planning law is a multidisciplinary area of the law and often leans quite heavily on other disciplines such as environmental law.⁸ It is therefore also an important field of law when it comes to the sustainable development of any country. This statement becomes logical when you realise that all development impacts upon land and therefore through effective land-use, land-use management and land-use planning, government can ensure that

⁶ The DFA will be discussed in greater detail in chapter 4.

⁷ These include, grouped by case and note by date, the following: *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 4 SA 572 (W); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC); *Swartland Municipality v Louw* 2010 5 SA 314 (WCC); *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 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 103/11 SA 7 (CC); *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* 2011 4 All SA 270 (WCC); *Lagoon bay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* 2013 13 SA 320/12 (SCA); *The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2013 39 SA 41/13 (CC); *Shelfplett 47(Pty) Ltd v MEC for Environmental Affairs and Development Planning and Another* 2012 3 SA 441 (WCC); *Clairison's CC v the MEC for Local Government Environmental Affairs and Development Planning and Bitou Municipality* 2012 3 SA 128 (WCC); *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and Another* 10629/2012 2013 10629 SA 2012 (KZDHC); *The Macassar Land Claims Committee v Maccsand CC and Others* 2013 37 (LCC); *RA Le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP); and *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others*; *City of Cape Town v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others* (6227/2013; 23061/2009) 2013 ZAWCHC 112; 2013 (6) SA 113 (WCC).

⁸ Van Wyk *Planning Law* 10.

all development is sustainable. Land-use, land-use management and land-use planning are in fact the three subcomponents of planning law and by expanding upon each the link between planning law and sustainability becomes even more lucid. Land use can best be described as “referring to the different activities (for example commercial or residential) which owners and occupiers of land conduct on their individual plots, as well as the densities (for example, height, coverage) appropriate to those plots.”⁹ Land-use management on the other hand refers to “government activity which seeks to influence or control change in the ways in which individuals use their land in including maximising benefits and minimising negative impacts”.¹⁰ Lastly, planning can be summed up as “the area of law which provides for the creation, implementation and management of a sustainable planning process to regulate land use, with the purpose of ensuring the health, safety and welfare of society as a whole and taking into account environmental factors”.¹¹

Accordingly, the planning law ethos aligns perfectly with the three pillars of sustainability, namely: economic development; societal improvement; and protection of the environment.¹² The concept of sustainable development has been a slippery one to define, albeit the many attempts to do so.¹³ Nevertheless, the definite link between sustainable development and planning cannot be denied. An effective planning regime therefore can be viewed as instrumental to achieving sustainable development throughout South Africa.¹⁴

⁹ Van Wyk *Planning Law* 5.

¹⁰ Van Wyk *Planning Law* 5.

¹¹ Van Wyk *Planning Law* 5.

¹² The link between the environment and development was established at the World Conference on the Human Environment, Stockholm, Sweden (1972).

¹³ For example see the Brundtland Report (1987); the Rio Deceleration (1992) and the Johannesburg Declaration (2002).

¹⁴ For a more detailed discussion of the concept of sustainable development see FERIS, LA “The role of good environmental governance in the sustainable development of South Africa” 2010 (13:1) *PER / PELJ Chapter 3*.

In light of the above, the benefits of having a coherent, integrated and holistic planning regime are clear. Unfortunately, the existence of a fragmented planning law regime in South Africa has negatively impacted upon many areas, for example:¹⁵

- (a) Economically: it impedes investment in land development and fails to establish sufficient certainty in the land market;
- (b) Spatially: it fails to address the segregated and unequal spatial patterns inherited from apartheid; and
- (c) Environmentally: it does not balance the country's socio-economic needs with those of environmental conservation.

In practice the inheritance of a fragmented land-use planning regime rendered many challenges to government when faced with "rapid and unprecedented urbanisation"¹⁶ which was sparked by the collapse of the apartheid regime. The DFA was promulgated, as mentioned above, as a response to this but it was only meant to be a temporary fix.

Nevertheless, despite the difficulties mentioned above, land-use planning in South Africa did develop in line with international trends as it was recognised that planning may impact upon more than one province or municipality. Accordingly, it was acknowledged that the planning regime, which in South Africa traditionally focussed on urban centres, has a key role to play throughout contemporary South Africa. Therefore all three spheres of government are involved in the planning process in their respective capacities.¹⁷

Naturally, because all spheres of government are role players in the planning regime it is of paramount importance that the planning mandates of each

¹⁵ S 38 of the Spatial Planning; Land Use Management Bill 14B of 2012.

¹⁶ Van Wyk *Planning Law* 457; Pienaar 2002 *SAPL* 343.

¹⁷ This will become evident through the unpacking of Schedule 4 and 5 of the Constitution in Chapter 3 below.

sphere are clearly understood by all stakeholders. The Constitution sets out the respective planning mandates in Schedules 4 and 5. Nevertheless, as will be depicted in this thesis, the mandates are by no means clear-cut, which does not provide for legal certainty.

The lack of legal certainty in this regard has been so problematic that it has rendered the many co-operative governance mechanisms ineffective.¹⁸ Without these co-operative governance mechanisms being utilized by the spheres of government and their line departments it does not come as a surprise that a plethora of matters have gone to court.

The aim of this thesis is to provide insight into the fragmented nature and the associated challenges of the South African planning regime with particular focus on the planning mandates of the respective spheres of government. The uncertainties regarding these mandates will be pin-pointed and unpacked.

After establishing the above foundation, the research question underlying this thesis will be answered, namely: has the latest intervention by both the judiciary and the legislature potentially provided for legal certainty on the land-use planning mandates of the respective spheres of government?

This structure of this thesis will be as follows. Chapter 2 seeks to outline the planning regime which existed prior to 1994. Particular emphasis will be placed on the governance aspects of this regime, namely which laws were administered by which authorities. The purpose of this chapter is to illustrate the governance challenges which existed in this era and which were subsequently inherited by the post-1994 era.

¹⁸ See Chapter 4 below for a discussion on the challenges and failings of co-operative governance.

Chapter 3 focuses on the post-1994 constitutional era and its planning regulatory framework. This will involve a discussion on the competences of national, provincial and local government, as per the Constitution, to promulgate and administer planning laws. This will be achieved by unpacking Schedules 4 and 5 and other relevant provisions of the Constitution. This exercise will show that the Constitution has catered for the spheres of government to be “distinctive, interrelated, and interdependent”. The two former concepts will be defined and the resulting overlaps and uncertainty will be identified. In addition, the regulatory framework within which planning authorities have to operate will also be discussed. This will outline the structure of the resultant planning laws and tools, with a view to illustrating the complexities, conflicts and overlaps inherent in the scheme. Moreover, this discussion will reflect on the associated complexities of having a host of old-order-legislation operating alongside post-1996 legislation and the consequential need for a national law to provide for a more holistic and integrated approach to planning.

Chapter 4 will expand on the later principle mentioned above, namely “interdependent”. Essentially this concept encapsulates co-operative governance amongst the various spheres of governance. Accordingly, this will entail a breakdown of what constitutes co-operative governance, the theoretical benefits thereof, and the statutory and non-statutory co-operative governance mechanisms. The aim of this chapter is to attempt to provide an explanation for why the numerous attempts at providing for co-operative governance have not succeeded in preventing matters dealing with planning mandates from going to court.

Chapter 5 will focus on the latest jurisprudence and attempts by the courts to provide legal certainty on the planning mandates of the respective spheres of government.

A strong message that has been made by the judiciary is that the planning law regime is crying out for legislative intervention to provide for a more “uniform, effective, efficient and integrated regulatory framework”.¹⁹ In response the legislature promulgated the SPLUMA. The extent to which the SPLUMA clarifies the respective planning mandates of the three spheres of government is considered in chapter 6.

After having set the foundation for understanding the dynamics of the planning law regime, the failings of co-operative governance and having expanded upon the latest attempts by the legislature and judiciary to provide legal certainty, chapter 7 will provide a conclusion on whether South Africa is moving towards promoting greater legal certainty in the country’s planning regime.

¹⁹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2012 2 SA 554 (SCA) para 33.

2 Chapter 2: Planning mandates in the pre-constitutional era

The Chapter seeks to outline the planning regime which existed prior to 1994. Particular emphasis will be placed on the planning mandates bestowed on government, more specifically, which laws were administered by which authorities. The purpose of this chapter is to not only provide an indication of the pre-1994 planning mandates but also to depict the system of governance that existed during this era. The post-1994 planning regime can therefore be juxtaposed against the above in order to showcase the changes that have been made in the constitutional era.

2.1 Pre- 1910

Before South Africa became a union in 1910, the country consisted of the Cape Colony and Natal, which were governed by the British, and the two independent *boer* republics- Orange Free State and Transvaal.

Each of these provinces promulgated legislation to govern planning in their respective jurisdictions. This began with the enactment of the Townships and Town Planning Ordinance²⁰ in the Transvaal.²¹ The Transvaal Ordinance made provision for the preparation by municipalities of schemes controlling land use, density, building size and position.²² This Ordinance was followed by similar Ordinances in the Cape²³, Natal²⁴ and the Orange Free State²⁵. Each of these laws was modelled according to the British Town Planning Act of 1925 and therefore contained tools such as schemes.²⁶ Moreover, there

²⁰ Ordinance 11 of 1931.

²¹ Kihato *Integrating planning and environmental issues through the law in South Africa* 25.

²² Kihato *Integrating planning and environmental issues through the law in South Africa* 26.

²³ Township Ordinance 33 of 1934 which was later replaced by the by the Land Use Planning Ordinance 15 of 1986.

²⁴ Private Townships and Town Planning Ordinance 10 of 1939 re-enacted by the Town Planning Ordinance 27 of 1949, and replaced by the Natal Land Use Planning and Development Act 9 of 2008.

²⁵ Township Ordinance 20 of 1947, replaced by the Townships Ordinance 9 of 1969, which is still applicable in the Free State.

²⁶ Kihato *Integrating planning and environmental issues through the law in South Africa* 26 (footnote omitted).

were similarities with the United States of America, especially in regard to the objects and purpose of spatial planning and the manner in which land use zoning law was conceptualised.²⁷

Developments at national level came in the form of the Slums Act of 1934 which allowed greater powers to local authorities to destroy existing areas within their jurisdictions and re-plan them.²⁸

It was a positive step for the planning regime to have the above Provincial Planning Ordinances of the four provinces governing physical planning and land use regulation. However, the systems provided for by the provincial Ordinances did not apply to the “native reserves”/ “controlled areas” created by the 1913 Land Act.²⁹ These “native reserves”³⁰ were even further extended under the Development Trust Land Act 18 of 1936 to include the so-called “released areas.”³¹ This led to geographical fragmentation in the application of the planning laws in South Africa.

2.2 A call for new national policy

The Social and Economic Planning Council (SEPC) compiled a report which recommended the establishment of a national department of planning and for the adoption of regional planning and town planning initiatives.³²

However, with growing hostility against the thought of central economic planning, national government hesitated to establish a national department of

²⁷ Kihato *Integrating planning and environmental issues through the law in South Africa* 26 (footnote omitted).

²⁸ Mabin & Smith 1997 *Planning Perspectives* 202.

²⁹ Todes, Sim & Sutherland 2009 “The Relationship between Planning and Environmental Management in South Africa: The Case of KwaZulu-Natal, *Planning Practice & Research*” (24:4) 411-433, DOI 417.

³⁰ “The Reserves were consolidated into nine ‘independent’ or ‘self-governing’ ‘homelands’ from the 1960s, while African Group Areas within the four provinces were managed under a different legal and administrative system...” (Todes et al 2009 DOI 417).

³¹ Van Wyk *Planning law* 43; the 1936 Land Act was bolstered by the Black Administration Act 38 of 1927 which produced regulations and proclamations for the administrative control of land, land tenure in the general use of land that took place on landing areas demarcated by the Land Acts (Van Wyk *Planning Law* 43-44; also see generally *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd* 2001 (1) SA 500 (CC)).

³² Mabin & Smith 1997 *Planning Perspectives* 205.

planning.³³ Although national government did establish two new planning agencies, the Land Tenure Advisory Board's (LTAB's) initial powers were limited to Indian segregation. The Natural Resources Development Council (NRDC) was established in October 1947 as a regional planning body with potentially broad planning powers.³⁴ The NRDC was the first regional planning body established in the country and was able to "co-ordinate the activities of other planning bodies, but also, in 'controlled areas' such as the three goldfields regions, no new urban development could take place without its approval."³⁵ Therefore, the NRDC was in a position to initiate planning for the general allocation of land uses in those regions.³⁶

However, the limitation of the NRDCs's powers to only those controlled areas meant that "it offered no new proactive plans for existing metropolitan areas, let alone small towns."³⁷ In addition, from the urban local authorities' perspective, "difficult problems were made no more tractable by the existence of the NRDC, LTAB and Native Affairs bureaucracies."³⁸

2.3 Growing fragmentation under the apartheid regime: 1950-1976

When the National Party came into power in May 1948 and with it came the promulgation of the Group Areas Act.³⁹ The Act provided for certain "group areas" for Africans and prohibited a member of one group to reside in a group area meant for another group. Finally, to entrench the permanence of the above separation, the Promotion of the Bantu Self-government Act⁴⁰ was promulgated which set aside areas that would later become the so called "independent homelands".

The NRDC staff:

³³ Mabin & Smith 1997 *Planning Perspectives* 205.

³⁴ Mabin & Smith 1997 *Planning Perspectives* 205.

³⁵ Mabin & Smith 1997 *Planning Perspectives* 205.

³⁶ Mabin & Smith 1997 *Planning Perspectives* 205.

³⁷ Mabin & Smith 1997 *Planning Perspectives* 205.

³⁸ Mabin & Smith 1997 *Planning Perspectives* 205.

³⁹ Act 41 of 1950.

⁴⁰ Act 46 of 1959.

“found themselves enmeshed in the tasks of planning racial restructuring of the cities, for example through appointments to the Mentz Committee of the Department of Native Affairs (which planned the locations of new African townships for the Pretoria-Witwatersrand-Vereeniging area); and in innumerable ‘subsidiary planning committees’ charged with the racial zoning of such areas as Durban, Pietermaritzburg and the East Rand as well as the new ‘controlled area’ towns like Welkom, Westonaria and.”⁴¹

Therefore, it was held that the NDRC became the “key national planning agency, the imperfect culmination of the wartime proposals for new agencies to carry forward the reconstruction of urban South Africa.”⁴²

However, there were still large ‘black urban areas’ within white South Africa where blacks were living. These urban areas, more commonly known as townships, were regulated by the Proclamation R293 of 1962,⁴³ which contained detailed provisions for the establishment, management and regulation of informal townships and the for the establishment of local government in these areas. The adoption of the Group Areas Act 36 of 1966 ensured that other non-European residents residing in these urban areas did not manage to escape the ferocity of these relocation programmes. This Act regulated the acquisition, alienation and occupation of land for whites, colours and Indians and resulted in the mass removals from District 6 in Cape Town and Sophiatown in Johannesburg, which had since become ‘white areas’.⁴⁴

As a result of Apartheid the country also saw the growth of new urban areas known as “bantustans”.⁴⁵ Urban planning for these areas “was largely

⁴¹ Mabin & Smith 1997 *Planning Perspectives* 206 (footnote omitted).

⁴² Mabin & Smith 1997 *Planning Perspectives* 206.

⁴³ Regulation 21 of the Regulations for the Administration and Control of Townships in Black Areas in terms of the Black Administration Act 18 of 1936.

conducted by central authorities in Pretoria and their consultants, and to a lesser extent by tiny bantustan bureaucracies and their generally much more powerful consultants.”⁴⁶

Accordingly, two distinct areas of planning arose due to the introduction of racial segregation into the planning regime. One area involved the planning of white areas, which was governed by local government authorities. The other area involved the planning for ‘black areas’, which was governed now by national and regional government. However, in the fifties and sixties the management of black informal urban settlements remained the responsibility of local government.⁴⁷

The increasingly fragmenting planning regime started to result in friction between local and national government. The national government reacted by giving itself further planning powers. An example was the national government’s move “to bring all urban African townships under the control of central government by establishing ‘Bantu Affairs Administration Boards’ in the early seventies.”⁴⁸ National government also established the Department of Community Development, which was responsible from the early sixties for planning within many coloured, Indian and white group areas.⁴⁹

Moreover, “similar tendencies towards centralization were evident also in measures to control the location of industry (the 1967 Physical Planning Act), the centralization of broad planning at metropolitan and regional scales in the early seventies (‘Guide Planning’), and the establishment of the machinery for regional and national planning.”⁵⁰ The NDRC was succeeded by a National Department of Planning in the mid-sixties and it “absorbed the planning functions of both the Group Areas Board (successor to the LTAB)

⁴⁶ Mabin & Smith 1997 *Planning Perspectives* 208.

⁴⁷ Mabin & Smith 1997 *Planning Perspectives* 208.

⁴⁸ Mabin & Smith 1997 *Planning Perspectives* 208.

⁴⁹ Mabin & Smith 1997 *Planning Perspectives* 209.

⁵⁰ Mabin & Smith 1997 *Planning Perspectives* 209.

and the NRDC".⁵¹ This department made further in-roads into the planning powers of local government in the cities by "establishing 'central guide plan committees' for metropolitan areas ".⁵² The guide plans published by these committees became "potentially statutory instruments, to which local authority plans had to conform, after 1975."⁵³

The integration of planning within the broader schemes of apartheid, meant that planning became a "sub-set of laws that included native administration, urban influx control, black labour, housing, land tenure and ownership, liquor licensing and family laws."⁵⁴ All these laws were driven by the apartheid regimes idea of social engineering. The rural black settlements carved into a mix of legislative creations such as the: "South African Development Trust areas, self-governing territories and the TBVC states governed by the Native Land Act 128 and Development Trust and Land Act."⁵⁵

Further development also occurred in a regional planning context. National government adopted a new set of development regions which cut across the bantustans boundaries.⁵⁶ Moreover, national government put in place a "non-statutory national regional development system, comprising nine (originally eight) regional development advisory committees (RDACs), and a National Regional Development Advisory Council (NRDAC), was created under the aegis of national government to formulate strategy in relation to these regions..."⁵⁷

⁵¹ Mabin & Smith 1997 *Planning Perspectives* 209.

⁵² Mabin & Smith 1997 *Planning Perspectives* 209.

⁵³ Mabin & Smith 1997 *Planning Perspectives* 209.

⁵⁴ Kihato *Integrating planning and environmental issues through the law in South Africa* 25.

⁵⁵ Kihato *Integrating planning and environmental issues through the law in South Africa* 29.

⁵⁶ Mabin & Smith 1997 *Planning Perspectives* 211; This suggested an acceptance by government "that those fragmented territories would never be economically viable on their own."

⁵⁷ Mabin & Smith 1997 *Planning Perspectives* 211.

In addition, government “established a Development Bank, initially to assist Bantustan governments, but its functions widened rapidly and numerous urban planning activities began to accrue to it.”⁵⁸

Furthermore, “existing provincial administrations were redefined as ‘general affairs’ branches of national government, and while carrying on their older planning functions (in newly standardized ways), they also acquired new responsibilities, in particular, for African areas.”⁵⁹

At a local level there was an attempt in incorporating Africans politically through the “attempted creation of fully fledged and autonomous ‘black local authorities’ (BLAs) in 1983.”⁶⁰ The BLAs were entrusted with certain planning functions through the provision contained in the Black Communities Development Act⁶¹; however, “provincially supervised Development Boards (successors to Administration Boards) retained much planning control; thus, planning became still further fragmented.”⁶²

2.4 Democracy- an era of reconstruction

Eventually on 2 February 1990 President De Klerk announced to parliament that that the ban on the African National Congress (ANC) was to be lifted and that Nelson Mandela be released. The Group Areas Act⁶³ was repealed by the Abolition of Racially Based Land Measures Act.⁶⁴ De Klerk also acted quickly to remove a range of discriminatory measures, many of which had direct relevance to urban planning.⁶⁵ This initiative came in the form of the

⁵⁸ Mabin & Smith 1997 *Planning Perspectives* 211.

⁵⁹ Mabin & Smith 1997 *Planning Perspectives* 211.

⁶⁰ Mabin & Smith 1997 *Planning Perspectives* 211.

⁶¹ Act 4 of 1984.

⁶² Mabin & Smith 1997 *Planning Perspectives* 211.

⁶³ Act 36 of 1966.

⁶⁴ Act 18 of 1991.

⁶⁵ Mabin & Smith 1997 *Planning Perspectives* 214.

Abolition of Racially Based Land Measures Act,⁶⁶ which repealed a number of discriminatory Acts.⁶⁷

Finally, the planning regime was in a position to be freed from its previous "commitment to racially divided space."⁶⁸ To address the urgent developmental needs the Less Formal Township Establishment Act⁶⁹ was promulgated to speed up the process.⁷⁰

On the morning of the 26th of April 1994, Nelson Mandela cast his vote and later won the election- South Africa was truly free from the shackles of apartheid.

