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Municipal Planning By-laws and the extent to which they give effect to the Spatial  
Planning and Land Use Management Act 16 of 2013.

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## Table of content

<b>CHAPTER ONE: INTRODUCTION</b>	4
1) Problem statement	4
2) Significance of the problem	5
3) Research questions	5
4) Chapter outline	7
5) Literature review	8
6) Research methodology	9
<b>CHAPTER TWO: THE EMERGING ROLE OF LOCAL GOVERNMENT IN PLANNING</b>	10
1) Introduction	10
2) The role of local government in planning	10
2.1 Local government under apartheid	10
3) The 1994 democratic elections giving birth to the new constitutional dispensation	11
3.1 Local government under the 1993 Constitution	11
3.2 Local government under the 1996 Constitution	11
4) Adoption of the Development Facilitation Act as a temporary measure in regulating planning	12
5) Local government elections of 2000	13
6) The judgments of the Constitutional Court dealing with planning	13
7) Conclusion	15
<b>CHAPTER THREE: OVERVIEW OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013</b>	17
1) Introduction	17
2) Relationship between the by-law and provincial law	17
3) Strengthening the link between forward planning and land use management	19
3.1 Relevant constitutional and statutory provisions	20
3.2 Municipal Systems Act provisions dealing with legal nature of MSDF	21
3.3 Relevant SPLUMA provisions pertaining to MSDFs	22
4) Dealing with informality	23
5) Reducing red tape	25
5.1 Red tape in the form of multiple approvals	25
5.2 Red tape in the form of land use management procedures	26
5.3 Red tape in determining applications within a predetermined period	27
6) Capability solutions	27
7) Conclusion	28
<b>CHAPTER FOUR: MUNICIPAL PLANNING BY-LAWS</b>	29
1) Introduction	29
2) Relationship between the by-law and provincial law	29
3) Strengthening the link between forward planning and land use management	30
4) Dealing with informality	32
5) Reducing red tape	34
6) Capability solutions	35

7) Conclusion	36
<b>CHAPTER FIVE: CONCLUSION: SUMMARY, FINDINGS AND RECOMMENDATIONS</b>	38
1) Summary	38
2) Findings	40
3) Recommendations	43
BIBLIOGRAPHY	44



## CHAPTER ONE

### INTRODUCTION

#### 1. PROBLEM STATEMENT

The spatial legacy created by the planning laws of the apartheid regime is still apparent in most cities and towns across South Africa. The legacy of apartheid spatial planning reveals not only planning which was undertaken along racial lines and inequality in the provision of infrastructure, amenities and accessibility, but the distances between where the poor and the rich live further perpetuates that inequality. Moreover, these planning laws also created a spatial pattern which resulted in the costs of maintaining infrastructure to be very high and public transport difficult to provide and access.<sup>1</sup> Berrisford notes, ‘the roots to this legacy are complex and varied, but the regulatory frameworks governing land tenure, development and use played a prominent role in creating problems now faced by South African towns and cities’.<sup>2</sup>

The reform of spatial planning and land use legislation in South Africa is an issue that was robustly debated since the early 1990s. The possibility of South Africa becoming a democratic state fuelled the need for debate in the area of planning legislation. This was mainly due to planning laws being used to further entrench racial segregation within towns and cities by the apartheid government. These barriers were used to prevent in particular, black South Africans from moving into the cities and towns.<sup>3</sup> Consequently, this demanded that spatial planning and land use legislation be reformed to not only promote racial integration within towns and cities, but to also provide access and remove barriers for the free movement of people in South Africa, especially black South Africans.

The process of reforming the planning laws enacted by the apartheid government proved to be a challenging task. In fact several drafts of planning legislation put forward by the Department of Land Affairs were widely rejected by other national departments as well as provincial governments. In the end, the final draft ended up being rejected by Parliament itself.<sup>4</sup>

The inability to develop new frameworks for planning legislation was a prevalent issue throughout the period from 2001 to 2010.<sup>5</sup> Some of the challenges which contributed to this inability included institutional and administrative problems as well as legal difficulties. In particular, the legal difficulties revolved around interpreting the provisions of the 1996 Constitution that set out which sphere of government between national, provincial or local has the power to make planning laws.<sup>6</sup> Fortunately, in June 2010 the legal uncertainties around which sphere of government is constitutionally empowered to make planning laws was resolved by the decision of the Constitutional Court in the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC).<sup>7</sup> Furthermore, after the *Gauteng Development Tribunal* judgment the Constitutional Court handed down five further judgments which provided clarity on the division of planning responsibilities between the national, provincial and local government.<sup>8</sup>

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<sup>1</sup> Berrisford S, (2011) 249.

<sup>2</sup> Berrisford S, (2011) 249.

<sup>3</sup> Berrisford S ‘Unravelling Apartheid Planning Legislation in South Africa: A Case Study’ (2011) 22 *Urban Forum* 249.

<sup>4</sup> Berrisford S, (2011) 250.

<sup>5</sup> Berrisford S, (2011) 253.

<sup>6</sup> Berrisford S, (2011) 254.

<sup>7</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC).

<sup>8</sup> De Visser J (2016) 98.

The overall conclusion of the six judgments seems to emphasise a stronger role for local government in land use management. Consequently, in 2013 the national government passed the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). This Act provides a national framework for spatial planning and land use management. It directs the national government to adopt a National Spatial Development Framework with a national spatial vision. It instructs each provincial government to adopt a Provincial Spatial Development Framework. It also directs each municipality to adopt a Municipal Spatial Development Framework with a municipal spatial vision. In other words SPLUMA has introduced a new planning system in terms of which the role of the national, provincial and local government in effecting spatial transformation is set out. The problem which this study aims to address pertains to the uncertainty with respect to local government's role, particularly with regard to its law-making role, as well as the uncertainty as to whether municipalities are implementing SPLUMA.

## **2. SIGNIFICANCE OF THE PROBLEM**

SPLUMA is an Act whose objectives include ensuring that the system of spatial planning and land use management promotes the social and economic inclusion, as well as, redressing the imbalances of the past and ensure equity in spatial development planning and land use management systems. Now, if the municipalities in particular do not exercise the powers which the Act confers on them, in the manner which the Act instructs municipalities do so, the transformative objects of the Act may be undermined and frustrated.

Moreover, the transformative objective which is to provide for inclusivity, mobility and access, and economic development will continue to be stalled. Consequently, the spatial legacy of apartheid will most likely continue to remain intact and serve the white minority interests, while the majority of black South Africans continue to experience the harsh effects of exclusion and hardship in mobility and non-delivery of services.

## **3. RESEARCH QUESTIONS**

The study seeks to interrogate and analyse, to what extent the municipalities through their enacted by-laws have given effect to the implementation of the provisions of SPLUMA thus far. In other words, the study aims to assess whether the ideals and objectives of the Act are being carried through by municipalities. It does so by first providing a brief introduction on the themes and then sets out the research questions. The study seeks to answer the following research questions.

### **Question One: Relationship with provincial law.**

The first research question of the study focuses on the relationship between a municipal by-law and the provincial law. The need for this assessment is based on the following reason. SPLUMA advocates for uniformity in the regulatory framework governing planning in South Africa. The view which this study postulates is that in order for uniformity to be achieved in the regulatory framework governing planning, there needs to be a link between provincial law and a municipal by-law. This link is important as it will ensure coherence in the way planning is governed. More importantly, the link between a by-law and provincial legislation will significantly contribute in the establishment of a single uniform system of planning as envisioned by SPLUMA. Therefore, the study will focus on whether a municipal by-law works in conjunction with a provincial law or not because, if a municipal by-law violates a provincial law, then that municipal by-law will be invalid. The question which the study aims to interrogate under this theme is the following.

- Does the by-law work in conjunction with a provincial law?

### **Question Two: Strengthening the link between forward planning and land use management.**

The second question deals with the insufficient link between forward planning and land use management. While in the past not much attention was paid to the importance of this link, SPLUMA now provides a framework which is designed to strengthen the link between forward planning and land use management. Therefore, the study seeks to answer the following research questions.

- Does the municipal planning by-law include any provisions that link the mandate of the Municipal Planning Tribunal or the authorised official to the municipality's IDP?
- Does the municipal planning by-law include any provisions that make obtaining land use approvals easier if the development is envisaged in the Municipal Spatial Development Framework?
- Does the by-law envisage SDFs or other types of plans, such as precinct plans or local development plans, below the MSDF?

### **Question three: Dealing with informality.**

The third question pays attention to the issue of informality. There is widespread agreement that the planning system is not responding adequately to informality. Informality refers buildings or building extensions constructed without conforming to existing planning legislation. It also includes slums. Another manifestation of informality which does not necessarily relate to informal settlements includes unplanned areas such as the rural areas and areas which were under the authority of traditional leaders in the former homelands. Therefore, the study seeks to answer the following questions.

- Does the municipal planning by-law include any provisions that differentiate between formal, informal or communal areas?
- How does the by-law define informal, formal and communal?
- If so, are there different application fees and liability for notice costs with respect to formal; informal and/or communal areas?
- Are there different methods of notification with respect to formal; informal and/or communal areas?
- Are there different enforcement and inspection with respect to formal; informal and/or communal areas?
- Are there different criteria for decision making with respect to formal; informal and/or communal areas?
- Does the by-law aim to facilitate the incremental introduction of land use management systems in informal or 'unplanned' areas?

### **Question four: Reducing red-tape.**

The fourth question the study focuses on pertains to the issue of red tape. A single land development application may affect the interests of the different spheres of government who must give their input on whether they approve the application or not. Consequently, the absence of a framework for decision-making has often led to many land development applications not being approved timeously based on the fact that each organ of state which has an interest in the matter may take its time in communicating its decision. In this regard, the study aims to answer the following questions.

- Does the municipal planning by-law include any provisions which seek to implement section 30 of SPLUMA by allowing for aligned procedures or integrated authorisations?
- I) Does the by-law provide for aligned procedures?
- II) Does the by-law provide for integrated authorisations?
- Does the by-law commit the municipality to predetermined time-frames for decision making?
- Are there consequences for non-compliance with time-frames?

### **Question five: Capability solutions.**

It is clear that capacity is also a key concern underlying planning, particularly when it comes to the implementation of legislation. In this regard, the study aims to answer the following questions.

- Does the municipal planning by-law include any provisions that make use of the mechanisms in SPLUMA to share municipal capacity by referring to the establishment of a joint MPT together with one or more local municipality or one district MPT?

## **4. CHAPTER OVERVIEW**

### **Chapter 1: Introduction.**

The study will set out the background, problem statement and methodology of the study.

### **Chapter 2: Emerging role of local government in planning.**

Under this chapter, the study will discuss the emerging role of local government in land use planning and land use management.

### **Chapter 3: Overview of SPLUMA.**

The study will discuss SPLUMA and what it provides on the themes identified as the research questions of this study.

### **Chapter 4: Findings of study.**

In this chapter, the study will deliver the findings of the study of the municipal planning by-laws and the extent to which they give effect to SPLUMA.

### **Chapter 5: Conclusion**

In this chapter, the study will tender concluding remarks.

## **5. LITERATURE REVIEW.**

The role of local government in spatial planning and land use management is increasingly being recognised. Van Wyk wrote an article where she discussed the existence of parallel planning mechanisms as being a recipe for disaster.

According to Van Wyk, township establishment in South Africa took place in terms of the provincial ordinances of the apartheid government. The process was overseen by municipalities as the ordinances put them in charge of determining where and how township establishment would take place. However, developers started using another mechanism found in the Development Facilitation Act (DFA) which allowed them to apply for permission from provincial development Tribunals to establish land development areas. It is to be noted that the DFA is the Act which was envisaged to operate as a temporary measure in regulating urban planning. Van Wyk states, this practice was met with concern and criticism, mainly because applying both these mechanism at the same time ended up causing considerable headaches for municipal planning departments.<sup>9</sup>

Van Wyk argues that the parallel application of the DFA and the Ordinances resulted in so much confusion and uncertainty which had the effect of weakening the role played by local government in the areas of planning.<sup>10</sup> Berrisford in his article discusses some of the key challenges which made it difficult for the government to introduce legislative reforms in the area of planning. Among these

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<sup>9</sup> Van Wyk J 'Parallel Planning Mechanisms as a Recipe for Disaster' (2010) 13 *PELJ* 214.

