

**ALMOST THREE YEARS AFTER COMMENCEMENT OF THE SPATIAL
PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013: AN ANALYSIS OF
CHALLENGES TO ITS IMPLEMENTATION WITH RELATION TO PLANNING
APPLICATIONS AND APPEALS**

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Statement of Originality

This project is an original piece of work which is made available for photocopying and for inter-library loan.

Neil Maleham

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1. Introduction:

In South Africa, the term “planning” has different meanings. To paraphrase the words of Jafta J in the landmark Constitutional Court decision in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*:¹

Different planning responsibilities are conferred on each of the three spheres of government in accordance with what is appropriate to each sphere. To reduce the term to its bare minimum, planning comprises the control and regulation of the use of land.

As a starting point, the Constitution of the Republic of South Africa, 1996, (hereafter the “Constitution”), sets out and defines the powers of the national, provincial and local government. This results in recognition being given to the importance of each sphere’s independence and its exclusive competence over the powers which it has been allocated.² Municipal planning in particular, is a power allocated to municipalities.³ The Constitution does not, define municipal planning nor set out exactly what this concept includes.

Municipal planning was defined by Jafta J in the same *Gauteng Development Tribunal* case referred to above:⁴

Returning to the meaning of “municipal planning”, the term is not defined in the Constitution. But “planning” in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use “planning” in the municipal context, they were aware of its common meaning. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs “planning” in its commonly understood sense.

¹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC), ad para 53.

² Section 40 of the Constitution.

³ *Ibid*, section 156(1)(a), read with Part B of Schedule 4 of the Constitution.

⁴ Ad para 57.

Prior to the Constitution, planning decisions were governed by provincial legal instruments, such as the various planning ordinances for the so-called “white areas”.⁵ These planning ordinances bestowed upon municipalities the powers to grant or refuse approvals when applications were made for changes in land use, rezonings, special consent, and removal of restrictive conditions, amongst others, (I will hereafter refer to these applications as “planning applications”).

When such approvals and refusals on planning applications were contentious, the various ordinances provided objectors and/or applicants the right to appeal the decisions taken by municipalities. These appeals were heard by provincial appeal bodies established by the ordinances. These appeal bodies had the power to approve, discard or replace the municipalities’ decisions on the planning applications, with their own.

The ordinances did not provide for, or intend to assist, black persons who, under apartheid, were forced to live in homelands which were regulated by separate planning legislation.⁶

The court in the *Gauteng Development Tribunal* case succinctly summarised the above problem:⁷

As has been alluded to above, the difficulty with these ordinances is that they apply only in those territories that formed part of the old Cape, Natal, Orange Free State and Transvaal provinces. They have no application to the former “independent” homelands and self-governing territories, which were governed by a parallel system of planning legislation. Furthermore, the creation of the nine provinces has meant that there has been further fragmentation as each province may be subject to a multiplicity of territorially-based legislative regimes.

The Development Facilitation Act (hereafter “DFA”),⁸ was enacted with the intention to, “facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land” and laying down a uniform system for land development to address the fragmented planning framework left by the legacy of apartheid, which had been allowed to continue by the ordinances.⁹

⁵ Town Planning and Townships Ordinance 15 of 1986, Land Use and Planning Ordinance 15 of 1985, Orange Free State’s Townships Ordinance 9 of 1969 and Natal Town Planning Ordinance 27 of 1949.

⁶ Examples of these acts are the Black Administration Act 18 of 1927 and the Natives Land Act 27 of 1913.

⁷ Ad para 32.

⁸ The Development Facilitation Act 67 of 1995.

⁹ This is specified in the purpose, which is found in the Long Title of the DFA.

Planning applications made under the DFA were decided by development tribunals, formed in each province.¹⁰ Thereafter, any appeal against the decision of a development tribunal would be decided by a development appeal tribunal,¹¹ which was also formed for each province.¹²

Developers therefore had the choice of whether to make planning applications in terms of either the DFA, or the old order ordinances. This understandably brought even more confusion and chaos to an already complicated and fragmented municipal planning application framework. In this regard, the Western Cape High Court in the case of *Camps Bay Ratepayers and Residents Association and Others v The Minister of Planning, Culture and Administration (Western Cape) and Others* summed up the existing planning regime as follows:¹³

The present application illustrates 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. This inevitably leads to certain 'practices' which develop in the course of time in the administration of these pieces of legislation, which may or may not necessarily correspond with the legislative regime which underpins the process. The system also frequently - as in the present case - gives rise to conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels of local and provincial government. It would be of great assistance to everyone involved in the process, from ordinary ratepayers to developers to officials, if the administrative machinery required to regulate these matters could be consolidated, simplified and streamlined by the Legislature...

Therefore, notwithstanding the enactment of the Constitution and its resultant allocation of government functions, and municipalities' exclusive jurisdiction to administer municipal planning, the *de facto* position was that the provinces continued to perform the function of municipal planning. The provinces unlawfully exercised the competence of municipal planning through the appeal bodies created by the ordinances, which could replace municipalities' decisions on planning applications, and through development tribunals and development appeal tribunals formed in terms of the DFA.

¹⁰ Ibid, section 15(1).

¹¹ Ibid, section 23(1).

¹² Ibid, section 24(1).

¹³ *Camps Bay Ratepayers and Residents Association and Others v The Minister of Planning, Culture and Administration (Western Cape) and Others* 2001 (4) SA 301 (C), ad page 329.

It was only in the face of several landmark court challenges, that it became apparent that the existing planning legal framework, through both the DFA and the ordinances, was unconstitutional and needed replacing. The comments of Judge Griesel referred to above,¹⁴ were finally acted upon, through governmental acknowledgement that new, national legislation was required to rectify this overlap of powers. The resultant legislation is the Spatial Planning and Land Use Management Act (hereafter referred to as “SPLUMA”).¹⁵

SPLUMA provides that appeals against decisions made by municipal planning tribunals on planning applications are heard by appeal authorities which are also municipal entities.¹⁶ SPLUMA therefore protects municipalities’ constitutionally granted competence of municipal planning, from interference by provincial or national government.

While SPLUMA has greatly improved the legal framework relating to planning applications and appeals thereto, it has not completely cured the defects of the previous planning acts and ordinances, and it is possibly vulnerable to constitutional challenge. Municipalities have faced considerable challenges implementing SPLUMA.¹⁷ As such, the processes SPLUMA has sought to prescribe are not always able to be implemented by municipalities, nor always effective in reality.

This dissertation seeks to assess the stated objectives of SPLUMA, with a particular emphasis on how it has sought to regulate planning applications and appeals thereto. This assessment will also address the implementation challenges that municipalities face almost three years after the commencement of SPLUMA.

This dissertation will be structured to answer the above, starting in Chapter 2 with a background to the historical development of the laws relating to planning applications and appeals thereto. This background addresses the various provincial ordinances and the DFA, and the various court challenges thereto, which led to the enactment and commencement of SPLUMA.

¹⁴ *Camps Bay Ratepayers* case, see supra footnote 13.

¹⁵ The Spatial Planning and Land Use Management Act 16 of 2013.

¹⁶ There are circumstances where a non-municipal body can be appointed to perform the functions of an appeal authority, as will be discussed hereunder in Chapter 3.

¹⁷ Department of Rural Development and Land Reform, ‘Progress Report on the Implementation of the Spatial Planning and Land Use Management Act (SPLUMA) – Presentation to the Portfolio Committee on Rural Development and Land Reform’, pmg-assets.s3-website-eu-west-1.amazonaws.com/150812SPLUMA.ppt, accessed on 12 December 2017.

Thereafter, in Chapter 3, this dissertation will look at the changes brought by SPLUMA, specifically in the way that planning applications, (defined in the DFA¹⁸ and later in SPLUMA¹⁹ as “land development” applications), and appeals thereto, are now legislated for.

Chapter 4 sets out the challenges that municipalities face in implementing SPLUMA, and where SPLUMA is legally deficient.

Thereafter, in Chapter 5, various solutions and suggestions intended to remedy and improve SPLUMA are provided.

Finally, Chapter 6 will summarise the previous chapters and conclude this dissertation.

2. The background to SPLUMA:

2.1 The genesis of SPLUMA:

As mentioned above, SPLUMA was enacted in response to chapters V and VI of the DFA being found to be unconstitutional, as it allowed provinces to usurp the municipalities’ exclusive competency to administer municipal planning.

But in truth, the genesis of SPLUMA can be found much earlier, and is evidenced in two documents, the first of which was the *Draft Green Paper on Development and Planning* which was drafted in 1999.²⁰

This paper identified the conflict that existed between the three spheres of government.²¹ It therefore recommended the approach of, “...rationalising the legal

¹⁸ Section 1 of the DFA.

¹⁹ Section 1 of SPLUMA.

²⁰ National Development and Planning Commission, *Draft Green Paper on Development and Planning* National Development and Planning Commission, 22 April 1999, https://www.gov.za/sites/www.gov.za/files/devplan_1.pdf, accessed on 18 November 2017.

²¹ Ibid, where it states that “While the advent of the DFA and new legislation in several provinces is informed by a new approach to planning, many problems remain. These include a lack of shared vision about what spatial development should be; a lack of co-ordination between different spheres of government and between different departments; a lack of capacity; a high degree of legal and procedural complexity; and a very slow pace of land development approvals”, at page 4.

framework by assisting provinces to repeal all existing provincial planning legislation and to enacting a single piece of planning legislation within a national framework...”²² and further, “...clarifying the roles of the different spheres of government and the framework for decision making. These goals would be achieved by the National Development and Planning Commission assisting provinces to draft new legislation.”²³

It also highlighted the practical problems of implementing the DFA:²⁴

The DFA tribunal system is only required in the provinces that have adopted the DFA. No tribunals have been set up in the Western Cape which did not adopt any aspects of the DFA. Even in provinces where they exist, developers can choose whether or not to use them over and above any other route for approval of a development application. This means their significance has not been as great as it could have been, given the wide powers they potentially have to fast track development by overriding certain laws;

and the problems with having multiple planning instruments generally:²⁵

...land development approval procedures are excessively slow and cumbersome, to the extent that the economics of land development is being compromised and the private-sector development community is losing faith and patience with the system. In particular, there is no single, simple route for land-related applications.

However, it supported the status quo of provinces exercising appeal powers over decisions made by municipalities:²⁶

It is recommended that each province should appoint a development appeal board which should serve as the single point in the province for the hearing of all land development and land use-related appeals. The appeal board should consist of professionals from appropriate disciplines, appointed by the MEC after a broad consultation process.