2.5 Conclusion

The pre-1994 government system was based on the "traditional stratified three-tier system of a central government at the top (and therefore the strongest), a second provincial tier in the middle and a local tier (the weakest) at the bottom." This hierarchical structure of government meant that the national legislature was sovereign and all-powerful, and the provincial and local government exercised only those powers that had been allocated to them by the sovereign legislature.⁷¹

Accordingly, the lower levels of government especially local government played a subordinate role. Cameron JA, as he was then, summed up the situation by stating that:

⁶⁶ Act 208 of 1991.

⁶⁷ These included: the Black Land Acts of 1913 and 1936; the Group Areas Act; and the Black Communities Development Act of 1984, successor to the Natives Urban Areas Act of 1923.

⁶⁸ Mabin & Smith 1997 *Planning Perspectives* 214.

⁶⁹ Act 113 of 1991.

⁷⁰ There was an "Independent Development Trust, created with a large slice of public money, decided to devote much of its resources to the delivery of services to 100 000 sites limited to those on the lowest incomes, roughly half through upgrading existing informal settlements and half in 'greenfield' projects." (Mabin & Smith 1997 *Planning Perspectives* 214).

⁷¹ *Maccsand* (SCA) para 11.

“municipalities were at the bottom of a hierarchy of lawmaking powers; constitutionally unrecognised and unprotected, they were by their very nature subordinate members of the government vested with prescribed, controlled government powers.”⁷²

Moreover, the old constitutional dispensation held that “one governmental department could not overrule another.”⁷³ This in effect gave national government departments far reaching powers and did not provide for inter-departmental integration or cooperation. The former Minister of Environmental Affairs, Gert Kotze, aptly summed up this situation by proclaiming that he was “the Minister of Damn all!”⁷⁴

If you look at planning mandates before “1994 it was clear that the power to make planning laws rested with the four provinces, the former TBVC ‘independent homelands’ and the ‘self-governing territories’.”⁷⁵ However, this system of having numerous parallel planning authorities only further fragmentation the planning regime. In addition, the use of planning laws during the apartheid era to promote a segregated and unequal landscape gravely undermined the legitimacy of planning as a discipline.⁷⁶ As a result, there was a concerted effort to move away from the tainted term “planning” and move towards the more progressive-sounding “development planning”.⁷⁷ In addition there was a concern that the apartheid-era planning law was unduly focussed on *controlling* development and therefore there was support for a paradigm shift within planning in order for planning to *facilitated* development.⁷⁸ The Forum for Effective Planning and Development

⁷² CDA *Boerdery v Nelson Mandela Metropolitan Municipality* 2007 4 SA 276 (SCA) para 32D.

⁷³ Couzens 1999 SAJELP 15.

⁷⁴ Clarke *Back to Earth* 317.

⁷⁵ Berrisford & Kihato *Local government planning legal frameworks* 379 (footnote omitted).

⁷⁶ Berrisford 2011 *Urban Form* 258.

⁷⁷ Berrisford 2011 *Urban Form* 258.

⁷⁸ Berrisford 2011 *Urban Form* 258-259.

proposed a definition of development planning that was widely embraced.⁷⁹ It defined development planning as:

“a participatory approach to integrate economic, sectoral, social, institutional, environmental and fiscal strategies in order to support the optimal allocation of scarce resources between sectors and geographical areas and across the population in a manner that provides sustainable growth, equity and the empowerment of the poor and the marginalised.”⁸⁰

The planning law regime therefore entered the new constitutional era (1996) driven by a new found enthusiasm and ambition to facilitate growth in a sustainable and co-operative manner.

The next chapter will outline the constitutional planning mandates bestowed on national, provincial and local government. However, the chapter below will also delineate the challenges facing the planning authorities due to the inheritance of pre-constitutional era planning legislation.

⁷⁹ Berrisford 2011 *Urban Form* 259.

⁸⁰ Berrisford 2011 *Urban Form* 259 (footnote omitted).

3 Chapter 3: planning law in the post-1996 constitutional era and its planning regulatory framework

This chapter focuses on the post-1996 constitutional era and its planning regulatory framework. The chapter will be broken up into two themes. Firstly, a discussion will ensue on the competencies of national, provincial and local government, as per the Constitution, to promulgate and administer planning laws. The main aim of this theme will be to provide an understanding of the autonomy that has been bestowed on the national, provincial and local planning authorities. This will serve as the foundation against which the regulatory framework should be compared.

Second, a discussion of the regulatory framework within which planning authorities have to operate will take place. The aim of this discussion will be to outline the structure of the resultant planning laws and tools, with a view to illustrating the complexities, conflicts and overlaps inherent in the scheme. In addition, this discussion should reflect on the associated complexities of having a host of old-order-legislation operating alongside post-1996 legislation and the consequential need for a national law to provide for a more holistic and integrated approach to planning.

Before commencing theme one, it is necessary to provide an indication of the constitutionally envisaged relationship between the national, provincial and local government. The Constitution states that government consists of national, provincial and local spheres of government.⁸¹ The use of the word "sphere" is of significance as it symbolises a break away from the past hierarchical division of government powers.⁸² Now each sphere is seen as being self-reliant, inviolable and of an equivalent status.⁸³ The Constitution makes express provision for this distinctiveness; however, it also emphasises

⁸¹ S 40(1).

⁸² In the pre Constitutional era the word 'tiers' was employed to describe the hierarchical structure of government.

⁸³ Van Wyk *Planning Law* 143 (footnotes omitted).

that the spheres of government are interdependent and interrelated.⁸⁴ These three principles underpin the way the respective planning authorities are to interact and accordingly each principle needs to be expanded upon.

“Distinctiveness” in broader terms means that certain functions and powers are allocated by the Constitution to each sphere and that the respective sphere has the final decision making power on those matters allocated to it.⁸⁵

“Interrelated” refers to the fact that the exercise of autonomy by a particular sphere of government can be supervised by another sphere.⁸⁶

“Interdependent” in turn means that although each sphere has autonomy over certain areas it must exercise such autonomy in a manner that promotes the common good of the country. The way to achieve the successfully achieve an interrelated and interdependent relationship between the spheres of government is through co-operative governance.⁸⁷

In fact, it can now be stated that the “basic structure of our government consists of a partnership”⁸⁸ between the spheres of government, “oiled by the principles of co-operative government.”⁸⁹ The importance of co-operative governance cannot be overstated and therefore chapter 4 will be devoted to a discussion thereon.

The next part of this chapter will focus on the constitutionally bestowed distinctiveness of each sphere of government in regards to their planning functions. More specifically, the constitutional administrative and legislative powers of each sphere of government will be unpacked in order to attempt to draw outline the parameters of their planning functions.

⁸⁴ S 40(1).

⁸⁵ Intergovernmental Relations Framework Act 13 of 2005, s 6.

⁸⁶ Intergovernmental Relations Framework Act 13 of 2005, s 6.

⁸⁷ Intergovernmental Relations Framework Act 13 of 2005, s 6.

⁸⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 82.

⁸⁹ *Maccsand (Pty) Ltd and Another v City of Cape Town* 2011 6 SA 633 (SCA) para 11.

3.1 The legislative and administrative autonomy of each sphere

Central to planning law is the "determination of which spheres of government have legislative and executive competence for specified functional areas of planning."⁹⁰ These functional areas are set out in Schedules 4 and 5 of the Constitution and include: "regional planning and development"; "urban and rural development"; "provincial planning"; and "municipal planning".

Schedule 4 lists the "Functional Areas of Concurrent National and Provincial Legislative Competence" and Section 5 lists the "Functional Areas of Exclusive Provincial Legislative Competence". Part B of Schedule 4 and 5 list the functions of local government.

Schedule 4 and Schedule 5 will be outlined in an attempt to ascertain the legislative and executive autonomy of each sphere of government. The legislative and executive competencies are distinguished because of the fact that South Africa is not a unitary state. What this means is the notion that "the power to legislate implies the duty to administer such legislation"⁹¹ does not apply in South Africa. In fact, in South Africa it is not uncommon for a sphere of government to promulgate a law and assign the duties to another sphere of government.⁹² Nevertheless, the focus in this part of the thesis is on planning autonomy, accordingly a discussion of each sphere of government's planning mandates, as per the Constitution, will now ensue.

3.1.1 National government's administrative and legislative functions

National legislative authority is exercised by Parliament which has the power to pass legislation on any matter, including subject areas that fall under Schedule 4, but excluding Schedule 5 matters.⁹³ Due to Schedule 4 being titled "[f]unctional areas of concurrent national and provincial legislative

⁹⁰ Van Wyk *Planning Law* 51.

⁹¹ Glazewski *Environmental law* 109.

⁹² Glazewski *Environmental Law* 109.

⁹³ National government may however under certain circumstances intervene in sch 5 matters.

competence”, it is clear that national legislative mandates are “demarcated in relation to provincial legislative authority.”⁹⁴

The Schedule 4 functional areas that are of importance in the planning context are “regional planning and development”, “urban and rural development” and “municipal planning”, which are set out in Schedule 4 Part A and the latter in Part B.⁹⁵

Matters that fall outside of the above Schedules are subject to the exclusive legislative competence of national government. Accordingly, it is often stated that national government enjoys “residual competence” over minerals and water- both subject areas are not included in the Constitutional Schedules.⁹⁶

In regard to executive/ administrative authority, the national executive competence vests in the President and is exercised together with the members of Cabinet.⁹⁷ This authority is exercised by administering, preparing and implementing national legislation, national policy and by co-ordinating the functions of state departments.⁹⁸

3.1.2 Provincial government’s legislative and administrative functions

In a provincial context, Section 104 of the Constitution provides for the legislative authority of nine provincial legislatures, which collectively fall part of the National Council of Provinces (NCOP). In accordance with this Section the provincial government may pass legislation on not only Schedule 4 and 5 matters but “any matter outside those functional areas that is

⁹⁴ Van Wyk 2 *Planning Law* 103.

⁹⁵ This is what allows parliament to draft legislation such as the *SPLUMB*, which essentially deals with land use planning in a municipal context.

⁹⁶ The exact parameters of this “residual competence” have been historically exaggerated by national government as will be seen in the *Maccsand* Judgement, discussed in chapter 5 below.

⁹⁷ S 85(1).

⁹⁸ S 85(2).

expressly assigned to the province by national legislation”.⁹⁹ As stated above, Schedule 4 functional areas fall into the concurrent national and provincial legislative arena and Schedule 5 matters fall under the exclusive purview of province. Therefore, “Provincial planning” is an exclusive provincial competence as it falls under Part A of Schedule 5.

The executive competence vests in the premier and members of the respective provincial council of a particular province.¹⁰⁰ Provincial executive competence includes the administering of national legislation assigned to province,¹⁰¹ which often deals with matters beyond the scope of Schedules 4 and 5.¹⁰² Accordingly, provincial executive power is exercised by preparing, initiating, implementing provincial legislation, provincial policy, and doing the same in regards to national legislation assigned to province. Moreover, provincial government is responsible for co-ordinating the functions of the provincial administrator and its departments.¹⁰³

3.1.3 Local government’s legislative and administrative functions

As stated above the Municipal Structures Act provides for three categories of municipalities, namely A, B and C municipalities.¹⁰⁴ Accordingly, large metropolitan areas are governed by metropolitan (category A) municipalities and the rest of the country is divided into district (category C) municipalities, which consist of a number of local (category B) municipalities. In each type of municipality, the legislative and executive authority of a municipality vests in its respective municipal council.¹⁰⁵ Local government exercise legislative power through the promulgation of legislation known as by-laws. By-laws can be created on matters that are listed in Part B of Schedule 4 (“municipal

⁹⁹ S 104(1)(b).

¹⁰⁰ S 125(1) and (2).

¹⁰¹ Examples of national planning legislation assigned to provinces include the Removal of Restrictions Act 84 of 1967 and the Less Formal Townships Establishments Act 113 of 1991.

¹⁰² S 125(2)(c).

¹⁰³ S 125(1)-(2)

¹⁰⁴ Part 1.

¹⁰⁵ S 151(2)

planning”) and Part B of Schedule 5. Take note, however, that by-laws cannot be in conflict with national or provincial legislation.¹⁰⁶

The executive mandates of a municipality include the right to govern, on their own initiative, the local government affairs of their communities, subject to national and provincial legislation.¹⁰⁷ Moreover, municipalities have the right to administer local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 and any other function expressly assigned to them by the national or provincial legislature.¹⁰⁸ Section 156(4) gives some insight in understanding when matters listed in Part A of Schedule 4 and 5 will be assigned to local government to administer. The section states that national and provincial government *must* assign to a municipality, by agreement and subject to any conditions, the administration of a Part A matter which necessarily relates to local government, if: that matter would be most effectively be administered locally and the municipality has the capacity to administer it.

Moreover, Section 156(5) states that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

Having laid the foundation for understanding the constitutionally bestowed administrative and legislative planning functions of each sphere of government, a further discussion on the regulatory framework governing planning can ensue. It is necessary to reiterate that the aim of this theme is to provide an overview of the plethora of planning laws and tools governing planning and the consequential overlaps, conflicts and resulting confusion.

¹⁰⁶ S 156(3)

¹⁰⁷ S 151 (3).

¹⁰⁸ S 156 (1); Local government must exercise these rights in accordance with those objectives contained in s 152, namely: (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government.

3.2 The resulting legal framework governing land-use planning

3.2.1 Planning legislation

National legislation that is of direct application to planning includes: the Removal of Restrictions Act,¹⁰⁹ the Less Formal Township Establishment Act,¹¹⁰ Subdivision of Agricultural Resources Act,¹¹¹ Local Government Transition Act,¹¹² Local Government: Municipal Structures Act,¹¹³ Local Government: Municipal Systems Act,¹¹⁴ and the DFA.

The Removal of Restrictions Act empowered the Administrator of a province to alter, suspend or remove certain restrictions and obligations in respect of land in the province.¹¹⁵ The Subdivision of Agricultural Resources Act controls the subdivision and, in connection therewith, the use of agricultural land. As a result, agricultural land cannot be subdivided or used in contradiction to the Act, unless the Minister of Agriculture consents thereto.

It has been stated that a "normative approach to physical planning, embracing the notion of sustainability, inter alia, was introduced through the... DFA."¹¹⁶ The DFA was viewed as the "flagship statute passed by government to set the overall framework and administrative structures for planning throughout the country."¹¹⁷ The primary objects of the DFA are to "facilitate and expedite the implementation of the reconstruction and development programmes and projects by introducing extraordinary measures; to lay down general principles regulating all land developments, irrespective of whether the development is undertaken in terms of the Act or

¹⁰⁹ Act 84 of 1967.

¹¹⁰ Act 70 of 1970.

¹¹¹ Act 103 of 1997.

¹¹² Act 209 of 1993.

¹¹³ Act 117 of 1998.

¹¹⁴ Act 32 of 2000.

¹¹⁵ It also provided for the repeal of the Removal of Restrictions in Townships Act, 1946.

¹¹⁶ Todes et al (2009) 421.

¹¹⁷ Glazewski *Environmental Law* 207.

some other law; and to establish, in all provinces, development tribunal with powers to determine land development applications.”¹¹⁸ The aim was for provinces to utilize the above principles in guiding their promulgation of provincial legislation.¹¹⁹ However, all provinces have not followed suit due to various factors unique to each province.¹²⁰

It has been stated that post-apartheid planning has refocused “towards a facilitative approach, concerned particularly with reconstruction and development.”¹²¹ The Local Government: Municipal Systems Act¹²² requires municipalities to adopt an Integrated Development Plan (IDP), which is a single, inclusive and strategic plan for the development of its municipality.¹²³ An IDP “encompasses both broad social and economic development planning and strategic spatial planning through spatial development frameworks (SDFs).”¹²⁴ The Act can therefore “be seen as an example of national exercising its powers to set norms and standards and see to the effective performance by municipalities of their duties in relation to, among other aspects of local governance, ‘municipal planning’.”¹²⁵

The Physical Planning Act 125 of 1991 (the 1991 PPA) provides for structure plans in the form of regional development plans, regional structure plans (RSPs) and urban structure plans.

The abovementioned provincial and local government planning tools are discussed in further detail below.

¹¹⁸ *GDT* (CC) para 35 (footnotes omitted).

¹¹⁹ Glazewski *Environmental Law* 207.

¹²⁰ The factors include: financial; capacity; political and practical constraints.

¹²¹ Todes (2009) DOI 421.

¹²² Act 32 of 2000.

¹²³ S 25.

¹²⁴ Todes (2009) DOI 421; Todes et al stated that “land use regulation, although still part of planning practice, is regarded as less important by many planners, and has to some extent been marginalized (Harrison et al., 2008).” (2009 DOI 421).

¹²⁵ Berrisford & Kihato *Local government planning legal frameworks* 379.

3.2.2 Planning tools- strategic planning

It is held that “an innovation of the post-apartheid era is an emphasis on strategic plans to guide decision-making with regard to development directions, expenditure priorities and spatial organization.”¹²⁶

The purpose of an IDP is to guide the decision making of local authorities when considering development applications. The exact legal status of an IDP has brought about confusion because in Section 35 it states that it is a principal strategic planning instrument and that it guides all planning and development, but that it binds the municipality and all other persons. Therefore, it raises the question of whether it is guiding or binding. The issue is further complicated by the fact that one of the components of an IDP is a SDF. A SDF is a spatial plan that serves as a guideline for the development of a basic land use management system for a municipality.¹²⁷ Therefore, because a SDF falls part of an IDP the same query regarding its legal status arises.¹²⁸

The next question that comes to the fore is in response to the wording of Section 35(2) of the Municipal Systems Act,¹²⁹ which stipulates that a SDF prevails over a plan as defined in the 1991 PPA. The 1991 PPA provides for structure plans in the form of regional development plans (RDPs), regional structure plans (RSPs) and urban structure plans (USPs). Accordingly, Section 35(2) suggests that in the event of conflict these will be trumped by a SDF. This can be accepted as it has been held that an approved structure can be viewed as “a species of subordinate legislation and thus ‘law’ within the meaning of s 172(1)(a) of the Constitution”.¹³⁰ However, the 1991 PPA

¹²⁶ Todes (2009) DOI 425.

¹²⁷ Municipal Systems Act, S 26(e).

¹²⁸ For an answer to the legal status of these tools see *Parkhurst Village Association v Capela & Others* 2010 JOL 25759 (GSJ).

¹²⁹ Act 32 of 2000.

¹³⁰ *Sheffplett* (WCC) para 61.

has allowed for guide plans passed under the 1967 PPA to be converted into RSPs. Guide plans on the other hand were definitely not considered subordinate legislation and once gazetted no other town planning schemes could be introduced or amended if it was in conflict with a guide plan.¹³¹ Therefore, legislature, unknowingly, might have developed a diverse beast and there is much uncertainty surrounding the relationship between a SDF and a converted guide plan.

In addition, there is uncertainty as to the status of an SDF and a conflicting town planning scheme. Above it was stated that a former guide plan would trump a conflicting town planning scheme. Therefore, the question can be asked whether a SDF would also trump such a scheme.¹³²

3.2.3 The reshaping of jurisdictional boundaries and resulting legislative overlapping

After the transition to democracy in 1994 the four provinces were replaced by nine new provinces, which resulted in the widespread redrawing of provincial boundaries.¹³³ However, the laws in place in a particular territory before 1994 remained despite the new provincial boundaries.¹³⁴ This resulted in cross-provincial-border application of planning legislation.¹³⁵

¹³¹ S 6A(12).

¹³² See *Parkhurst Village Association v Capela & Others* 2010 JOL 25759 (GSJ).

¹³³ Berrisford 2011 *Urban Forum* fn 3.

¹³⁴ Berrisford 2011 *Urban Forum* fn 3.

¹³⁵ For example, the Land Use Planning Ordinance 15 of 1985 (Cape Ordinance or LUPO) applied to the Western Cape, Eastern Cape and parts of North West. (Van Wyk 2 ed *Planning Law* 284.); Furthermore, the Town Planning and Township Ordinance 15 of 1986 (Transvaal Ordinance) applied in Gauteng, Mpumalanga, Limpopo and North West. (Van Wyk J 2 ed *Planning Law* 285). Accordingly, the North West Province, as an example, has parts of the old Cape and old Transvaal laws applicable to it. Planning legislation in other provinces includes: in regards to KwaZulu-Natal- The Town Planning Ordinance 27 of 1949 (Natal Ordinance), which now needs to be read with the KwaZulu-Natal Planning and Development Act 6 of 2008; in the Free State, land use is regulated by the Townships Ordinance 9 of 1969 (Free State Ordinance); in the Northern Cape the Northern Cape Planning and Development Act 7 of 1998, better known as the "Northern Cape Act", is the provincial legislation.

Add to the above the reshaping of the “plethora of fragmented ... local governments”¹³⁶ into 258 municipalities with new boundaries that overlapped with old racial boundaries and the potential confusion is only amplified.¹³⁷

The above situation is further complicated once you add into the mix the former territories of the TBVC states and self-governing territories.¹³⁸ This is especially true when you take into account the often sporadic geographies of these “homeland areas”.¹³⁹ In addition, some of the legislation of the former homelands that regulates township establishment and town planning in certain areas is still in existence and has been assigned to the provinces.¹⁴⁰

As a result of the above overlaps, a planning authority in the Province of Gauteng, for example, will have to include in his decision making process old order legislation and new order legislation such as: the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 20 of 1943; Town Planning & Townships Ordinance, 15 of 1986; Division of Land Ordinance, 20 of 1986; Gauteng Removal of Restrictions Act 3 of 1996; Gauteng Planning & Development Act 2 of 2003.