<sup>10</sup> Van Wyk (2010) 229.

challenges was the legal difficulties around interpreting the 1996 Constitution's provisions that set out which sphere of government between national, provincial or local has the power to make planning laws.<sup>11</sup>

Both articles provide a significant discussion of the role of local government in planning matters on the one hand. On the other hand they highlight the challenges encountered during the process of attempted legislative reform of planning laws. However, this research will be based on examining municipal by-laws and the extent to which they give effect to SPLUMA.

In another article, Van Wyk discussed the functional areas pertaining to planning in the Constitution and which sphere of government had authority over which area of competence. Van Wyk thereafter provided a brief overview of the decisions of the Constitutional Court on planning. The author argued that, from the Court decisions, it is clear that municipal planning regulates issues that impact intra-municipality. She then goes on to conclude that, from the perspective of the law of planning, a core issue is the developing debate regarding the content of the legislative and executive functional areas relating to planning that are enjoyed by each of the spheres of government.<sup>12</sup>

An insightful discussion on the emerging role of local government in planning was among the items discussed in a roundtable report.<sup>13</sup> The overall theme of the report focused on law reform in planning. The roundtable was organised by De Visser and Berrisford in collaboration with various stakeholders. Amongst the key issues discussed in the report, is the conceptualisation of local government in land use planning.<sup>14</sup> The report states that, the constitutional role of local government in planning has been affirmed by the Constitutional Court.

Elsewhere in the report, a major concern raised is the fact that, municipalities have been given powers that they often are not able to manage. The report submits that, many municipalities are unable to manage their new responsibilities which results from the Constitution making asymmetry difficult to implement. Furthermore, the report argues that, new laws set high standards which many municipalities do not have the capacity to meet.<sup>15</sup>

The study accepts the views expressed by the different authors, however the aim of the study is to investigate and assess the extent to which municipalities have taken up the opportunities brought by SPLUMA. The main question of this theme has not been discussed or investigated before. Thus this makes the study different from what has been examined in other studies. In short, the study will attempt to provide a practical assessment of the role of local government in dealing with land use planning and land use management.

Schoeman wrote an article which discusses the importance of proper alignment between spatial planning, transportation planning and environmental management within the new spatial systems in South Africa.<sup>16</sup> The issue raised by Schoeman is a relevant issue which this study will also address. However, this study will not deal with the issues pertaining to proper alignment between the three

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<sup>11</sup> Berrisford S, (2011) 250.

<sup>12</sup> Van Wyk J 'Planning in All (DIS) GUISES: Spheres of Government, Functional Areas and Authority' (2012) 16 *PELJ* 296.

<sup>13</sup> De Visser J & Berrisford S 'Report on a roundtable on law reform in planning' available at <http://sacitiesnetwork.co.za> (accessed 28 May 2016).

<sup>14</sup> De Visser J & Berrisford S 'Report on a roundtable on law reform in planning' available at <http://sacitiesnetwork.co.za> (accessed 28 May 2016) 4.

<sup>15</sup> De Visser J & Berrisford (2012) 6.

<sup>16</sup> Schoeman C 'The Alignment between Spatial Planning, Transportation Planning and Environmental Management within the new Spatial Systems in South Africa' 2015 *PELJ* 42.



planning areas, but will simply examine whether or not a municipal by-law includes any provisions that seek to implement SPLUMA by allowing for aligned procedures.

## **6. RESEARCH METHODOLOGY**

The research methodology of the study includes a review of literature, legislation and case law. In addition, a sample of municipal planning by-laws will be taken from various municipalities across all nine provinces of the country. In essence the study includes a review of 15 municipal planning by-laws. The by-laws will be selected from the different categories of municipalities. The criteria for the selection of by-laws will also take into account the size of the municipality concerned as well as the geographical location of where the municipality is situated.

The by-laws which this study examined are taken from the relevant provincial gazette. Finally, the examination of the 15 municipal planning by-laws will be conducted in terms of a set of questions relating to the themes of the study. For the full list of the by-laws see annexure 1 which is attached to the thesis.



## CHAPTER TWO

### THE EMERGING ROLE OF LOCAL GOVERNMENT IN PLANNING

#### 1. INTRODUCTION

The central theme of this chapter will be to examine and describe the emerging role of local government in planning. In unpacking the theme, the chapter will be broken down into seven sections. The second section briefly outlines the role of local government before 1994. Under the third section, the chapter explores local government under the new constitutional dispensation. In the fourth section, the chapter focuses on the adoption of a key planning law in the post-apartheid South Africa, namely, the Development Facilitation Act.<sup>17</sup> In the fourth section, the chapter discusses some of the significant events that took place leading up to the first democratic local government elections which were held in 2000. In the sixth section, the chapter focuses on the judgments of the Constitutional Court dealing with municipal planning. Lastly, the final section briefly discusses the impact the six judgments of the Constitutional Court have had on the role of local government in land use management.

#### 2. THE ROLE OF LOCAL GOVERNMENT BEFORE 1994

##### 2.1 Local government under apartheid.

During the era when South Africa was a Union, local government was treated as a public body which exercised delegated legislation. In other words, local government's power to make by-laws was characterised as a delegated power. Furthermore, the Union of South Africa Act of 1909 did not give any form of recognition to local government as being an institution that was capable of governing in its own right. Instead, the Act empowered the four provincial councils established under it, to pass legislation governing local government in each of the four respective provinces.<sup>18</sup>

Likewise, before 1994 local government was characterised as a subservient institution that enjoyed no powers except for those that were conferred by a competent legislative authority. Although local government had the power to enact by-laws, such by-laws were subordinate delegated legislation and subject to judicial review.<sup>19</sup> Local government was merely an institution that was defined along racial terms. One of the ways in which the apartheid government ensured that its segregationist vision remained firmly entrenched involved the promulgation of planning laws that were intended to maintain racial segregation within towns and cities.<sup>20</sup> These planning laws included the town planning Ordinances of the four provinces established under the apartheid regime, namely the Town Planning Ordinance 27 of 1949 (N), Townships Ordinance 9 of 1969 (OFS), Land Use Planning Ordinance 15 of 1985 (C), and the Townships Ordinance 15 of 1986 (T).<sup>21</sup>

Consequently, local government was then employed as an instrument in implementing these planning laws that sought to give effect to the racist and segregationist vision of the apartheid government. Areas where black South Africans resided were under-developed with no adequate infrastructure as compared to areas where white South Africans lived. Moreover, the development of urban areas was prioritised to the exclusion of areas where black South Africans lived. Planning was undertaken with the aim of promoting racial segregation and inequality in the provision of infrastructure, and access to

<sup>17</sup> Development Facilitation Act No 67 of 1995.

<sup>18</sup> Steytler N & De Visser *Local Government Law of South Africa* (2009) 3.

<sup>19</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (2) BCLR 1458 (CC) at para 40.

<sup>20</sup> Berrisford S 'Unravelling Apartheid Planning Legislation in South Africa: A Case Study' (2011) 22 *Urban Forum* 249.

<sup>21</sup> Town Planning Ordinance 27 of 1949 (N), Townships Ordinance 9 of 1969 (OFS), Land Use Planning Ordinance 15 of 1985 (C), and the Town –planning and Townships Ordinance 15 of 1986 (T).

facilities. Furthermore, the distance between where the poor lived and worked and where the rich lived further contributed to that inequality.<sup>22</sup>

### **3. THE 1994 DEMOCRATIC ELECTIONS GIVING BIRTH TO THE NEW CONSTITUTIONAL DISPENSATION.**

The negotiations to move South Africa away from a society that was characterised by an oppressive government to a new democratic state where everyone was equal began in 1990 when Nelson Mandela was released from prison. This resulted in the first steps to transform local government from being racist institutions being taken in 1990.<sup>23</sup> The transformation of local government was one of the areas that was hotly contested during the process of negotiations. However, the topic did not attract as much attention as the prominent negotiations held between the different political parties about the nature of the national state. The contestation around the issue of local government transformation was based on the fact that local government was used by the apartheid government as a means to protect and advance the interests of white South Africans.

#### **3.1. Local government under the 1993 Constitution.**

In 1993 the Interim Constitution was adopted, ushering in a new democratic dispensation in South Africa. In April 1994, South Africa held its first ever national democratic elections. These elections did not only symbolise the formal demise of apartheid but also resulted in a major step being taken with respect to local government. For the first time in the constitutional history of South Africa, local government was accorded constitutional recognition under Chapter 10.<sup>24</sup>

Unlike in the past, local government was now constitutionally declared a self-governing institution that was autonomous and entitled to regulate its affairs in terms of section 174 (3) of the 1993 Constitution.<sup>25</sup> Gone were the days where local government was a subordinate creature of statute with no constitutional rights or powers. Local government was now recognised as a form of government that enjoyed original powers derived directly from the Constitution.<sup>26</sup>

In order to ensure that local government functioned efficiently and effectively, the 1993 Constitution provided local government with the power to make by-laws subject to the Constitution, national and provincial legislation in terms of section 175 (4).<sup>27</sup> At the same time, section 178 (2) of the Interim Constitution also conferred upon local government the powers of taxation. Lastly, section 178 (3) guaranteed local government's entitlement to receive its equitable share of funds from the provincial government.<sup>28</sup> However, the autonomy of local government was curtailed in that the 1993 Constitution gave the national and provincial government the power to determine the detail of local government, which included the powers, functions and structures of local government under section 175 (1).<sup>29</sup>

#### **3.2. Local government under the 1996 Constitution.**

The 1996 Constitution however, went one step further. It established a strong local government that would play a critical role in the development of South Africa, particularly in areas such as the provision of basic services to the communities and spatial development. Of critical significance is section 151 (2) of the 1996 Constitution which accords local government with executive and

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<sup>22</sup> Berrisford S (2011) 250.

<sup>23</sup> Berrisford S (2011) 250.

<sup>24</sup> Steytler N & De Visser J (2009) 12.

<sup>25</sup> S 174 (3) Interim Constitution.

<sup>26</sup> Steytler N & De Visser J (2009) 12.

<sup>27</sup> Steytler N & De Visser J (2009) 12.

<sup>28</sup> S 178 (3) interim Constitution.

<sup>29</sup> Local Government Transition Act, No 209 of 1993.

legislative authority. Both the executive and legislative authority of a municipality vests in the municipal council of a municipality.<sup>30</sup>

The right of a municipality to govern, on its own initiative the local government affairs of its community subject to national and provincial legislation is entrenched under section 151 (3) of the 1996 Constitution.<sup>31</sup> Unlike the 1993 Constitution, the 1996 Constitution recognises local government as a sphere of government which is not subordinate to national and provincial government in terms of section 40.<sup>32</sup> Of critical significance is the powers and functions that the 1996 Constitution conferred upon local government under section 156 (1) (a).<sup>33</sup> This section declares that a municipality has executive authority in respect of and the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. Of relevance in this regard is a new power which the 1996 Constitution accords to local government under Part B of Schedule 4, namely, “municipal planning”.<sup>34</sup> However, the drafters of the 1996 Constitution may never have imagined that this power would later become a source of conflict and tension between the three spheres of government. What is also important to note is that after 1996 the full implementation of chapter 7 of the 1996 Constitution did not apply immediately. Chapter 7 of the Constitution began to be fully implemented after the local government elections which were held in 2000.

#### **4. ADOPTION OF THE DEVELOPMENT FACILITATION ACT AS A TEMPORARY MEASURE IN REGULATING PLANNING.**

As noted above,<sup>35</sup> before the 1994 elections were held, different stakeholders who were interested in urban future of South Africa proposed the adoption of a new law that would provide an alternative route for the approval of land development projects by the new democratic government. In particular, the main problem which the DFA sought to address mainly related to the concern that many local government councils established under the apartheid regime would try and block big new, transformative projects which the new democratic government would intend to implement.<sup>36</sup> Therefore, to deal with this concern, it was proposed that the new law must take away the power to approve land development projects from local government councils and give it to an appointed tribunal.<sup>37</sup> Consequently, a concerted effort between these various stakeholders led to the introduction of a new law called the Development Facilitation Act of 1995.<sup>38</sup> It was intended to operate as an interim measure in regulating urban planning until such time when the legislature passed comprehensive planning legislation that would regulate planning in the country.<sup>39</sup>

The DFA came into operation on the 22<sup>nd</sup> of December 1995. It provided for the establishment of Development Tribunals in the respective provinces to consider and determine land development applications. However, the DFA did not repeal the old order provincial ordinances which applied in the four former provinces established by the apartheid regime.<sup>40</sup> The Development Tribunals established under the DFA, were empowered to take decisions on any land development applications.

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<sup>30</sup> S 151 (2) Final Constitution.