²² Ibid, at page 5.

²³ Ibid, at page 6.

²⁴ Ibid, at page 11.

²⁵ Ibid, at page 19.

²⁶ Ibid at page 57.

The second document was the *White Paper on Spatial Planning and Land Use Development*, drafted in 2001,²⁷ which also envisaged a uniform and consistent approach to land use planning nationwide.²⁸ However, while it did recognise that each sphere of government should be entitled to administer its own competency,²⁹ it still proposed that the provincial and national government spheres would have the power to review the exercise of municipal powers relating to municipal planning.³⁰

It was therefore clear that while these papers envisaged a uniform system of municipal and spatial planning, they failed to acknowledge that municipalities ought to be completely autonomous in relation to municipal planning and reaffirm the position of provincial appeal tribunals reviewing the decision of municipalities, as it states, “The premier of each province shall appoint the appeal tribunal. The appeal tribunal shall hear appeals from land development decisions taken by municipalities and land use tribunals”.

2.2 The planning legislation applicable to different racial groups:

As mentioned earlier, the various ordinances were only applicable to the old Cape, Natal, Orange Free State and Transvaal provinces.³¹

During apartheid, numerous acts were passed to separate non-white people from white people. While this dissertation does not seek to address the full history of apartheid legislation, some of the acts relevant to the municipal planning context are discussed.

²⁷ Minister of Agriculture and Land Affairs *White Paper on Spatial Planning and Land Use Development*, Minister of Agriculture and Land Affairs, <https://www.gov.za/documents/spatial-planning-and-land-use-management-white-paper>, accessed on 17 November 2017.

²⁸ See the *White Paper on Spatial Planning and Land Use Development* (2001) which states that “The White Paper proposes one set of such procedures for the whole country, thereby eliminating the current situation where different procedures apply in different provinces, and even within a province in different apartheid race zones”.

²⁹ *Ibid*, where it states that “Each national department, provincial government, and municipality must take responsibility for spatial planning within their sectoral and or jurisdictional areas”.

³⁰ *Ibid*, where it states that “The most prevalent land use regulators will be municipalities. Each province will have a provincial land use tribunal and appeal tribunal that will be land use regulators in specified situations. Nationally the Minister will be a land use regulator of last resort, only acting in cases where there has been neglect or flouting of the national principles and norms.”

³¹ See *supra* footnote 7.

Firstly, the government implemented the policy of separation of racial groups through several acts including the Natives Land Act,³² the Natives (Urban Areas) Act,³³ the Native Administrative Act,³⁴ the Natives Laws Amendment Act,³⁵ the Group Areas Act,³⁶ the Natives Resettlement Act.³⁷ Through these acts, separate “native areas” were demarcated (and later “homelands”), which were designated for black people and black people were prohibited from purchasing or leasing land outside the areas designated for them.

The Black Communities Development Act³⁸ was also enacted to facilitate racially separate areas and in terms of this act land was designated for black people but also managed as separate zones. Therefore, an area could be zoned as a place of residence for black people, but maintained as an area in which black people could not own land. Regulations were promulgated in terms of this act namely, the Regulations relating to Township Establishment and Land Use,³⁹ which regulated township establishment and set out land use conditions applicable to black areas.

There were also regulations promulgated in terms of the Natives Administration Act, namely Township Development Regulations⁴⁰ and the Land Use Planning Regulations,⁴¹ which regulations dealt with township establishment and the preparation of town planning schemes respectively.

In this way, by the time apartheid was ending, there were different planning laws applicable to white urban areas, and black areas. These laws were largely repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.⁴²

³² The Natives Act 27 of 1913.

³³ The Natives (Urban Areas Act) 21 of 1923.

³⁴ Native Administration Act 38 of 1927.

³⁵ Natives Laws Amendment Act 46 37.

³⁶ The Group Areas Act 41 of 1950.

³⁷ The Natives Resettlement Act 19 of 1954.

³⁸ Black Communities Development Act 4 1984.

³⁹ GNR 1897, 1986.

⁴⁰ GNR R1886, 1990.

⁴¹ GNR 1888, 1990.

⁴² Abolition of Racially Based Land Measures Act 108 of 1991. Refer further to Van Wyk *Planning Law* (2012) 43-49.

2.3 The enactment of the Constitution and the allocation of powers to the various spheres of government:

The Constitution is the most important source of law in South Africa, and it sets out obligations,⁴³ which obligations are allocated to, and are required to be fulfilled by various spheres of government (national, provincial and local).⁴⁴

Each sphere is required to “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”⁴⁵ and national and provincial spheres cannot prevent municipalities from performing their final functions.⁴⁶

Local government has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution.⁴⁷ Part B of Schedule 4 includes, “Municipal planning”.

There is no definition of “Municipal Planning” in the Constitution, and as referred to above, the Constitutional Court was required to provide a definition, which definition states that it should be interpreted in its commonly understood sense.⁴⁸

As a result of the enactment of the Constitution, it very quickly became evident that the existing planning ordinances were flawed insofar as they allowed provinces to decide planning applications, and effectively administer municipal planning instead of municipalities. Furthermore, the DFA, which was enacted just prior to the enactment of the final Constitution, also flouted the constitutional allocation of municipal planning powers to municipalities.

The result of these unconstitutional planning laws was a series of landmark cases which are discussed further hereunder.

⁴³ Section 2 of the Constitution.

⁴⁴ *Ibid*, section 40(1).

⁴⁵ *Ibid*, section 41(1)(g).

⁴⁶ *Ibid*, section 151.

⁴⁷ *Ibid*, section 156.

⁴⁸ *Gauteng Development Tribunal* case, ad para 57, see *supra* footnote 1.

2.4 The constitutionality of the DFA:

The DFA, which was enacted prior to the enactment of the Constitution⁴⁹ was, at the time, considered to be a turning point in South Africa's planning legislation history, and brought a new approach to municipal planning and town planning applications.⁵⁰

The DFA effectively provided a new name for planning applications, that of "land development" applications:⁵¹

"land development" means any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes, including such a procedure in terms of Chapter V, VI or VII, but excluding such a procedure in terms of any other law relating exclusively to prospecting or mining.

As mentioned previously, these land development applications were to be decided by development tribunals and were appealable to development appeal tribunals, both provincial bodies.

Clearly, the primary purpose of the DFA and the formation of these tribunals was to speed up the process of land development applications, evident by its preamble in which it states, "To introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land; and in so doing to lay down general principles governing land development throughout the Republic...", and thereafter it follows, "...to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses...".

Despite its progressive approach and noble intentions, it was clear that the DFA was permitting provinces to usurp the function of municipal planning from municipalities. In the *Gauteng Development Tribunal* case, the Constitutional Court ruled that chapters

⁴⁹ The DFA commenced on the 22 December 1995. The Constitution commenced on the 4 February 1997.

⁵⁰ Van Wyk J *Planning Law* (1999) 585.

⁵¹ Section 1 of the DFA.

V and VI of the DFA were unconstitutional for this very reason. In this case, Justice Jafta recognised and explained the municipalities' exclusive rights to administer municipal planning, and found that the DFA violated this:⁵²

It was further submitted that Chapters V and VI of the Act were not concerned with planning but that they have permissibly established institutions with adjudicatory powers to determine land development applications. I have pointed out already that in granting applications for rezoning or the establishment of townships the development tribunals encroach on the functional area of "municipal planning". The form that such encroachment takes matters not. It follows, therefore, that the impugned chapters are inconsistent with section 156 of the Constitution read with Part B of Schedule 4.

This decision by the Constitutional Court was therefore the catalyst required to give effect to the visions of the *Draft Green Paper on Development and Planning* and the *White Paper on Spatial Planning and Land Use Development*, and it ultimately led to the enactment of SPLUMA.⁵³

While SPLUMA was eventually enacted in 2013, repealing the DFA in its entirety, it only came into effect on 1 July 2015.⁵⁴

2.5 The constitutionality of the previous planning ordinances and acts:

As mentioned, prior to the enactment of SPLUMA, planning applications were governed by various provincial ordinances and acts. After the enactment of the Constitution and the allocation of the competence of municipal planning to municipalities, there were several legal challenges to these ordinances and acts, which are discussed hereunder.

⁵² *Gauteng Development Tribunal* case, ad paras 69 and 70, see supra footnote 1.

⁵³ *Ibid*, despite declaring the DFA unconstitutional, the Constitutional Court did however suspend the declaration for a period of two years for Parliament to "to correct the defects or enact new legislation", ad para 7 of the order.

⁵⁴ As per the Proclamation in Government Gazette 38828 GNR 26, dated 27 May 2015

2.5.1 Land Use and Planning Ordinance 15 of 1985:

The Cape Land Use and Planning Ordinance, (hereafter referred to as “LUPO”)⁵⁵ was a planning ordinance which was applied to the Western Cape, Eastern Cape, Northern Cape provinces and parts of the North West province.⁵⁶ In terms of LUPO, planning applications were heard and decided on by the council of a municipality⁵⁷ and appeals against decisions made by a council were heard by the Administrator, who was the competent authority to whom administration of LUPO was assigned, in those provinces.⁵⁸

The first legal challenge to LUPO came in the case of the *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others*,⁵⁹ where a developer’s planning application, (a rezoning application), had been initially approved by the municipality and thereafter refused by the provincial Minister in terms of LUPO.⁶⁰ The developer brought an application in terms of the Promotion of Administrative Justice Act, (hereafter “PAJA”),⁶¹ to review the province’s decision, on the basis that the Minister did not have the functional competence to decide on the matter, as it fell under the municipal competence of “municipal planning”. The matter was heard by both the Western Cape High Court and the Supreme Court of Appeal before finally being appealed to, and heard by, the Constitutional Court.

The Constitutional Court was not asked, nor required, to make a ruling on whether or not LUPO was unconstitutional and simply made an order to the effect that LUPO was still in effect and therefore empowered the provincial Minister to make decisions in terms of clause 16 of LUPO. As an *obiter* statement however, the judgment did state that there was at least a “strong case”, that such provincial intrusion was unconstitutional.⁶²

⁵⁵ The Cape Land Use and Planning Ordinance no. 15 of 1985.

⁵⁶ *Ibid*, clause 1, definition of “province”.

⁵⁷ As per clauses 9(1), 15(1)(b), 16(1) and 23(1) of LUPO.