¹³⁶ Todes et al 2009 *DOI* 418.

¹³⁷ Jafta J summed up the implications hereof in the following statement:

“where a municipality’s geographical area consists of areas that fell... under the old Transvaal province [, for example,] and a former ‘independent’ state or a self-governing homeland, different pieces of legislation may apply in these municipalities. There can be no doubt that this situation is undesirable.” (*Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 78.)

¹³⁸ The reason therefore is because the above old-order Ordinances’ do not apply in the former “homeland” areas, which include the former territories of the TBVC states and self-governing territories. The laws applicable in the former these areas are mostly represented by the Black Administration Act 38 of 1927 and the Black Communities Development Act 4 of 1984, which are influential over matters such as land tenure and land administration arrangements. (Berrisford and Kihato *Local government planning legal frameworks* 383).

¹³⁹ To depict the nonsensicality of the erstwhile homeland area geographies it is only necessary to look at a few examples. KwaZulu, in 1975 consisted of forty-eight pieces of land and scores of smaller tracks, and Bophuthatswana of nineteen pieces of land spread across three provinces.” (Meridith *The State of Africa* (2005) Free Press 422).

¹⁴⁰ For example GN R1886 of 1990 was assigned to the Eastern Cape, Mpumalanga, KwaZulu- Natal, Limpopo, North West and Free State in terms of the interim Constitution s 235(8). GN R1886 of 9090 was assigned to the Cape in terms of the Provincial Government Act 69 of 1990. GN R1888 of 1990 was assigned to Gauteng, Western Cape and Northern Cape in terms of the interim Constitution s 235(8).

The former provides for Township development procedures and the latter for structure plans and town planning schemes.

Clearly this plethora of legislation and its geographically cross-cutting nature does not cater for certainty. This can be addressed, however, through the promulgation of a new provincial planning Act, to repeal the above list of legislation, and provide for a more holistic and integrated approach to planning in the province.¹⁴¹ However, this problem is not restricted to the Gauteng Province. Therefore, to ensure that the planning regime develops in a more holistic manner a national planning law is needed to guide the development of provincial planning laws.

3.3 Conclusion

The Constitution has attempted to place certain legislative and administrative functions on the respective spheres of government. These include: “agriculture”, “environment”, “regional planning and development” and “urban and rural development” which are listed in Schedule 4 (Part A) of the Constitution as functional areas of concurrent national and provincial legislative (and concomitant executive) competence. On the other hand, “municipal planning” is a Schedule 4 (Part B) functional domain in respect of which both the national and the provincial legislatures may enact legislation to the extent set out in sections 155(6)(a) and (7). “Provincial planning” is an exclusive provincial functional domain (Schedule 5 (Part A)).¹⁴²

However, it is also clear that the planning functions of each sphere of government cannot be packaged into clear-cut boxes due to the Constitution prescribing concurrent functional areas and due to the Constitution allowing

¹⁴¹ Nevertheless, it is necessary to note that this will only repeal the old-order legislation in regards to its application in that particular province. Therefore, the only way for the planning law regime to rid of the apartheid legislation is through a collective effort from all nine provinces. This was recognised by the Department of Rural Development and Land Reform who issued a tender in 2011 calling for the proposals for new provincial planning legislation. (Van Wyk 2 ed *Planning Law* 52). The provinces have answered this call by drafting the necessary legislation and KwaZulu-Natal has already developed new planning legislation in the form of the KwaZulu-Natal Planning and Development Act 6 of 2008. Nevertheless, in order to ensure consistency amongst provinces the necessity for a national planning law could not be overstated.

¹⁴² Olivier & Williams 2013 *Journal for Juridical Science* 127.

for the assignment of planning functions from one sphere of government to another.

Accordingly, it is plain to see that there are many nuances governing the everyday interaction between the planning authorities of each sphere of government. This complicated relationship gives rise to a number of questions, namely: what if two or even all three spheres of government have authority over a single functional area and what is the precise content of these functional areas (e.g. "municipal planning", "provincial planning", "urban and rural development" and "regional planning and development").¹⁴³ The fact that the planning legislative framework does not provide direct answer to this is an issue.

To give a practical illustration of the above concerns, take for example the "municipal planning" function. This function is listed under Schedule 4 of the Constitution giving both national and provincial government legislative power over it, but because it falls under Part B of the Schedule the administration thereof has been constitutionally assigned to local government. Another issue would be the fact that the word "planning" is used in three of the four functions mentioned above, which leads to the question does this word carry the same meaning in each of the three functions? The same can be said for the word "development"- used in two of the above functional areas.

If one looks at the planning legislative framework, it is clear that it consists of a plethora of planning legislation and planning tools that do not always speak the same language. Moreover, the regime consists of three parallel sets of laws, namely: the provincial planning Ordinances,¹⁴⁴ apartheid Proclamations

¹⁴³ Berrisford and Kihato summed up the situation by stating that "interpreting what legislative concurrence means in any context is difficult, and in a potentially contentious field like planning, all the more so." (Berrisford & Kihato *Local government planning legal frameworks* 379).

¹⁴⁴ The irony of still having legislation developed during the apartheid era to guide planning was pointed out by Berrisford and Kihato when they stated that "[l]ocal government, faced with the challenge of reversing apartheid's spatial legacy and integrating previously divided communities, is thus hamstrung in its efforts: the only laws available to them for this task are those designed specifically to achieve the very thing that they are charged to undo." (Berrisford & Kihato *Local government planning legal framework* 377).

still applicable in the “homelands”, and new order planning laws. Furthermore, these laws have jurisdictional boundaries that do not correlate with the new provincial boundaries of the nine provinces. Add to this the overlapping mandates catered for in Schedules 4 and 5 of the *Constitution* and you have a discombobulating framework within which the land-use planning authorities are expected to operate.¹⁴⁵

The next chapter will provide a brief outline of the co-operative governance provisions and mechanism that were envisaged to provide a vital safety net in the midst of the potential confusion outlined above.

¹⁴⁵ Berrisford and Kihato described this situation by stating that the “legislative framework for planning presents a formidable regulatory maize”. (Berrisford & Kihato *Local government planning legal framework* 378).

4 Chapter 4: Constitutional tools for promoting certainty and cooperation

The above chapter described the planning mandates bestowed on planning authorities and the confusing regulatory framework within which the planning authorities operate. This chapter will involve the unpacking of the potential laws and tools for promoting greater integration, cooperation and conflict resolution.

The structure of the chapter will be as follows. First, national and provincial government's monitoring, support and intervening in local planning mandates will be discussed. This will be followed by a discussion on the legislative mechanisms available for resolving conflicting planning mandates. Lastly an analysis will be undertaken on the Constitutional principles of co-operative governance and other non-statutory co-operative governance mechanisms.

4.1 Monitoring, support and intervention

Although the spheres of government have distinctive mandates they are described as being interrelated. Interrelatedness is one of the main principles governing the interaction between the respective spheres of government. Accordingly, the spheres of government are not expected to exercise their functions in an isolated vacuum.

The Constitution instils a duty on national and provincial government to monitor local government.¹⁴⁶ Provincial government must provide for the

¹⁴⁶ Practitioners Guide to Intergovernmental Relations (IGR) 33.

monitoring¹⁴⁷ and support of local government in their respective province.¹⁴⁸ Moreover, national and provincial government must see to the performance of municipalities.¹⁴⁹ The Constitution also contains a general instruction that all three spheres of government must support one another.¹⁵⁰ The Constitution also contains more toothy provisions that allow for the unilateral interference by one sphere into the affairs of another.¹⁵¹ In this regard, national government can intervene in the affairs of provincial and local government in terms of Section 100; and province can interfere in local government in accordance with Section 139.

Monitoring, support and intervention are discussed in isolation below. Each concept is discussed in isolation on order to determine whether the Constitution and other legislation provides for defined parameters that are to govern each concept. This discussion will take place through a planning law lens.

4.1.1 Monitoring of local government¹⁵²

Section 155(6) of the Constitution states that each province must provide for the monitoring of local government to promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs. Accordingly, province must monitor local government to ensure that it is performing its “municipal planning” functions.

The Municipal Systems Act¹⁵³ was promulgated partly to aid provincial government in fulfilling the above Constitutional duties. The Act allows national and provincial government to set standards against which local

¹⁴⁷ “Monitoring occurs when one sphere measures the compliance of another sphere with legislative directives” (Practitioners Guide to IGR 33).

¹⁴⁸ S 155(6)(a).

¹⁴⁹ S 155(7).

¹⁵⁰ “Support refers to measures of assistance to ensure that another sphere is able to perform adequately” (Practitioners Guide to IGR 34).

¹⁵¹ “Intervention is the unilateral interference by one sphere into the affairs of another in order to remedy an unacceptable situation” (Practitioners Guide to IGR Systems 34).

¹⁵² See the *Practitioners Guide to IGR* 34-36 for a detailed discussion of monitoring mechanisms.

¹⁵³ Act 32 of 2000.

municipalities can be monitored.¹⁵⁴ The Municipal Systems Act allows national and provincial government to pass laws requiring local government to submit information in the form of reports.¹⁵⁵ In limited circumstances the Act empowers the MEC for Local Government to demand information from local government and appoint a Commission of Enquiry.¹⁵⁶ However, this can only take place if there is reason to believe that a municipality “cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality”.¹⁵⁷

The Minister (responsible for Provincial and Local Government) also has the duty to compile a report on the performance of municipalities weighed against their fulfilment of key performance indicators.¹⁵⁸

4.1.2 Support¹⁵⁹

Section 125(3) of the Constitution instructs national government to support provincial government. Moreover, Section 154(1) instructs both national and provincial government to support and strengthen local government capacities to perform their functions. Interestingly, Section 155(6) once again obliges province to do the above. Accordingly, it is assumed that province will be the main role player in the support of local government, which seems sensible given the closer relationship between the two spheres. Moreover, there is a clear focus on capacity building of local government. The main focus, for purposes of this thesis, is on the ‘municipal planning’ function.

¹⁵⁴ Chapter 10.

¹⁵⁵ Chapter 10.

¹⁵⁶ S106.

¹⁵⁷ S106.

¹⁵⁸ S 43.

¹⁵⁹ See the *Practitioners Guide to IGR* 36-38 for a detailed discussion of support mechanisms.

4.1.3 Intervention¹⁶⁰

Unilateral intervention by one sphere government into the affairs of another sphere effectively results in the usurping of functions by the intervening sphere. Moreover, as shown above, certain functions have been designated exclusively by the Constitution to a particular sphere of government. Accordingly, intervention cannot take place willy-nilly as this would constitute a direct attack on the autonomy (distinctiveness) of another sphere of government. As a minimum it should first be shown that the monitoring and support mechanisms have been unable to remedy the shortcomings of the respective local government in the undertaking of its municipal planning functions.¹⁶¹

National intervention in provincial affairs is governed by Section 100 of the Constitution. When considering this Section the “provincial planning” functions must be kept in mind. Forthwith, Section 100 states that the national executive may only intervene “when the province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation”. Moreover, it defines that the intervention can be in the form of a directive issued to province stating the extent of the failure and the required steps to be taken to rectify the situation.¹⁶² Intervention can also take place by national government if intervention is necessary to: “(i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) maintain economic unity; (iii) maintain national security; (iv) or prevent that province from taking unreasonable action that is prejudicial to the interest of another province or to the country as a whole.”¹⁶³ Point of (i) and (iv) are of particular relevance to planning. It is important to note that national government intervention into the affairs of province can only take place under specific circumstances. Moreover, national government must

¹⁶⁰ See the *Practitioners Guide to IGR 41-59* for a detailed discussion of intervention.

¹⁶¹ *Practitioners Guide to IGR 41*.

¹⁶² S 100(1)(a).

¹⁶³ S 100(1)(b).

submit a written notice to the NCOP 14 days after the intervention began and may not continue if the Council disapproves of such intervention.¹⁶⁴ Notably the Constitution does not state that this intervention is subject to the procedures set out in Section 76, which caters for the negotiation between the National Assembly and the National Council of Provinces and allows for disputes to be referred to the Mediation Committee.

Province may intervene in local government matters in accordance with Section 139 of the Constitution. Once again the identical phrase that is used in Section 100 is used in this section, namely that intervention may take place only when a municipality “cannot or does not fulfil an executive obligation in terms of the Constitution or legislation”.¹⁶⁵ Similarly, methods of intervention allowed include the issuing of a directive or the assuming of responsibility to the extent necessary to ensure points (i) and (ii) above and to “prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole”.¹⁶⁶ Provision is made for an additional form of intervention, namely the “dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.”¹⁶⁷

Intervention seems to be the method of last resort given the cautionary language used- “cannot or does not”, “extent necessary”, “exceptional circumstances”. The need for caution is further confirmed by the fact that the intervening provincial executive must submit a written notice to the Cabinet member responsible for local government and the NCOP. Both can disapprove within 28 days of the intervention. Strikingly this does not allow the Municipal Council any say, which makes clear sense if the council had been dissolved but if this is not the case it is testament to the extremities of

¹⁶⁴ S 100(2).

¹⁶⁵ S 139(1).

¹⁶⁶ S 139(1)(b)(ii).

¹⁶⁷ S 139(1)(b)(iii).

this intervention as local government will effectively lose all control over its functions. Accordingly, this must be read in light of Section 151(4) of the Constitution which clearly states that “national or provincial government may not compromise or impede a municipality’s ability to exercise its powers or perform its functions.”

In summation: the Constitution allows for the intrusion by one sphere into the competencies of another but such intrusion should only take place as a last resort and even then should be exercised with extreme caution. Moreover, the aim of such intervention should be in light of supporting and strengthening the capacity of the other sphere. More eloquently put, the intervention should be solution-oriented and aim not merely to fulfil an obligation that a province or a municipality failed to fulfil, but to ensure that it will be fulfilled in future.¹⁶⁸

4.2 Constitutional conflict resolution

As was stated in Chapter 3 above, one of the main questions that arise in regards to Schedules 4 and 5 of the Constitution is- what if two or even all three spheres of government have authority over a single functional area?

4.2.1 Schedule 4 conflicts

Schedule 4 contains functional areas of both national and provincial government. Therefore how are national and provincial legislative conflicts to be addressed? Section 146 of the Constitution provides an answer to resolving potential Schedule 4 conflicts.

Section 146(2) stipulates that national legislation that is of general application prevails over provincial legislation if any of the following conditions are met:

¹⁶⁸ *Practitioners Guide to IGR* 41.

- (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
- (c) The national legislation is necessary for –
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.

Moreover, Section 146(3) states that:

“National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that -

- (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
- (b) impedes the implementation of national economic policy.

Nevertheless, provincial government is given a voice in certain instances. For example, Section 146(4) states that when there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must

have due regard to the approval or the rejection of the legislation by the NCOP. In addition, provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.¹⁶⁹ Moreover, a law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the NCOP.¹⁷⁰

4.2.2 Schedule 5 conflicts

In the context of Schedule 5, the Constitution states that national legislation referred to in Section 44(2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.¹⁷¹ Section 44(2) reads:

“Parliament may intervene, by passing legislation in accordance with section 76(1), 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.”

4.2.3 Intervention by courts- conflicts that cannot be resolved

However, the question a begging is what is the procedure to be followed if a conflict cannot be resolved? The Constitution provides guidance in this

¹⁶⁹ S 146(5).

¹⁷⁰ S 146(6).

¹⁷¹ S 147(2).

regard by stating that if a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation.¹⁷² In the event that a court does rule that legislation prevails over other legislation, the Constitution provides that that the other legislation is not invalidated but it becomes inoperative for as long as the conflict remains.¹⁷³

However, the Constitution guides the courts in the above decision making by stating that when considering an apparent conflict between national and provincial legislation, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.¹⁷⁴

4.3 Co-operative governance (interdependence)

At this point in the thesis it has been depicted that the spheres of government are distinctive, yet also interrelated. The next theme guiding government relations is "interdependence". By saying that the spheres of government are interdependent it means that "each sphere must exercise its autonomy to the common good of the country by co-operating with the other spheres."¹⁷⁵

Accordingly, as stated above, the interaction between spheres of government is supposed to resemble a relationship similar to that of a partnership.¹⁷⁶

Consequently, the "notion of interrelatedness is... not about making legally binding decisions that affect another sphere. Instead, it is about co-operation through joint planning, fostering friendly relations and avoiding conflict."¹⁷⁷

It has been said that this partnership needs to be "oiled by the principles of co-operative government"¹⁷⁸ to ensure more effective, integrated and

¹⁷² S 148.

¹⁷³ S 149.

¹⁷⁴ The Constitutional Court held in *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 BCLR 156 (CC) that the relevant government department should "re-evaluate its position fundamentally ... to consider alternative possibilities and compromises" (para 36) and thus indicated that government departments should try and not litigate against each other.

¹⁷⁵ *Practitioners Guide to IGR* 6.

¹⁷⁶ This can be juxtaposed with the pre-constitutional tiered approach to governance.

¹⁷⁷ *Practitioners Guide to IGR* 6.

¹⁷⁸ *Maccsand* (SCA) para 11.

streamlined governance and process. To help conceptualise the above relationship it is useful to view the constitutional provisions and Schedules as the engine and to view co-operative governance as the oil needed for this engine to operate smoothly and effectively. Naturally, the one cannot exist without the other.

The rest of this chapter outlines the co-operative governance provisions provided for by the Constitution and other legislation, including other statutory and non-statutory co-operative governance mechanisms. However, first the parameters of co-operative governance as a concept will be unpacked and the functions of co-operative governance outlined.

4.3.1 Unpacking the confines of co-operative governance

The parameters of co-operative governance as a concept is best understood by discussing each of the terms in isolation. “Governance” is a function of public administration which has been defined as:¹⁷⁹

“the use of managerial, political and legal theories and processes to fulfill legislative, executive and judicial governmental mandates for the provision of regulatory and service functions for the society as a whole or for some segments of it.”

In addition, “governance” has been described as “all processes, organisations and individuals (the latter acting in official positions and roles) that are associated with carrying out laws and other policy measures adopted by the legislature or the executive and interpreted by courts.”¹⁸⁰

The Commission on Global Governance describes “governance” as “the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or

¹⁷⁹ Feris 2010 PEJL 75 (footnotes omitted).

¹⁸⁰ Feris 2010 PEJL 75 (footnotes omitted).

diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.”¹⁸¹ In essence “governance”¹⁸² involves a decision-making process, “i.e. decisions relating to managerial, political and legal processes, and that grant privileges and powers.”¹⁸³

Before discussing the definition of “co-operative” it is necessary to outline what constitutes “good governance”. “Good governance” is dependent on how these decisions are made, implemented and executed.¹⁸⁴ Section 195 of the Constitution provides some guidance in this regard, as it requires that “public administration be governed by the democratic principles and values enshrined in the Constitution and that it be inter alia accountable, transparent, and efficient and that it should involve public participation.”¹⁸⁵ Accordingly, it is held that Section 195 “sets a yardstick for decision-making from a good governance perspective.”¹⁸⁶

“Co-operative”, on the other hand, is the act of “aligning and integrating governance across spheres so as to ensure coherence... It is different from supervision in that it takes place in a context of equality: each participating

¹⁸¹ Weiss “Governance, good governance and global governance: conceptual and actual challenges.” 2000 (21:5) *Third world quarterly* 797 (footnote omitted).

¹⁸² For a number of further definition of “governance” see *Weiss 2000 Third world quarterly* 797. For example, the World Bank “has identified three distinct aspects of governance: (i) the form of political regime; (ii) the process by which authority is exercised in the management of a country’s economic and social resources for development; and (iii) the capacity of governments to design, formulate, and implement policies and discharge functions.” In addition, the UNDP states that governance “is viewed as the exercise of economic, political and administrative authority to manage a country’s affairs at all levels. It comprises mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.” (*Weiss 2000 Third world quarterly* 797 (footnotes omitted)).

¹⁸³ Feris 2010 *PEJL* 75.

¹⁸⁴ Feris 2010 *PEJL* 75.

¹⁸⁵ Feris 2010 *PEJL* 75.

¹⁸⁶ Feris 2010 *PEJL* 75.

sphere is an equal partner.”¹⁸⁷

4.3.2 Function of co-operative governance

Watts RL once stated that:

"Interdependence between governments and hence the need for effective intergovernmental relations and cooperation is a characteristic of all multisphere, multi-tier or multi-level forms of government, whether federal or constitutionally decentralized unitary in form. This is so because in such systems it is never possible to divide jurisdiction among governments in watertight exclusive compartments. Overlap and interpenetration of jurisdiction is inevitable".¹⁸⁸

“Co-operative governance” is therefore of immense value as it can provide for an integrated and streamlined governance process as well as a planning law process. It will allow for negotiation, which will in turn aid “the organs of government involved in the same functional area [to] agree to allocate specific tasks to a particular sphere, in the spirit of co-operative government and mutual trust.”¹⁸⁹ Co-operative governance should operate as a planning mandates overlay in that it should permeate into the everyday interaction between the land-use planning authorities. It can be used as a mechanism to bypass the potential stumbling blocks caused by lack of certainty within the planning mandates arena. A co-operative approach is always “preferable as immediate clarity relevant to the parties is achieved without complex and cumbersome legislative or judicial proceedings.”¹⁹⁰

¹⁸⁷ *Practitioners Guide to IGR* 51.