<sup>31</sup> S 151 (3) Final Constitution.

<sup>32</sup> S 40 Final Constitution.

<sup>33</sup> S 156 (1) (a) Final Constitution.

<sup>34</sup> S 156 (1) schedule 4 Part B of the Final Constitution.

<sup>35</sup> See paragraph 3 above.

<sup>36</sup> Berrisford S (2011) 250.

<sup>37</sup> Berrisford S (2011) 250.

<sup>38</sup> Development Facilitation Act 67 of 1995.

<sup>39</sup> Berrisford S (2011) 249.

<sup>40</sup> Town Planning Ordinance 27 of 1949 (N), Townships Ordinance 9 of 1969 (OFS), Land Use Planning Ordinance 15 of 1985 (C), and the Town –planning and Townships Ordinance 15 of 1986 (T).

As noted in chapter 1,<sup>41</sup> the DFA was intended to be an interim measure. Various attempts to enact a comprehensive planning law that would replace the DFA were undertaken. Although several drafts of planning legislation were put forward by the Department of Land Affairs. However, these drafts were widely rejected by other national departments as well as provincial governments for creating inadequate and unworkable planning frameworks. In the end, the proposed planning legislation ended up being rejected by Parliament itself.<sup>42</sup>

Consequently, in the absence of a single comprehensive law to uniformly regulate planning in the country, it was not only the DFA that continued to remain in force. The old order town planning ordinances of the four provinces established under the apartheid regime,<sup>43</sup> as well as national planning laws governing black areas, continued to apply as they contained detailed provisions regarding the establishment of town planning schemes.<sup>44</sup> Therefore, in reality, this meant that the very same ordinances used as instruments in entrenching the segregationist vision of the apartheid regime were still the applicable legal instruments governing planning in the new democratic South Africa.

The concern with these ordinances was that they applied only in those territories that formed part of the old Cape, Natal, Transvaal, and the Orange Free State.<sup>45</sup> They did not apply to the former independent homelands and self-governing territories which were governed by a different system of national planning legislation.<sup>46</sup> This is why the Development Facilitation Act continued to govern land use management in the country despite it being enacted as a temporary stop-gap.

## **5. LOCAL GOVERNMENT ELECTIONS OF 2000.**

The preparations for the local government elections began in 1999 when the Municipal Demarcation Board was appointed and soon after commenced its work.<sup>47</sup> The Municipal Demarcation Board managed to demarcate the entire land mass of the country into six metropolitan municipalities, 46 district municipalities and 232 local municipalities. For the first time in South Africa the 1996 Constitution mandated the establishment of a system of wall to wall local government.<sup>48</sup> The system of wall to wall local government which is demanded by the Constitution has ensured that each municipality in South Africa exercises a municipal planning power with the aim to develop its municipal area.

On 5 December 2000 history was made when the first fully democratic local government elections under the new democratic dispensation were held in the country. These elections marked the final phase of the local government transition process. On the other hand, not everything was settled yet. The legislative framework for local government planning was not yet complete. That caused the provincial ordinances to continue regulating sectoral matters such as land use planning.<sup>49</sup>

## **6. THE CONSTITUTIONAL COURT JUDGMENTS DEALING WITH PLANNING**

The continuous application of the DFA in regulating planning, as well as the old order town planning ordinances and the other various apartheid laws which applied in the former homelands began to

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<sup>41</sup> See chapter 1.

<sup>42</sup> Berrisford S (2011) 250.

<sup>43</sup> See paragraph 2 above.

<sup>44</sup> Van Wyk (2010) 229.

<sup>45</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC).

<sup>46</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) at para 35.

<sup>47</sup> Powell D, Imperfect transition-local government reform in South Africa 1994-2012 in Booyesen S (ed) *Local Elections in South Africa: Parties, People Politics* (2012) 16.

<sup>48</sup> S 151 (1) Final Constitution

<sup>49</sup> Steytler N & De Visser J (2009) 23.

attract concern and criticism from many quarters.<sup>50</sup> This was based on the ground that township establishment in the country took place in terms of the provincial ordinances and the municipalities were also empowered by the old order ordinances to be in charge of that process.<sup>51</sup> However, the Development Facilitation Act made provision for property developers to apply for permission from the provincial development tribunals to establish land development areas which would later turn out to be a township establishment. It is this practice that caused headaches for municipalities as they argued that this was an impermissible exercise of their powers to determine township establishment, a power that fell within the schedule 4B function of municipal planning.<sup>52</sup>

In June 2010 the Constitutional Court provided direction as to how the process of reforming planning laws should proceed. The case involved a dispute between the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*.<sup>53</sup> In this case, the principal issue which the Court had to decide was whether the Gauteng Development Tribunal established in terms of the DFA was constitutionally empowered to make planning decisions. The Court held that the Tribunal was not empowered to do so. It stated that only the municipalities have the power to make planning decisions in relation to the rezoning of land and township establishment. The Court ordered the national government to correct the defects or enact new legislation within 24 months.<sup>54</sup>

In the second judgment that was handed down in 2012, namely the *MEC for Local government, Environmental affairs and Development Planning. Western Cape Province in re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsands (Pty) Ltd and the City of Cape Town and others*.<sup>55</sup> This judgment further expanded on the precedent set by *Gauteng Development Tribunal* judgment. In this case the Court had to determine whether the granting of a mining licence by a national department to a mining company obviated the need for the municipality to also make its own decision in this instance.<sup>56</sup>

The dispute in this case arose when the Minister for Mineral Resources, acting in terms of section 27 of the Mineral and Petroleum Development Act 28 of 2002, granted a mining permit to Maccsands (Pty). This permit authorised Maccsands (Pty) to mine sand on a piece of land which was zoned as public open space by the City of Cape Town. The City of Cape Town was also the owner of the land. This meant that unless the land was appropriately rezoned, it could not be used for mining purposes.<sup>57</sup> Consequently, since the land was not rezoned and the municipality's approval to commence the mining activities was not obtained, the City objected and the matter went to highest Court in the land. The Constitutional Court had to decide whether the granting of a mining permit obviated the need for the municipality to make its own decision on the matter. In ruling in favour of the City of Cape Town, the Court emphatically answered the question in the negative. It held that national approval does not mean the municipality cannot also make a decision on the matter.

The third case raised the issue of whether provinces still enjoyed the power to trump municipal decisions relating to planning. In the *Minister of Local Government, Environmental Affairs and*

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<sup>50</sup> Van Wyk (2010) 214.

<sup>51</sup> Van Wyk (2010) 214.

<sup>52</sup> Van Wyk (2010) 214.

<sup>53</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC).

<sup>54</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) at para 95.

<sup>55</sup> *MEC for Local government, Environmental affairs and Development Planning. Western Cape Province in re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsand (Pty) Ltd and the City of Cape Town and others* (2012) (CC).

<sup>56</sup> See chapter 3 paragraph 5.1.

<sup>57</sup> *MEC for Local government, Environmental affairs and Development Planning. Western Cape Province in re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsands (Pty) Ltd and the City of Cape Town and others* (2012) (CC) at para 20

*Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and others* case, the constitutionality of this power to trump municipal planning decisions by the provinces was challenged.<sup>58</sup> The dispute revolved around whether the province had the power to veto the decision to approve the proposed development in the area of George if the impact of the development would stretch beyond the jurisdiction of the municipality. The Court held that the province does not have that power. Even if the impact of the development stretches far beyond the municipal area of a particular municipality, the municipality still has the power to take its own decision.

The fourth judgment is *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Others*,<sup>59</sup> The question was whether the MEC for Environmental Affairs and Development Planning can be an appeal body to planning decisions taken by the municipality. The Court replied by holding that the hearing of appeals against the planning decisions taken by the municipality by the province is unconstitutional. The Court stated that the direct provincial intervention in particular municipal land-use decisions was incompatible with the Constitution's allocation of functions between local and provincial government.

The issue of a province serving as an appeal body to planning decisions taken by a municipality was again at the heart of the dispute between *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and others*.<sup>60</sup> This case is a follow up on the *Habitat Council* judgment as it also deals with provincial appeals. This time around the provincial appeal body was independent and staffed with experts. Therefore, the question was whether this body was constitutional or not. The Constitutional Court responded with an emphatic no, stating that the provincial appeal body was not permitted by the Constitution to decide appeals against planning decisions taken by the municipality. Although the appeal body was staffed with experts that did not change the fact that the appeal of municipal planning decisions to the province was still not permitted by the Constitution.

The most recent judgment sees the Constitutional Court reiterate the stance it had adopted in the *Habitat Council* judgment with respect to provinces seeking to be the final decision-makers in decisions taken by the municipalities. The judgment of the Constitutional Court in the *Pieterse N.O. and Another v Lephalale Local Municipality*,<sup>61</sup> is essentially the same as the *Habitat Council* judgment discussed above. In this case, the Court confirmed the decision of the High Court of South Africa, Gauteng Division in Pretoria when it declared section 139 of the Town-planning and Townships Ordinance 15 of 1986 (Ordinance) inconsistent with the Constitution and invalid. This was because the provision allowed for provincial interference in a municipality's exclusive, constitutionally-enshrined power to manage municipal planning by giving appellate powers over its planning competences to the provincial government.<sup>62</sup>

## 7. CONCLUSION

The emerging trend in these judgments of the Constitutional Court dealing with planning is that they emphasise a stronger role for local government in land use management than in the past. In all six judgments, local government authority with respect to land use management was successfully asserted in the Constitutional Court. It is now clear that only local government has the power to make decisions concerning the rezoning of land or township establishment and not any other sphere of government. Furthermore, if a piece of land is zoned by the municipality for a particular use, an

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<sup>58</sup> *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and others*, 2014 (2) BCLR 182 (CC).

<sup>59</sup> *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Others* (2014) (4) BCLR 591 (CC).

<sup>60</sup> *Tronox KZN Sands (Pty) Ltd v Kwazulu-Natal Planning and Development Appeal Tribunal and others* (2016) (CC).

<sup>61</sup> *Pieterse N.O. and Another v Lephalale Local Municipality and Others* [2016] 40 (ZACC).

<sup>62</sup> *Pieterse N.O. and Another v Lephalale Local Municipality and Others* [2016] 40 (ZACC) at para 10.

approval by the national government to use the land for a purpose other than the one which the municipality has zoned the land for does not mean the approval of the municipality is not needed. In other words, even if the national government grants an approval, the municipality in such a situation must still render its decision on whether it permits the activity to be conducted on the land which falls within its jurisdiction.

While provinces had the authority to override local government decisions pertaining to planning in the past, that is no longer the case under the democratic dispensation. Now municipalities take all decisions concerning municipal planning within their areas of jurisdiction even if the impact of the development would stretch beyond the jurisdiction of a municipality. Furthermore, not only can local government make planning decisions, they are also empowered to set up structures which will provide for an appeal process for people who are aggrieved by the decisions taken by the municipality.

It is suggested that while local government autonomy has been successfully asserted by the Constitutional Court, the Constitutional Court has not yet made any remarks regarding the municipalities making by-laws dealing with municipal planning in its judgments, particularly in its expansion and strengthening of the role of local government in land use management. Importantly, the Constitutional Court has not yet in any of the six judgments dealing with planning discussed how the important power of local government to make by-laws fits within this new emerging role of local government in land use management.

In describing the situation of planning law in South Africa, the Constitutional Court in the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* case stated that “the situation cries out for legislative reform”.<sup>63</sup> In seeking to introduce the reform of planning legislation, the Constitutional Court gave the national government the mandate to enact new planning legislation.<sup>64</sup> In responding to the order of the Court, in 2013 Parliament passed that legislation, namely, the Spatial Planning and Land Use Management Act of 2013, (SPLUMA).



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<sup>63</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) at para 33.

<sup>64</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) at para 99.



## CHAPTER THREE

### OVERVIEW OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT ACT

#### 1. INTRODUCTION.

The new expansive role of local government was designed and captured in the Spatial Planning and Land Use Management Act No 16 of 2013 (SPLUMA). SPLUMA incorporates the decisions taken by the Constitutional Court. For example, in line with the *Johannesburg Development Tribunal* judgment, the Act puts local government at the forefront in determining issues such as the zoning of land, rezoning of land and township establishment. Also, the Act empowers local government to also take decisions on matters which not only affect their functions but the functions of other spheres of government. Therefore, when these decisions are made, SPLUMA demands that municipalities and other organs of state apply the development principles contained in section 7 of SPLUMA. Moreover, municipalities are required by the Act to establish Municipal Planning Tribunals, prepare and compile Spatial Development Frameworks, as well as adopt and approve a single land use scheme for its entire area.