⁵⁸ *Ibid* clauses 1 and 44(1)(a).

⁵⁹ *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC).

⁶⁰ LUPO, clause 16.

⁶¹ Promotion of Administrative Justice Act 3 of 2000.

⁶² *Lagoonbay* case, para 46, see *supra* footnote 43.

The constitutionality of LUPO was finally decided upon in the case of *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others*.⁶³ In this case, two planning applications were made to the municipality in terms of LUPO, which applications were refused. In both matters, appeals were made to the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape, which appeals were upheld.

The City of Cape Town and Habitat Council approached the High Court for a declaratory order that clause 44 of LUPO, which related to the province's appeal powers, was unconstitutional. The requested order was granted.⁶⁴ The Constitutional Court was thereafter approached to confirm the declaratory order.

The Constitutional Court confirmed that the appeal powers in LUPO were unconstitutional as it, "...allows the Province to interfere in all municipal land-use decisions and substitute its decisions for those of the municipality...".⁶⁵

This judgment followed the reasoning of the *Gauteng Development Tribunal* case,⁶⁶ and this case was the first instance of a planning ordinance being declared unconstitutional.

As a direct response to the *Habitat Council* case, (and its resultant obligations in terms of SPLUMA), the Western Cape Province has subsequently enacted the Western Cape Land Use Management Act to replace LUPO.⁶⁷

⁶³ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC).

⁶⁴ *Habitat Council and Another v Provincial Minister of Local Government, Western Cape, and Others* [2013] ZAWCHC 112; 2013 (6) SA 113 (WCC).

⁶⁵ *Habitat Council* case, ad paras 11 to 15.

⁶⁶ *Ibid*, para 13.

⁶⁷ Western Cape Land Use Management Act 3 of 2014 commenced in various municipalities at different dates, and it commenced in the City of Cape Town on 1 July 2015, which was the date of commencement of SPLUMA.

The other case with relevance to LUPO and the constitutional allocation of powers, is the case of *Maccsand (Pty) Ltd v City of Cape Town and Others*.⁶⁸ While this case did not involve the interplay between municipalities and provinces relating to appeals against planning application decisions made in terms of LUPO, the court made many important findings related to ‘municipal planning’ in favour of municipalities. The court held:⁶⁹

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 in 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 cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.

The *Maccsand* case therefore sets out that a developer may require several authorisations from various government entities in order to commence development. This is constitutional and permissible. Where one authorisation is granted and another denied, it is not a veto of another entity’s power, but simply an exercise of functional competence.⁷⁰

2.5.2 Town Planning and Townships Ordinance 15 of 1986:

The Town Planning and Townships Ordinance, (hereafter “TPTO”)⁷¹ was a planning ordinance which applied to the Gauteng, Mpumalanga and Limpopo provinces and parts of the North-West Province.⁷² Planning applications made in terms of the TPTO were heard and decided on by the municipality,⁷³ being a city, town or village council of a municipality.⁷⁴ Similar to LUPO which also gave appeal powers to the province, appeals against decisions made by a council

⁶⁸ *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

⁶⁹ *Ibid*, ad para 47.

⁷⁰ *Ibid*, ad para 48.

⁷¹ The Town Planning and Townships Ordinance no. 15 of 1986.

⁷² *Ibid*, clause 1, definition of “province”.

⁷³ *Ibid*, clause 56(1).

⁷⁴ *Ibid* clause 1.

in terms of the TPTO on planning applications were heard by the Director, who an officer in the provincial administration of that province designated to perform the functions entrusted by or under the TPTO.⁷⁵

Similar to the court challenges to LUPA, it was recognized in the case *Pieterse N.O. and Another v Lephalale Local Municipality and Others* that the TPTO allowed the provinces to usurp the power of finally deciding planning applications instead of municipalities.⁷⁶

In this case, the applicants made planning applications to Lephalale Local Municipality for the use of pieces of land in terms of the TPTO, which applications were refused by Lephalale Local Municipality. Aggrieved by the refusals, the applicants were advised by Lephalale Local Municipality of their rights to lodge appeals against the decisions to the Director. The applicants believing this appeal procedure to be an unlawful exercise of provincial power, and an unnecessary hurdle, approached the Pretoria High Court, for an order that the decision of the municipality be reviewed and overturned, and that clause 139 of the TPTO be declared unconstitutional on the grounds that it amounted to the province interfering in a municipal competence.⁷⁷ This order was granted, and it was referred to the Constitutional Court for confirmation.

The Constitutional Court followed the reasoning of the *Habitat Council* case and confirmed the order of the High Court, insofar as it unlawfully allowed the province to administer and decide planning applications. In this regard, the Constitutional Court made the following statement:⁷⁸

In short, section 139 allows for a parallel or concurrent authority at provincial level to countermand the Municipality in an area of competence assigned exclusively to it. In this, it fails to observe municipal autonomy. And it constitutes constitutionally impermissible provincial interference. The High Court was correct to declare the provision inconsistent with the Constitution and invalid.

⁷⁵ Ibid clause 59(1).

⁷⁶ *Pieterse N.O. and Another v Lephalale Local Municipality and Others* 2017 (2) BCLR 233 (CC).

⁷⁷ *Pieterse N.O. v Lephalale Local Municipality* unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria Case No. 79281/14 (25 May 2016) (High Court judgment).

⁷⁸ Ibid, para 15.

2.5.3 Natal Town Planning Ordinance 27 of 1949:

The Natal Town Planning Ordinance (hereafter “NTPO”)⁷⁹ formerly governed planning applications in KwaZulu-Natal. The NTPO created the town planning appeals board, which was a provincial appeal authority, which similar to LUPO and the TPTO, allowed a provincial body to decide appeals against planning decisions made by municipalities.⁸⁰ This ordinance was later repealed by the KwaZulu-Natal Planning and Development Act (hereafter “PDA”).⁸¹

The PDA provides for planning applications, such as amendments of the town planning scheme,⁸² and subdivisions of land,⁸³ which are heard by and decided upon by a municipality. However, appeals made against these planning decisions were heard and decided by the planning and development appeal tribunal, another provincial body.⁸⁴

Notwithstanding its repeal, certain provisions of the NTPO remained in force after the enactment of the PDA, which provisions primarily related to special consent applications and appeals thereto.⁸⁵ The PDA also kept the town planning appeal board alive. Therefore, for a time from 2008 to early 2016, there were two provincial planning appeal bodies in KwaZulu-Natal with powers to overturn municipal decisions.⁸⁶

The case that changed this position was the case of *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others*.⁸⁷

This case involved a mining concern, Tronox KZN Sands (Pty) Ltd, which made

⁷⁹ The Natal Town Planning Ordinance 27 of 1949.

⁸⁰ Ibid, clause 73bis.

⁸¹ Section 162 and schedule 2 of the KwaZulu-Natal Planning and Development Act 6 of 2008.

⁸² Ibid, section 9.

⁸³ Ibid, section 21.

⁸⁴ Ibid, sections 45 and 100.

⁸⁵ Ibid, section 163(2) and schedule 3.

⁸⁶ The dates indicate a period from when the PDA was enacted until it was declared unconstitutional on 29 January 2016, as is discussed further hereunder.

⁸⁷ *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2015] ZAKZPHC 42 (3 June 2015).

application in terms of the PDA for the right to mine on a piece of land which was zoned agricultural, and which was located just outside the town of Mtunzini. This application was granted. The Mtunzini Conservancy, an objector at all times to Tronox's operations near Mtunzini, appealed the decision to the planning and development appeal tribunal. Before the appeals were heard, Tronox applied to Pietermaritzburg High Court for an order declaring sections 45 and chapter 10 of the PDA to be unconstitutional.⁸⁸

The Pietermaritzburg High Court followed the reasoning of the *Habitat Council* and *Gauteng Development Tribunal* cases and granted the order sought, stating:

The operation of s 45 and Chapter 10, in my view, usurps the functions of a municipality. It does not preserve the autonomy of municipalities, and constitutes provincial government interference with the sphere of the municipality's constitutional empowerment to make decisions relating to municipal planning. I am accordingly of the view that Habitat is indistinguishable from the circumstances of this matter.

The Constitutional Court confirmed this order, again confirming the municipalities' exclusive competence of municipal planning.⁸⁹

Section 45 impermissibly interferes with municipalities' exclusive constitutional power. The contention that the establishment of the Appeal Tribunal and the provision of an internal appeal does not involve the exercise of a provincial function or power is unconvincing. The Appeal Tribunal is established by the Province through legislation, namely the PDA, and this legislation subjects municipalities to an appeal process without their consent and regardless of whether or not they think it is appropriate.

Although it is true that the Appeal Tribunal is not staffed by provincial officials (and the appellate oversight is not exercised by the Administrator/MEC, as was the case in *Habitat Council*), the *Habitat Council* decision, boiled down to its essence, establishes that local authorities have the power to manage "municipal planning". This power is autonomous and under no circumstances can it be intruded upon. Therefore, the alleged "independence" of the Appeal Tribunal does not necessarily render *Habitat Council* inapplicable. The fact that municipalities are subjected to an appeal process

⁸⁸ Section 45 refers to appeals against decisions relating to land situated outside a scheme, whereas chapter 10 refers to the Planning and Development Appeal Tribunal.

⁸⁹ *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC), ad paras 27 and 28.

by the Province also intrudes upon their autonomous power. The Province's involvement in appointing persons to the Appeal Tribunal and its administrative influence exacerbate the intrusion.

Another legal challenge relating to the conflict between provincial and municipal exercises of power in KwaZulu-Natal, was the case of *Le Sueur and Another v Ethekewini Municipality and Others*.⁹⁰ In this case, the applicants owned a piece of land which fell within the jurisdiction of the eThekweni Municipality.

The eThekweni Municipality had developed and implemented the DMOSS, (Durban Metropolitan Open Space System), an environmental control, designed to demarcate and preserve areas of high biodiversity and environmental significance.⁹¹ Part of the applicants' land was designated as environmentally significant in terms of the DMOSS, and the result of such demarcation was that the applicants were precluded from developing the affected portions of their land.

The applicants therefore applied to High Court for an order declaring the DMOSS to be unconstitutional, as the eThekweni Municipality could not lawfully legislate on environmental matters as it is an issue which falls outside of its competence.⁹²

The High Court disagreed with this argument, and found that municipal planning automatically and necessarily encompasses the environment, stating:⁹³

Municipalities under the banner of "*municipal planning*" have historically always exercised executive legislative responsibility over environmental affairs within a municipal area. The drafters of the Constitution were aware of this fact and recognized this fact in the manner in which the newer Constitutional dispensation was formulated.