¹⁸⁸ Watts Intergovernmental relations (Department of Constitutional Development and Provincial Affairs Pretoria 1999) 6-7.

¹⁸⁹ *Practitioners Guide to IGR* 38.

¹⁹⁰ *Practitioners Guide to IGR* 38.

4.3.3 Constitutional co-operative governance provisions

As stated above, each sphere of government is mandated with distinct governmental functions. However, the execution of these distinct functions should be premised on the on the constitutionally entrenched principle of co-operative governance.¹⁹¹

The co-operative governance principles are found in Chapter 3 of the Constitution. Chapter 3 states that “[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.”¹⁹² This is followed by a list of co-operative governance and intergovernmental relations and an express obligation on “all spheres of government and all organs of state” to follow them.¹⁹³ Section 41 of the Constitution states that:

“All spheres of government and all organs of state within each sphere must: ...

(e) respect the constitutional status, institutions, powers and functions of government in other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) 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;

(h) co-operate with one another in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting one another;

¹⁹¹ Bosman, Kotze & Du Plessis 2004 (19) *SAPR/PL* 412.

¹⁹² S 40(2).

¹⁹³ S 41(1).

- (iii) informing one another of, and consulting one another on matters of common interest;
- (iv) co-ordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another.”

The “significance of this chapter is that every conceivable functionary in every sphere of government will have to be reminded continually of the principles of co-operative government contained in Chapter 3, not only for co-operation in general but also because the principles reinforce the values underlying open, transparent and responsible government.”¹⁹⁴

In addition, the Constitution states that in the event of an intergovernmental dispute the parties involved “must make every reasonable effort to settle the dispute by means of mechanism and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.”¹⁹⁵ However, it is important to note that the:

“provisions of chapter 3 are not meant to diminish the power of one organ of state at the expense of another. Rather, it presupposes and emphasises the willingness by all spheres of government to work together. For this to materialise, it is essential that conflict between laws is avoided, and the administration of the implementation of these laws is clearly regulated by way of co-ordination.”¹⁹⁶

Nevertheless, the implementation of the above has its challenges. If you look at planning law alone it is clear that a “number of functional areas are interwoven with planning such as agriculture, environment, housing and

¹⁹⁴ Van Wyk *Planning Law* 144.

¹⁹⁵ S 41(3).

¹⁹⁶ Bosman et al 2004 *SAPR/PL* 413 (footnote omitted).

transport.”¹⁹⁷ It is logical that “all these functional areas cannot all be the administrative responsibility of one government department; [therefore] principles of co-operative government must feature significantly.”¹⁹⁸

However, in this intertwined planning arena conflict between the respective authorities is inevitable and therefore “a number of institutions, procedures, and mechanisms are provided to facilitate conflict resolution in a co-operative spirit (Bray 1999 *SAJELP* 4).”¹⁹⁹

The above institutions, procedures and mechanisms are provided by a number of statutory²⁰⁰ and non-statutory co-operative governance initiatives that are discussed below.

4.4 Co-operative non-statutory mechanisms and the Intergovernmental Relations Framework Act

There are numerous non-statutory mechanisms that have been developed over time that have seen varying success in achieving co-operative governance. These include, for example, the: Inter-Governmental Forum (IGF); Ministerial Forums (MINMECs and MINTECHs); the Premier Forum;²⁰¹ the Forum for South African Director Generals;²⁰² and the signing of Service Delivery Outcome Agreements.²⁰³

¹⁹⁷ Van Wyk *Planning Law* 145 (footnotes omitted).

¹⁹⁸ Van Wyk *Planning Law* 145.

¹⁹⁹ Bosman et al 2004 *SAPR/PL* 413.

²⁰⁰ Namely, NEMA and the Intergovernmental Relations Framework Act 13 of 2005.

²⁰¹ Meeting of the nine premiers of the respective provinces.

²⁰² The Forum for South African Directors-General is an example of an informal intergovernmental relations structure, which is an example of administrative intergovernmental relations between officials and structures that exist for administrative purposes (Malan (2005) *Politiea* 236). Malan L explains that the “Forum for South African Directors-General was created to discuss mutual problems, share experiences and learn from each other in terms of the administration of the different provinces and to promote coordination between national and provincial departments. The overarching objective of the Forum for South African Directors-General is to promote section 41 of the Constitution, pertaining to co-operative government.” (Malan (2005) *Politiea* 236).

²⁰³ Paterson A states that “these initiatives have recently been complemented by the signing of service delivery agreements between national and provincial authorities to improve the coordination of the functions and responsibilities.” (Paterson (2011) case note fn 234)

The IGF was comprised of the premiers of provinces and representatives of national government; however, the IGF has been abolished “due to its size, cost, lack of focus, no linkages with other fora and the fact that it was used as an ‘information sharing exercise’.”²⁰⁴

MINMECs²⁰⁵ emerged as a result of the need to oversee the joint concurrent competency between spheres as contained in Schedule 4, which contains national and provincial planning functions.²⁰⁶ MINMECs comprise: the relevant national Minister; the Deputy Minister; the nine provincial MECs in the same functional area; and local government representatives if the function is related to Schedule 4B and 5B of the Constitution.²⁰⁷ How the MINMEC process operates is as follows. If national legislation is to be promulgated that impacts upon provinces then it will usually be introduced at MINMECs where the relevant Minister will seek support from MECs for the Bill before it is submitted to the Cabinet.²⁰⁸ By having province actively participate in MINMECs it allows for them to have a greater influence because they are involved at an early stage of the national legislative process. This is also beneficial for national government as it allows for provincial insights and speeds up the process because when the Bill is submitted to Cabinet it will already have the stamp of approval from province.²⁰⁹ Moreover, MINMEC debates can play a vital role in conflict resolution of present or potential future conflicts between the spheres.²¹⁰ Lastly, MINMECs give province and local government the opportunity, through their input and knowledge, to help shape national policy and priorities.²¹¹

²⁰⁴ Nel 2004 *SA Public Law* footnote 36.

²⁰⁵ For further details on MINMECs see the Practitioners Guide to IGR 66-67 and Malan 2005 *Politeia* 233-234.

²⁰⁶ *Practitioners Guide to IGR* 66.

²⁰⁷ *Practitioners Guide to IGR* 66.

²⁰⁸ *Practitioners Guide to IGR* 66.

²⁰⁹ *Practitioners Guide to IGR* 66.

²¹⁰ *Practitioners Guide to IGR* 67.

²¹¹ *Practitioners Guide to IGR* 67.

However, problems experienced include “domination by national ministers, provincial MECs have no mandate from their executive committees, attendance, lack of communication, only information is shared, no monitoring of decisions.” (Reddy (2001) *Politeia* 32) ²¹² In addition, it has been held that the MINMEC meetings focus on political agendas as opposed to a focus on executive and procedural issues. ²¹³

Paterson A explains that “the MINTECH structures are ‘technical committees’ comprising of the national line function Director-General and his/her respective provincial Head of Departments. Their function is generally to achieve ‘administrative or technical harmony’ within the different spheres of government.” ²¹⁴

The Forum for South African Directors-General is an example of an informal intergovernmental relations structure, which is an example of administrative intergovernmental relations between officials and structures that exist for administrative purposes. ²¹⁵ Malan L explains that the “Forum for South African Directors-General was created to discuss mutual problems, share experiences and learn from each other in terms of the administration of the different provinces and to promote coordination between national and provincial departments. The overarching objective of the Forum for South African Directors-General is to promote section 41 of the Constitution, pertaining to co-operative government.” ²¹⁶

It must be noted that “these initiatives have recently been complemented by the signing of service delivery agreements between national and provincial

²¹² Nel 2004 *SA Public Law* footnote 38.

²¹³ Peart & Wilson 1998 *SAJELP* 237.

²¹⁴ Paterson 2011 *SA Publiekreg/ SA Public Law* footnote 234.

²¹⁵ Malan 2005 *Politeia* 236.

²¹⁶ Malan 2005 *Politeia* 236.

authorities to improve the coordination of the functions and responsibilities.”²¹⁷

The role and functions of the various Committees of MINMEC were formalised in terms of the Intergovernmental Relations Framework Act, 2005 (IRFA),²¹⁸ to enable these structures to have more binding decision-making powers.²¹⁹ The IRFA was promulgated in 2005 and is administered by the department of Co-operative Governance and Traditional Affairs. The Act aims to give effect “to the constitutional requirement regarding structures and institutions to promote intergovernmental relations (IGR) and mechanisms and procedures to facilitate dispute resolution.”²²⁰ The underlying purpose of the IRFA is to serve to encourage the spheres of government in the implementation of legislation and policy, and to promote certainty, stability, predictability, transparency and accountability within the system of IGR.²²¹

The IRFA “creates various structures on national, provincial and local level as well as on interdepartmental and inter-sphere level to give effect to co-operative governance.”²²² These structures “include a president’s coordinating council consisting of the president, deputy-president, minister in the presidency, Minister of Finance, other ministers, premiers of the provinces and a municipal councillor designated by the organised local government structure.”²²³

In addition, the IRFA also makes provision for “the establishment of national intergovernmental forums to discuss matters of national interest and to deal

²¹⁷ Paterson 2011 *SA Publiekreg/ SA Public Law* footnote 234.

²¹⁸ For a more in depth discussion on the IRFA and co-operative governance see Edwards 2008 *Politeia* 65-85; *Practitioners Guide to IGR* 51-78; and Malan 2005 *Politeia* 226-243.

²¹⁹ Malan 2005 *Politeia* 233.

²²⁰ *Practitioners Guide to IGR* 52.

²²¹ *Practitioners Guide to IGR* 52.

²²² Du Plessis 2008 *SAPR/PL* 104.

²²³ Du Plessis 2008 *SAPR/PL* 104.

inter alia with the coordination and alignment of functional areas in section 10.”²²⁴ The forum is tasked with, for example, discussing performance in the provision of services and initiating corrective action where failure occurs.²²⁵

Moreover, the Act through Section 11 makes provision for provincial intergovernmental forums.²²⁶ These forms include the premier, relevant members of the provincial executive council and mayors of district and metropolitan municipalities, administrators or municipal councillors. More specifically, “this forum consists of the responsible minister, deputy minister, relevant MECs of the provinces, and municipal councillors within the functional area of Schedule 4B and 5B of the Constitution.”²²⁷ Part 4 of IRFA makes provision for similar structures to be developed at a local government level.

The IRFA also makes provision for the intergovernmental forums to establish intergovernmental technical support structures comprising officials or other persons who can assist in supporting the forum.²²⁸ However, it is important to note that these technical support structures are formed to facilitate intergovernmental consultation and they are not decision-making bodies themselves. Nevertheless they may adopt resolutions or make recommendations in terms of agreed procedures.²²⁹

Importantly, the Act provides for coordination when it comes to implementation of a policy, the exercise of a statutory power, the performance or the provision of a service that may depend on the

²²⁴ Du Plessis 2008 *SAPR/PL* 104.

²²⁵ Du Plessis 2008 *SAPR/PL* 104.

²²⁶ Examples of existing provincial intergovernmental relations structures include: the Eastern Cape Provincial Political Intergovernmental Forum, Free State Provincial and Local Government Coordinating Committee, Gauteng Intergovernmental Forum, Gauteng Premier's Coordinating Committee, KwaZulu-Natal Provincial Cabinet Clusters, Mpumalanga Intergovernmental Relations Forum, North West Intergovernmental Forum and the Western Cape Provincial Advisory Forum. (Malan 2005 *Politiea* 235).

²²⁷ Du Plessis 2008 *SAPR/PL* footnote 99.

²²⁸ S 30.

²²⁹ S 32.

participation of another organ of state.²³⁰ The Act caters for this by making provision for parties to enter into implementation protocols.²³¹

Section 40 states that all organs of state must make every reasonable effort to avoid intergovernmental disputes when exercising their functions and to settle disputes without resorting to judicial proceedings. In this regard guidelines have been published to regulate intergovernmental dispute prevention and settlements,²³² “which could play an important role in decision-making...”²³³

Therefore in summation the IRFA sets out to achieve its objectives by creating a statutory framework dealing with: key principles of co-operative government and IGR; intergovernmental forums that form the institutional spine of IGR; implementation protocols that facilitate integrated service delivery; and rules for the settlement of intergovernmental disputes.²³⁴

4.5 Conclusion

The Constitution clearly provides for the monitoring and support of local government. In regards to Schedule 4B matters, for example, national and provincial government only have administrative authority if operating under the umbrella of support or within the strict confines that allow for intervention. Nevertheless, in practice it seems that the parameters within which supervision should occur remain fuzzy.²³⁵

²³⁰ S 35(1).

²³¹ S 35(2) sets out exactly when a implementation protocol should be considered and section 35(3) sets out what an implementation protocol must cover, which includes identification of the challenges, description of roles and responsibilities and provide for dispute-settlement procedures and mechanisms etc.

²³² For example, see GN 491 in GG 29845 of 2007-04-26 and GN 1770 in GG 29422 of 2006-11-27.

²³³ Du Plessis 2008 *SAPR/PL* 105.

²³⁴ Practitioners Guide to IGR 52; for a more detailed discussion of the IRFA see Du Plessis 2008 *SAPR/PL* 104-105; also see Malan 2005 *Politeia* 226-243.

²³⁵ See the *Lagoon Bay* judgments, which will be discussed later in this thesis, for a good example of the lack of certainty surrounding this supervisory function.

The Constitution makes provision for conflict resolution by providing clear rules and guidelines. However, in light of Chapter 3 and the obligation placed on the spheres to fulfil their planning functions in a co-operative manner, it seems that the conflict resolution provision serve as a matter of last resort as opposed to being utilised in the first instance.

Nevertheless, there seems to be a host of co-operative governance provisions and mechanisms that could be utilised before resorting to the constitutional conflict resolution rules and guidelines. These can be found in the Constitution, NEMA (albeit in an environmental context), the IRFA and other non-statutory initiatives.

It is clear that the co-operative governance provisions and mechanisms have to overcome certain challenges arising due to the lack of legal certainty within the planning law regime. However, it seems trite that this uncertainty could have been dealt with had the respective spheres of government, and their line departments, fully embraced and utilised the co-operative governance provisions and mechanisms provided. Nevertheless, this all-powerful concept of co-operative governance inserted in legislation as a safety net/save all tool is in practice not the magic wand the legislature pictured it to be. The lack of utilisation of the co-operative governance provisions and mechanisms has resulted in each sphere of government and line departments fending for their own interests and needs and refusing to surrender to the interests and needs of the other spheres of government and their respective line departments.

Why the co-operative governance mechanisms have failed in the planning context cannot be attributed to a single factor. Perhaps it can be contributed to the mere non-willingness of officials.²³⁶ However, the fact that planning law at present is governed by an array of old order and new order legislation is surely a factor. With this often indecipherable mix bag of legislation, it is difficult for planning authorities to know the exact parameters of their powers

²³⁶ Nel & Du Plessis 2004 *Public Law* 181 (footnote omitted).

and duties, which caters for conflict. This issue is further convoluted by the overabundance of land-use planning tools supposedly operating alongside one another. It is only understandable that this setup “could lead to inconsistency in decision-making and even conflict among and between spheres of government that cannot be resolved with reference to the provisions on co-operative governance alone.”²³⁷ Once again this reiterates the desperate need for a national planning law in South Africa.

The next chapter will outline the resulting conflicts and jurisprudence that have arisen due to the lack of legal certainty within the planning law regime and the unwillingness by government to utilise the co-operative governance mechanisms and procedures. The main question that needs to be kept in mind throughout this analysis is: have the courts provided a sufficient amount of legal certainty with regard to the planning mandates of the respective spheres of government.

²³⁷ Bosman et al 2004 *SAPR/PL* 411.

5 Chapter 5: the role of the judiciary in clarifying planning mandates

Despite the comprehensive array of provisions seeking to promote clarity and co-operative governance – confusion and conflict abounds. The judiciary has therefore been left with the task of trying to resolve these matters. The courts have addressed various points of conflict between the national and local government, the local government and statutory authority, and the provincial and local government. Case law on these areas of conflict will be analysed and discussed in detail. The conflicts that will be discussed in this thesis include those between national and local government (i.e. *Swartland Municipality v Louw* (WCC);ⁱ *City of Cape Town v Maccsand (Pty) Ltd* (WCC);ⁱⁱ *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* (SCA);ⁱⁱⁱ *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* (CC);^{iv} *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and Another* (KZDHC)).^v

It will also include conflicts between local government and statutory authorities (i.e. *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* (W));^{vi} *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (SCA);^{vii} *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* (CC)).²³⁸

In addition, matters dealing with the conflicts between provincial government and local government will be unpacked (i.e. *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others*; *City of Cape Town v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others* (WCC);^{viii} *Lagoon*

Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others (WCC);^{ix} *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others (SCA);*^x and *The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others (CC).*^{xi}

Lastly, the matters involving private developers challenging government for exercising “*ultra vires*” powers will also be unpacked by analysing the following case law: i.e. *RA Le Sueur v eThekweni Municipality (KZP);*²³⁹ *Shelfplett 47(Pty) Ltd v MEC for Environmental Affairs and Development Planning and Another (WCC);*²⁴⁰ *Clairison’s CC v the MEC for Local Government Environmental Affairs and Development Planning and Bitou Municipality 2012 3 SA 128 (WCC);*²⁴¹ and *MEC for Environmental Affairs and Development Planning v Clairison’s CC (SCA).*²⁴²

Accordingly, the courts have been provided with an opportunity to provide legal certainty on a number of key issues. These key issues serve as the respective themes of discussion in this chapter, namely: (i) Defining the bounds of Municipal Planning; (ii) Defining the Bounds of Provincial Planning and Regional Planning and Development; (iii) Clarifying the planning domain of Statutory Planning Authorities and Local Planning Authorities; (iv) Resolving Conflicts between Environmental Mandates and Planning Mandates; (v) Drawing a line between Provincial Planning Mandates and Local Planning Mandates; and (vi) Providing Clarity on the Form, Nature and Status of Planning Tools (particularly Provincial Structure Plans, SDFs, IDPs

²³⁹ 2013 JDR 0178 (KZP).

²⁴⁰ 2012 3 SA 441 (WCC).

²⁴¹ 2012 3 SA 128 (WCC).

²⁴² (408/2012) [2013] SCA 82.

and Structure Plans). Each of these themes will be discussed below in greater detail.

5.1 Defining the bounds of “municipal planning”

Local government finds itself at the coalface of the planning law regime. Its direct link with the community and its intimate knowledge of the micro-planning arena has led to it being assigned powers and duties ascribed in provincial and national laws.

“Municipal planning” undoubtedly has seen more growth in the post-apartheid era than any other functional area of planning and its nuances are many. Accordingly, it is an accepted notion that by establishing the confines of “municipal planning” the parameters of the other functional areas of planning can more easily be ascertained.²⁴³

5.1.1 The unravelling of municipal planning by the courts

The unravelling of “municipal planning” as a concept began with an earlier Constitutional Court judgement, albeit indirectly. Yacoob J, in his minority judgment in the *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* case,²⁴⁴ stated that “municipal planning” is a local government function, but is a concurrent area of national and provincial legislative competence. Yacoob J did not expand any further on confines of the “municipal planning” function but he did provide an understanding of the activities undertaken by local government in fulfilment of its “municipal planning” functions and the instruments that guide such functions.²⁴⁵

²⁴³ Van Wyk *PER/PELJ* 295; Davis J agreed with this through his statement that “It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as a starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government (my emphasis).” (*Habitat Council* (WCC) 17).

²⁴⁴ 2009 1 SA 337 (CC).

²⁴⁵ Jaccob J held that that local government in exercising its “municipal planning” function must develop integrated development planning (as per the Local Government: Municipal Systems Act 32 of 2000), which must incorporate SDFs setting out spatial objectives and strategies

It was only until the *GDT (SCA)* case where real clarity was provided on the confines of “municipal planning”. The court revisited Schedules 4 and 5 of the Constitution and confirmed that “municipal planning” was a local government functional area. However, the pressing legal question was whether the powers exercised by local government in terms of the town planning ordinances also fell within the ambit of “municipal planning”?

In order to come to a viable conclusion on the above, the court separated the two terms and first expanded on the term “planning”. Nugent JA made reference to the minority judgement of Yacoob J²⁴⁶ and his statement that, “it has become commonplace throughout the English-speaking world to use the word ‘planning’ to describe the regulation and control of land use”.²⁴⁷ Nugent JA proclaimed the following:

“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 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.”

(para 132-135). The strategies to achieve these spatial objectives must outline desired patterns of land use, cater for the spatial reconstruction of a municipality, and be relevant to the location and nature of municipal development. The municipal land use management system must also be guided by the SDF (para 136).

²⁴⁶ *Wary Holdings (CC)* par 131.

²⁴⁷ *GDT (SCA)* 40.