One of the objectives of the Municipal Planning Tribunal is to receive and consider land use applications lodged to the municipality. After considering the application, the Tribunal may decide to approve the application or reject it. Now if the application is rejected and the applicant is aggrieved by the decision of the Municipal Planning Tribunal, he or she can appeal that decision not to the province but to the executive authority of the municipality where they lodged the application in the first place. To this end, the Act requires a municipality to establish an appeal authority where the applicant can launch his or her appeal to that decision.

The next chapter of the study will examine SPLUMA, more specifically the study will focus on whether SPLUMA contains any provisions which aim to address the themes identified as the research questions for this study. To this end, the chapter will be broken down into seven parts. The second part discusses the role of provincial legislation in SPLUMA. The third part focuses on the link between forward planning and land use management. The fourth part examines whether SPLUMA contains any provisions that are aimed at dealing with informality. The fifth part focuses on the issue of reducing red tape. The sixth part discusses the issue of capacity. It assesses whether SPLUMA provides mechanisms that can be used to share municipal capacity. Lastly, concluding remarks are made.

#### 2. RELATIONSHIP BETWEEN THE BY-LAW AND PROVINCIAL LAW.

SPLUMA intends to establish a single planning system in the country. Section 2 (1) of SPLUMA confirms this when it declares that the Act applies to the entire area of the Republic and is legislation enacted in terms of section 155 (7) of the Constitution insofar as it regulates municipal planning, as well as section 44 (2) of the Constitution insofar as it regulates provincial planning.<sup>65</sup> Section 104 (b) (i) of the Constitution empowers provinces to enact laws dealing with provincial planning while section 155 (7) of the Constitution empowers provinces and national government to regulate municipal planning.

In terms of section 104 (b) (i) of the Constitution each province is empowered to pass provincial planning laws. Provincial planning is a competence that falls under Schedule 5A of the Constitution.<sup>66</sup> In the same vein, section 155 (7) of the Constitution empowers provinces to regulate municipal planning. Therefore this means that a province may regulate the manner in which land use decisions are taken by a municipality. However, such regulation must not be so extensive that it has the effect of

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<sup>65</sup> Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

<sup>66</sup> Schedule 4B Constitution.

stripping the municipality of its power to exercise its discretion in matters related to municipal planning.<sup>67</sup> Likewise, each province is accorded the exclusive legislative authority to regulate its own planning by enacting its own provincial planning legislation in terms of Schedule 5A of the Constitution.<sup>68</sup>

Section 10 (1) of SPLUMA affirms the role of provincial legislation in regulating municipal planning when it declares that, provincial legislation which is consistent with SPLUMA may provide for matters contained in schedule 1 of SPLUMA as well as matters of provincial interest. Consequently, this indicates that SPLUMA does not intend to be the sole Act that plays a role in regulating planning in the entire country. It also creates room for different planning laws that are adopted by the other spheres of government to play a role in ensuring that the new system of planning achieves its objectives.<sup>69</sup>

As noted above, SPLUMA recognises the constitutional right of provinces to pass legislation that regulates planning. In particular, section 7 of SPLUMA provides for the development principles that must be applied to spatial planning, land development and land use management.<sup>70</sup> One of those principles requires all spheres of government to ensure an integrated approach to land use and land development that is guided by the spatial planning and land use management systems that are embodied in SPLUMA.<sup>71</sup>

The integrated approach SPLUMA envisages allows for the integration of planning decisions made in terms of other laws. Provincial planning laws in particular play a key role in this regard. There are several functional areas in Schedules 4A and 5A that are relevant to land use planning. These include housing, agriculture and environment. Provincial government has full authority over these matters, it may legislate, implement and administer in these functional areas without the constraints that apply to provincial involvement in Schedule 4B and 5B matters.<sup>72</sup> The exercise of the provincial powers mentioned above will inevitably limit a municipality's power over land use. In short, the integrated approach SPLUMA envisages in integrating decisions taken in terms of different statutes, namely provincial legislation and the Municipal Systems Act clearly demonstrates the role of provincial law in SPLUMA.

In essence, it is submitted that SPLUMA envisages a process whereby there is a relationship between the by-law of a municipality and the provincial law. An example that illustrates this is the Western Cape Province which has passed the Land Use Planning Act No 3 of 2014 (LUPA) that brings additional rules and requirements to those set out in SPLUMA. Both the municipalities around the Western Cape and the applicants need to be aware of these additional rules and ensure compliance with them. For example, sections 10 to 15 of LUPA add further requirements for the compilation of municipal spatial development frameworks.

While many of the provisions in SPLUMA are easy to understand and interpret, section 10 (2) of SPLUMA is a particularly difficult provision to understand and interpret. This section provides that, provincial legislation not inconsistent with the provisions of this Act may provide for structures and procedures different from those provided for in this Act in respect of a province.<sup>73</sup> The confusion in this section is based on the following. First, the provision is contradictory in the sense that it permits provincial legislation to provide for structures and procedures different from those provided for in

<sup>67</sup> Steytler N and De Visser J *Local Government Law of South Africa* (2014).

<sup>68</sup> Schedule 5B Constitution.

<sup>69</sup> Berrisford S & De Visser J (2015) 18.

<sup>70</sup> S 7 SPLUMA.

<sup>71</sup> S 7 (1) (e) SPLUMA.

<sup>72</sup> South African Cities Network 'Important legal issues for provincial legislation dealing with spatial planning and land use management' available at <http://sacitiesnetwork.co.za> (accessed 11 November 2016) 2.

<sup>73</sup> S 10 (2) SPLUMA.

SPLUMA such as the Municipal Planning Tribunal. This may give rise to a conflict between provincial legislation and SPLUMA in that SPLUMA specifically sets out the procedures and structures which must be established by the municipalities. It can be argued that the section seeks to avoid compromising the autonomy of provinces in regulating planning as empowered by the Constitution in terms of Schedule 4B by allowing provinces to provide for structures and procedures different from those provided by SPLUMA in its provincial legislation which will be province-specific and suited to the context of the province. If that is the real underlying intention of the provision then it is a laudable objective.

However, the question then arises, what if provincial legislation does not provide for the establishment of structures such as the Municipal Planning Tribunal as demanded by SPLUMA. Would that be permitted or not by SPLUMA? It is submitted that, on the basis of section 10 (2) a Municipal Planning Tribunal is considered to be a structure. Consequently, a province is therefore allowed by section 10 (2) to provide for structures and procedures different from those provided by SPLUMA. Now, if provincial legislation would not provide for establishment of a structure such as the Municipal Planning Tribunal in its province, would that not result in the provincial legislation being inconsistent with the provisions of SPLUMA which instruct municipalities to establish structures such as the Municipal Planning Tribunal? In short, section 10 (2) is a very vague provision which is likely to give rise to confusion in practice.

The overall conclusion is that, while SPLUMA regulates the entire planning system in the country, it also affords space for provincial legislation to regulate municipal planning and provide for matters of provincial interest. Furthermore, it is safe to hold the view that provincial legislation is going to play a key role in the viability of the new planning system SPLUMA has established. Given the critical role provincial legislation will play in regulating municipal planning, the study aims to examine whether the planning by-laws of municipalities include provisions which aim to subject the by-law to provincial planning legislation.

### **3. STRENGTHENING THE LINK BETWEEN SPATIAL PLANNING AND LAND USE MANAGEMENT.**

This section discusses whether SPLUMA contains any provisions which are aimed at strengthening the link between spatial planning and land use management. If SPLUMA does contain the abovementioned provisions, then in the next chapter, the study will assess whether the planning by-laws of municipalities include provisions which are aimed at strengthening the link between forward planning and land use management.

Before discussing whether SPLUMA contains any provisions which are aimed at strengthening the link between forward planning and land use management, two key terms which will be used in this chapter need to be defined first. These terms relate to two distinct components of the broader spatial planning concept as it is applied in South Africa. The first concept is land use planning, also known as forward planning.<sup>74</sup> This refers to the adoption of spatial plans that articulate a spatial vision for a specific area.<sup>75</sup> Section 12 (1) of SPLUMA defines a spatial development framework as a framework that interprets and represents the spatial development vision of the responsible level of government.<sup>76</sup> These are generally policy plans which do not confer any specific land use rights to anyone but indicate broadly where government is targeting development to take place and what type of development that may be. In South Africa, these plans are called spatial development frameworks.<sup>77</sup>

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<sup>74</sup> Van Wyk J 'Parallel Planning Mechanisms as a Recipe for Disaster' (2010) 13 *PELJ* 19.

<sup>75</sup> De Visser J (2016) 96.

<sup>76</sup> S 12 (1) SPLUMA.

<sup>77</sup> De Visser J (2016) 96.

The second concept is land use management and is different from land use planning. In South Africa, land use management means the conferring of land use rights to individual land owners or users.<sup>78</sup> Section 1 of SPLUMA defines land use management as the system of regulating and managing land use and conferring land use rights through the use of schemes and land development procedures.<sup>79</sup> A wide variety of procedures is envisaged here. For example, the removal of restrictions, the removal or amendment of conditions of title, the granting of so-called consent uses, subdivision of land and consolidation of land as well as the zoning of land.<sup>80</sup>

### 3.1. Relevant constitutional and statutory provisions.

In terms of section 153 (a) of the Constitution, each municipality is required to structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community. Municipalities are also obligated to participate in national and provincial development programmes.<sup>81</sup> One of the most important instrument which a municipality uses to implement its constitutional duties and obligations is the Integrated Development Plan (IDP).

The basic features of the IDP are listed under section 25 (1) of the Local Government: Municipal Systems Act 32 of 2000 which ensures that the IDP,

- (a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;
- (b) aligns the municipality's resources and capacity with the implementation of the plan;
- (c) forms the policy framework and general basis on which the budget must be based; and
- (d) is compatible with national and provincial development plans and planning requirements that are binding on the municipality in terms of legislation.<sup>82</sup>

While the IDP is the principal strategic planning instrument that guides and informs all planning and development within the municipal area, it was not always given effect to in the manner in which the Municipal Systems Act intended.<sup>83</sup> In other words, the importance of the IDP was not recognised by the provincial government. What would happen was that the provincial government would not take into account the IDPs of municipalities when they took decisions that affected the municipalities, in particular, the development priorities and objectives of the municipalities which are contained in the IDP. In short, it was inevitable that this would give rise to serious conflict in practice.

A practical example of the challenges encountered in practice is illustrated by the facts of the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* case. In that case, Chapters V and VI of the Development Facilitation Act 67 of 1995 authorised provincial development tribunals (Tribunal) established in terms of the Act to determine applications for the rezoning of land and the establishment of townships. In the process of determining these applications, the Tribunals would not uphold or give regard to the municipality's integrated development plans. This therefore would result in land use management decisions not being in line with the municipalities IDP and more specifically, the municipality's spatial development framework.

Furthermore, in the past, not much attention was paid to strengthening the link between spatial planning and land use management. This may partly be attributed to the fact that these mechanisms

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<sup>78</sup> De Visser J (2016) 96.

<sup>79</sup> S 1 SPLUMA.

<sup>80</sup> Van Wyk (2010) 23.

<sup>81</sup> S 153 (b) Constitution.

<sup>82</sup> S 25 (1) Municipal Systems Act.

<sup>83</sup> S 26 (e) Municipal Systems Act.

were dealt with in terms of different legislative instruments. On the one hand, land use management was conducted in terms of old order laws such as well as the Development Facilitation Act,<sup>84</sup> while on the other hand, spatial planning was conducted in terms of the Municipal Systems Act. Since the spatial development framework of a municipality is included in the IDP, the total disregard of the IDP by provincial tribunal when they took land use decisions inevitably affected the ability of a municipality to realise its spatial vision which is articulated in its spatial development framework.

The Constitutional Court in the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* judgment came out strongly in emphasising the vital importance of IDPs for land use planning and management when it stated that, ‘the role played by these plans in the administration of land is important. They provide for, among other things, the alignment of resources utilised to supply basic services to local communities. There can be no doubt that any development carried out within a municipal area affects the budget of the municipality concerned, particularly in the supply of services’.<sup>85</sup> In essence the Court condemned the Tribunal for taking decisions outside the municipality’s IDP.