⁹⁰ *Le Sueur and Another v Ethekewini Municipality and Others* (9714/11) [2013] ZAKZPHC 6 (30 January 2013).

⁹¹ eThekweni Municipality, 'D'MOSS An integral component of the eThekweni Planning Schemes, http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx, accessed on 17 October 2017.

⁹² *Le Sueur* case, para 16, see supra footnote 74.

⁹³ *Ibid*, ad para 21 and 23.

It is clear that both at the time that the Constitution was enacted and since then Municipalities have been allocated by national legislation and provincial legislation and policies, a legislative and executive mandate with respect to environmental matters, placing such matters squarely within the concept of municipal planning.

This case is indicative of how the courts intend municipalities to take a proactive and robust approach towards planning matters, even where the competence is not specifically assigned to them.

3. A summary of the changes introduced by SPLUMA:

3.1 An overview of the goals of SPLUMA:

SPLUMA was intended to consolidate the fragmented system of planning previously in place.⁹⁴ In contrast to the provincial ordinances, SPLUMA, as national legislation, applies to the entire area of the Republic.⁹⁵

The preamble of SPLUMA specifically addresses that it was enacted with an awareness of the municipal planning disputes that existed, due to manner in which planning competences were allocated by the previous planning legislation and ordinances. Specifically, it mentions:

...AND WHEREAS various laws governing land use give rise to uncertainty about the status of municipal spatial planning and land use management systems and procedures and frustrates the achievement of cooperative governance and the promotion of public interest...

This statement recognises that a new approach to municipal planning, amongst other planning, was required, which system SPLUMA purported to provide. It provides a statutory definition for municipal planning, which includes:⁹⁶

⁹⁴ SPLUMA, section 3(a).

⁹⁵ Ibid, 2(1)(a).

⁹⁶ Ibid, section 5(1).

- (c) 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.

It is therefore clear that SPLUMA, among other purposes, was enacted to give effect to the Constitutional obligation on local government to administer municipal planning and resultant land use.

3.2 SPLUMA and municipal planning tribunals:

SPLUMA requires municipalities to prepare and administer land use schemes:⁹⁷ These land use schemes allow municipalities to determine and set out what types, and to what extent, development can take place. SPLUMA also requires that Municipalities must set out, in their land use schemes, how the land use can be altered, through land use applications.⁹⁸

In SPLUMA's definition section, it also includes the following definition:⁹⁹

‘Land development’ means the erection of buildings or structures on land, or the change of use of land, including township establishment, the subdivision or consolidation of land or any deviation from the land use or uses permitted in terms of an applicable land use scheme.

SPLUMA introduces a new body to determine land use and land development applications, namely municipal planning tribunals. It provides that,¹⁰⁰ “Except as provided in this Act, all land development applications must be submitted to a municipality as the authority of first instance” and then goes on to provide that,¹⁰¹ “A municipality must, in order to determine land use and development applications within its municipal area, establish a municipal planning tribunal”.

⁹⁷ SPLUMA, section 24(3).

⁹⁸ Ibid, sections 25 and 26(4) read with regulation 14 of the Spatial Planning and Land Use Management Regulations: Land Use Management and General Matters, 2015, GN R239 in GG 38594 of 23 March 2015, (hereafter the “Regulations”).

⁹⁹ Ibid, section 1.

¹⁰⁰ Ibid, section 33(1).

¹⁰¹ Ibid, section 35(1) and see also section 26(4).

While each municipality is obliged to set up a municipal planning tribunal, SPLUMA does make provision for two or more municipalities to appoint a joint municipal planning tribunal in respect of those municipalities.¹⁰² Furthermore, a district municipality may, with the consent of local municipalities falling within its area, form a single municipal planning tribunal.¹⁰³ However, before such a decision to set up a joint municipal planning tribunal can be taken, municipalities must consider the effect of the decision according to strict criteria.¹⁰⁴

Municipalities are also entitled to make provision for certain types of land use application to be decided by a single official, and others by the municipal planning tribunal.¹⁰⁵

Municipal planning tribunals may hear and decide land development applications for change in the use, form or function of land,¹⁰⁶ which includes: township establishment;¹⁰⁷ the subdivision of land;¹⁰⁸ the consolidation of different pieces of land;¹⁰⁹ the amendment of a land use or town planning scheme;¹¹⁰ or the removal, amendment or suspension of a restrictive condition.¹¹¹

SPLUMA has also included a provision which expressly states that ‘where an application or authorisation is required in terms of any other legislation for a related land use, such application must also be made or such authorisation must also be requested in terms of that legislation’.¹¹² Presumably, this section was included as a response by the legislature to the conflict raised in the *Maccsand* case as discussed previously.

¹⁰² Ibid, section 34(1) read with regulations 4,5 and 6 of the Regulations.

¹⁰³ Ibid, section 34(2) read with regulations 7, 8 and 9 of the Regulations.

¹⁰⁴ Regulation 2(1) and 2(2) of the Regulations set out these criteria which include: the impact of the Act on the municipality's financial, administrative and professional capacity; the ability of the municipality to effectively implement the provisions of Chapter 6 of the Act; the average number of applications dealt with by the municipality annually in terms of existing planning legislation; and the development pressures in the municipal area.

¹⁰⁵ SPLUMA, section 35(2) and (3) read with regulation 15(4) of the Regulations.

¹⁰⁶ Ibid, section 41(1)

¹⁰⁷ Ibid, section 41(2)(a).

¹⁰⁸ Ibid, section 41(2)(b).

¹⁰⁹ Ibid, section 41(2)(c).

¹¹⁰ Ibid, section 41(2)(d).

¹¹¹ Ibid, section 41(2)(e).

¹¹² Ibid, section 33(2).

SPLUMA also provides that municipalities should construct their own frameworks for deciding these applications through publishing their own by-laws, a power which was previously provided by provincial ordinances and the national legislature through the DFA.

Finally, SPLUMA expands the scope of *locus standi* for persons who can submit a land development application. These persons include: an owner;¹¹³ a person acting as the duly authorised agent of the owner;¹¹⁴ a person to whom the land concerned has been made available for development in writing by an organ of state or such person's duly authorised agent;¹¹⁵ or a service provider responsible for the provision of infrastructure, utilities or other related services.¹¹⁶ In this way, not only the owner is entitled to make such an application, which was sometimes the case previously. Furthermore, the definition of owner in SPLUMA “means a person registered at a deeds office as the owner of land or who is the beneficial owner in law.¹¹⁷ A beneficial owner in law is defined by City of Tshwane Metropolitan Municipality in its bylaws as:¹¹⁸

...means where the Municipality determines for purposes of this By-law that specific property rights and equity in the property(ies) in terms of any repealed or other law grants such beneficial ownership and lawfully belongs to a person(s) even though dominium or formal title of the property has not been registered or transferred.”

Interpreting “beneficial owner” as City of Tshwane Metropolitan Municipality has done, therefore casts the net wide and allows a wider spectrum of land rights holders to make land development applications in terms of SPLUMA, not just formal title deed holders.

¹¹³ Ibid, section 45(1)(a).

¹¹⁴ Ibid, section 45(1)(b).

¹¹⁵ Ibid, section 45(1)(c).

¹¹⁶ Ibid, section 45(1)(d).

¹¹⁷ Ibid, section 1.

¹¹⁸ The City of Tshwane Land Use Management By-law, 2016 which was promulgated on 2 March 2016.

3.3 SPLUMA and land use appeals:

SPLUMA's new appeal procedure is stated as follows:¹¹⁹

- (1) 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 manager within 21 days of the date of notification of the decision.
- (2) The municipal manager must within a prescribed period submit the appeal to the executive authority of the municipality as the appeal authority.
- (3) The appeal authority must consider the appeal and confirm, vary or revoke the decision.
- (4) A person whose rights are affected within the provisions of subsection (1) includes-
 - (a) an applicant contemplated in section 45 (1);
 - (b) the municipality where the land affected by the application is located;
 - (c) an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings.
- (5) An interested person for the purpose of subsection (4) (c) must be a person having a pecuniary or proprietary interest who is adversely affected or able to demonstrate that she or he will be adversely affected by the decision of the planning tribunal or an appeal in respect of such a decision.
- (6) A municipality may, in the place of its executive authority, authorise that a body or institution outside of the municipality or in a manner regulated in terms of a provincial legislation, assume the obligations of an appeal authority in terms of this section.
- (7) No appeal in respect of a decision taken in terms of or pursuant to this Act may be lodged in terms of section 62 of the Municipal Systems Act.

SPLUMA therefore makes some noteworthy changes to appeals against land development applications that existed prior to its enactment. The first point to note is that the appeal body is no longer a provincial or national body, but rather the executive authority of the municipality in question.¹²⁰ The definition of executive authority in

¹¹⁹ Ibid, section 51.

¹²⁰ Ibid, section 51(2).

SPLUMA provides that it consists of the executive committee or the executive mayor, or in absence of those, a committee of councillors appointed by the Municipal Council.¹²¹ It is for this reason that the appeal mechanism is referred to as an internal appeal in the heading of the relevant section of SPLUMA,¹²² as it relates to a municipality re-considering an application which it has previously decided on.

A second change is that SPLUMA entitles, "...a person whose rights were affected by a decision taken by municipal planning tribunal..." to lodge an internal appeal, ("person" includes a natural or juristic person¹²³).¹²⁴ This is further expanded on by saying that this includes an applicant in terms of section 45(1) of SPLUMA,¹²⁵ the municipality where the land affected by the application is located,¹²⁶ and/or an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings.¹²⁷ Interested parties are also entitled to join appeal proceedings after they have commenced,¹²⁸ provided they can show that they have an interest in the matter, to the satisfaction of the appeal authority.¹²⁹

While SPLUMA provides that the executive authorities of municipalities are the designated bodies for the receiving and deciding of appeals,¹³⁰ it also allows municipalities to appoint external bodies, or bodies authorised in terms of provincial legislation, to deal with these appeals, rather than their executive authorities.¹³¹

3.4 SPLUMA's regulations

SPLUMA provides that the Minister of Rural Development and Land Reform may make regulations relating to procedures concerning the lodging, consideration and

¹²¹ Ibid, section 1.

¹²² Ibid, section 51.

¹²³ Ibid, section 1.