Consequently, the court concluded that the functions which are assigned to local government by the provincial ordinances fell within the ambit of “municipal planning” and therefore were reserved for local government.²⁴⁸

The order of the SCA was submitted to the Constitutional Court for confirmation. This gifted the court another opportunity to confirm the SCA findings regarding “municipal planning” by stating:

“...‘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.”²⁴⁹

Jafta J went on to say that the purpose of Schedule 4 and 5 are to itemise the powers and functions allocated to each sphere and that this should be read in light of the fact that our Constitution contemplates some degree of autonomy for each sphere.²⁵⁰ It was held that autonomy cannot be achieved if the functional areas itemised in the Schedules are interpreted in a manner that fails to give effect to the constitutional vision of distinct spheres of government.²⁵¹

Moreover, it was stressed that the Constitution must be interpreted purposively, which in the context of the Schedule 4 and 5 functional areas means that the correct interpretation must allow for all spheres of government to exercise their powers “fully and effectively”.

²⁴⁸ *GDT (SCA)* para 31.

²⁴⁹ *GDT (CC)* para 57; *Maccsand (WCC)* 69I-71E; *Maccsand (SCA)* para 27.

²⁵⁰ Para 50 (footnotes omitted).

²⁵¹ Para 50; Davis J in the *Habitat Council (WCC)* judgement reiterated the *GDT (CC)* dicta and stated that in effect this means that provincial planning and municipal planning must be given different content and that the prefix “municipal” or “provincial” holds clear legal implications 13-14.

The GDT judgments' set the foundation for another battle between the spheres of government, yet this time national government also found itself at the frontline in the following cases: *Swartland (WCC)*²⁵² and *Maccsand (WCC)*, *Maccsand (SCA)*, *Maccsand (CC)*. These cases had substantially the same facts and legal question, namely, can mining activities commence without having to secure planning authorisation from the local authorities in accordance with LUPO?

The Western Cape High Court in both matters granted an interdict against the continuation of mining. The decisions were driven by the local government's contention that to commence mining operations the appropriate land-use planning approvals needed to be secured from local government despite the mining companies already being in possession of mining rights.

The respondents argued that mining is a national government functional area and managed by national legislation (the MPRDA), which in terms of section 146 of the Constitution trumps conflicting provincial legislation (LUPO). In addition, the respondents argued that despite section 23(6) of the MPRDA stating that mining was subject to itself and any other "relevant law", the LUPO did not qualify as a "relevant law" in this context. The applicants²⁵³ naturally argued the opposite successfully.²⁵⁴

The SCA revisited the constitutional division of legislative and executive powers amongst the three spheres of government and stressed that there has been a move away from the hierarchical structures of the past.²⁵⁵ It was confirmed that the regulation of mining was an exclusive national legislative

²⁵² For a more in depth discussion of the *Swartland (WCC)* matter see Patterson *SAPL* 692-697.

²⁵³ The City of Cape Town; the Minister of Local Government, and the Western Cape Department of Environmental Affairs and Development Planning.

²⁵⁴ The begrudged respondents of the court a quo decided to take the matter on appeal and due to the striking similarities both the *Swartland* and *Maccsand* matters were argued jointly on 16 August 2011.

²⁵⁵ Para 10.

competence and that the administration of MPRDA vests in the DMR.²⁵⁶ LUPO on the other hand is old order legislation and is considered to be provincial legislation for purposes of the Constitution.²⁵⁷

The court expanding on a number of municipal functions and tools, which included structure plans, zoning schemes, subdivision and spatial developments, held that because municipalities play such a central role in land-use planning within their jurisdiction there can be no doubt that they are the appropriate authorities given their knowledge of local conditions and intimate link with the local electret whose interests they represent.²⁵⁸

The court also reiterated on the new constitutional position of municipalities and the subsequent powers and functions vested in them.²⁵⁹ Accordingly, the court was in agreement with the judgments of Nugent JA in *GDT(SCA)* case,²⁶⁰ Yacoob J in *Wary Holdings (CC)*,²⁶¹ and Jafta J in *GDT (CC)*,²⁶² with regard to their respective delineations of the “municipal planning” concept.²⁶³

²⁵⁶ Para 14.

²⁵⁷ Para 16; it is important to also note that LUPO grants powers to municipalities to regulate land-use subject to the oversight of provincial governments and therefore is of relevance to this section of the thesis.

²⁵⁸ Para 71; The importance of this planning function had been commented on by Rogers AJ, when he stated that land use planning contrary, however minor the diversion, to LUPO would lead to the frustration of the very purpose of town planning and jeopardise the character of the area, the welfare of the members of the community, frustrate the planning objectives of the local authority (*Intercape Ferreira Mainliner (Pty) Ltd & others v Minister of Home Affairs & others 2010 (5) SA 367 (WCC) para 105*).

²⁵⁹ The court held that a “municipality in 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 ‘enjoys “original” and constitutional entrenched powers, functions, writes and duties that may be qualified or constrained by law and only to the extent the Constitution permits.’” (Para 22 (footnotes omitted)).

²⁶⁰ Para 41.

²⁶¹ Para 131.

²⁶² Para 57.

²⁶³ Accordingly, certain arguments by Maccsand and the DMR Minister were dismissed. Namely, that a necessary component of the power to regulate mining is DMR’s power to determine mining related land-use rights and consequently no room can be made for land-use planning under LUPO in respect of mining (para 29). The courts response was that when the Minister considers mining right applications the Minister takes into account certain factors listed in the MPRDA, however, not one of the considerations listed is concerned with “municipal planning” (para 33).

Consequently, the court held that it cannot be said that the MPRDA provides a surrogate municipal planning function displacing LUPO.²⁶⁴ Instead the court held that the MPRDA and LUPO fulfil different functions and operate alongside one another and accordingly once a mining right or mining permit has been granted it will be subject to LUPO allowing that use of the land in question.²⁶⁵ In this regard it was held that dual authorisations by different bodies, serving different purposes, were not unknown and not objectionable in principle, even if this would in effect amount to one of the bodies having a veto.²⁶⁶

The matter eventually was heard by the Constitutional Court who confirmed the above courts findings.²⁶⁷ Therefore, it is clear that mining cannot commence unless the land is appropriately zoned or a temporary departure is secured.

Nevertheless, the mining company applied for a temporary departure and in the interim continued to mine. However, they were later interdicted by the Land Claims Court from continuing mining operations until the departure was secured or until the land was appropriately rezoned.²⁶⁸

From the above mentioned judgements' it is clear that "municipal planning" includes the control and regulation of land-use. Moreover, it is clear that

²⁶⁴ Para 33.

²⁶⁵ Para 33.

²⁶⁶ Para 34.

²⁶⁷ Jafta J stated that an overlap between LUPO and the MPRDA naturally occurs due to the fact that mining is carried out on land, and such an overlap does not constitute an impermissible intrusion by one sphere of government into the functional area of another because the spheres of government do not operate in hermetically sealed compartments (para 43). Moreover, Jafta J proclaimed that LUPO regulates municipal land planning and that it applies to the land which is subject to these proceedings and accordingly it cannot be assumed that the mere granting of a mining right cancels out the application of LUPO (para 44). Furthermore, Jafta J held reiterated that there is nothing in the MPRDA that suggests LUPO ceases to apply to land over which a mining right or permit has been granted, and that in fact s 32(6) of the MPRDA states the contrast by proclaiming that a mining right "granted in terms of this Act is subject to its and other relevant laws. Interestingly, in this regard the court in fact made reference to the mining permit in question and that is stated that it is subject to any other laws (fn47).

²⁶⁸ *Maccassar Land Claims Committee (LCC)*.

local government approval for a departure or rezoning needs to be secured before the commencement of operations that are in contradiction to the zoning scheme. But, what does 'control and regulation' of land-use entail? Davis J in the *Habitat Council (WCC)* judgement grouped the two concepts by stating that land-use control included:²⁶⁹

“the control and regulation of the use of land in the municipal area and detailed through the zoning of land (that is, the making, amending and replacing of the zoning schemes, rezoning particular land, and the granting of departures from the provision of zoning schemes or consent uses in relation to particular land), as well as to the establishment of townships (that is controlling and regulating the consolidation, and particularly the subdivision of land units to create new urban areas, or for urban renewal).”

In addition, Davis J held that municipal planning comprises forward planning. Municipal forward planning was held to include the, “laying down detailed guidelines for the future spatial development of the municipal area.”²⁷⁰

Accordingly, “municipal planning” local government matters contained in Schedule 4B to the Constitution entails forward planning and the control of land-use, which includes the regulation thereof.²⁷¹

5.1.2 Retrospective and national implications of the Maccsand Judgements'

Since the passing down of the Maccsand judgements' many questions have been asked regarding the retrospectively of this decision and its potential implication beyond the Western Cape and LUPO.

²⁶⁹ Para 18.

²⁷⁰ Para 18.

²⁷¹ Therefore, it can be said that local government is responsible for: the development of IDPs, SDFs and land use schemes; zoning; rezoning; the removal of restrictions; the subdivision of land; the establishment of townships; and all applicable building restriction (Van Wyk 2012 *PER/PELJ* 303).

The recent case of *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and Another*²⁷² provides some clarity on this matter. The Kwazulu-Natal Planning and Development Act²⁷³ (KZNPDA) is the current applicable land-use planning legislation within the relevant province. In light of the *Maccsand* judgments²⁷⁴ the applicants sought to interdict the respondents from the construction of the Fairbreeze mine until they had applied for the necessary development approval in terms of the KZNPDA.

However, in this case the mining authorisation was obtained under the now repealed Minerals Act²⁷⁴ which differed from the MPRDA as it contained no “subject to other relevant laws” provision and in fact stated that it was only subject to itself and to other *national* legislation related to the mining activity.²⁷⁵ An important point made by the court was at the time there were no “wall-to-wall municipalities” either.²⁷⁶

The court, furthermore, expanded on the Transvaal Planning Ordinance (TPO). It was held that s11 of the 1992 TPO did not require provincial planning approval for mining and that the effect of Schedule 6 of the Constitution was that this situation continued until the TPO was amended.²⁷⁷ The relevant “Fairbreeze properties” were not located inside a municipal area and were not subject to any zoning controls when the authorisation was granted in 1988 and this situation persisted until 2002 when the mining activities commenced. In light of these facts (the “trumps all” character of the

²⁷² 10629/2012 2013 10629 SA 2012 (KZDHC).

²⁷³ No 6 of 2008.

²⁷⁴ No 50 of 1991.

²⁷⁵ Para 37.

²⁷⁶ Para 38.

²⁷⁷ Para 54; This amendment took place with the adoption of the KZN Town Planning Ordinance Amendment Act 3 of 2008. Notably, section 11(6) of the amended TPO correlates exactly with the KZNDPA s 38(3), which is “indicative of the provincial government’s appreciation of the correct position in law when it introduced mining as an activity requiring provincial planning authorisation.” (Para 56-57).

Minerals Act and the relevant TPO at the time) the court dismissed the application with costs.

Although the *Tronox* case is merely of persuasive value in jurisdictions outside KwaZulu-Natal, it provides a clear reminder that each matter needs to be considered in its merits and that the *Maccsand (CC)* ruling may have limited retrospective effect in certain circumstances.²⁷⁸

5.2 Defining the bounds of “provincial planning”, “regional planning and development”, and “urban and rural development”

With regard to “provincial planning” a point of departure, as ascribed by the Constitution in Schedule 5, is that “provincial planning” is an exclusive provincial government competence. In *Wary Holdings (CC)* it was made clear that “provincial planning” excludes “municipal planning”.²⁷⁹ Accordingly, it can be held the “municipal planning” predetermines the confines of “provincial planning”.²⁸⁰ Naturally, the notion that “provincial planning” can be predetermined by the concept of “municipal planning” extends to other functional areas as well (i.e. “regional planning and development” and “urban and rural development”).

In the *GDT (CC)* Jafta J did not find it necessary to unpack the concepts “regional planning and development”, “urban and rural development” and “provincial planning”. Nevertheless, as stated above the court did consider

²⁷⁸ Feris J and Naidoo J summarise the implications of this judgement as follows: “the decision provides useful guidelines for approaching the zoning obligations of holders of old-order mining rights. In determining whether an applicant for a mining right would require consent from a municipal authority to conduct mining operations, it is important to consider whether the proposed mining area is situated within or outside a municipal area or if the municipality extended its town planning scheme to include the area in which mining is being conducted and has been zoned appropriately. Should a holder of an old-order mining right have conducted mining operations continuously since the granting of an old order mining right, the area should be zoned for mining purposes. The risk to a holder of an old order mining right that an area could have been zoned for purposes other than mining is, however, possible when no mining was conducted prior to the enactment of MPRDA and only commenced on conversion of the old order mining right.” Feris J & Naidoo J (2013) “Sorting out mining in municipal areas: mining municipal law. Without Prejudice” 2013 (13:3) *without prejudice* 90.

²⁷⁹ Para 127.

²⁸⁰ Van Wyk 2012 *PER/PELJ* 302.

the word “planning” in isolation and in so doing, a certain amount of clarity was provided. It was held that the spheres of government are autonomous, have distinctive functions and that the context in which the term planning is used carries different meanings.²⁸¹ The Constitution allocates different planning responsibilities to each sphere of government in alignment with what is appropriate to that specific sphere.²⁸² The distinctiveness was held to lie at the level at which a particular power is exercised.²⁸³ To illustrate this, the court held that:

“province exercises powers relating to ‘provincial roads’ whereas municipalities have authority over ‘municipal roads’... [t]he prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres.”²⁸⁴

Jafta J provided some clarity on “urban and rural planning,” albeit indirectly. Firstly, to lay the foundation for this discussion, Jafta J held that the legislative authority over Part B of Schedule 4 vests in the national and provincial spheres concurrently, while the legislative authority over Part B Schedule 5 matters vests exclusively in the latter mentioned sphere.²⁸⁵ Nevertheless, the national and provincial government cannot through legislative means assign themselves the power to exercise executive municipal administrative functions and powers, because these are prescribed to municipalities in terms of Section 156(1)(a) of the Constitution.

However, the respondents held that they cannot be construed to be impeding or compromising municipalities when they exercised the contested “municipal powers” because they were exercising these powers under the functional

²⁸¹ Para 53.

²⁸² Para 53.

²⁸³ Para 55.

²⁸⁴ Para 55.

²⁸⁵ Para 59.

area of “urban and rural development”.²⁸⁶ Therefore the respondents held that by exercising these powers, “rightly allocated to them by the Constitution,” it cannot be deemed to be in contravention with Section 151(4) of the *Constitution*.²⁸⁷ This submission was premised on the assumption that the concept “urban and rural development” ought to be given its ordinary, wide meaning, nevertheless, in light of the distinctive discussion above, Jafta J held that such a wide interpretation would be at odds with this *Constitutional* theme and approach.²⁸⁸ The court therefore held that in light of the courts duty to construe the sections of the Constitution in a manner that strikes harmony and gives full effect to each section, this expansive interpretation contended for by the respondents must be rejected.

The court therefore did not find that the situation necessitated the giving of a definition for “urban and rural development”; nevertheless, it held that it was sufficient to say that “it is not broad enough to include powers forming part of ‘municipal planning’”.²⁸⁹

Fortunately, Davis J in the *Habitat Council (WCC)* judgment managed to provide some express certainty on the confines of “regional planning and development”, “urban and rural development” and “provincial planning”. As discussed above, Davis J concluded that “‘municipal planning’ comprises forward planning and land use control”.²⁹⁰ However, Davis J also stated that inevitably, “‘regional planning and development’, and ‘urban and rural development’ functional areas set out in Schedule 4A to the Constitution, and the “provincial planning” functional area in Schedule 5A to the Constitution,... constitute forward planning and land use control” as well.²⁹¹

²⁸⁶ Para 60.

²⁸⁷ Para 60.

²⁸⁸ Para 60-61.

²⁸⁹ Para 63.

²⁹⁰ Para 18.

²⁹¹ Para 18-19.

Nevertheless, Davis J proclaimed that regional and provincial forward planning entail “laying down broader guidelines for areas encompassing the whole or parts of more than a single local or metropolitan municipality.” With regard to the control of land use in a provincial context, Davis J held that it “entails provincial government taking decisions concerning zoning and the establishment of townships, which, because of the nature and scale of land use to which they relate, have substantial regional or provincial planning effects.”²⁹²

5.3 Clarifying the planning domain of statutory planning authorities and local planning authorities

The *GDT* cases involved the struggle between the City of Johannesburg Metropolitan Municipality and the Gauteng Development Tribunal (GDT).²⁹³

Besides the two relevant farms proposed for the township development being zoned as ‘Agriculture’, the development was inconsistent with the existing town planning scheme, the IDP, the SDF, and the urban edge of the municipality. Accordingly, the municipality opposed the developments; however, GDT was later approached by the developers and proceeded to approve the developments.

This sparked, in August 2005, an announcement by the municipality that it would no longer recognise planning approvals granted by the GDT. A simultaneous application was brought to the South Gauteng High Court.²⁹⁴ The applicants (the municipality) wanted a declaratory order on the exact powers the GDT had in terms of the DFA to approve the establishment of townships and to amend existing town planning schemes. Furthermore, the applicants requested that the abovementioned approvals be reviewed and

²⁹² Para 19.

²⁹³ The GDT is a provincial statutory body given certain decision making authority over planning by the DFA.

²⁹⁴ At the time of this application the court was still the Witwatersrand High Court.

set aside and that the developers be interdicted from proceeding with their respective development projects.

Gildenhuys J found that the DFA procedures could be used alternatively to those set out in the provincial ordinances and that the 'provincial ordinances' and the DFA operated as parallel legislation.²⁹⁵

Unsatisfied by the above decision the municipality approached the SCA.²⁹⁶ The pressing legal question was the constitutionality of both chapters V and VI of the DFA.²⁹⁷ The SCA ruled that allowing two different bodies to speak on the same subject with different voices, could only lead to the disruption of orderly planning and development within the "municipal planning" regime.²⁹⁸ Accordingly, Chapters V and VI of the DFA were declared invalid in their entirety but the declaration of invalidity was suspended for 18 months to enable Parliament to remedy the defects identified by the Court.²⁹⁹

When the matter was submitted to the Constitutional Court for confirmation, the court confirmed the unconstitutionality of the above chapters. However, the court suspended the order of invalidity for 24 months to avoid and disruptive effect that the invalidity order might have. Furthermore, the development tribunals were prohibited from hearing any further matters in the City's jurisdiction and in the jurisdiction of the eThekweni Municipality, except for those already pending matters.

²⁹⁵ Unfortunately, this decision was heavily influenced by the wording of literature on the land development procedures of the DFA, which stated that the DFA "will operate in parallel to and as alternative for existing land development procedures" (Budlender et al *Juta's new land law* 2A-3).

²⁹⁶ *GDT* (SCA).

²⁹⁷ Para 4.

²⁹⁸ *GDT* (SCA) para 1.

²⁹⁹ The reasoning behind this suspension was to prevent those local authorities with capacity constraints from immediately being burdened with a flurry of development applications.

5.4 Resolving conflicts between environmental mandates and planning mandates

In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*³⁰⁰ the Constitutional Court found that when the local authorities considered the need and desirability of a development they did so from a planning law perspective and when the environmental authorities (provincial government) decided on same they would take into account socio-economic, economic and environmental considerations (the principles of sustainability).

The *Lagoon Bay (WCC)* ruling served to further complicated and confused concepts that seemed to have been cleared up by the Constitutional Court by failing to take the above matter into account. Instead the court accepted that the test to determine need and desirability is a policy driven test and authorities have a broad discretion on what factors to take into account. Therefore, this ruling appears to be in direct conflict to the narrow interpretation adopted by the Constitutional Court in the *Fuel Retailers* judgment.

The *Lagoon Bay* matter did eventually end up at the doors of the Constitutional Court.³⁰¹ The court provided some clarity on the ambit of the Minister's decision-making authority under LUPO. The court held that the Minister was entitled to take account of factors such as the 'preservation of the natural and developed environment' when exercising the power in question."

In coming to this decision, the Constitutional Court aptly made reference to the *Fuel Retailers (CC)* judgment and reiterated that.³⁰²

³⁰⁰ 2007 (6) SA 4 (CC).

³⁰¹ See Cullinan & Associates Legalbrief Environmental 26 November 2013 for a further discussion on the decision of the Constitutional Court.

³⁰² Para 64.

“It is no answer by the environmental authorities to say that had they themselves considered the need and desirability aspect, this could have led to conflicting decisions between the environmental officials and the town-planning officials [who had also considered desirability]. If that is the natural consequence of the discharge of their obligations under the environmental legislation, it is a consequence mandated by the statute. It is impermissible for them to seek to avoid this consequence by delegating their obligations to the town-planning authorities.”

Accordingly, the court held that it is possible that different decision-makers may consider some of the same factors during different approval processes.³⁰³ Therefore, for example, when a decision maker is evaluating a rezoning application, they may have regard to considerations such as “...safety and welfare . . . of the community and ‘the preservation of the natural and developed environment’, within the context of his or her broad discretion to determine ‘desirability’.”³⁰⁴

As a result the court held that a decision-maker, when considering an application for an environmental authorisation, must “have regard to various principles to ensure socially, environmentally and economically sustainable development, including avoiding environmental degradation, preserving cultural heritage, the responsible and equitable use of natural resources, community well-being and empowerment and the beneficial use of environmental resources for the service of the public interest.”³⁰⁵

Therefore, the court held that “it seems that it is clear that environmental authorities and planning authorities may... consider some of the same factors when granting their respective authorisations.”³⁰⁶ However, the court held that this cannot detract from their statutory obligations to consider

³⁰³ Para 65.