It is the abovementioned practice of taking land use decisions without due consideration of the municipality’s IDP which SPLUMA attempts to change. SPLUMA includes provisions that are aimed at strengthening the link between spatial planning and land use management. In the next chapter, the study will examine whether the municipalities in their planning by-laws also include provisions which are aimed at strengthening the link between spatial planning and land use management, but before that the study in the following section focuses on the relevant provisions of Systems Act which regulate the legal nature of the IDP.

### **3.2. Relevant provisions of Municipal Systems Act dealing with the legal nature of the IDP**

It is useful to first examine the legal nature of the IDP. This is because the status and legal effect of the MSDF is regulated by the Municipal Systems Act, SPLUMA and any relevant provincial legislation. Sections 35 and 36 of the Municipal Systems Act provide that the IDP:<sup>86</sup>

- must be given effect to by the municipality
- must guide and inform all planning and development by the municipality
- binds the municipality when it exercises executive authority; and
- binds other persons but only to the extent that it has been incorporated in a by-law

Furthermore, according to section 24 (1) of the Municipal Systems Act, the IDP is declared to be the principal strategic planning instrument that guides and informs all planning and development for municipality’s area of jurisdiction, and all decisions with regard to planning, management and development, in the municipality<sup>87</sup>. Finally, a municipality is instructed to give effect to its IDP and conduct its affairs in a manner that is consistent with it in terms of section 25 (2) of the Municipal Systems Act.

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<sup>84</sup> See paragraph 2 of Chapter two above.

<sup>85</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) at para 83.

<sup>86</sup> S 34 & 35 Municipal Systems Act.

<sup>87</sup> S 24 (1) Municipal Systems Act.

### 3.3. Provisions of spluma pertaining to MSDFs.

SPLUMA contains provisions which are aimed at strengthening the link between spatial planning and land use management. In SPLUMA, the link between a MSDF and land use management is legislated for the first time.<sup>88</sup>

SPLUMA requires the municipal council of a municipality to adopt a municipal spatial development framework (MSDF) for the municipality.<sup>89</sup> This MSDF needs to be prepared as part of the municipality's integrated development plan in accordance with the provisions of the Local Government Municipal Systems Act.<sup>90</sup> Part F of chapter four is particularly important when assessing whether SPLUMA attempts to establish a link between spatial planning and land use management or not.

According to section 22 (1) of SPLUMA, a Municipal Planning Tribunal or any other authority required or mandated to make a land development decision in terms of SPLUMA or any other law relating to land development, may not make a decision which is inconsistent with the MSDF.<sup>91</sup> However, an exception is provided for in section 22 (2) which provides that, subject to section 42 a Municipal Planning Tribunal or any other authority required or mandated to make a land development decision, may depart from the provisions of a municipal spatial development framework only if site-specific circumstances justify a departure from the provisions of such municipal spatial development framework.<sup>92</sup>

The discretion to not give effect to the MSDF in certain circumstances which is contained in section 22 (2) of SPLUMA is limited. First of all, section 22 (2) envisages this discretion to be used only under certain circumstances, "these are "site-specific circumstances". Secondly, before this discretion is used, it is argued that these circumstances need to have been shown to exist in order for a departure to be justified under SPLUMA. Furthermore, if a Municipal Planning Tribunal or any other authority that is mandated to take a land development decision, takes a decision which is inconsistent with a MSDF and no site-specific circumstances have been shown to exist, such a decision effectively contravenes SPLUMA. The site-specific circumstances referred to in SPLUMA are in essence a jurisdictional fact that can be tested by a court. In other words, they are objective facts which the court can assess to determine whether the site-specific circumstances do in fact exist or not.

Moreover, SPLUMA also recognises the MSDF as part of the IDP in terms of section 22 (1).<sup>93</sup> First, in terms of section 23(1) (a) and (b) of the Municipal Systems Act, the IDP, once adopted, remains in force until amended or until a newly-elected council adopts a new IDP.<sup>94</sup> It is therefore clear that the IDP legally binds the municipality in the exercise of its executive authority as no single executive decision may be in conflict with the IDP. The only exception occurs when there is inconsistency between the IDP and national or provincial legislation. In that case, the legislation prevails.<sup>95</sup> The IDP must be given effect to by the municipality. Also, it binds the municipality when it exercises its executive authority. Therefore, it is suggested that SDFs or MSDF are no longer just mere guidelines. They are elevated under SPLUMA to be legally recognised policy documents which must be given

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<sup>88</sup> South African Cities Network 'SPLUMA as a tool for spatial transformation' available at <http://sacitiesnetwork.co.za> (accessed 1 November 2016).

<sup>89</sup> S 20 (1) SPLUMA.

<sup>90</sup> S 20 (2) SPLUMA.

<sup>91</sup> S 22 (1) SPLUMA.

<sup>92</sup> S 22 (2) SPLUMA.

<sup>93</sup> S 20 SPLUMA.

<sup>94</sup> S 23 (1) (a) & (b) Municipal Systems Act.

<sup>95</sup> Steytler N & De Visser J (2016) 8.

effect to when a land development decision is taken either by the Municipal Planning Tribunal or other authority mandated to take such decisions.<sup>96</sup>

Also relevant in this regard is section 25 (1) which states that, a land use scheme must give effect to and be consistent with the municipal spatial development framework.<sup>97</sup> This means that the municipality is not only instructed to give effect to its MSDF when taking land development decisions, it is also mandated to use its land use scheme to give effect to its MSDF. Taken together, these provisions all point toward the aim of strengthening the link between forward planning and land use management. The next chapter of the study will therefore examine whether municipalities in their planning by-laws have included any provisions that are aimed at strengthening the link between forward planning and land use management.

#### 4. DEALING WITH INFORMALITY

This section examines whether SPLUMA requires the planning by-laws of municipalities to include provisions aimed at facilitating the incremental introduction of land use management systems in informal or currently unplanned areas.

In general the term ‘informal’ is used here to refer to buildings or building extensions constructed without conforming to existing planning legislation. Informal settlements or settlements of the urban poor are a common phenomenon in many parts of South Africa.<sup>98</sup> Informal settlements also include slums.<sup>99</sup> In this regard, De Visser notes, ‘the vast majority of informal settlements are established without proper connection to municipal services such as water, electricity and sanitation. This then leaves the dwellers of informal settlements deprived of essential services and that therefore becomes a source of underdevelopment and marginalisation’.<sup>100</sup>

The rapid growth of informal settlements in South Africa is caused by a number of factors. The main two leading factors at the moment are high rates of urbanisation caused by the significant number of people who move into the cities in search of opportunities.<sup>101</sup> Secondly, informal settlements are also caused by the high number of evictions that have taken place, particularly in Johannesburg by property developers.<sup>102</sup> Informal settlements are often characterized as ‘illegal’ residential formations lacking basic services such as water, sanitation and electricity.<sup>103</sup> This means that these are areas which are not subjected to any planning laws or regulations. Above all, these informal areas usually lack legal recognition and the people living in those areas do not have any form of land rights, thus making it difficult for them to receive assistance in the form of service delivery. There are also other manifestations of informality which do not necessarily relate to informal settlements. These include unplanned places such as the rural areas and areas which were under the authority of traditional

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<sup>96</sup> South African Cities Network ‘SPLUMA as a tool for spatial transformation’ available at <http://sacitiesnetwork.co.za> (accessed 1 November 2016).

<sup>97</sup> S 25 (1) SPLUMA.

<sup>98</sup> Kali P ‘Regeneration of informal settlements toward sustainability’ available at <http://informalsettlements.com/sustainability&growth> (accessed 1 November 2016).

<sup>99</sup> Kali P ‘Regeneration of informal settlements toward sustainability’ available at <http://informalsettlements.com/sustainability&growth> (accessed 1 November 2016).

<sup>100</sup> De Visser J (2016) 97.

<sup>101</sup> SERI ‘Submission on city of Johannesburg’s municipal planning by-law’ available at <http://www.seri.org> (accessed 1 November 2016).

<sup>102</sup> SERI ‘Submission on city of Johannesburg’s municipal planning by-law’ available at <http://www.seri.org> (accessed 1 November 2016).

<sup>103</sup> Watson V ‘The planned city sweeps away the poor: Urban planning and 21<sup>st</sup> century urbanisation’ available at [www.elsevier.com/locate/pplann](http://www.elsevier.com/locate/pplann) (accessed 11 November 2016).

leaders in the former homelands.<sup>104</sup> All these areas were unplanned because there was no formal planning legislation that regulated planning in these areas.<sup>105</sup>

#### **4.1. The provisions of SPLUMA establishing a framework to deal with informality**

The issue of informality is mentioned in SPLUMA. In particular, SPLUMA provides a framework for the incremental upgrade of informal areas through the progressive introduction of administration, management and land tenure rights to areas situated outside existing planning legislation.<sup>106</sup> To this end, SPLUMA instructs the national, provincial spheres of government and each municipality to prepare a spatial development framework that includes informal areas such as disadvantaged areas, areas under traditional leadership, rural areas, informal settlements and slums. After these areas have been included in the spatial development framework, then the respective spheres of government may then address the inclusion of these areas into the spatial, economic, social and environmental objectives of the relevant sphere.<sup>107</sup> This section clearly mandates the municipality in preparing its MSDF to include the areas such as informal settlements, rural areas and slums in its MSDF. This in turn assists the municipality to expedite the process of introducing the incremental upgrading of these informal areas because they are areas that have already been identified and located in the MSDF of the municipality.<sup>108</sup>

Furthermore, SPLUMA specifically mentions these previously disadvantaged areas. It is therefore a logical consequence to assert that a municipality is mandated to first define some of these areas or all of them if they are present within its area of jurisdiction and thereafter make provision of how it intends on addressing the inclusion of the area into the spatial, economic and social objectives of the municipality. It is thus suggested that the best way municipalities may address this issue, is for them to include provisions aimed at providing a framework in their planning by-laws through which the upgrading of informal areas can be facilitated. Moreover, SPLUMA reiterates its intention when it comes to addressing the issue of informality in chapter five.<sup>109</sup>

In terms of chapter five, SPLUMA instructs municipalities, after public participation to adopt and approve a single land use scheme for its entire area within five years from the commencement of the Act.<sup>110</sup> This land use scheme needs to include provisions aimed at facilitating the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme.<sup>111</sup>

To this end, municipalities are not required to only identify areas which are not part of land use schemes in their municipal areas. They are instructed by SPLUMA to include provisions in their planning by-laws that are aimed at facilitating the incremental introduction of land use management systems in areas which were not covered by any formal planning legislation. To determine whether these instructions are in fact carried out in practice, the provisions of a municipality's planning by-law must be assessed to determine whether these instructions are being implemented or not.

## **5. REDUCING RED TAPE**

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<sup>104</sup> Watson V 'The planned city sweeps away the poor: Urban planning and 21st century urbanisation' available at [www.elsevier.com/locate/ppplan](http://www.elsevier.com/locate/ppplan) (accessed 11 November 2016).

<sup>105</sup> De Visser J (2016) 97.

<sup>106</sup> S 1 SPLUMA.

<sup>107</sup> S 12 (1) (h) SPLUMA.

<sup>108</sup> SAGE 'informal settlements: Production and intervention in Twentieth-Century-Brazil and South Africa' available at <http://www.jstor.org/stable/> (accessed 10 November 2016).

<sup>109</sup> Chapter 5 SPLUMA.

<sup>110</sup> S 24 (1) SPLUMA.

<sup>111</sup> S 24 (2) (e) SPLUMA.



This section focuses on whether SPLUMA requires the planning by-laws of municipalities to address the issue of red tape, particularly, issues surrounding the alignment of procedures or integrated authorisations. Furthermore, the discussion of reducing red tape will also explore whether SPLUMA expects municipalities to include provisions that enable the identification of areas where shortened land use development procedures may be applied. Finally, the section closes the discussion by assessing whether SPLUMA includes provisions that aim to limit how long it takes to make a land development decision.

### **5.1. Red tape in the form of multiple approvals.**

The issue of red tape mainly relates to the aspect of multiple approvals, as well as the general burden of land use management procedures. All spheres of government, one way or another exercise powers connected to land. For example, the national sphere of government is responsible for issuing mining licences as well as permits for prospective assessments of mineral resources in the land in terms of the Mineral and Petroleum Resources Development.<sup>112</sup> On the other hand, the area on which the mining activity will commence may be zoned for a use that doesn't include mining. In addition, before a mining activity can be given the green light to commence, in most cases an environmental impact assessment must be undertaken in terms of the National Environmental Management Act 107 of 1998 (NEMA) to determine whether the mining activity may have any adverse effects to the environment or not. Therefore, the above scenario represents the interplay between the various legislative instruments which all regulate land. In this regard, a person applying for a mining licence must at the same time apply to the municipality for the rezoning of the land before it can commence its operations as well as obtain approval from the Minister of Environmental affairs who is responsible for protecting the environment through conducting environmental impact assessments.<sup>113</sup>

The situation can be even worse when a proposed development will also likely affect a heritage site or agriculture in general. If that development is likely to impact on these other interests, it will therefore require the relevant organ of state responsible for managing the area to issue an approval on whether it agrees that the development may take place or not. This then illustrates the multiple approvals a person may need to obtain. Furthermore, the departments responsible for the issuing of a respective approval will most likely be situated in different spheres of government and dealing with different functions. It is against this context in which the issue of multiple approvals becomes a tough challenge.