¹²⁴ Ibid, section 51(1).

¹²⁵ Ibid, section 51(4)(a).

¹²⁶ Ibid, section 51(4)(b).

¹²⁷ Ibid, section 51(4)(c).

¹²⁸ Ibid, section 45(2).

¹²⁹ Ibid, sections 45(4) and 51(4) read with regulation 31 of the Regulations.

¹³⁰ Ibid, section 51(2).

¹³¹ Ibid, section 51(6).

decision on appeals,¹³² the fees payable in connection with applications and appeals,¹³³ and any ancillary or incidental matter that is necessary for the proper implementation and administration of this Act.¹³⁴

Furthermore, different regulations may also be made for different categories of municipal planning tribunals,¹³⁵ land use schemes,¹³⁶ development applications and appeals.¹³⁷ The Minister of Rural Development and Land Reform has published such Regulations.¹³⁸

The Regulations specifically state that municipalities must determine appeal procedures, and these procedures must make provision for appeals to an executive authority,¹³⁹ to a body other than an executive authority if so designated,¹⁴⁰ to another body authorised by provincial legislation,¹⁴¹ or a duly appointed official.¹⁴²

The Regulations also state that an appeal authority has both appeal and review powers, being able to decide on the merits of a land development application¹⁴³ and the procedural fairness of an administrative act.¹⁴⁴

It further sets out the types of decisions an appeal authority can make in respect of an appeal and these include the right to confirm, vary, or revoke a decision made by a municipal planning tribunal or a delegated official.¹⁴⁵ If a decision of a municipal planning tribunal or designated official is set aside, the appeal authority can either refer the decision back to the municipal planning tribunal or designated official, or replace the decision with one of its own.¹⁴⁶

¹³² Ibid, section 54(1)(f).

¹³³ Ibid, section 54(1)(h).

¹³⁴ Ibid, section 54(1)(l).

¹³⁵ Ibid, section 54(3)(a).

¹³⁶ Ibid, section 54(3)(b).

¹³⁷ Ibid, section 54(3)(c).

¹³⁸ GN 1126 in GG 39415 of 13 November 2015.

¹³⁹ Regulation 20(a) of the Regulations.

¹⁴⁰ Ibid, regulation 20(b).

¹⁴¹ Ibid, regulation 20(c).

¹⁴² Ibid, regulation 20(d).

¹⁴³ Ibid, regulation 22(b).

¹⁴⁴ Ibid, regulation 22(a).

¹⁴⁵ Ibid, regulation 26(1)(b).

¹⁴⁶ Ibid regulation 26(2).

The Regulations also specify other procedural issues relating to the form and manner of the appeal hearing;¹⁴⁷ the parties' rights to representation;¹⁴⁸ the discovery process;¹⁴⁹ and the time frames for the appeal.¹⁵⁰

3.5 SPLUMA by-laws:

SPLUMA provides for municipalities to prepare by-laws aimed at enforcing their land use schemes.¹⁵¹ The municipal by-laws are further referred to in several ways, in the Regulations.¹⁵²

As an illustrative example, the eThekweni Municipality has passed such by-laws, known as the eThekweni Municipality: Planning and Land Use Management By-laws 2016 (hereafter "the By-laws").¹⁵³

The By-laws are cognizant of the eThekweni Municipality's obligations to form a municipal planning tribunal and designate an appeal authority, as evident by the objects of the By-laws, which include, amongst others, to:¹⁵⁴

- (g) regulate land development application and decision-making procedures;
- (h) provide for the establishment, functions and operations of the Tribunal;
- (i) provide for facilitation and enforcement of land use and development measures;
- (j) provide for an appeal authority; and
- (k) provide penalties for breach of its provisions.

The By-laws, then set out that no person may commence with land development without authorisation in terms of the By-laws.¹⁵⁵ It also adds that if any authorisation is required from another organ of state, it must accompany the land development

¹⁴⁷ Ibid, regulation 23.

¹⁴⁸ Ibid, regulation 24.

¹⁴⁹ Ibid, regulation 25.

¹⁵⁰ Ibid, regulation 30.

¹⁵¹ SPLUMA, section 32(1).

¹⁵² The Regulations, regulations 16(1), 17(1)(c), and (2), and schedule 4.

¹⁵³ Provincial Gazette number 1871, Municipal Notice 114 of 2017, 31 August 2017.

¹⁵⁴ The By-laws, Clause 3(g), (h), (i), (j), and (k).

¹⁵⁵ Ibid, clause 21(1).

application to the municipality. This again appears to be a confirmation of the *ratio* found in the *Maccsand* judgment.¹⁵⁶

The By-laws also specify the persons who are entitled and/or qualified to make a land development application¹⁵⁷ and the manner in which land development applications must be made, including practical considerations,¹⁵⁸ such as the submission of necessary documents.¹⁵⁹

As allowed for in the Regulations,¹⁶⁰ the By-laws have also made provision for different categories of land development applications.¹⁶¹ In this respect, the By-laws set out the competent authority to decide each type application, which are split into four, namely:

Category 1 applications, which include adoption and amendment of land use schemes, which is undertaken by the Municipal Council;¹⁶²

Category 2 applications, where there is a departure from the Municipal Spatial Development Framework, rezonings where there have been objections, zoning, and combined applications, which include one or more of the land development uses set out above as well as any land uses falling within category 3 and 4, which must be heard by the municipal planning tribunal;¹⁶³

Category 3 applications, which include special consents, subdivisions, township establishment, closure of roads and public spaces, rezoning in line with the Municipal Spatial Development Framework, removal or suspension of restrictive conditions, development of land outside the scheme, and combined applications of the above and land uses falling in category 4 applications, must all be decided by the Head;¹⁶⁴ and

¹⁵⁶ Ibid, clause 21(3).

¹⁵⁷ Ibid, clause 21(4) and (5)

¹⁵⁸ Ibid, clause 23.

¹⁵⁹ Ibid, clause 23(2) and (3).

¹⁶⁰ The Regulations, regulation 15.

¹⁶¹ The By-Laws, Clause 25(1).

¹⁶² Ibid, clause 26.

¹⁶³ Ibid, clause 27.

¹⁶⁴ Ibid, clause 28, read with clause 1, the definition of “Head”.

Category 4 applications, which include relaxations where the necessary consent/s have been obtained, exemption from the provisions of the land use scheme where the necessary consent/s have been obtained, notarial tie of adjacent land, and development of land outside of a scheme in respect of a relaxation or exemption where the necessary consent/s have been obtained, are all to be decided by the Deputy-Head.¹⁶⁵

In this way, the By-laws, set out that certain land development applications, Category 2 and 3, have been delegated away from the municipal planning tribunals, to other entities. This is in line with section 35(2) of SPLUMA, (read with regulation 15(2) of the Regulations) which allows an authorised representative to hear certain types of land development applications.

If one looks at the factors that a municipality must consider before it delegates a land development application to an official, (which factors can be found in the Regulations¹⁶⁶), it is evident that the eThekweni Municipality has ranked the applications in terms of “difficulty” or “complication”, from hardest to simplest and delegated accordingly. Therefore, a rezoning application to which objections have been made must be heard by the municipal planning tribunal,¹⁶⁷ whereas relaxation applications where consents of neighbours have already been obtained, can be heard by the Deputy-Head on his/her own.¹⁶⁸

The By-Laws also regulate the types of land development applications which require public participation¹⁶⁹ and what that public participation must entail.¹⁷⁰ This allows

¹⁶⁵ Ibid, clause 29, read with clause 1, the definition of “Deputy-Head”.

¹⁶⁶ The Regulations, regulation 15(2) states that these factors include:

- (a) type of land development or land use application;
- (b) scale and nature of the land development or land use application;
- (c) the potential impact of the right granted if the land development or land use application is approved;
- (d) the level of public participation required;
- (e) whether or not the land development or land use application is in line with the municipality's spatial development framework and other relevant policies;
- (f) any other aspect that the municipality considers appropriate; or
- (g) any combination of the aspects referred to in paragraphs (a) to (f).

¹⁶⁷ The By-Laws, clause 27(1)(b).

¹⁶⁸ Ibid, clause 29(2)(a).

¹⁶⁹ Ibid, clause 32.

¹⁷⁰ Ibid, clause 34.

interested parties the opportunity to consider the application, and lodge an objection if they so wish.¹⁷¹

Clause 38 of the By-laws gives effect to SPLUMA's requirement to establish a municipal planning tribunal, and the By-laws also add that no other organ of state may interfere with the functions of the municipal planning tribunal¹⁷² and the members must act impartially and without outside influence.¹⁷³

Furthermore, the By-Laws specify exactly how the municipal planning tribunal should be comprised, which summarized, states that the members should include designated officials in the full-time employ of the eThekweni Municipality, and external persons appointed by the Municipal Council.¹⁷⁴ The qualifications and expertise of the officials and external persons are also specified.¹⁷⁵

The By-laws then set out how appeals are to be handled in the eThekweni Municipality. Clause 55 states that the Executive Authority is the appeal authority in terms of SPLUMA, and that the Executive Authority may delegate its functions to an official within the eThekweni Municipality. This is a simple duplication of sub-sections 51(2) and (6) of SPLUMA.

The By-laws are an example of a municipality promulgating by-laws aimed at giving effect to SPLUMA.

3.6 SPLUMA, section 62 of the Local Government: Municipal Systems Act and review applications in terms of PAJA:

Section 62 of the Local Government: Municipal Systems Act (hereafter "MSA"),¹⁷⁶ provides a general appeal mechanism for appeals against decisions of municipalities. The appeal lies against decisions taken by political structures, political office bearers,

¹⁷¹ Ibid, clause 36.

¹⁷² Ibid, clause 38(4).

¹⁷³ Ibid, clause 38(5).

¹⁷⁴ Ibid, clause 40(1).

¹⁷⁵ Ibid, clause 40(3) and (4).

¹⁷⁶ The Local Government: Municipal Systems Act 32 of 2002.

councillors or staff of a municipality. This appeal is heard by the municipal manager, the executive committee, the executive mayor or the council of the municipality, depending on who made the initial decision.

Where an appellant is unhappy with the outcome of the appeal provided by section 62 of the MSA, its remedy is to review the decision, in terms of section 6(1) of PAJA, effectively requesting a court to consider whether the decision was unlawful. A review application in terms of section 6(1) of PAJA is not permissible unless an applicant has complied with section 7(2)(a) of PAJA, requiring that an applicant exhaust all internal remedies beforehand. An appeal in terms of section 62 of the MSA is therefore an internal remedy for the purposes of section 7(2)(a) of PAJA.