³⁰⁴ Para 65.

³⁰⁵ Para 65 (footnote omitted).

³⁰⁶ Para 65.

those factors, and indeed to reach their own conclusions in relation thereto.”³⁰⁷

Accordingly, the court ruled that Lagoon Bay “had failed to show that, to the extent that the Provincial Minister may have ignored or revisited some of the conclusions reached during the earlier approval processes, he improperly or unlawfully exercised his discretion in terms of section 36 of LUPO.”³⁰⁸

5.4.1 Local authorities legislative powers over the environmental sphere

It has already been said that that “environment” is listed in Schedule 4A of the Constitution and is therefore a functional area of concurrent national and provincial legislative competence. However, local governments are also charged with the obligation of providing a healthy environment to their populace.

The question is what is the ambit of the municipality’s powers in as far as it concerns nature conservation through the use of spatial planning instrumentation? This exact question was taken on in the *Le Sueur (ZAKZPHC)* judgement handed down on 30 January 2013, where the court considered whether local government had acted *ultra vires* its powers by legislating in the sphere of the environment.³⁰⁹

³⁰⁷ Para 65 (footnote omitted).

³⁰⁸ Para 66.

³⁰⁹ Dagut & Chien provide an succinct summarised the matter as follows: “.The Durban Metropolitan Open Space System (D-MOSS) (initially known as the eThekweni Environmental Services Management Plan) was introduced as a policy directive of the Municipal Council. It created a system of open spaces of land and water, consisting of areas of high biodiversity. As directives do not have the same legislative weight as a town-planning scheme, it was difficult for the First Respondent (the eThekweni Municipality) to enforce D-MOSS. Although landowners would undertake work on their properties in accordance with its zoning provisions, they were often ignorant of the provisions of D-MOSS. In order to improve enforcement and certainty, the First Respondent passed a resolution in 2010 to integrate D-MOSS into its town-planning schemes. Essentially, D-MOSS would overlay the underlying zoning and create controlled areas. Developments within the controlled areas would require environmental authorisation or support from the Environmental Planning & Climate Protection Department of the eThekweni

The applicant argued because “environment” is listed in Schedule 4, Part A of the Constitution it excludes Municipalities at Local Government level from such area of activity.³¹⁰ The municipality conversely argued that Section 156(4) of the Constitution indicates that even matters reserved for National and Provincial legislative authority in Parts A of Schedules 4 and 5 may be dealt with at a municipal level.³¹¹ In addition, Section 156(5) provides that “a Municipality has the right to exercise any power concerning a matter reasonably necessary for or incidental to, the effective performance of its functions.”

The respondents took the point that “although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern or sphere of National and Provincial responsibility that Local Governments in the form of Municipalities are in the best position to know, understand, and deal with issues involving the environment at the local level.”³¹² The court agreed with the respondent’s view that “the framers of the Constitution did not intend thereby to allocate legislative powers amongst the three spheres of Government in hermetically sealed, distinct and water tight compartments.”³¹³

The court therefore concluded that “the environment is an ideal example of an area of legislative and executive authority or power which had to reside in

Municipality, regardless of their underlying zoning.” (Dagut & Chien “Court confirms that municipalities may regulate on environmental matters too” 2013 *Environment* <http://www.withoutprejudice.co.za/index.php/issues/category/2013/25> para 3-5).

³¹⁰ Para 16; This section states that National Government and Provincial Governments must assign to a Municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4, or Part A of Schedule 5 which necessarily relates to Local Government, if: (i) the matter would most effectively be administered locally; and (ii) the Municipality has the capacity to administer it.

³¹¹ This section states that National Government and Provincial Governments must assign to a Municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4, or Part A of Schedule 5 which necessarily relates to Local Government, if: (i) the matter would most effectively be administered locally; and (ii) the Municipality has the capacity to administer it.

³¹² Para 20.

³¹³ Para 20; in coming to this conclusion the court referred to section 40 and 43 of the Constitution.

all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4.”³¹⁴

5.5 Drawing a line between “provincial planning mandates” and “local planning mandates”

5.5.1 Intervention and supervision by provincial government in local government affairs

It has been repeated above that “the constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise.”³¹⁵ However, it is also recognised that the “constitutionally mandated intervention in terms of Section 100...and 139...constitute an exception to the principle and limited autonomy of the spheres of government.”³¹⁶

However, it must be noted that intervention in local government matters in accordance with Section 139 of the Constitution should only take place when local government, “cannot or does not fulfil an executive obligation in terms of the Constitution or legislation”.³¹⁷

Moreover, provincial government in terms of Section 125(3), 154(1) and 156(6) of the Constitution must support local government to help develop

³¹⁴ Para 20; in order to support this argument the court made reference to the *Warey Holdings (CC)* judgement where the court held that: “There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of sub-division of ‘Agricultural Land’ the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective. Each having its’ own constitutional and policy considerations.” (para 20). In addition, the court in paragraph 20 made reference to the *Maccsand (CC)* decision and the comments that: “The Constitution allocates powers to three spheres of Government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of Government to co-operate with one another in mutual trust and good faith, and to co-ordinate the actions taken with one another.” (para 47).

³¹⁵ *GDT (CC)* para 56.

³¹⁶ *GDT (CC)* para 56.

³¹⁷ S 139(1).

their capacities to a point that will allow them to perform their designated and assigned functions.

The *Lagoon Bay (WCC)* case confirmed that the above powers may be misused or be subject to misinterpretation.³¹⁸ The applicants attacked the decision by the first Provincial Minister (MEC) on the grounds that the condition imposed by the MEC to allow his successor to revisit a local government planning decision was *ultra vires* the empowering provisions of LUPO and constitutionally unlawful in regards to its effect on s 156 (1), read with Part B of Schedule 4.³¹⁹

The court dismissed the former argument and held that LUPO³²⁰ authorises the Minister when granting an application to do so subject to conditions that they may deem fit. In regard to the constitutional argument the applicants referred to the *GDT (CC)* case. As stated above in the *GDT* judgment “municipal planning” was interpreted to encompass the control and regulation of the use of land, including the zoning of land and the establishment of townships. In short, it was concluded that zoning of land is an exclusive municipal competence.

Nevertheless, the court held that the above matter was distinguishable from the *Lagoon Bay* case, for it dealt with an Act that created tribunals “as separate bodies with “parallel authority”, and purported to confer equivalent authority on such tribunals to deal with matters falling within the functional area of ‘municipal planning’.”³²¹ This was juxtaposed with the “complex”³²²

³¹⁸ The applicant (LagoonBay) wished to develop the Lagoon Bay Lifestyle Estate. Application was made to the Minister for the amendment of a structure plan from “agriculture/ forestry” to township development. This was duly authorised by the Minister but on a condition. The condition was that when an application was submitted for rezoning and subdivision to the local authorities, the decision would have to be referred back to the Minister for his consideration. The local authorities approved the application and accordingly referred it to the present Minister for the necessary further attention. The Minister’s decision was to overturn the local authority’s approval.

³¹⁹ Para 6.

³²⁰ S 42(1).

³²¹ Para 11.

³²² Para 12.

consideration that the court was faced with in *Lagoon Bay*, namely the constitutional relationship between provincial government and municipalities.

The court held it was the above constitutional relationship that distinguished the two matters and that the Constitution entrusts the provinces with extensive powers with regard to the monitoring and support over local government. Furthermore, the court stated that the Constitution in s 139(1) provides that provincial government has the power to directly intervene “when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.”³²³

Before going any further it is necessary to discuss the above *dicta* in isolation. The court mentions all the provisions that allow for an intervention by provincial government into local government competencies, however, it fails to sufficiently focus on the underlying events that would lawfully necessitate such intervention. For example, had the municipality failed or was there a possibility that it would fail to fulfil its executive duties? There was no evidence put forth to allow this question to be answered in the affirmative. This being said, it can be confirmed despite “the functional areas allocated to the various spheres of government... not [being] contained in hermetically sealed compartments”,³²⁴ the interference by one sphere in the competencies of another cannot occur unless it does so within the parameters of the Constitution. In this case it seemed that those parameters, were breached.

However, *Lagoon Bay* had not directly challenged the constitutionality of Section 16 and section 25 of LUPO and the court therefore held that the MEC was allowed to consider the application for rezoning and subdivision. The reason being, Sections 16 and 25 of LUPO, allowed the MEC to approve such applications. In addition, the court held that these sections are not

³²³ Para 12.

³²⁴ *GDT* (CC) para 55.

repugnant to the Constitution and therefore have neither been, by way of implication, repealed nor amended.³²⁵

Lagoon Bay took the above matter on appeal to the SCA and the matter was heard 25 February 2013. The *Lagoon Bay* (SCA) judgement was decided on 15 March 2013 and the court overturned the *court a quo*'s decision. The SCA held that:

“In terms of LUPO, the principal tools for the regulation of land use are through the introduction and enforcement of structure plans at a regional level and zoning schemes at a municipal level. The general purpose of a structure plan is to lay down guidelines for the future spatial development of the area to which it relates in such a way as will most effectively promote the order of the area and the general welfare of the community concerned (s 5). And the general purpose of a zoning scheme is to determine use rights and to provide for control over use rights and over the utilisation of the land in the area of jurisdiction of a local authority (s 11).”³²⁶

Therefore, the court held that “while a comprehensive land-use regime calls for integrated and co-ordinated interaction on the part of provincial and municipal government, it goes without saying that the one may not usurp the powers of the other.”³²⁷ The court held that the MEC was able to consider the application to amend the structure plan but was not able to consider the rezoning application and declared the municipality the competent authority to

³²⁵ Para 16-18.

³²⁶ Para 11.

³²⁷ Para 11.

consider and determine the applicant's application for rezoning and subdivision.³²⁸

The MEC begrudged by the above decision took the matter to the Constitutional Court. The *Lagoon Bay* (CC) matter reiterated the findings of the court of first instance that Section 16 and 25 of LUPO remain in force as old-order legislation remains in force until the necessary steps are taken to have it set aside.³²⁹ In this regard the court held that even if it was accepted that the legislative provisions may be impliedly amended or repealed, there is no obvious and direct contradiction between those broad phrases in the Constitution (i.e. "provincial planning", "municipal planning" and "regional planning and development").³³⁰

In addition, the court held that the structure plan that had been amended in 1988 to allow for the municipality to consider all rezoning applications was subject to a qualification in the amendment that stated that this delegation of power will not be applicable where a state institution (i.e. provincial government) was not in favour of the rezoning.³³¹ Therefore, the court held that Lagoon Bay's challenge to the rezoning refusal as being *ultra vires* LUPO must fail; however, the court emphasised that this in no way implies that the MEC was competent under the Constitution to exercise rezoning functions, but this finding is limited to a rejection of Lagoon Bay's argument that the impugned decision was *ultra vires* LUPO.³³²

With regard to the MECs to decide upon subdivision applications, the court held that unlike the structure plan amendment, the Scheme Regulations do not qualify a local authority's power to decide subdivision applications, nor limit its competence to instances when there is no disagreement from the

³²⁸ Para 12; it is important to note that the SCA did not deal with the MEC's powers under LUPO, but relied on the provisions of the Constitution regarding the division of functions and competences between spheres of government, as well as the interpretation of those provisions by court in *GDT* (SCA).

³²⁹ Para 26.

³³⁰ Para 27.

³³¹ Para 51.

³³² Para 52.

MEC.³³³ The court held that while the amendment authorises MECs to make subdivision decisions, it only grants that authorisation if a municipality has elected not to decide the subdivision application itself. In the present case the municipality elected to decide the subdivision and therefore the MEC was acting *ultra vires* when deciding the application.

The above decision has been viewed as an opportunity missed for the court to further build on the *GDT* cases and subsequently further clarify the ambit of the municipal and provincial planning competences in the Constitution.³³⁴

Fortunately, Davis J in the *Habitat Council (WCC)* judgement provided some guidance on the provincial intervention. Davis J held that:

“provincial government may enact, maintain in force and enforce legislation and take and implement executive decisions which regulate or broadly manage or control the exercise by municipalities over the executive authority in relation to municipal planning.”³³⁵

This approach was held to promote the aim, enshrined in section 155(7) of the Constitution, of “ensuring effective performance by municipalities of the functions which they have been granted under the rubric of municipal planning,”³³⁶ as well as to promote “the development of their capacity to perform their functions and manage their own affairs” as per section 155(6)(b) of the Constitution.

Accordingly, Davis J ruled that “provincial government may regulate the manner in which municipalities exercise their executive authority, which

³³³ Para 53.

³³⁴ Cullinan & Associates 2013 *Legalbrief Environmental*.

³³⁵ Para 20.

³³⁶ Para 20.

entails a 'broad managing or controlling rather than a direct authorisation function'.³³⁷

In light of the above, Davis J held that in the context of the case *in casu*:³³⁸

"provincial government may also assess the outcome of the municipal planning processes. Provincial government may require that the decision be reconsidered by a municipality if the manner in which it was taken, the justification for the decision, or the nature and effect, or likely effect of the decision undermines the effective performance by the municipality of its forward planning and land use control functions."

It was held that such an approach "harmonises the relationship between the two levels of government, rather than being destructive of local government powers and their conflation with provincial powers."³³⁹

From the above it can be deduced that provincial government should not interfere in intra-municipal planning matters that do not affect provincial interests. However, in the *Habitat Council (WCC)* decision it was held that this does not mean that provincial government "cannot make provision for and consider appeals aimed at ensuring the effective performance by municipalities of their municipal planning competences."³⁴⁰

Nevertheless, the court held that Section 44 of LUPO was "manifestly inconsistent with the Constitution to the extent that it not only permits appeals to the Province against every decision made by a municipality in terms of LUPO, and also because it allows first respondent to replace every decision with his own decision, even where the development in question patently affects only 'municipal planning'."³⁴¹

³³⁷ Para 20 (footnote omitted).

³³⁸ Para 21.

³³⁹ Para 21.

³⁴⁰ Para 23.

³⁴¹ Para 28.

5.5.2 *Extra-municipal issues*

The MEC's council in the *Lagoon Bay* (WCC) matter emphasised that “there is a category of planning decisions which will have an impact beyond the area of a single municipality”³⁴² and that “these ‘extra-municipal’ issues... exceed the bounds of municipal planning and fall within the ambit of ‘regional planning and development’... and/or ‘provincial planning’.”³⁴³ It was argued and accepted that this particular development fell within this extra-municipal category. Whether this submission was one of merit cannot be confirmed as the court seemed to ignore this point and provided no clarity on what constitutes “provincial planning” or “regional planning and development”. A three-stage enquiry starting by: defining both concepts; determining the conflict; and lastly how to resolve the conflict would have been the preferable approach.³⁴⁴ This in turn can only be viewed as a missed opportunity to provide for some much needed legal clarity.

Davis J in the *Habitat Council* (WCC) decision fortunately provided some guidance in this regard. Davis J held stated that it is only apt for province to take a decision, concerning zoning and township establishment, if the nature and scale of land use to which they relate, have substantial regional or provincial planning effects.³⁴⁵ Therefore, Davis J held that:

“When exercising this power, the provincial government must confine itself to the regional provincial effects; that is it is not at large to reject a proposal because it approves of a feature which has only intra-municipal effects. Recall Nugent JA's dicta in the GDT case at paragraphs [35]–[37], namely, that the enquiry commences with an examination of the narrowest form of power, and moves upwards,

³⁴² Para 10.

³⁴³ Para 10.

³⁴⁴ Patterson 2012 *Land use planning*.

³⁴⁵ Para 19.

rather than the other way round. This approach permits a clear demarcation between municipal and provincial government.”

Davis J also expressed that the very purpose of forward planning and land use control under "municipal planning", "regional planning and development", "urban and rural development", and "provincial planning" "exist to promote order of the area, whether it be the municipal area, the region or the province, and the general welfare of the community concerned through a coordinated and harmonious development of the area."³⁴⁶

5.5.3 Provincial government basing decisions on “municipal planning”- a false dichotomy

The setting of this discussion, akin to the *Lagoon Bay* and *Habitat Council* judgements, is once again the Western Cape. However, this time we find ourselves in the beautiful garden route area. The applicable case law:: *Shelfplett (WCC)*, *Clairison's (WCC)* and *Clairison's (SCA)*.

In the *Shelfplett (WCC)*³⁴⁷ matter the main point of departure was that for the development to go ahead the KWP RSP would have to be amended by the MEC to allow for the rezoning and subdivision approval from the Bitou Municipality. The legal question was: had the MEC in coming to his decision wrongly taken into account “municipal planning” considerations?

³⁴⁶ Para 20.

³⁴⁷ Shelfplett was the owner of a property, located in the Plettenberg Bay area, which they wanted to develop. The property was designated “recreation” in accordance with the Knysna- Wilderness- Plettenberg Bay Regional Structure Plan (KWP RSP). Accordingly, an application was made to the MEC to change the designation to ‘Township Development’, however, the MEC rejected the application. As a result of the above refusal the Shelfplett, with the support of the Bitou Municipality, approached the High Court for the review and setting aside of the decision and moreover for the RSP to be declared invalid. The High Court declared the RSP invalid in that the relevant map guiding the RSP was “informed by discriminatory laws and had a racial character.” (para 46) This in effect rendered moot the review of the MEC’s decision, however, Rogers J, in a great service to legal certainty, looked into the remaining ground of review.

In answering the above, the court thought it necessary to revisit the MEC's reasons for his decision, which included the following:³⁴⁸

(a) where the local authorities has failed to draw up urban edges as obligated by the WC SDF the MEC has to determine a suitable urban edge ensuring room for future development while attaining higher densities; (b) the existence of a golf estate and polo estate in the area does not justify shifting the urban edge; (c) given the exceptionally attractive landscape present to the north a township development in that direction was undesirable; (d) the development would put added pressure on the N2; (e) employees of the proposed development would have to travel substantial distances , which conflict with the aims of WC SDF's; (f) the Bitou Municipality would potentially be burdened in providing services and infrastructure.

Shelfplett argued that the 1991 PPA must be interpreted in a manner that would align it with the provisions of the Constitution, which has reserved local government as the sphere to deal with “municipal planning” responsibilities. Moreover, Shelfplett held that even if only a few of the considerations taken into account by the MEC were influenced by “municipal planning”, they would still constitute impermissible considerations, sufficient to invalidate his decision.³⁴⁹

Counsel for the MEC agreed that if any of the considerations were “municipal planning” rather than “provincial planning” functions that the MEC's decision would have to be set aside. However, the MEC's argument was that this decision had implications beyond the boundaries of one municipality and may have implications for the concurrent functional areas of national and provincial competence.³⁵⁰

³⁴⁸ Para 82.

³⁴⁹ Para 87.

³⁵⁰ Para 88; Reference was made to the *Lagoon Bay* judgment in support of this argument.

However, Rogers J did not agree with the above contention put forth by counsel and said that you have to look at the empowering legislation in order to determine the considerations the MEC was entitled to reflect upon.³⁵¹ The court held that it could not have been intended by the legislature to install certain powers on the MEC and then prevent the MEC from taking into account considerations instrumental to exercising those powers.³⁵²

Accordingly, it was held that If the legislative scheme for RSPs is a provincial planning matter, which Rogers J submitted it was, then “all the considerations which the legislation authorises the relevant authority to take into account in approving or amending an RSP are permissible provincial planning considerations.”³⁵³ On this point Rogers J explained that a false dichotomy has been assumed between the *function* entrusted to an authority and the *considerations* that may be taken into account in executing that function.³⁵⁴ Rogers J distinguished the facts that lay before the Constitutional Court in the *GDT case* and the facts at hand. In the *GDT case*:

“it was the function (the granting of rezonings and subdivision approvals) that was investigated and held to be a ‘*municipal planning*’ function. For this reason it was held to have been constitutionally impermissible for the DF Act to allocate the performance of such functions to provincial tribunals. Once one finds that the function of approving rezonings and subdivisions is a municipal planning function, all the considerations that the governing legislation authorises a municipality to take into account in deciding rezoning applications and subdivision applications may be taken into account. They are *ex hypothesi* valid municipal planning considerations for purposes of the function under consideration. There is in truth no point in labelling the

³⁵¹ Para 90.

³⁵² Para 100.

³⁵³ Para 113.

³⁵⁴ Para 113.

considerations -they take their character from the function to which they relate.”

In light of the above, the relevant function in this case is the approval or amendment of the RSP and the decision in this regard was a “provincial planning” function. Accordingly, the same inference can apply, namely that the consideration that the MEC is empowered to take into account by legislation are *ex hypotheis* “provincial planning” considerations for the purposes of that particular function. Naturally, from this reasoning in deciding to amend an RSP the MEC could have regard to considerations such as containing urban sprawl, densifying existing areas of urban development. The reason being, that “the MEC was authorised by the 1991 PPA and Section 29(3) of the DFA to base his decision on these considerations he did, even if some or all of them were matters of ‘municipal planning’.”³⁵⁵

The *Clairison's (WCC) case* was similar to the above as it also involved a property within the KWP area, which was owned by Clairison's CC who wished to develop the property. Once again the question was whether the MEC could take into account “municipal planning” considerations (or, put differently, the spatial context of the applicant's land) in reaching his decision?³⁵⁶ However, this time the matter involved an application for the judicial review of the MEC's decision to dismiss an internal appeal against the MEC's refusal to grant environmental authorisation for the development.