Fortunately, SPLUMA contains provisions which are aimed at addressing the possible challenges the issue of red tape poses in land use management processes. Chapter 5 of SPLUMA deals with the issue of land use management. One of the issues covered by this chapter relates to the alignment of authorisations in terms of section 30 (1). This section states that, where an activity requiring authorisation in terms of this Act is also regulated in terms of another law, the relevant municipality and the relevant organ of state responsible for authorising the activity in terms of the other law, may exercise their respective powers jointly by issuing separate authorisations or integrated authorisation.<sup>114</sup>

The alignment of authorisations refers to a process whereby the municipality and the organ of state concerned engage one another in aligning their procedures for the respective decisions each party is going to take. Put differently, the municipality and the organ of state concerned will issue separate authorisations but they will align the procedures that they must follow in reaching their respective decisions. For example, section 67 (1) (a) of LUPA instructs the municipalities and other organs of state that administer other legislation relating to activities that require approval in accordance with

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<sup>112</sup> Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA).

<sup>113</sup> See chapter 2 paragraph 6.

<sup>114</sup> S 30 (1) SPLUMA.

LUPA to strive to coordinate and align the procedural requirements for decision-making in terms of LUPA and that legislation, to avoid duplication.<sup>115</sup>

Integrated authorisation refers to a process whereby different organs of state that have an interest in a land use application engage in consultations to determine whether they agree to issue an integrated authorisation in response to a single application. In other words, an integrated authorisation comprises of a single integrated authorisation which is constituted by the different decisions taken by the relevant organs of state in relation to whether a particular development or activity should be permitted or not. For example, this situation arises where different organs of state need to issue a permit, licence or authorisation with regard to a single application for development.

The concept of integrated and aligned authorisations is not an entirely new concept, there are several legislative enactments which also make use of this mechanism. By way of illustration, section 24L of NEMA provides for the alignment of environmental authorisations. More specifically section 24L (1) states that, a competent authority empowered under Chapter 5 to issue an environmental authorisation and any other authority empowered under a specific environmental management Act may agree to issue an integrated environmental authorisation.<sup>116</sup> However, section 24L (2) provides that, an integrated environmental authorisation contemplated in subsection (1) may be issued only if the relevant provisions of this Act and the other law or specific environmental management Act have been complied with and the environmental authorisation specifies the provisions in terms of which it has been issued and relevant authority or authorities that have issued.<sup>117</sup> Consequently, NEMA also provides a framework for the issuing of an integrated authorisation if an application for land use development requires the authorisations of different organs of state. For example, section 67 of LUPA.<sup>118</sup> This section also illustrates the framework on which integrated authorisations may be undertaken by the municipalities of the Western Cape. In this regard, section 67 (1) governs the integration of approvals and decisions relating to land use application.<sup>119</sup>

In short, SPLUMA provides mechanisms that specifically seek to address the issue of reducing red tape. However, whether section 30 of SPLUMA will be implemented in practice will mainly depend on the extent to which the municipalities and the relevant organs of state are willing to co-operate and consult with one another in deciding which mechanism as provided by SPLUMA may be utilised in issuing a decision relating to a land use development application. In addition, the municipal planning by-laws of the municipalities must also permit the use of this mechanism or at the very least make reference to it.

## **5.2. Red tape in land use management procedures.**

The issue of red tape also encapsulates the general burden in land use management procedures. SPLUMA requires a MSDF as part of its content to identify the designation of areas in which more detailed local plans must be developed and shortened land use development procedures may be applicable and land use schemes may be so amended.<sup>120</sup> This provision therefore permits municipalities to include in the MSDF a provision that deals with shortened land use development procedures as part of the overall attempt to reduce red tape. It is to be noted that mere identification of the areas in which shortened land use development may apply is not sufficient for one to hold that SPLUMA is being implemented. Instead, what is required of municipalities by SPLUMA is for them to include provisions in their enacted planning by-laws that will regulate shortened land use

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<sup>115</sup> S 67 (1) LUPA.

<sup>116</sup> S 24L (1) NEMA.

<sup>117</sup> S24L (2) NEMA

<sup>118</sup> Land Use Planning Act No 3 of 2014. (LUPA)

<sup>119</sup> S 67 (1) LUPA.

<sup>120</sup> S 21 (1) (ii) SPLUMA.

development procedures that for example, provides for a shorter period of public participation in respect of a proposed development involving the informal settlements.

### **5.3. Red tape in the form of determining applications within a prescribed period.**

A Municipal Planning Tribunal is mandated to consider and determine all applications lawfully referred or submitted to it.<sup>121</sup> Furthermore, it must decide a land use application without undue delay and within a prescribed period.<sup>122</sup> This therefore suggests that the Municipal Planning Tribunal must decide a land use application within a predetermined timeframe. SPLUMA confers the authority to determine timeframes to the Minister and section 44 (2) instructs the Municipal Planning Tribunal to take its decision within the period prescribed by the Minister.<sup>123</sup> What the study aims to examine is whether the planning by-laws of municipalities also contain provisions which commit the municipality to a specific timeframe within which it must decide a land development application.

## **6. CAPABILITY SOLUTIONS.**

This section discusses the issue of capacity. In essence, capacity relates to the availability of resources. Consequently, lack of adequate human resource affects the efficient and effective achievement of objectives in municipalities.<sup>124</sup> Also, the shortage of skills required to execute functions efficiently and effectively is considered a major concern in municipalities.<sup>125</sup> Furthermore, another contributing factor in municipalities lacking capacity involves municipalities being given powers that they are not able to manage. This issue was raised in a report compiled by De Visser and Berrisford<sup>126</sup>.

SPLUMA compels each municipality in terms of section 35 (1) to establish a Municipal Planning Tribunal that will decide land use and land development applications within its municipal area.<sup>127</sup> In the same vein, the SPLUMA regulations provide for the establishment of Joint Municipal Planning Tribunals in terms of Part C of chapter 2.<sup>128</sup> The Joint Municipal Planning Tribunal may be established in a scenario whereby two or more municipalities collaborate to jointly establish one Tribunal which will deal with all land use applications submitted to the municipalities that have collaborated together. Another scenario involves the district municipality with the agreement of the local municipalities within the area of such district municipality, establishing a Municipal Planning Tribunal that will deal with land development applications within the district municipal area.<sup>129</sup> These are mechanisms that SPLUMA provides to address the issue of capacity which a significant number of municipalities around the country currently lack.<sup>130</sup> In short, SPLUMA recognises the reality that the establishment of Municipal Planning Tribunals and sustaining them will be a daunting task for municipalities in many parts of the country. In coming to the aid of those municipalities, SPLUMA puts in place these mechanisms to assist municipalities. For example, the thought of establishing a Municipal Planning Tribunal caused serious headaches for many municipalities that lacked capacity. Therefore, the Joint Municipal Planning Tribunals will assist a significant number of municipalities that lacked the required capacity to establish a Municipal Planning Tribunal of their own. In sum, the study aims to specifically examine whether the planning by-laws of municipalities contain provisions which give effect to the relevant mechanism set out in SPLUMA to share municipal capacity.

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<sup>121</sup> S 40 (4) SPLUMA.

<sup>122</sup> S 40 (9) SPLUMA.

<sup>123</sup> S 44 (2) SPLUMA.

<sup>124</sup> De Visser (2016) 99.

<sup>125</sup> Ramutsheli M & Van Rensburg J (2015) 109.

<sup>126</sup> See chapter 1 paragraph 6.

<sup>127</sup> S 35 (1) SPLUMA.

<sup>128</sup> Spatial Planning and Land Use Management regulations in GN 239 GG 38594 of 23 March 2015.

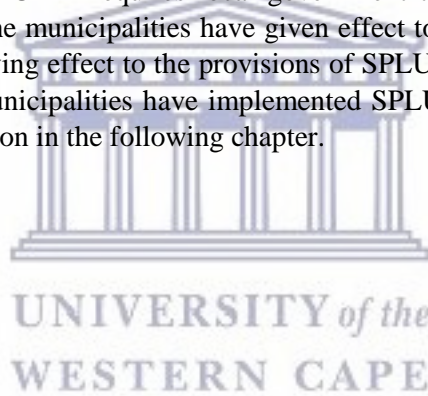
<sup>129</sup> S 34 (2) SPLUMA.

## 7. CONCLUSION

In closing, the study found that SPLUMA does recognise and create space for provincial legislation to further regulate municipal planning, as well as provincial planning. The second part sets out the provisions of SPLUMA which include section 22 (1) that requires the Municipal Planning Tribunal or any other designated authority to not make a land use management decision that is inconsistent with the municipal spatial development framework.

The third part dealt with the issue of informality. It examined whether SPLUMA includes provisions that are aimed at addressing the issue of informality. The study has shown that informality is one of the key issues of which SPLUMA provides a framework whereby the progressive upgrading of informal settlements may be introduced. It does so through the inclusion of provisions that are aimed at facilitating the incremental introduction of land use management systems in informal or currently unplanned areas. The fourth part discussed the issue of red tape. The study pointed out that SPLUMA does in fact put in place mechanisms which are aimed at reducing red tape. Finally, the last part dealt with the issue of municipal capacity.

SPLUMA provides mechanisms that can be used to share municipal capacity. For example, by having two or more municipalities collaborating together to establish a Joint Municipal Planning Tribunal and a District Municipal Planning Tribunal. However, although it is an important exercise in elucidating on the themes of the study, it is not enough to simply ascertain what SPLUMA states about these themes or what SPLUMA requires local government to do. Of critical significance is examining the extent to which the municipalities have given effect to these themes. The examination of whether municipalities are giving effect to the provisions of SPLUMA will provide an opportunity to assess the extent to which municipalities have implemented SPLUMA. It is therefore this task to which the study seeks to embark on in the following chapter.



## CHAPTER FOUR

### MUNICIPAL PLANNING BY-LAWS

#### 1. INTRODUCTION

Starting from the assertion that SPLUMA contains provisions which are aimed at addressing the five themes of this study, this chapter delivers the findings of the study pertaining to the examination of fifteen municipal planning by-laws which are listed in annexure 1 that is attached to the thesis. It does so with a view to ascertain the extent to which municipalities have implemented SPLUMA. While the assessment of whether SPLUMA is being implemented is limited to only fifteen municipalities, the municipalities which the study has chosen to examine substantially represent the various provinces of the country. The findings of the by-laws are discussed below.

#### 2. DOES THE BY-LAW WORK IN CONJUNCTION WITH A PROVINCIAL LAW?

The first question is whether the by-laws contain any provisions aimed at facilitating a relationship between the by-law and provincial legislation. In seeking to answer the main question of this study, the study began its examinations with two municipalities from the Northern Cape, namely the Dikgatlong local municipality and the Sol Plaatjie local municipality. First, in relation to the by-law of the Dikgatlong local municipality, the by-law contained no provisions which required it to work in conjunction with a provincial law.<sup>131</sup> Similarly, the Sol Plaatjie planning by-law also does not make any reference to it working in conjunction with a provincial law.

It is not clear whether the by-laws by not making any reference to provincial legislation suggest that there will not be provincial planning legislation in Northern Cape. In other words, should this be taken to mean that planning in the Northern Cape will be regulated only by SPLUMA and the by-laws? Also, what will happen if a provincial law is adopted and prescribes standards which are aimed at further regulating municipal planning? Will the municipalities then amend their by-laws to be in line with the provincial law or the provisions of the by-law will prevail in such a situation? In fact this is what the Constitution prescribes in section 156 (3). It is submitted that these are serious questions which may need to be addressed if one of the above scenarios manifests in practice.