Section 51(7) of SPLUMA, specifically excludes the application of section 62 of the MSA to decisions in terms of SPLUMA. As SPLUMA itself provides an appeal mechanism in section 51, section 51(7) was obviously included to ensure that an appellant does not file two separate appeals on the same decision, one through section 62 of the MSA and the other section 51 of SPLUMA.

The appeal provided in section 51 of SPLUMA will therefore constitute an internal remedy for the purposes of section 7(2)(a) of PAJA. Therefore, before an applicant may review a decision of a municipality in terms of section 6(1) of PAJA it must ensure that it lodges an appeal in terms of section 51. In the ordinary course, purely due to the cost implications of high court litigation, it is unlikely that a disgruntled applicant would go straight to high court without first trying to appeal the decision in terms of section 51 of SPLUMA.

4. Has SPLUMA been successful in changing South African planning law:

4.1 The success of SPLUMA:

The reception of SPLUMA has been overwhelmingly positive. SPLUMA has been praised as follows:¹⁷⁷

With the approval of the Spatial Planning and Land Use Management Act (SPLUMA) (Act 16 of 2013) and the SPLUMA Regulations (23 March, 2015), the last bastion of spatial and statutory planning legislation reform from the previous political dispensation within municipalities was transformed... Thus far, SPLUMA (2013) seems to be a step ahead in the alignment of spatial planning, land use management, and land development;

and further:¹⁷⁸

Prior to the advent of SPLUMA planning law was severely fragmented, consisting as it did of levels and layers of confusing, disparate legislation. There was a dire need for reform. SPLUMA constitutes an important step towards a uniform system, which is nationally applicable and more modern in its approach to planning.

Generally speaking, SPLUMA has addressed the issue of provincial interference with municipal functions fairly comprehensively and effectively, as has been discussed above in Chapter 3. It is therefore appropriate for Chapter 4's focus to be an assessment of where SPLUMA has been deficient, assessment which follows directly hereafter.

¹⁷⁷ Schoeman J *The alignment between spatial planning, transportation planning and environmental management within the new spatial systems in South Africa* 2015 (67), TRP.

¹⁷⁸ Murray P, 'Zoning matters: A 'SPLUMA' score-card one year on', De Rebus, <http://www.derebus.org.za/zoning-matters-spluma-score-card-one-year/>, 2016 (DR 26), accessed on 17 September 2017.

4.2 The lawfulness of a municipality reviewing and replacing its own decision:

Criticism has been levelled at SPLUMA for the appeal processes it prescribes and it has been stated that, “The municipality's ability to appeal to its own executive authority is, at face value, a somewhat ludicrous notion”¹⁷⁹ and stated further:¹⁸⁰

Appeals are heard either by the executive authority of the municipality (the executive committee or the executive mayor) or by a body or institution outside of the municipality. In terms of reg 23 the appeal authority may hear the appeal by means of a ‘written hearing’ or an ‘oral hearing’. I submit that both formulations are unfortunate. Firstly, in some municipalities the executive authority will serve as the appeal authority. In others, an outside body will be designated. A greater degree of objectivity can, naturally, be expected from outside bodies. Secondly, the decision to hold a hearing or not is discretionary and no objective criteria are set out for purposes of exercising the discretion. In practice, very few appeal hearings are held. In the previous planning paradigm most provinces convened a Townships Board for purposes of hearing appeals. Large amounts of institutional expertise developed within the boards, as well as a high degree of objectivity. This might now have been lost.

It does seem counterintuitive that the overall entity making a decision on an application, is the same entity that reconsiders a decision on appeal. Once an entity has made a decision it is essentially *functus officio* and precluded from re-making that decision.¹⁸¹ It therefore follows, that a municipality’s municipal planning tribunal which has made a decision on a land development application, should be precluded from re-visiting the decision “under the cloak” of an appeal authority. Both the municipal planning tribunal and the appeal authority are entities within the same municipality, and it is accordingly the same municipality making two decisions on one land development application.

¹⁷⁹ Gedye M, ‘Planning Legislation gets a makeover’, Garlicke and Bousfield, <http://www.mondaq.com/southafrica/x/278382/Building+Construction/Planning+Legislation+Gets+A+Makeover> Planning Legislation Gets A Makeover Megan Gedye Garlicke and Bousfield 29 November 2013, accessed on 23 November 2017.

¹⁸⁰ Murray P, ‘Zoning matters: A ‘SPLUMA’ score-card one year on’, De Rebus, <http://www.derebus.org.za/zoning-matters-spluma-score-card-one-year/>, accessed on 17 September 2017.

¹⁸¹ Hiemstra VG and Gonin HL, ‘Trilingual Legal Dictionary’, 3 ed (1992), defines the term *functus officio* as ‘nie meer diensdoende nie; nie meer in funksie nie// no longer in office (officiating); having discharged his office’. Baxter L *Administrative Law* (1984) at 372, states, ‘Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus, when an administrative official has made a decision which bears directly upon an individual’s interests, it is said that the decision-maker has discharged his office or is *functus officio*.’

However, SPLUMA and the Regulations contain several provisions aimed at ensuring the independence of the appeal authority and its distinctiveness from the municipal planning tribunals.

For example, SPLUMA states that the composition of a municipal planning tribunal must be made up of municipal officials and persons who are not municipal officials and who have knowledge and experience of spatial planning, land use management and land development or the law related thereto.¹⁸² SPLUMA also provides that municipal councillors may not be appointed as members of a municipal planning tribunal.¹⁸³ Presumably these are included to minimise political interference. SPLUMA also states that members of municipal planning tribunals should disclose any conflict of interest,¹⁸⁴ and may not take part in the municipal planning tribunals if he/she has such a conflict of interest.¹⁸⁵

A municipality may also authorise another body or institution outside of the municipality to assume the obligations of the appeal authority.¹⁸⁶ Such an authorisation could be done to avoid a conflict of interest or where the appeal relates to large or technical matter, requiring an independent body with the competence and capacity to effectively determine the appeal.

Presumably also with the intention of minimizing political interference, the Regulations state that:¹⁸⁷

The appeal authority may not delegate its power to hear an appeal to an official in the employ of the municipality who decided the application or who is a member of the municipal planning tribunal that made a decision on the application that forms the subject matter of the appeal.

Despite these sections and regulations respectively, it is unclear whether the municipal planning tribunals and appeal authorities can ever be completely free from outside influence and completely impartial. Furthermore, it can be argued that if another entity

¹⁸² SPLUMA, section 36(1)(b).

¹⁸³ Ibid, section 36(2).

¹⁸⁴ Ibid, section 38(3)(a).

¹⁸⁵ Ibid, section 38(3)(b).

¹⁸⁶ Ibid, section 51(6).

¹⁸⁷ The Regulations, regulation 29.

outside the municipality were to decide appeals on its behalf, it would be encroaching on the municipality's exclusive competence of municipal planning.

It is noteworthy that other appeal mechanisms exist where a decision is reviewed and reconsidered by essentially the same entity. Examples of these appeal mechanisms are appeals in terms of section 62 of the MSA, (as discussed above), and appeals in terms of section 61 of the KwaZulu-Natal Liquor Licensing Act,¹⁸⁸ which act provides that decisions made by the liquor authority on license applications in terms of section 41 of the act can thereafter be appealed to the executive council of the liquor authority in terms of section 61 of the act. In this way the liquor authority can essentially remake its own decision. Another example is the process for obtaining environmental authorisations and appeal thereto in terms of the National Environmental Management Act.¹⁸⁹ Applications for environmental authorisations are made to officials designated by the MEC's or the Minister who oversees environmental affairs (depending on the nature of the application)¹⁹⁰ and those same MEC's or the Minister must then re-assess those decisions when appeals are lodged against the decisions.¹⁹¹

4.3 The legality of authorisations in terms of section 51(6) of SPLUMA:

Section 51(6) of SPLUMA provides that, "A municipality may, in the place of its executive authority, authorise that a body or institution outside of the municipality or in a manner regulated in terms of a provincial legislation, assume the obligations of an appeal authority in terms of this section".

Section 51(6) of SPLUMA effectively means that a municipality, unwilling or incapable of considering appeals against decisions of municipal planning tribunals, could authorise a provincial body, (for example the town planning appeals board or planning and development appeal tribunal), to handle appeals on its behalf.

The problem encountered with such an authorisation is stated as follows:¹⁹²

¹⁸⁸ The KwaZulu-Natal Liquor Licensing Act 06 of 2010.

¹⁸⁹ The National Environmental Management Act 107 of 1998.

¹⁹⁰ Ibid, sections 24 and 24C.

¹⁹¹ Ibid, section 43.

¹⁹² Van der Westhuizen JE *Land use planning mandates – A quest for legal certainty* Unpublished LLM thesis, University of Cape Town (2014),

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.

It would appear at face value that this is precisely the issue caused by the ordinances and the DFA that SPLUMA was enacted to remedy. However, the difference in the case of section 51(6) is that the municipality is choosing to authorise another entity to undertake its function, it hasn't been usurped or authorised by the provincial or national government to do so. Municipalities have the right to choose the model and form of their appeal authority, to their liking.

There is provision in both the Constitution¹⁹³ and SPLUMA¹⁹⁴ to allow national and provincial governments to assist municipalities in the exercise of their functions and the extent of this assistance is summarised as follows:¹⁹⁵

Yet, municipalities cannot operate entirely independently and their powers may be curtailed by the following constitutional provisions. Firstly, national government and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority. Secondly, provincial government has the powers of monitoring and supporting local government in the provinces as well as of promoting the development of local government capacity to enable municipalities to perform their functions and manage their affairs. Thirdly, when a province or a municipality cannot or does not fulfil an executive obligation in terms of legislation, the national or the relevant provincial executive may intervene by taking appropriate steps.

https://open.uct.ac.za/bitstream/item/21308/thesis_law_2014_van_der_westhuizen_jonathan_eugene.pdf?sequence=1, accessed on 14 October 2017.

¹⁹³Section 155(7) of the Constitution states that, 'The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)'.

¹⁹⁴ Sections 9 and 10 of SPLUMA provide for assistance from national and provincial governments where necessary to municipalities.

¹⁹⁵ Van Wyk J, 'Planning in all its (Dis)Guises: Spheres of Government, Functional Areas and Authority', 2012 (15:5) PELJ.