Cloete J referred to the *Shelfplett* judgment and stated that the same logic surrounding the empowering legislation and the above false dichotomy must prevail.³⁵⁷ First, the MEC in terms of Section 35(4) of the ECA was obliged to consider whether to grant or refuse the applicant's appeal. Secondly, if not

³⁵⁵ Para 103.

³⁵⁶ Para 56.

³⁵⁷ Para 61.

empowered to give consideration to the spatial context of the applicant's land in relation to environmental factors how was the MEC supposed to have exercised the very power conferred upon him by the ECA.³⁵⁸ Once again the *function* and the *considerations* have to be separated and because this was clearly a "provincial planning" function the MEC taking into account "considerations which the municipality could or should take into account when deciding on municipal planning issues, does not preclude another sphere of government (*in casu* the MEC) from taking into account the very considerations in the exercise of its functions."³⁵⁹

Nevertheless, the court did find that the decision to dismiss the internal appeal should be set aside as the MEC had failed to take into account relevant considerations, when making his decision and that Clairisons CC had reasonable grounds for apprehending that the MEC was biased.³⁶⁰

One of the key relevant factors that the MEC had failed to take into account included the existing Municipality's delineated wide urban edge. The court held that the MEC should have taken the municipal urban edge into account, irrespective of whether the MEC regarded that delineation as having been rationally and lawfully determined, because there had over the past six years been developments that proceeded in accordance with the wide urban edge.

Secondly, it was held that the MEC could not, simply based on his disagreement with the decision, ignore his predecessor's decision to grant an amendment to the structure plan.

However, the matter was taken on appeal to the SCA. In the *Clairison (SCA)* judgement Nugent JA set-aside the findings of the *court a quo* and held that the evidence in fact alluded to the fact that "the MEC pertinently took account of each of the factors [and that] the application was refused precisely

³⁵⁸ Para 61.

³⁵⁹ Para 61.

³⁶⁰ Both these reasons are grounds for a review in accordance with s 6(2)(e)(iii).

because he took them into account.”³⁶¹ Nugent JA stated that in fact the true compliant of Clairsons in the *court a quoa* was that the MEC attached no weight to one of the factors, and in the other cases he weighed them against granting the application, whereas Clairsons contends that they ought to have weighed in favour of granting it.

The Nugent JA held that the *court a quo* had blurred the lines between appeal and review.³⁶² Nugent JA held that:

“a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation.”

Hence, Nugent JA held that there has been no suggestion that the avoidance of urban sprawl was not a legitimate environmental concern upon which the MEC was entitled to found his decision on.

5.6 Providing clarity on the form, nature and status of planning tools (particularly provincial structure plans, SDF, IDPs and structure plans)

In *Shelfplett (WCC)* the court first set the foundation for the above arguments by analysing the applicable legal instruments and the origins of RSPs. Under the 1967 PPA the relevant national Minister could develop “guide plans”, which guided the future spatial of a development of a particular defined area. The legal status of these guide plans was such that any local town planning schemes could be amended or introduced if in the opinion of the Minister it

³⁶¹ Para 17.

³⁶² Para 18.

would result in inconsistencies with the guide plan.³⁶³ The KWP RSP was approved as a guide plan in September 1982.³⁶⁴

The 1991 PPA repealed the relevant provisions of the 1967 PPA, however, in terms of Section 37(1) of the 1991 PPA guide plans continue in force as if unabated by the repeal. Nevertheless, in terms of Section 37(2)(a) of the 1991 PPA the Minister may declare such a guide plan a RSP. RSPs fulfil a very similar role under the 1991 PPA as guide plans did under the 1967 Act.³⁶⁵ Accordingly, on 9 February 1996 the former KWP guide plan was declared a RSP under the 1991 PPA, and therefore incorporated within the ambit of the 1991 PPA.

An important point covered was that the administration of the PPA had not been assigned to province, “whether by design or oversight”, and therefore the President was in fact the planning authority.³⁶⁶ However, it was argued and accepted that due to Section 29(3) of the DFA³⁶⁷ the MEC was nevertheless allowed to decide on the matter.³⁶⁸ Rogers J confirmed that the DFA was an independent source of power and therefore neither the procedure nor the criteria for amendment in Section 19 of the 1991 PPA are applicable.³⁶⁹ In light of Section 2 of the DFA, the power of amendment under Section 29(3) should be exercised in accordance with the land development specified in Section 3(1) of the DFA.³⁷⁰

In terms of LUPO the “Administrator”, namely the MEC, was empowered to make scheme regulations and the relevant scheme in question had designated Shelfpetts property as *Agriculture F*.³⁷¹ LUPO states that

³⁶³ S 6A(12); para 8 of the *Shelfplett* judgment.

³⁶⁴ Para 9.

³⁶⁵ Para 12.

³⁶⁶ Para 15.

³⁶⁷ This section was unaffected by the *GDT (CC)* case as it falls outside of chapters V and VI.

³⁶⁸ Para 16.

³⁶⁹ Para 17.

³⁷⁰ Para 17.

³⁷¹ Para 18.

rezoning and subdivision applications may be made and granted by local government, and that the decision will be subject to an appeal by the MEC in terms of Section 44.³⁷²

The Municipal Systems Act in Section 35(1)(a) states that a duly adopted IDP is the “principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality”.³⁷³ Moreover, Section 35(2) states that a SDF forming part of the IDP prevails over a “*plan*” as defined in section 1 of the 1991 PPA. Consequently the implications are that an approved IDP’s SDF would prevail over an RSP for the same area.³⁷⁴

In December 2005 various provincial planning policies, including the Provincial Urban Edge Guideline and golf estate and resort development approval guidelines, were approved by the Western Cape Provincial Government (WCPG).³⁷⁵ As per these guidelines an urban edge is defined as a line drawn around an urban area, forming a growth boundary to limit urban sprawl. LUPO allows both local authorities and provincial authorities to prepare *structure plans*. In terms of Section 36(1) of LUPO rezoning and subdivision applications can only be refused on limited grounds, notably this includes if the contemplated land use is undesirable.³⁷⁶ On 24 June 2009 the Western Cape Provincial Spatial Development Framework (WC SDF) was approved as a structure plan and required each municipality in development preparations for their respective SDFs, to determine medium term urban edges.³⁷⁷ There was dispute as to whether the Bitou municipality had

³⁷² Para 18-19.

³⁷³ Para 22.

³⁷⁴ Para 22; The court did revisit whether the Bitou Municipality had a duly adopted IDP, however, this is beyond the scope of this thesis and the discussion will end here.

³⁷⁵ Para 24.

³⁷⁶ Para 26.

³⁷⁷ Para 27.

provided for such an urban edge and, if they had not, the urban edge would be determined by the *de facto* limit of urban development.

Consequently, Rogers J provided some much needed guidance on the different planning tools and their interaction with one another.

5.7 Conclusions

The courts have made a valiant effort in providing some much needed legal certainty to the planning law regime. This includes the unravelling of the “municipal planning” function in the *GDT* and *Maccsand* judgements. In the latter series of judgements the court also provided guidance on the relationship between the MPRDA and LUPO. However, the implications of this judgement were qualified by the *Tronox* case.

Although the confines of “provincial planning”, “regional planning and development” and “urban and rural development” were only given indirect attention in the *War Holdings* and *GDT* cases; Davis J in the *Habitat Council* matter provided some clear guidance in this regard.

The *GDT* case clarified that a statutory authority cannot be given “municipal planning” powers and operate in parallel with local government.

Although the *Lagoon Bay* (WCC) judgement initially befuddled the *Fuel Retailers* (CC) judgement, with regard to resolving conflicts between environmental mandates and planning mandates, the *Lagoon Bay* (CC) decision rescued the situation. Therefore, it is now understood that planning and environmental authorities when considering the need and desirability of a project, do so through a different lens. The *Le Sueur* judgement also provided that local government can legislate on environmental matters and provided guidance on how such powers should be exercised.

The courts have further provided a degree of certainty concerning provincial governments’ powers to decide on extra municipal issues and where to draw the line in this regard. The court in the *Habitat Council* case provided some much needed legal certainty on the decision-making authorities of all spheres

of government. In addition, the courts' in *Shelfplett* (WCC), *Clairison's* (WCC) and *Clairison's* (SCA) provided an indication on when provincial government may take "municipal planning" considerations into in their decision making processes.

However, the fact that Lagoon Bay did not directly challenge the constitutionality of LUPO, it must be held that this was a missed opportunity for the highest court in the land to provide further certainty on provincial government support and intervention of local government. In addition, it is unfortunate that the Court in *Lagoon Bay* did not highlight the applicability and relevance of other pieces of legislation, such as SALA, to the matter at hand.³⁷⁸

It is therefore evident that there is still room for legislative intervention to fill these gaps of uncertainty. In the next chapter it will be considered the degree to which SPLUMA is able to do so.

³⁷⁸ Olivier & Williams 2013 *Journal for Juridical Science* 130.

6 Chapter 6: Legislative attempt at legal certainty- SPLUMA

6.1 Introduction

SPLUMA was promulgated on 05 August 2013; however, the commencement thereof has been postponed pending the development of Regulations³⁷⁹ needed to give effect to the Act and assumingly to give provincial and local government time to draft their respective planning Acts and by-laws. SPLUMA provides for the repeal of a host of planning laws that, as outlined above, provided for a fragmented planning regime that was unable to address South Africa's planning needs.³⁸⁰

SPLUMA introduces provisions to cater for: development principles; norms and standards; inter-governmental support; SDFs across national, provincial, regional and municipal scales; land use schemes; municipal planning tribunals; applications affecting national interest. This Chapter looks at these provisions and whether they provide sufficient clarity regarding planning mandates in line with Constitution and the lessons learnt from the jurisprudence analysed above.

6.2 The ambit of SPLUMA

The SPLUMA applies to the entire area of the Republic of South Africa.³⁸¹ In addition, except as provided for in this Act, no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with the provisions of this

³⁷⁹ Draft Regulations were published on 4 July 2014 for public comment in General Notice 526, Government Gazette 37797.

³⁸⁰ The following Acts will be repealed: Removal of Restrictions Act (Act No. 84 of 1967); Physical Planning Act (Act No. 88 of 1967); Less Formal Township Establishment Act (Act No. 113 of 1991); Physical Planning Act (Act No. 125 of 1991); and Development Facilitation Act (Act No 67 of 1995).

³⁸¹ S 2(1).

Act.³⁸² The key words here are “except as provided for in the Act”.³⁸³ SPLUMA provides that “Provincial legislation not inconsistent with the provisions of this Act may provide for structures and procedures different from those provided for in this Act”.³⁸⁴ Schedule 1 lists matters that have to be regulated in provincial legislation and these include matters that are also regulated by SPLUMA. Accordingly, SPLUMA does not exhaustively regulate planning matters and is intended to be framework legislation. As a result, matters such as land use schemes, township establishment, subdivision of land, consolidation of land and the removal, suspension and amendment of conditions of title could potentially be regulated by provincial laws. However, all provincial legislation will have to be consistent with SPLUMA.

6.3 Planning functions of the spheres of government

The Act provides outlines the planning functions of each sphere of government. Municipal planning is said to include the following elements: the compilation, approval and review of IDPs; the compilation, approval and review of the components of an IDP prescribed by legislation and falling within the competence of a municipality, including a SDF and a land use scheme; and the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.³⁸⁵

Provincial planning on the other hand involves: the compilation, approval and review of a provincial SDF; monitoring compliance by municipalities with this Act and provincial legislation in relation to the preparation,

³⁸² S 2(2).

³⁸³ Roos G “Will SPLUMA replace the 2008 PDA on 1 September 2014?: How to reconcile SPLUMA and the 2008 PDA” *KwaZulu-Natal Planning and Development Act Internet Forum*.

³⁸⁴ S 10(2).

³⁸⁵ S 5(1).

approval, review and implementation of land use management systems; the planning by a province for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and the making and review of policies and laws necessary to implement provincial planning.³⁸⁶

Lastly, National planning, in accordance with SPLUMA, consists of: the compilation, approval and review of spatial development plans and policies or similar instruments, including a national SDF; the planning by the national sphere for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and the making and review of policies and laws necessary to implement national planning, including the measures designed to monitor and support other spheres in the performance of their spatial planning, land use management and land development functions.³⁸⁷

By describing the planning functions of each sphere of government, SPLUMA builds on lessons learned in judgements, such as the *GDT* case, and provides for legal certainty that will hopefully foster co-operative relations amongst the spheres of government operating in the planning space.

6.4 **Development principles, norms and standards**

The Act provides for a list of development principles³⁸⁸ that are applicable to all spheres of government and to all aspects of spatial planning, land development and land use management.³⁸⁹

³⁸⁶ S 5(2).

³⁸⁷ S 5(3).

³⁸⁸ See s 6(2) for the complete list of development principles; the principles, in summary, include: The principle of spatial justice; the principle of spatial sustainability; the principle of efficiency; the principle of spatial resilience; and the principle of good administration.

³⁸⁹ S 6(1).

The SPLUMA charges the Minister of Department of Rural Development and Land Reform (DRDLR), after consultation with provincial and local authorities, to develop norms and standards for land-use management and land development in accordance with certain guidelines set out in the Act. These include, but are not limited to, national policy, social inclusion and efficient and effective processes. Consequently, once these norms and standards are developed they could provide for a far more streamlined and holistic planning practice.

6.5 Spatial planning

The spatial planning system provide for by SPLUMA consists of SDFs to be developed by each sphere of government. The Act is prescriptive as to the contents of each SDF. The Act also states that in some case regional SDFs must also be developed. IDPs, adopted in terms of the Local Government Municipal Systems Act, will form the basis of municipal planning. IDPs must be consistent with provincial and national spatial frameworks. No land development decisions can be in conflict with a municipal SDF.³⁹⁰ In the event of conflict between a provincial and local government SDF, the Premier must in accordance with the IRFA take all necessary steps to support the revision in order to ensure consistency.³⁹¹

The Act therefore provides greater certainty surrounding the confines and legal status of SDFs as well as the procedure to be followed in the event of conflict.

³⁹⁰ S 22(1).

³⁹¹ S 22(3).

6.6 Intergovernmental support

6.6.1 *National government obligations*

SPLUMA bestows certain obligations on national government when it comes to the support of the other spheres of government. For example, national government must support and assist the other governmental spheres when it comes to fulfilling their respective land use management functions and related obligations.³⁹² Moreover, national government must monitor:³⁹³ provincial and local government compliance with the development principles and norms and standards; local government progress with the adoption or amendment of land use schemes; the quality and effectiveness of municipal SDFs and other spatial planning and land use management tools and instruments; and the capacity of provincial and local government to implement the provision of the Act.³⁹⁴ National government must build the capacity of the other spheres through the development of support mechanisms in accordance with the Act and the IRFA.³⁹⁵ National government must, after consultation with provincial and local spheres of government, prescribe procedures to resolve and prevent conflicts or inconsistencies which may emerge from spatial plans, frameworks and policies of different spheres of government and between a spatial plan, framework and policies relating to land use of any other organ of state.³⁹⁶ In addition, the Act stipulates that national government must when performing a function, prescribed by the intergovernmental support provisions of the Act, consult with any Minister responsible for a national function affected by the performance of that function.³⁹⁷

³⁹² S 9(1)(a).

³⁹³ S 9(1)(b).

³⁹⁴ S 9(1)(a).

³⁹⁵ S 9(1)(2).

³⁹⁶ S 9(3).

³⁹⁷ S 9(4).

6.6.2 Provincial government obligations

The SPLUMA also stipulates that provincial government *may*, subject to the Constitution and any other law regulating provincial supervision and monitoring of municipalities in the province, support and assist local government. This includes assisting with the preparation, adoption or revision land use schemes and the alignment of land use management systems.³⁹⁸

Moreover, provincial government may in terms of SPLUMA take steps to resolve disputes in connection with the preparation, adoption or revision of a SDFs, land use schemes or related tools and planning instruments.³⁹⁹ Notably the Act states that this must take place “subject to the Constitution and any other law regulating provincial supervision and monitoring of municipalities in the province.”⁴⁰⁰

Importantly, SPLUMA makes it mandatory for provincial government to develop mechanisms to support, monitor and strengthen the capacity of municipalities to adopt and implement an effective system of land use management in accordance with this Act.⁴⁰¹ Similarly, provincial legislation having the effect of regulating land use, land use management and land development within a province must promote the development of local government capacity to enable municipalities to perform their municipal planning functions.⁴⁰²

³⁹⁸ S 10(3).

³⁹⁹ S 10(3)(c).

⁴⁰⁰ S 10(3)(c).

⁴⁰¹ S 10(4).

⁴⁰² S 10(5).

6.6.3 *Municipal differentiation*

The above provision for support, monitoring, capacity building and conflict resolution of the spheres of government is positive to see and is in line with the mandate placed on government in terms of Section 155 of the Constitution. However, in light of the jurisprudence analysed above, it is important that national and provincial government do not intrude unnecessarily into the realm of municipal planning. As a result, SPLUMA provides that before such support takes place the respective sphere needs to consider the unique circumstances of the relevant municipality.⁴⁰³ The Act stipulates that the specific circumstances that need to be taken into account include: the category of the municipality; the criteria identified and applied in accordance with national or provincial legislation relating to the supervision and monitoring of local government; financial resources, capacity and financial viability of a municipality.⁴⁰⁴

6.7 Land use management

A municipality must, after public consultation, adopt and approve a single land use scheme for its entire area within five years from the commencement of this Act.⁴⁰⁵ The land use scheme will have force of law and will be binding on all organs of state, land owners and land users within the municipal area.⁴⁰⁶ The land use schemes adopted in terms of SPLUMA will replace all existing schemes within the municipal area to which the land use scheme applies and will provide for land use and development rights within the area covered.⁴⁰⁷

⁴⁰³ S 11(1).

⁴⁰⁴ S 11(2).

⁴⁰⁵ S 24(1).

⁴⁰⁶ S 26(1)(a).

⁴⁰⁷ S 26(1)(b)-(c).

Land use schemes must: include appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme; take cognisance of relevant environmental management instruments adopted by environmental authorities (i.e. Bioregional Plans and Environmental Management Frameworks); comply with all relevant environmental legislation; provide for incremental regulation of informal settlements and areas not previously subject to a land use scheme; include incentives to promote the effective implementation of the SDF; include provisions that promote the policies of national and provincial government; and give effect to municipal SDFs and IDPS.⁴⁰⁸ In addition, land use schemes must include zoning maps, zoning regulations that we have at present and a register of all amendments to such land use scheme.⁴⁰⁹

Local government may pass by-laws aimed at enforcing its land use scheme.⁴¹⁰ However, given the ambit of the proposed land use schemes and the potential need to develop by-laws there were concerns that local government would have the capacities and expertise to meet the five year deadline. In order to address this, the Western Cape Government, for example, took on the task of drafting a model by-law on municipal planning as well as a Model Zoning Scheme, to be considered for adoption as by-laws by municipalities.

Importantly SPLUMA also provides for potential integration by stipulating that where an activity requiring authorisation in terms of this Act is also regulated in terms of another law, the relevant municipality and the other organ of state can issue separate authorisations or an integrated authorisation.⁴¹¹

⁴⁰⁸ S 24(2).

⁴⁰⁹ S 25(2).

⁴¹⁰ S 32(1).

⁴¹¹ S 30(1).

6.8 Land development

6.8.1 Municipal planning tribunal as the appeal authorities

The SPLUMA makes it clear that local government is the authority of first instance in regard to land development applications.⁴¹² SPLUMA provides that municipalities need to form Municipal Planning Tribunals who will act as the primary decision making authorities.

The Municipal Planning Tribunals must consist of officials in the full-time employ of the municipality and persons appointed by the municipal council who or not municipal officials.⁴¹³ Municipal councillors may not be appointed as members of a Municipal Planning Tribunal.⁴¹⁴

A person 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 manager⁴¹⁵ who must submit the appeal to the executive authority of the municipality⁴¹⁶ as the appeal authority.⁴¹⁷ The municipal executive authority has the power to confirm, vary or revoke the decision.⁴¹⁸ It has been stated that the “municipality’s ability to appeal to its own executive authority is, at face value, a somewhat ludicrous notion.”⁴¹⁹ However, the Act does allow a municipality to authorise that a body or institution outside of the municipality assume

⁴¹² S 33(1).

⁴¹³ S 36(1).

⁴¹⁴ S 36(2).

⁴¹⁵ S 51(1).

⁴¹⁶ Previous drafts of the Act made provision for appeal to a provincial planning tribunal; however, this would have been unconstitutional in accordance with the *Habitat Council* judgement.

⁴¹⁷ S 51(2).

⁴¹⁸ S 51(3)

⁴¹⁹ Garlick and Bousfield *Planning Legislation Gets a Makeover*.

the obligations of an appeal authority.⁴²⁰ Therefore the Act does provide for delegation of powers regarding appeals.