Unlike the two municipalities from the Northern Cape, the Mbombela local municipality which is located in the Mpumalanga province recognises the relationship between its planning by-law and provincial planning legislation. Section 3 (1) of the Mbombela municipality's by-law declared that the by-law is subject to the relevant provisions of SPLUMA *and provincial legislation*.<sup>132</sup>

Although there is currently no adopted provincial planning legislation in Gauteng yet, the City of Johannesburg's planning by-law recognises provincial legislation. More specifically, section 10 of the by-law acknowledges provincial planning legislation which is yet to be promulgated.

In the Eastern Cape, the planning by-laws of the Engcobo local municipality and the Kouga local municipality were very similar. The planning by-laws of these municipalities do contain provisions which require the by-law to work in conformity with a provincial law. With respect to the Engcobo municipality, section 3 (1) of its planning by-law provides that the by-law is subject to the provisions of SPLUMA and provincial legislation. In similar fashion, section 3 (1) of the Kouga local municipality also provides that the by-law is subject to the provisions of SPLUMA and provincial legislation.

Moving on to the province of KwaZulu-Natal, the study also examined two municipal planning by-laws, namely those of Nongoma local municipality as well as Ubuhlebezwe local municipalities. Although the by-laws do not specifically state that the by-law is subject to provincial legislation, they do contain provisions which envisage a relationship between the by-law and provincial legislation. In terms of section 54 (4) (a) of the Nongoma municipality's planning by-law, it is stated that the Municipal Planning Approval Authority may not approve an application for municipal planning approval that is inconsistent with the provincial planning norms and standards.

In similar terms, section 54 (4) (a) of the Ubuhlebezwe local municipality's planning by-law also provides that the Municipal Planning Approval Authority may not approve an application for municipal planning approval that is inconsistent with the provincial planning norms and standards.

In the North West province, the study examined the planning by-laws of two municipalities, namely Madibeng local municipality and the Rustenburg local municipality. The by-law of the Madibeng local municipality makes reference to provincial legislation in section 10 by acknowledging provincial legislation which may be promulgated in the near future. Similarly, section 10 of the Rustenburg by-law also acknowledges provincial legislation which may be promulgated soon in the North West province. The by-laws of two municipalities from the Free State, namely Tswelopele and Mantsopa local municipality's by-law makes no reference to the by-law operating subject to provincial legislation. The by-law of the Mogalakwena municipality is also silent about whether the by-law works subject to provincial legislation.

Lastly, the study selected one by-law in the Western Cape, namely the George local municipality's by-law. The municipality gives effect to SPLUMA in that its planning by-law contains provisions which require the by-law to work in conjunction with a provincial law. Section 1 of the George municipality's by-law provides, in this by-law, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the Western Cape Land Use Planning Act, 2014 (Act 3 of 2014), has the meaning assigned to it in that Act. Another specific reference to LUPA can be found under section 3 of the by-law which deals with the compilation or amendment of the municipal spatial development frameworks. Section 3 (1) provides that, (1) When the Council compiles or amends its municipal spatial development framework in accordance with the Municipal Systems Act, the Council must, as contemplated in section 11 of the Land Use Planning Act (a) establish an intergovernmental steering committee to compile or amend its municipal spatial development framework or (b) refer its draft municipal spatial development framework or draft amendment of its municipal spatial development framework to the Provincial Minister for comment.

Overall, at this stage 60% of the municipalities have made provision in their by-laws which subject the by-laws to provincial legislation. This means that these municipalities recognise the key role provincial legislation will play in further regulating municipal planning in the various provinces.

### **3. DOES THE BY-LAW CONTAIN ANY PROVISIONS THAT AIM TO STRENGTHEN THE LINK BETWEEN SPATIAL PLANNING AND LAND USE MANAGEMENT?**

The second question is whether the by-laws contain any provisions aimed at strengthening the link between forward planning and land use management. More specifically the question is whether the by-laws contain any provisions that link the mandate of the Municipal Planning Tribunal (MPT) or the Authorised Official to the IDP or MSDF of the municipality. Furthermore, this theme also contains two sub-themes, namely whether the by-law somehow makes obtaining land use approvals easier for development envisaged in the MSDF and whether the by-laws envisage MSDFs or other type of plans, such as precinct plans or local development plans below the MSDF.

The by-laws of two municipalities from the Northern Cape, namely Dikgatlong and the Sol Plaatjie do not provide any provisions aimed at strengthening the link between forward planning and land use

management. For example, both by-laws do not contain any provisions that link the mandate of the MPT or Authorised Official to the IDPs or MSDFs of these municipalities. Neither do they contain provisions dealing with the sub-themes of this question.

Contrary to the two municipalities of the Northern Cape, the by-laws of the municipalities from Gauteng and Mpumalanga, namely Johannesburg Metropolitan municipality and Mbombela both contain provisions that link the mandate of the MPT or authorised official to the IDPs or MSDFs of the municipalities. These provisions instruct the MPT or Authorised Official to have regard to the IDP and MSDF of the municipality when they considering land development applications. However, they do not include any provisions that aim to make obtaining land use approvals easier for development envisaged in the MSDF. Finally, the study reports that both municipalities do make provision in their by-laws which envisage other type of plans below the MSDF, in particular the local development plans.

In KwaZulu-Natal and the Eastern Cape, the situation appears to be similar in terms of the by-laws including provisions that are aimed at strengthening the link between forward planning and land use management. Both by-laws of the Nongoma and Ubuhlebezwe from KwaZulu-Natal contain provisions that link the mandate of the MPT or the authorised official to the IDPs and MSDFs of these municipalities. They do so by instructing the Municipal Planning Approval Authority to be guided and informed by the IDP and MSDF. However, in relation to the sub-themes mentioned above, the by-laws made no mention of making land use approvals easier to obtain for development that is envisaged in the MSDF. Equally absent in the two by-laws is a provision which envisages other type of plans below the MSDF.

With respect to the municipalities in the Eastern Cape, namely Engcobo and Kouga. Their by-laws include provisions which are aimed at strengthening the link between spatial planning and land use management. For example, both by-laws provide that when the MPT or Authorised Official considers an application submitted in terms of this by-law it, he or she must have regard to the integrated development plan and municipal spatial development framework. The by-laws do not include any provisions that make land use approvals for development that is envisaged in the MSDF easier to obtain. However, in relation to the recognition of other types of plans below the MSDF, section 10 (1) of both by-laws makes provision for the adoption of local development plans.

Moving on to the province of North West which is represented in this study by Madibeng and Rustenburg, The by-laws of both municipalities do contain provisions which are aimed at linking the mandate of the MPT or Authorised Official to the IDPs or MSDFs of the municipalities respectively. Conversely, the by-laws do not appear to deal with the issue of making land use approvals easier to obtain for development that is envisaged In the MSDF. However, when it comes to the adoption of other types of plans, such as precinct plans or local development plans below the MSDF, the by-laws of both municipalities envisage not only local development plans but precinct plans as well.

The two municipalities from the Free State, namely Tswelopele and Mantsopa follow the same pattern. Both by-laws intend to strengthen the link between spatial planning and land use management by mandating the municipality to have regard to the IDP and MSDF when it considers an application. Both by-laws also do not include provisions that make land use approvals for development that is envisaged in the MSDF easier to obtain. This is the trend which is emerging with respect to all the municipalities examined in this study thus far in relation to this theme. However, when it comes to the question of whether the by-laws recognise the adoption of plans below the MSDF, the answer is in the affirmative. In terms of section 10 (1) of both by-laws it is provided that the municipality may adopt a local spatial development framework for a specific geographical area in a portion of the municipal area.

The by-law of Mogalakwena municipality from Limpopo does include provisions that seek to strengthen the link between spatial planning and land use management. For example, section 12 (3) of the by-law, (dealing with general provisions of the LUS) states that the Municipality's Land Use Scheme shall take into consideration the IDP; SDF; and Provincial legislation (if applicable). In relation to whether the by-law contains provisions that make land use approvals easier to obtain for development envisaged in the MSDF, the by-law makes no mention of this. What the by-law makes mention of is the adoption of local development plans which may include precinct plans in section 8. Finally, the municipality representing the Western Cape in this study, namely George also does include provisions which are aimed at strengthening the link between forward planning and land use management. For example, section 65 of the by-law mandates the MPT or Authorised Official to give effect to the IDP and MSDF when executing their functions. In sum, the study can report that over 93% of the municipalities examined included provisions in their by-laws aimed at strengthening the link between forward planning and land use management.

#### **4. DO THE BY-LAWS CONTAIN ANY PROVISIONS WHICH ARE AIMED AT DEALING WITH INFORMALITY?**

The study examined the by-laws with the aim of ascertaining whether the by-laws address the following questions, namely (1) does the by-law differentiate amongst formal; informal and/or communal areas? (2) If so, how does the by-law define informal, formal and communal? (3) If so, is there different application fees and liability for notice costs with respect to formal; informal and/or communal areas? Are there different methods of notification with respect to formal; informal and/or communal areas? Are there different enforcement and inspection measures with respect to formal; informal and/or communal areas? Are there different criteria for decision making with respect to formal; informal and/or communal areas? Does the by-law aim to facilitate the incremental introduction of land use management systems in informal or 'unplanned' areas?

Most of the by-laws appear to differentiate between formal, informal and communal areas. For example, the by-laws of Mbombela, Johannesburg, Engcobo, Mogalakwena, Kouga, Nongoma, Ubuhlebezwe, Madibeng, Rustenburg, Tswelopele, as well as Mantsopa all differentiate between the formal, informal and communal areas. However, the Dikgatlong, Sol Plaatjie and George municipality's by-law do not provide any differentiation amongst formal, informal and communal areas.

With respect to sub-theme two, the by-laws of the following seven municipalities provide definitions of informal and communal. These municipalities include the Mogalakwena, Mbombela, Johannesburg, Engcobo, Kouga, Madibeng and Rustenburg. For example, section 1 of the Engcobo and Kouga by-law defines communal land as land under the jurisdiction of a traditional council determined in terms of section 6 of the Eastern Cape Traditional Leadership and Governance Act, (Act 4 of 2005) and which was at any time vested in (a) the government of the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), or (b) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971).<sup>133</sup> It is noted that the by-law of Mbombela also contains the exact same definition. The Johannesburg by-law provides a definition of an informal settlement in section 1: an "informal settlement" means the informal occupation of land by persons none of whom are the registered owner of such land, which persons are using the land for primarily residential purposes, with or without the consent of the registered owner and established outside of the provisions of this By-law or any other applicable planning

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<sup>133</sup> Section 1 of Engcobo and Kouga Municipal Planning By-law of 2015.



legislation.<sup>134</sup> The by-laws of the Dikgatlong, Sol Plaatjie, George, Tswelopele, Nongoma Ubuhlebezwe local municipalities contained no definitions of these areas in their respective by-laws.

In relation to the third sub-theme, it is pointed out that the majority of the by-laws do not contain provisions which provide for different application fees and liability for notice costs with respect to formal; informal and/or communal areas except for the Mogalakwena, Nongoma and Ubuhlebezwe municipalities. The latter municipalities make provision in their by-laws for the different application fees and liability for notice costs with respect to formal; informal and/or communal areas. For example, section 39 of the Mogalakwena by-law deals with application fees but section 39(6) empowers the municipality to grant exemptions. However, the municipality must determine criteria for exemptions which would then enable the municipality to differentiate the fees applicable between formal, informal or communal areas. It is submitted that both these provisions envisage different application fees with respect to formal, informal and communal areas.

Out of all the municipalities examined in this study, none of the municipalities have included provisions in their by-laws that provide for different methods of notification with respect to formal; informal and/or communal areas. In relation to the fifth sub-theme, the study also points out that none of the by-laws made mention of different enforcement and inspection with respect to formal; informal and/or communal areas.

When it comes to the sixth sub-theme which deals with the criteria for decision-making with respect to formal; informal and/or communal areas, the study reports that it is only the by-laws of the Nongoma, Ubuhlebezwe and the Madibeng that make provision for criteria for decision-making with respect to formal, informal and communal areas. For instance, section 30 (1) (xxiv) of the Madibeng by-law distinguishes traditional use applications relating to communal lands from other land use application. In the same vein, schedule 7 of both Nongoma and Ubuhlebezwe local municipality's by-law provides the criteria for decision-making in relation to informal or communal areas. For example, in terms of this criteria, it is provided that the persons who may make an application for the erection of a dwelling house on land declared by the municipality as land for the settlement of indigent households must be made by the head of the household, whereas, in other types of applications, the person who may make an application is the owner of the land that is subject to an application including an organ of state. Moreover, the application process with respect to informal or communal areas is different to other types of application in that the information which must form part of the application is totally different from what is required in other types of application. For example, the name and contact details of the applicant, the name of the household which the applicant represents, the name of the traditional area and of the isiGodi where the land is situated must be furnished to the municipality before it can make its decision on whether to declare land as land for the settlement in an unstructured manner by a traditional community or indigent households.