Therefore, it is consistent with the Constitution that the municipalities are able to authorise a province to assist with municipal planning where appropriate.

4.4 The public participation requirements of SPLUMA:

A major criticism of SPLUMA is its lack of specificity on public participation. SPLUMA essentially provides that public participation is a matter to be left to regulations.¹⁹⁶ The Regulations simply state that each municipality must determine the public participation process required for each land development application.¹⁹⁷

SPLUMA does not contain an automatic objection right to interested and affected parties as was contained in previous ordinances and acts. Instead a person wishing to object is now required to apply for an intervener status to be allowed to participate in a land development application.¹⁹⁸ There are no objective criteria for deciding whether a person should be granted this status, and in summing up the issue it was stated:¹⁹⁹

One of the most notable omissions from SPLUMA is that in providing land use change procedures it does not mention that interested and affected parties may object to applications. This has been a key feature of planning procedures for many decades, and it has provided a valuable procedural remedy to neighbouring property owners, residents, activists, and even competitors who oppose proposed land use change.

The benefit of this intervener process in SPLUMA to objectors is that there is no time restriction on when an interested party may intervene. This will undoubtedly cause headaches for municipalities who do not regulate this issue in their by-laws and receive intervener petitions at the eleventh hour, delaying decisions being made.

SPLUMA, in leaving the public participation requirements up to municipalities has also created a situation where certain municipalities' public participation requirements may be stricter than others. This problem has been noted and commented on as follows:²⁰⁰

¹⁹⁶ SPLUMA, section 54(1)(j).

¹⁹⁷ The Regulations, regulation 14(1)(d).

¹⁹⁸ SPLUMA, section 45(2).

¹⁹⁹ Murray P, 'Zoning matters: A 'SPLUMA' score-card one year on', De Rebus, <http://www.derebus.org.za/zoning-matters-spluma-score-card-one-year/>, accessed on 17 September 2017.

²⁰⁰ Ibid.

Some by-laws provide for an objection procedure. It is not inconceivable, however, that some by-laws might not provide one. Practitioners will have to consider the by-laws of the municipality concerned before deciding how best to oppose a land use application or to resist an objection.

A case with applicability to this very issue is the recent Eastern Cape High Court, Grahamstown case of *Zimmerman v Ndlambe Municipality and Others*.²⁰¹ In this case, the applicant sought to review the Ndlambe Municipality's decisions to approve rezoning and departure applications made by her neighbour in terms of section 6(1) of PAJA. Among the reasons the applicant raised in arguments for the review to succeed was that she was not afforded an opportunity to object, to make submissions prior to the decision, to be given reasons for the decision, to be given the full record of the decision or to be availed of her appeal rights.

The municipality argued that as she was not an initial party to the application, she was not entitled to automatically object and was required to petition to intervene in terms of section 45 of SPLUMA.

The Court rejected the municipality's arguments and, in following the decisions of *BEF (Pty) Ltd v Cape Town Municipality*²⁰² and *JDJ Properties CC and Another v Umngeni Local Municipality*,²⁰³ held that the applicant's interest as a neighbour was sufficient to give her standing as an objector and the protections for fair administrative action in terms of section 33(1) of the Constitution and PAJA.²⁰⁴ In this regard, the court added that:²⁰⁵

In applications for large scale township development schemes there may well be a necessity for applications in terms of section 45 of the Act as an intervening party and the Tribunal to take a view on such an applicant's rights. This does not affect the long held legal rights of neighbouring property owners where their properties and rights to preservation and enjoyment of the amenities associated with properties falling within an established scheme.

²⁰¹ *Zimmerman v Ndlambe Municipality and Others* [2017] 4 All SA 584 (ECG).

²⁰² *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C).

²⁰³ *JDJ Properties CC and Another v Umngeni Local Municipality* 2013(2) SA (SCA).

²⁰⁴ *Ibid*, ad paras 68 to 71.

²⁰⁵ *Ibid*, ad para 76.

Finally, in summing up the matter, the court made the following *obiter* statement:²⁰⁶

Officials of municipalities as organs of state are expected when executing their daily functions to adhere to the well-meaning principles of ‘Batho Pele’ (people first) when dealing with land owning ratepayers. Those principles are about placing the interests of people before any other demands and the end objective is the promotion of accountability and good governance. Section 195(1) of the Constitution invokes the principle that public administration must be accountable. What was done is contrary to these lofty aspirations of the Constitution, PAJA and SPLUMA expected of officials charged with the responsibility to manage the first respondent.

While this case was not heard in the Constitutional Court and is only of persuasive value in other courts, the judgment gives a clear indication that the courts will not rigidly adhere to the requirements of SPLUMA where it fails to provide opportunity for adequate and meaningful public participation. The courts will ensure that the administrative rights in terms of the Constitution and PAJA are provided for in land development applications despite SPLUMA’s shortcomings.

4.5 The ability of municipalities to implement SPLUMA financially:

There have been questions as to municipalities’ abilities to set up and maintain tribunals.²⁰⁷ Furthermore, it appears that a lack of funds has slowed down the finalisation of the by-laws in certain provinces, as no additional funds were allocated to municipalities to implement SPLUMA.²⁰⁸

SPLUMA affording municipalities more definitive powers has been described as being a “hollow victory”, as while the municipalities of major metropolitans such as Johannesburg, Cape Town and Durban have the ratepayer base to afford the implementation of SPLUMA this is not the case with the vast majority of municipalities in the country. Twenty-seven percent of municipalities have been described by the Auditor General as being in a particularly poor financial position by the end of 2015 to

²⁰⁶ Ibid, ad para 95.

²⁰⁷ South African Cities Network *SPLUMA as a tool for spatial transformation* (2015) South African Cities Network, http://www.sacities.net/wp-content/uploads/2015/SPLUMA-as-a-tool-for-spatial-transformation_final.pdf, accessed on 12 October 2017.

²⁰⁸ Fonkam A *The Spatial Planning and Land Use Management Act I – The Framework and Implementation* (#) Helen Suzman Foundation, <http://hsf.org.za/resource-centre/hsf-briefs/the-spatial-planning-and-land-use-management-act-i-the-framework-and-implementation>, accessed on 5 November 2017.

2016, with material uncertainty with regard to their ability to continue operating in the foreseeable future.²⁰⁹ If almost a third of municipalities in South Africa are unsure of their continued existence, it is rather unlikely that SPLUMA can realistically be expected to successfully be implemented.

To give an idea of the extent of debt that municipalities in South Africa find themselves in, the following summary is frighteningly informative:²¹⁰

Municipal debt – which includes both non-current and current liabilities – totalled R211 billion in 2016. With total assets worth R737 billion, that translates to a debt ratio of 29%. In other words, 29c of every rand used to finance municipal operations was in the form of debt.

With much larger issues facing municipalities, such as the possibility of not being able to provide water²¹¹ or electricity²¹² to their ratepayers, the implementation of SPLUMA may take a back seat to basic human rights.

4.6 The time taken to implement SPLUMA:

While SPLUMA was enacted on 5 August 2013, it only commenced on 1 July 2015, leaving an almost two year waiting period. The Regulations only became effective on 13 November 2015, delaying proper implementation of SPLUMA for a further four months. This delay was criticised for “holding up” twelve billion rands worth of development projects.²¹³

²⁰⁹ Auditor General South Africa, ‘Media Release – Auditor-general notes marginal improvements in local government audit results’, Auditor General South Africa, <https://www.agsa.co.za/Portals/0/AGSARReports/MFMA201516/2015-16%20MFMA%20media%20release.pdf>, accessed on 3 October 2017.

²¹⁰ Statistics South Africa, ‘Municipalities: which are most in debt?’, Statistics South Africa, <http://www.statssa.gov.za/?p=10152>, accessed on 18 November 2017.

²¹¹ Business Tech, ‘All the municipalities facing water cuts for non-payment’, Business Tech, <https://businesstech.co.za/news/government/213231/all-the-municipalities-facing-water-cuts-over-non-payment/>, accessed on 23 November 2017, where the article refers to municipalities facing having their water cut off due to non-payment of 10.7 billion rand.

²¹² Njobeni S, ‘Eskom forecasts debt of 12 billion’, Independent Online, <https://www.iol.co.za/business-report/energy/eskom-forecasts-debt-due-of-r12bn-7340635>, accessed on 21 November 2017, where the article refers to non-payment by the municipalities of 12 billion rand to Eskom.

²¹³ Limacher J, ‘SPLUMA update’, Urban Dynamics, <https://www.urbandynamics.co.za/news/34-spluma-update.html>, accessed on 13 October 2017.

After the various court decisions referred to above, the various provinces initially got to work at provincial level, developing new provincial planning laws that would be consistent with the Constitutional Court’s interpretation of “municipal planning”:²¹⁴

By the time that SPLUMA was approved, almost all provinces had draft planning laws, in varying degrees of readiness to implement in parallel with the national SPLUMA. To date, with the exception of the Western Cape’s Land Use Planning Act, none of these draft laws has been approved by the relevant legislatures. The reasons for this delay vary from province to province, but in the main it is because the national regulations in terms of SPLUMA have not yet been finalised, and provinces want to have a better sense of the direction that these regulations will take before they commit their own draft bills to the legislative process. In some provinces, the draft bills are simply not ready to be submitted to the relevant legislatures for consideration and debate.

The delays in the Regulations had the knock-on effect of delaying the establishment of municipal planning tribunals due to the need for municipal councils to approve the officials’ appointments and the need to re-advertise where insufficient nominations had been received. Some municipal council decisions also required more than one sitting resulting in further delays.²¹⁵

The extent of the delays with the enactment and implementation of SPLUMA and the consequent problems as a result thereof, were succinctly summarized as follows:²¹⁶

SPLUMA constitutes an important step towards a uniform system, which is nationally applicable and more modern in its approach to planning. However, given the central role of planning in guiding and regulating the manner in which our cities, towns and rural areas develop and change, a valuable opportunity has been missed. SPLUMA should have replaced the provincial planning regimes; the time lapse between SPLUMA and the new by-laws is problematic in practice; and the new schemes should have been ready for simultaneous implementation. This is particularly regrettable given the lapse of 15 years between the White Paper and the SPLUMA effective date.

²¹⁴ Berrisford S, ‘The Evolution of Urban Planning Law and Policy, 1994 – 2014: Implications for South African Cities’, The Urban Land Planning Series, Volume 1, South African Cities Network, <http://www.sacities.net/wp-content/uploads/2015/10/Urban-Land-Series-Vol-1-SACN-2015.pdf>, accessed on 11 November 2017, at page 7.