A question that arises is whether the potential composition of the Municipal Planning Tribunals and the fact that delegation of powers can take place is not akin to the DFA tribunal setup declared unconstitutional in the GDT (CC) judgement? After all, Section 156(1)(a) of the Constitution states that a Municipality has executive authority in respect of, and has the right to administer...municipal planning". However, the difference here is that it is the municipality that appoints the tribunal or delegates the appeal functions to another body not provincial or national government. Provincial and national government can provide for regulation of municipal planning but they cannot impede on those functions bestowed on municipalities.

6.8.2 Provincial legislative appeal process for local government

It is important to reiterate that SPLUMA does allow provincial government to draft legislation that may provide for alternative measures to those stipulated in SPLUMA, as long as such measures are consistent with SPLUMA and the IGRFA.⁴²¹ Therefore province can provide for its own appeal and review procedures which may be followed by local government.⁴²² It is important that the *Habitat Council* judgement is kept in mind by provincial government when drafting their respective provincial planning laws and if providing for different appeal procedures.⁴²³ As a recap, this Davis J ruled that an MEC can be involved in the appeal

⁴²⁰ S 51(6).

⁴²¹ S 10(1).

⁴²² See Schedule 1 for a list of matters that may be addressed by provincial legislation.

⁴²³ The Western Cape Department of Environmental Affairs and Development Planning (DEADP) have provided on its website a list of frequently asked questions (FAQ) around the Habitat Council Judgement (website details are provided in the bibliography below).

process but they will have to assess such appeals within the context of the provincial monitoring and support functions as contained in the Constitution. Therefore in context of LUPO there are three ways (or a combination thereof) that the MEC will be able to decide appeals. First, the MEC may, after consultation with the municipal council, dismiss an appeal against the decision of a council.⁴²⁴ In such a case the MEC in effect agrees with the council and therefore dismissed the appeal. Second, section 44(3)(a) of LUPO, as amended, permits the MEC, in instances where the MEC is of the opinion that a municipality did not effectively perform its functions in respect of a municipal planning matter, to set aside this decision or part of a decision, thereby referring it back to the council, requiring it to reconsider the matter.⁴²⁵ The MEC will provide reasons for this decision, and these reasons will form part of the reconsideration of the matter by the municipality.⁴²⁶ Last, section 44(3)(b) of LUPO, as amended, permits the MEC to substitute his decision for that of the municipality only in instances where the MEC is of the opinion that the application also concerns provincial planning considerations and that the MEC has made an incorrect decision on these aspects.⁴²⁷

6.8.3 Land development applications that affect national interests

SPLUMA also provides certainty regarding land development applications made to municipalities that may impact upon national government interests. Section 52 states that development applications that may affect national interest and therefore should be referred to the Minister. These include applications that may *materially impact* upon: matters within the exclusive functional area of the national sphere in terms of the Constitution; strategic national policy objectives, principles or priorities, including food security, international relations and co-operation, defence

⁴²⁴ See the DEADP website for FAQs on the Habitat Council Judgement (website details are provided in the bibliography below).

⁴²⁵ See the DEADP website for FAQs on the Habitat Council Judgement (website details are provided in the bibliography below).

⁴²⁶ See the DEADP website for FAQs on the Habitat Council Judgement (website details are provided in the bibliography below).

⁴²⁷ See the DEADP website for FAQs on the Habitat Council Judgement (website details are provided in the bibliography below).

and economic unity; or land use for a purpose which falls within the functional area of the national sphere of government.⁴²⁸

In addition, land development applications must be referred to the minister if the *outcome* may affect national interests.⁴²⁹ The Act provides scenarios where an application may impact national interests.⁴³⁰ These include: applications where the outcome may be prejudicial to the economic, health or security interests of one or more provinces or the Republic as a whole; and applications that may impede the effective performance of the functions by one or more municipalities or provinces relating to matters within their functional area of legislative competence.⁴³¹

The Act states that where an applicant believes that the application is likely to affect the national interest, they must submit a copy of that application to the Minister.⁴³² In addition, if a Municipal Planning Tribunal receives such an application they must provide the national Minister with a copy thereof.⁴³³ The Minister upon receiving the copy of the application may join as a party in such application or may direct that such application be referred to him or her to decide.⁴³⁴ Importantly the Act expressly reiterates that nothing in this section authorises the lodgement or referral of an application for land use or land development to the Minister without such application having first been lodged and considered by the relevant municipality.⁴³⁵ Therefore the municipality remains the authority of first instance.

⁴²⁸ S 52(1).

⁴²⁹ S 52(2).

⁴³⁰ S 52(6).

⁴³¹ S 52(2).

⁴³² S 52(3).

⁴³³ S 52(1)-(5).

⁴³⁴ S 52(5).

⁴³⁵ S 52(7).

In addition, the Act charges national government with the obligation to prescribe a set of criteria to guide the implementation of this section.⁴³⁶

This will aid development applicants and municipalities to determine when a copy of the application needs to be submitted to the Minister.

6.9 Conclusion

SPLUMA has set out a comprehensive framework governing spatial planning, land use management and land development management. Its provision relating to planning mandates and intergovernmental support have provided for legal certainty in line with recent jurisprudence and the Constitutional mandates bestowed on each sphere. Also SPLUMA will apply to the whole of South Africa and will repeal a host of laws that previously provided for a cumbersome and fragmented planning regime.

Nevertheless, SPLUMA has bestowed obligations on each sphere of government that may present challenges especially at a local level. SPLUMA has in accordance with the Constitution, and in line with judgements such as the *Lagoon Bay* and *GDT* cases, placed local government at the coalface of planning. Municipalities are therefore confirmed as the principle sphere of government responsible for planning and they therefore carry the main obligations when it comes to the implementation of the Act. This involves, amongst other matters, the establishment of Municipal Planning Tribunals, comprehensive land use schemes and by-laws. It is therefore essential that national and provincial government provide the support needed to local government to allow them to implement an effective planning regime within their respective jurisdictions.

⁴³⁶ S 53(6).

National government initiatives have been headed up by the Department of Rural Development and Land Reform (DRDLR) that is “coordinating and driving a change management process through an Implementation and Change Management Plan to assist provinces and municipalities in considering and drafting spatial planning and land-use management legislation (at provincial level) and land use schemes and by-laws (at municipal level).”⁴³⁷ In addition some provinces (for example, Gauteng, Kwa-Zulu Natal and the Western Cape) have taken a pro-active approach in their own planning and budgeting considerations, making provision for the Act to come into operation.⁴³⁸ In addition, the Western Cape is in the process of promulgating its own planning legislation which, inter alia, that will align with and give effect to SPLUMA.⁴³⁹

⁴³⁷ Kruger *Planning with purpose*.

⁴³⁸ Kruger *Planning with purpose*.

⁴³⁹ Kruger *Planning with purpose*.

7 Chapter 7: Conclusion

This thesis has outlined the pre-1994 dispensation and the type of government that was based on “the old traditional stratified three-tier system”. The planning powers of this era rested on the four provinces, the former TBVC independent homelands and the self-governing territories. However, it was explained how this system of having numerous parallel planning authorities only further fragmentation the planning regime. In addition, the use of planning laws during the apartheid era to promote a segregated and unequal landscape gravely undermined the legitimacy of planning as a discipline.

Thereafter, planning in the post-constitutional era was discussed and the new “sphered system” of government was outlined. It was discussed how the Constitution has placed certain legislative and administrative functions on the respective spheres of government. However, it was also explained how the Constitution allows for overlap of such function in given circumstances and how this together with the lack of definitions within the constitution for “municipal planning”, “provincial planning”, “urban and rural development” and “regional planning and development” has resulted in confusion.

In addition, it was explained how the regulatory framework consists of a plethora of planning legislation and planning tools that do not always speak the same language. A number of factors were outlined that amount in a completely discombobulating framework within which the land-use planning authorities are expected to operate.

Given the above confusion, it was discussed why the plethora of co-operative governance legislative and non-legislative attempts have failed to provide the safety net envisaged and that ultimately this failure has resulted in a range of matters going to court.

A number of court decisions were discussed and it was concluded that the courts had contributed to providing some legal certainty on a number of matters such as: unravelling of the “municipal planning”; the relationship between the MPRDA and LUPO; the confines of “provincial planning”, “regional planning and development” and “urban and rural development”; the allowance for parallel statutory bestowed with “municipal planning” function; the conflicts between environmental mandates and planning mandates; local government’s ability to legislate on environmental matters; the application of provincial planning tools; provincial governments ability to decide extra municipal issues etc. However, it was also stated that there are some matters that could still be further clarified.

Lastly, the SPLUMA was outlined and it was discussed how it will fill many of the gaps left by judiciary and created for by the previous planning regime. Nevertheless, the implementation of the Act will not be without its challenges and therefore it was held that the spheres of government need to support one another to make the implementation of the Act a success.

As a final comment, developments over the last five years have provided a planning regime indistinguishable from that inherited by from the pre-1994 dispensation. This new planning regime is bolstered by the fact that there is finally a national planning law to guide the future development of planning in South Africa. In addition, the efforts of the courts will go a long way in making the relationships between planning authorities a far more cohesive one. The framework is in place for a more cohesive planning law system in South Africa and only the future will tell whether this new system will be utilised effectively.

8. Bibliography

LITERATURE

Printed:

Books:

Berrisford S & Kihato, M "Local government planning legal frameworks and regulatory tools: vital signs?" in Parnell S, Pieterse E, Swilling M Wooldridge D & van Donk M *The Developmental Local State: Lessons from Theory and Practice* (2008) UCT Press Cape Town 377-405

Budlender G, Latsky J & Roux T *Juta's New Land Law* (1998) Juta Cape Town

Clarke J *Back to Earth: South Africa's Environmental Challenges* (1991) Southern Book Publishers

Glazewski J *Environmental law in South Africa* (2005) LexisNexis Durban

Kidd M *Environmental Law* (2011) Juta Cape Town

Kotze LJ "Environmental governance" in Paterson A & Kotze LJ *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) Juta Cape Town 103-125

Meridith M *The State of Africa* (2005) Free Press

Van Donk M *Consolidating developmental local government: Lessons from the South African experience* 2008 Juta Cape Town

Van Wyk J *Planning Law* (1999) Juta Cape Town

Van Wyk J *Planning Law* 2 ed (2012) Juta Cape Town

Journal Articles:

Bray E "Co-operative Governance in the Context of the National Environmental Management Act 107 of 1998" 1999 SAJELP 1-12

Berrisford S "Unraveling Apartheid Spatial Planning Legislation in South Africa: A Case Study" 2011 (22:3) *Urban Forum* 247-263

Bosman C, Kotze LJ & Du Plessis W "The failure of the Constitution to ensure integrated environmental management from a co-operative governance perspective" 2004 (19) *SAPR/PL* 411-421.

- Couzens E "NEMA- A Step Closer to Coherence?" 1999 (6) *SAJELP* 13-19.
- Du Plessis W "Legal mechanisms for co-operative governance in South Africa: Successes and failures" 2008 (23) *SAPR/PL* 87-110
- Edwards XXX "Co-operative governance in South Africa, with specific reference to the challenges of intergovernmental relations" 2008 (27) *Politeia* 65-85
- FERIS, LA "The role of good environmental governance in the sustainable development of South Africa" 2010 (13:1) *PER / PELJ* 73-99
- Humby T "Maccsand in the Constitutional Court: dodging the NEMA issue [Discussion of Maccsand (Pty) Ltd v City of Cape Town 2012 4 SA 181 (CC)]" 2013 (24:1) *SLR/SR* 55-72
- Kotzé LJ "Improving unsustainable environmental governance in South Africa: the case for holistic governance" 2006 (9:1) *PELJ/PER* XXXX
- Nel J & Du Plessis W "Unpacking integrated environmental management-a step closer to effective co-operative governance?" 2004 *SA Publiekreg/ SA Public Law* 181-190
- MacKay HM & Ashton PJ "Towards co-operative governance in the development and implementation of cross-sectoral policy: water policy as an example" 2004 (30(1):1 3) *Water SA* XXX
- Mabin A & Smit D "Reconstructing South Africa's cities' The making of urban planning 1900-2000" 1997 (12:2) *Planning Perspectives* 193-223
- Malan XXX "Intergovernmental relations and co-operative government in South Africa: The ten-year review" 2005 (24) *Politeia* 226-243
- Oranje, M "Getting the Balance Right? Mining Interests, Planning Law and Sustainable Human Development in South Africa" XXX
- Olivier NJJ, Williams C & Badenhorst PJ "Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC) [2012]" XXX *PER* 61- XXX
- Olivier NJ & Williams C "Coordination of development approval processes revisited-Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs & Development Planning of the Western Cape and Others [2011] 4 All SA 270 (WCC)" 2013 (37:2) *Journal for Juridical Science* 117-135
- Parnell SM & Mabin "Rethinking urban South Africa" 1995 (21:1) *Journal of Southern African Studies* 19-38
- Paterson A "The judiciary's gritty efforts to erode the mining authority's continued aversion to co-operative environmental governance in the Cape

dunes-Hugo Wiehahn Louw NO v Swartland Municipality and Maccsand (Pty) Ltd v City of Cape Town: case notes" 2011 (26:2) *SA Publiekreg/ SA Public Law* 576-577

Paterson A "Undermining land-use planning and co-operative governance" 2010 (25) *SAPL* 692-697

Pearl R & Wilson J "Environmental Policy-making in the New South Africa" 1998 *SAJELP* 249-261.

Pienaar XXX "The housing crisis in South Africa: Will the plethora of housing policies and legislation have a positive impact?" 2002 (17) *SAPL* 336-370

Reddy PS "Intergovernmental relations in South Africa" 2001 (20(1):21) *Politeia* 31-33

Van Wyk J "Planning in All its (Dis) guises: Spheres of Government, Functional Areas and Authority" 2012 (15:5) *PER/PELJ* 287-312

Van Wyk J & Oranje M "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" 2013 *Planning Theory* 1473095213511966.

Weiss TG. "Governance, good governance and global governance: conceptual and actual challenges." 2000 (21:5) *Third world quarterly* 795-814.

Theses

Kihato M. *Integrating planning and environmental issues through the law in South Africa: learning from international experience* LLM thesis UNISA (2013)

Kotze LJ *A Legal Framework for Integrated Environmental Governance in South Africa and the North-West Province* DPhil thesis University of Helsinki (2005)

Electronic

Todes A, Sim V & Sutherland C (2009) "The Relationship between Planning and Environmental Management in South Africa: The Case of KwaZulu-Natal, *Planning Practice & Research*" 2009 (24:4) 411-433, DOI: 10.1080/02697450903327022

Dagut H & Chien L "Court confirms that municipalities may regulate on environmental matters too" 2013 *Environment* <http://www.environment.co.za/environmental-issues-news/court-confirms-that-municipalities-may-regulate-on-environmental-matters-too.html> (accessed 16.02.2014).

Feris J & Naidoo J "Sorting out mining in municipal areas: mining municipal law. *Without Prejudice*" 2013 (13:3) *without prejudice*
<http://www.withoutprejudice.co.za/index.php/issues/category/2013/25> 89-90
 (accessed 16.02.2014).

Other

Practitioners guide to intergovernmental relations in South Africa (2007)

Department of Provincial and Local Government *Practitioners guide to intergovernmental relations in South Africa* (2007)

Carpenter 'Co-operative government, devolution of powers and subsidiarity: the South African perspective' Konrad Adenauer Stiftung Seminar on Subnational Constitutional Governance (1999)

Watts RL *Intergovernmental relations* (Department of Constitutional Development and Provincial Affairs Pretoria 1999) 6-7.

Websites

Garlicke and Bousfield Planning Legislation Gets a Makeover
<http://www.gb.co.za/content/planning-legislation-gets-makeover> (accessed 17.08.2014)

George Municipality "SPLUMA leads to new Municipal By Laws"
<http://thegremlin.co.za/george-news/wordpress/2014/06/14/spluma-leads-to-new-municipal-by-laws/> (accessed 17.08.2014)

Kruger M Planning with purpose
<http://www.webberwentzel.com/wwb/content/en/ww/ww-in-the-news?oid=49321&sn=Detail-2011&pid=32696> (accessed 17.08.2014)

Roos G "Will SPLUMA replace the 2008 PDA on 1 September 2014?: How to reconcile SPLUMA and the 2008 PDA" KwaZulu-Natal Planning and Development Act Internet Forum
<https://groups.google.com/forum/#!topic/kznpda/Te3ANO5VlvM> (accessed 17.08.2014)

The Western Cape Department of Environmental Affairs and Development Planning (DEADP) frequently asked questions (FAQ) around the Habitat Council Judgement.
[http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Feadp.westerncape.gov.za%2Fsites%2Fdefault%2Ffiles%2Fbasic-page%2Fdownloads%2FLUPO%2520Section%252044%2520FQA's%2520\(final%252028-10\).docx&ei=m0znU anFJCu7AaHuYDgDQ&usg=AFQjCNHsmQL7kBuHf7h](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Feadp.westerncape.gov.za%2Fsites%2Fdefault%2Ffiles%2Fbasic-page%2Fdownloads%2FLUPO%2520Section%252044%2520FQA's%2520(final%252028-10).docx&ei=m0znU anFJCu7AaHuYDgDQ&usg=AFQjCNHsmQL7kBuHf7h)

[V9vqUZidq76kwVQ&sig2=4_522QO80XasweQhAtgsmQ&bvm=bv.72676100_d.ZGU](http://www.saflii.org/za/doc/other/v9vqUZidq76kwVQ&sig2=4_522QO80XasweQhAtgsmQ&bvm=bv.72676100_d.ZGU) (accessed 17.08.2014)

Case law

City of Cape Town v Maccsand (Pty) Ltd 2010 6 SA 63 (WCC)

CDA Boerdery v Nelson Mandela Metropolitan Municipality 2007 4 SA 276 (SCA)

Doctors for Life International v Speaker of the National Assembly & others 2006 6 SA 416 (CC)

Maccsand (Pty) Ltd and Another v City of Cape Town and Others 2011 6 SA 633 (SCA) (Maccsand (SCA))

Maccsand (Pty) Ltd and Another v City of Cape Town and Others 2012 103 SA 11 (CC)

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2008 4 SA 572 (W)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2012 2 SA 554 (SCA)

Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others; City of Cape Town v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others (6227/2013; 23061/2009) 2013 ZAWCHC 112; 2013 (6) SA 113 (WCC)

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

Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs 2010 5 SA 367 (WCC)

The Macassar Land Claims Committee v Maccsand CC and Others 2013 37 (LCC)

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 1 SA 337 (CC)

National Gambling Board v Premier of KwaZulu-Natal 2002 2 BCLR 156 (CC)

Parkhurst Village Association v Capela & Others 2010 JOL 25759 (GSJ)

RA Le Sueur v eThekweni Municipality 2013 JDR 0178 (KZP)

Swartland Municipality v Louw 2010 5 SA 314 (WCC)

Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others 2011 4 All SA 270 (WCC)

Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others 2013 13 SA 320/12 (SCA)

The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others 2013 39 SA 41/13 (CC)

Shelfplett 47(Pty) Ltd v MEC for Environmental Affairs and Development Planning and Another 2012 3 SA 441 (WCC)

Clairison's CC v the MEC for Local Government Environmental Affairs and Development Planning and Bitou Municipality 2012 3 SA 128 (WCC)

MEC for Environmental Affairs and Development Planning v Clairison's CC (408/2012) [2013] ZASCA 82 (31 May 2013)

Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and Another 10629/2012 2013 10629 SA 2012 (KZDHC)

Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd 2001 1 SA 500 (CC)

Legislation

National Legislation

Constitution of the Republic of South Africa, 1996

Environment Conservation Act 73 of 1989

Intergovernmental Relations Framework Act 13 of 2005

National Environmental Management Act 107 of 1998

The Native (Urban Areas) Act of 1923

Less Formal Township Establishment Act 113 of 1991

Local Government: Municipal Structures Act 117 of 1998

Local Government: Municipal Systems Act 32 of 2000

Local Government Transition Act 209 of 1993

Physical Planning Act 125 of 1991

Removal of Restrictions Act 84 of 1967

Subdivision of Agricultural Resources Act 103 of 1997

Slums Act of 1934

Provincial Legislation

KwaZulu-Natal Planning and Development Act 6 of 2008

Transvaal Board for the Development of Peri-Urban Areas Ordinance 20 of 1943

Transvaal Town Planning & Townships Ordinance 15 of 1986

Gauteng Planning and Development Act 3 of 2003

Planning Ordinance 15 of 1985 (C)

Northern Cape Planning and Development Act 7 of 1998

Town Planning Ordinance 27 of 1949 (N)

Townships Ordinance 9 of 1969 (OFS)

Division of Land Ordinance 20 of 1986

Gauteng Removal of Restrictions Act 3 of 1996

GNR1886 of 1990 of 10 August 1990 (GG 12688)

Soft Law

The Guidelines for Preparation of First Edition EIPs and EMPs (1999)

Practitioners Guide to the Intergovernmental Relations System in South Africa (2007)

The Brundtland Report (1987)

The Rio Deceleration (1992)

The Johannesburg Declaration (2002)