²¹⁵ Parliamentary Monitoring Group, ‘Spatial Planning Land Use Management Act implementation; Rama and Riemvasmaak challenges: Department progress report; Committee Oversight Visit Report’, Parliamentary Monitoring Group, <https://pmg.org.za/committee-meeting/21306/>, accessed on 29 November 2017.

²¹⁶ Murray P, ‘Zoning matters: A ‘SPLUMA’ score-card one year on’, De Rebus, <http://www.derebus.org.za/zoning-matters-spluma-score-card-one-year/>, accessed on 17 September 2017.

For example, the following percentage of municipalities had established municipal planning tribunals as of 24 May 2017²¹⁷: Eastern Cape - eighteen percent; Free State - sixty eight percent; Gauteng – thirty three percent; KwaZulu-Natal – eighteen percent; Limpopo – eighty two percent; Mpumalanga – one hundred percent; Northern Cape - one hundred percent; North West – forty four percent and Western Cape – ninety six percent.

That means that as of May 2017, 82 percent of municipalities in Eastern Cape and KwaZulu-Natal could not process land development applications in terms of SPLUMA.

4.7 The conflict between SPLUMA and tribal/informal land:

The preamble to SPLUMA sets out various problem statements which SPLUMA is intended to remedy. One of these problem statements is:

AND WHEREAS parts of our urban and rural areas currently do not have any applicable spatial planning and land use management legislation and are therefore excluded from the benefits of spatial development planning and land use management systems.

Despite this stated intention, SPLUMA is primarily designed to regulate land affairs in formal and regulated planning environments. A significant percentage of land is governed by traditional leaders and SPLUMA's land development mechanisms will not be effective or considered over most of this land, which is governed by tribal leaders. As much as fifty percent of the land in Kwazulu-Natal is owned by the Ingonyama Trust and another four million hectares in the Transkei is unregistered land.²¹⁸ The Institution of Traditional Leaders has criticised SPLUMA for not consulting with and considering the roles of Traditional Councils in spatial planning and land use management and traditional leaders have called for SPLUMA to be suspended until the matter has been

²¹⁷ Parliamentary Monitoring Group *SPLUMA transfer to Presidency; Communal Property Association Amendment Bill: briefing, with Deputy-Minister (#)* Parliamentary Monitoring Group, <https://pmg.org.za/committee-meeting/24459/>, accessed on 29 November 2017.

²¹⁸ De Wet P, 'Up to 21% of land is state owned, says surveyor general', Mail & Guardian, <https://mg.co.za/article/2013-09-05-up-to-21-of-land-is-state-owned-says-surveyor-general>, accessed on 22 October 2017.

resolved.²¹⁹ As a result thereof, traditional leaders have been unwilling to cooperate and participate in the implementation of SPLUMA, as they claim custodianship of tribal land, which SPLUMA now regulates.²²⁰

While SPLUMA provides for external persons to be a part of municipal planning tribunals, it is required that these persons “have knowledge and experience of spatial planning, land use management and land development or the law related thereto.”²²¹ SPLUMA could have made greater provision for the specific inclusion of traditional leaders in municipal planning tribunals where a land development application relates to tribal land.

5. Recommendations to address SPLUMA’s shortcomings:

5.1 Greater clarity on the role of provincial and national government:

SPLUMA could greatly benefit through greater clarity of the roles of the provincial and national governments.

Firstly, the nature of the legislation that provinces are able to enact in terms of section 10(2) should be explained in sufficient detail to allow the provinces to create useful and effective legislation and to ensure that there is no interference with the municipalities’ competence of municipal planning.

SPLUMA should also have clarified/made provision for how SPLUMA will be implemented by municipalities financially and capacity wise, either by providing funding models/allocations by provincial and national government or by lessening the requirements incumbent on municipalities. An example of this would be for national government to have drafted more detailed regulations in terms of SPLUMA, which in turn would then require less comprehensive by-laws to be published by each municipality to regulate the day-to-day processes of SPLUMA.

²¹⁹ Parliamentary Monitoring Group, ‘Spatial Planning Land Use Management Act implementation; Rama and Riemvasmaak challenges: Department progress report; Committee Oversight Visit Report’, Parliamentary Monitoring Group, <https://pmg.org.za/committee-meeting/21306/>, accessed on 29 November 2017.

²²⁰ Ibid.

²²¹ See supra footnote 171.

Lastly, SPLUMA could have eased the administrative load on municipalities by allowing the various responsibilities to be shared more evenly between the various spheres of government:²²²

The legislation would have been more transformative in its approach if it allowed for capacity support to transcend the three spheres of government, depending on where there is capacity. It is clear that due to capacity constraints and the need to ensure that implementation will be incremental and the process will differ from local government to local government. In order to facilitate institutional change, targets will need to be agreed upon as to the type of skills and number of staff required.

5.2 Involvement of tribal leaders and fostering the regulation informal land development:

SPLUMA could greatly benefit from including mandatory consultation and consensus seeking with traditional leaders who exercise custodianship over tribal land to prevent the current situation of traditional leaders being ignored.

SPLUMA should also provide for the establishment of “local community planning tribunals”, comprising members of communities, traditional leaders and local business persons, in addition to municipal officials, to oversee rural/informal land use applications. In doing so the interests of the community will be considered and given weight. No single community perspective (political, social, religious, or business) should be afforded an elevated status.²²³

Alternatively, traditional leaders should be included as the non-municipal members in municipal planning tribunals, with SPLUMA to make provision for their inclusion where tribal land is involved.

²²² South African Cities Network, ‘SPLUMA as a tool for spatial transformation’, South African Cities Network, http://www.sacities.net/wp-content/uploads/2015/SPLUMA-as-a-tool-for-spatial-transformation_final.pdf, accessed on 12 October 2017.

²²³ Charman A, Tonkin C, Denoon-Stevens S, Demeestere R, ‘Post-Apartheid Spatial Inequality: Obstacles of Land Use Management on Township Micro-Enterprise Formalisation’, Sustainable Livelihoods Foundation, http://www.livelihoods.org.za/wp-content/uploads/2017/09/SLF_Post-Apartheid_Spatial_Inequality_-_lr_version.pdf, accessed on 7 November 2017, at page 58.

It is also recommended that municipalities develop land-use schemes or precinct plans that incorporate informal settlements, “defining the use and the future development intent for each such settlement within a municipal jurisdiction”. Furthermore, municipalities should “fast-track mechanisms to enhance the internal capacity of municipal development planning departments to enforce land-use decisions and to monitor the implementation of these decisions particularly in relation to informal settlement upgrading.”²²⁴

5.3 Regulation of the public participation requirements:

SPLUMA, though section 54 allows the Minister to make regulations, which regulations may include, ‘procedures concerning the lodging of applications and the consideration and decision of such applications’,²²⁵ “the process for public participation in the preparation, adoption or amendment of a land use scheme or the performance of another function in terms of this Act”²²⁶ and “the operating procedures of a municipal planning tribunal”.²²⁷ With this authority, the Minister should promulgate regulations to fully set out the public participation requirements.

These regulations should also clarify the criteria required to be met for “intervener” status and define this ambiguous term. At the very least, a neighbour to a land development application should automatically be granted intervener status, as discussed above and with reference to the *Zimmerman* case.

Furthermore, the promulgation of regulations for public participation will be applicable to all municipalities equally and it will avoid the current situation where residents in one municipality have greater rights to participate than the residents of another municipality, due to different, or in some cases no, by-laws.

²²⁴ Lester N, ‘Land Use Planning Alignments – Reflections on Short-cuts and Compromises’, The Urban Land Planning Series, Volume 1, South African Cities Network, <http://www.sacities.net/wp-content/uploads/2015/10/Urban-Land-Series-Vol-1-SACN-2015.pdf>, accessed on 11 November 2017, at page 7.

²²⁵ SPLUMA, section 54(1)(e).

²²⁶ Ibid, section 54(1)(j).

²²⁷ Ibid, section 54(1)(k).

6. Conclusion:

It is clear that SPLUMA radically improved a complicated, fragmented and unconstitutional system of planning legislation that existed prior to its development.

Firstly, by consolidating all planning legislation, and providing a uniform and consistent system of planning, it has ensured that planning rights and obligations are easily exercisable and enforceable.

By building on the foundations of the *Draft Green Paper on Development and Planning* and *White Paper on Spatial Planning and Land Use Development*, and the various Constitutional Court judgments referred to above, SPLUMA has also ensured that it has returned the competence of municipal planning back to municipalities, as it is mandated in the Constitution. For this reason alone, SPLUMA should be praised.

While it wasn't the first piece of legislation seeking to simplify planning law and speed up development, unlike the DFA, it managed to achieve this without compromising on municipal autonomy.

SPLUMA has also undoubtedly brought improvements to the way land development applications are made and appeals thereto are decided. The fact that more groups of people are entitled to make land development applications is a step forward and the fact that anyone may appeal a decision, (unlike previously with the ordinances, where this right was usually reserved for initial objectors to applications).

It is therefore unfortunate, that despite its overall successes, SPLUMA still has some glaring deficiencies that could have been addressed prior to its enactment. The lack of focus on traditional/tribal land and uncertainty on provincial legislation permissible in terms of SPLUMA are a few of the examples of where the legislature could have improved SPLUMA.

There is also the underlying issue of municipalities revisiting their own decisions via acting appeal authorities. Municipalities will have to carefully consider whether to authorise an outside body to adjudicate appeals to avoid the perception of bias or political interference. However, in doing so, especially if that body was a provincial body, the status quo would

remain unchanged before and after and SPLUMA with a province exercising the competence of municipal planning.

The practical implementation of SPLUMA by municipalities in particular, has also been an issue and it is possible that SPLUMA is too idealistic, requiring too much of already struggling municipalities.

The fact that twelve years lapsed between the *White Paper on Spatial Planning and Land Use Development*, and the enactment SPLUMA, two years until its commencement and six months until the Regulations were promulgated, has made the implementation of SPLUMA troublesome.

Despite its flaws, the commencement of SPLUMA is mostly a success story. Whether or not it practically lives up to expectations and can be successfully implemented, will depend on whether legal challenges and policy makers can adapt SPLUMA through necessary amendment and regulation.

Only time will tell whether SPLUMA manages to reach the lofty goals it set.

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