Similarly, the final sub-theme under informality which pertains to the incremental introduction of land use management systems in informal or unplanned areas is also addressed by a few municipalities, namely Johannesburg, Nongoma, Ubuhlebezwe and Rustenburg. It is reported that the by-laws of the above municipalities contain provisions which are aimed at introducing land use management systems in informal or unplanned areas. For example, section 6 (2) of the Johannesburg Metropolitan municipality provides for the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme. In the same vein, section 44 of both the Nongoma and Ubuhlebezwe local municipality's by-law provide for a framework within which the introduction of land use management systems in informal or unplanned areas may be introduced. Lastly, the by-law of the Rustenburg local municipality includes provisions that are aimed at creating a framework for

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<sup>134</sup> Section 1 City of Johannesburg planning by-law.

upgrading of informal areas. This framework will then assist the municipality to facilitate the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation and may include any settlement or area under traditional tenure.

In sum, while the by-laws of most municipalities do not contain provisions which addressed all the sub-themes of informality, the by-laws of a few municipalities substantially included provisions which are aimed at providing a framework for dealing with informality.

## **5. DO THE BY-LAWS INCLUDE ANY PROVISIONS AIMED AT REDUCING RED TAPE?**

In this section, the study will report on whether the by-laws make provision for aligned procedures or integrated authorisations. Secondly, the study will also explain whether the by-laws of the municipalities include provisions which commit the municipality to predetermined time frames for decision making. Lastly, in case a municipality fails to adhere to the prescribed time-frame within which it must render its decision, the study in this section also reports on whether the by-laws contain any provisions which are aimed at dealing with non-compliance with timeframes.

While the majority of the by-laws do not include provisions aimed at facilitating integrated authorisations except for Johannesburg, it is reported however, that a substantial number of municipalities included provisions in their by-laws which provide for aligned procedures. For example section 47 (3) of the Tswelopele by-law provides that, if a municipality and an organ of state elect to exercise their powers jointly, they may enter into a written agreement that provides a framework for the coordination of the procedural requirements for applications submitted in terms of the municipal bylaws and other legislation. Another example can be found under schedule 5 of the Nongoma by-law. Schedule 5 of the by-law deals with the joint publication of notice for an application for municipal planning approval and an application for environmental authorisation. More specifically, in terms of the schedule, it is provided that, an applicant may give notice of both an application for municipal planning approval and an application for environmental authorisation in the same notice. Lastly, the Johannesburg by-law contains provision which are aimed at facilitating both aligned procedures as well as integrated authorisations in section 3. The reason is because the section adopts the same terminology that is used under section 30 of SPLUMA.

In relation to whether the by-laws include provisions which are aimed at committing the municipalities to determine land use applications within a specified period. It is pointed out that the majority of the by-laws contain provisions which instruct the municipality to make its decisions concerning land use application within a specified time-frame except for Rustenburg. For example, section 37 of the Dikgatlong by-law stipulates that the MPT or the designated employee must decide on an application within 100 days from the date in which it is requested to do so.<sup>135</sup> The by-law of Mbombela also provides for a specific time-frame under section 92. Section 92 of the by-law states that when the power to take a decision is delegated to the Land Development Officer (LDO) or MPT, subject to the provisions in section 28(3) and no integrated process in terms of another law is being followed, the LDO or the MPT must decide on the application within 120 days of the closing date for the submission of comments or objections.<sup>136</sup> Similarly, section 41 of the Sol Plaatjie by-law provides that, if the power to take a decision in respect of an application is delegated to an Authorised Official and no integrated process in terms of another law is being followed, the Authorised Official must decide on the application within 120 days.<sup>137</sup> The Rustenburg local municipality's by-law does not

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<sup>135</sup> Section 37 Dikgatlong by-law

<sup>136</sup> Section 92 of Mbombela by-law

<sup>137</sup> Section 41 of Mbombela by-law

include any provision setting out the timeframes within which the municipality must take its decision when considering a land use application.

For the municipalities that have included provisions prescribing timeframes for decision-making in their by-laws, the study examined the by-laws of the municipalities to ascertain whether they contained any provisions setting out the consequences for non-compliance to timeframes. The majority of the municipalities examined in this study included provisions in their by-laws aimed at addressing non-compliance to specified time-frames except for three municipalities, namely Dikgatlong, Rustenburg and Mogalakwena. However, with respect to the rest of the municipalities, it is pointed out that their by-laws include provisions which are aimed at addressing non-compliance with the specified time-frames. For example, section 106 of the Engcobo by-law provides that, if no decision is made by the Municipal Planning Tribunal within the period required in terms of the Act, it is considered undue delay<sup>138</sup> for purposes of these By-Laws and the applicant or interested person may report the non-performance of the Municipal Planning Tribunal or Authorised Official to the municipal manager, who must report it to the municipal council and mayor.

On the other hand, if it occurs that a decision with respect to a land use application has not been considered and determined within the stipulated period, the applicant has recourse in the form of an appeal. The appeal process can only be utilised by the applicant only if he/she has submitted a land use application but which has not been determined within the prescribed period it must be decided on. For example, according to section 42 of the Sol Plaatjie by-law, an applicant may lodge an appeal to the Appeal Authority if the authorised employee or the MPT fails to decide on an application within the period referred.<sup>139</sup>

The overall conclusion in this theme is that 73% of the by-laws examined in this study included provisions aimed at facilitating aligned procedures, while it was the by-law of only one municipality which contained a provision that provided for both aligned procedures as well as integrated authorisation, namely City of Johannesburg's by-law. 93% of the by-laws examined included provisions in their by-laws which stipulate the period within which a land use decision must be taken. At the same time, 73% of the by-laws included provisions which specifically provide for consequences relating to non-compliance with prescribed time-frames.

## **6. DO THE BY-LAWS INCLUDE ANY PROVISIONS PROVIDING FOR CAPABILITY SOLUTIONS?**

In this section the study assesses whether the by-laws contain any provisions aimed at addressing capacity problems. In particular, the study will report on whether the by-laws include any provisions that make use of the mechanisms in SPLUMA to share municipal capacity by referring to the establishment of a Joint Municipal Planning Tribunal together with one or more local municipality or one District Municipal Planning Tribunal?

The study began its analysis of the by-laws with two municipalities in the Eastern Cape, namely Engcobo and Kouga. After examining both by-laws, it is reported that both by-laws contain provisions that make use of the mechanism in SPLUMA to share municipal capacity by referring to the establishment of Joint Municipal Planning Tribunal or one District Municipal Planning Tribunal. In terms of section 45 of the Engcobo municipality's by-law, provision is made for the establishment of a Joint Municipal Planning Tribunal and section 49 makes provision for the establishment of a District Municipal Planning Tribunal. Similarly, the by-law of Kouga provides the same in sections 45 and 49.

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<sup>138</sup> S 40 (9) SPLUMA.

<sup>139</sup> S 42 of Sol Plaatjie planning by-law..

Conversely, the by-laws of Dikgatlong, Sol Plaatjie, Mogalakwena and Mbombela as well as Johannesburg make no mention of the establishment of a Joint Municipal Planning Tribunal or the District Municipal Planning Tribunal. In KwaZulu-Natal however, it is pointed out that the by-laws of Nongoma and Ubuhlebezwe include provisions which provide for the mechanisms in SPLUMA to share municipal capacity. According to section 8 (1) in both the Nongoma and Ubuhlebezwe by-law states that the Municipal Council must establish either the Municipal Planning Tribunal or the Joint Municipal Planning Tribunal.

In relation to the municipalities representing the Free State in this study, namely Tswelopele and Mantsopa, the study can report that the by-law make use of the mechanism in SPLUMA to share capacity. For instance, section 77 (1) of both by-laws provides that the Municipality must establish a Tribunal for its municipal area; or by agreement with one or more municipalities establish a joint Tribunal or agree to the establishment of a district Tribunal by the District Municipality after the assessment which may be done as contemplated in regulation 7 of the Regulations in terms of SPLUMA.

As far as the Madibeng and George are concerned, the study can report that they both include provisions that provide for the mechanisms in SPLUMA to share municipal capacity by referring to the establishment of a Joint Municipal Planning Tribunal or District Municipal Planning Tribunal. For example, section 31(1) of the Madibeng by-law provides for the establishment of an MPT for the local municipal area while section 31(2) makes provision for the establishment of a joint Municipal Planning Tribunal or a District Municipal Planning Tribunal. In the same vein, section 70 (1) (b) of the George local municipality's by-law provides for the establishment of a Joint Municipal Planning Tribunal.

In sum, the study can report that 53% of the municipalities included provisions in their by-laws that make use of the mechanisms in SPLUMA to enable municipalities to share municipal capacity by referring to the establishment of a Joint Municipal Planning Tribunal or the District Municipal Planning Tribunal. In fact most of the by-laws refer specifically to the establishment of either the Joint Municipal Planning Tribunal or District Municipal Planning except for the by-law of the George local municipality which only makes provision for the establishment of a Joint Municipal Planning Tribunal.

## **7. CONCLUSION**

The aim of this chapter was to deliver the findings of the study pertaining to the examination of the by-laws in relation to the themes of this study. The study reported that 60% of the municipality's by-laws contained provisions which are aimed at facilitating a relationship between the by-law and provincial law. These include the municipalities from the Eastern Cape, KwaZulu-Natal, North West and the Western Cape.

In relation to the second theme, 93% of the municipalities made provision in their by-laws that give effect to the provisions of SPLUMA intending to strengthen the link between forward planning and land use management. The third theme focused on informality. In this regard, the study pointed out that most of the by-laws did not contain provisions that established a clear framework to deal with informality. However, the by-laws of municipalities such as the Nongoma, Ubuhlebezwe, Madibeng and Rustenburg contained provisions which are aimed at dealing with the issue of informality. In particular, these provisions do not just mention the issue of informality, they set out the framework in terms of which the issue of informality may be addressed.

As far as the fourth theme is concerned, the study reported that a total of 73% of the municipalities included provisions aimed at reducing red tape in their by-laws. In particular, the 73% comprised of municipalities that made provision in their by-laws for aligned procedures. It is only the Johannesburg

by-law which contained a provision that provided for both the aligned procedures and integrated authorisations. In relation to committing the municipality to predetermined timeframes for decision making, the study pointed out that 93% of the municipal by-laws examined in this study included provisions which declared the period within which a land use decision must be made. Lastly, the study examined the number of municipal by-laws which contained provisions setting out the consequences for non-compliance with timeframes. In this regard, the study explained that a total of 73% of the by-laws included provisions aimed at dealing with non-compliance with specified timeframes. Finally, when it came to the last theme which deals with capability solutions, the study pointed out that 53% of the municipalities included provisions in their by-laws which made use of the mechanisms in SPLUMA relating to the sharing of capacity through the establishment of either the Joint Municipal Planning Tribunal or District Municipal Planning Tribunal. In fact, the study reported that most of the by-laws refer specifically to the establishment of either the Joint Municipal Planning Tribunal or District Municipal Planning Tribunal except for the by-law of the George local municipality which only makes provision for the establishment of a Joint Municipal Planning Tribunal. In short, the study can report that 54% of the municipalities include provisions that deal with all the themes of this study. In other words, half of the municipalities examined in this study implement the provisions of SPLUMA dealing with the themes of this study.



## CHAPTER FIVE

### CONCLUSION: SUMMARY, FINDINGS AND RECOMMENDATIONS.

#### 1. INTRODUCTION

This concluding chapter has three objectives. First, it summarises the preceding chapters with the aim of elucidating the assertion that local government has undergone tremendous changes in the last two decades. Secondly, the chapter highlights the findings of the study in relation to the research questions it sought to answer. Lastly, the chapter concludes by putting forward its recommendations on some of the things which can be done going forward to ensure that the current planning system achieves its objectives.

#### 2. SUMMARY OF THE PREVIOUS CHAPTERS

The second chapter of this study discussed the emerging role of local government in planning. It did so by first tracing the history of local government before 1994. During this period, the study explained, local government was treated as a subservient institution which exercised delegated powers. Local government was afforded no form of recognition or powers to govern in its own right. In other words, local government was characterised as a subservient institution that enjoyed no powers except for those that were conferred by a competent legislative authority. Furthermore, the chapter also discussed the manner in which local government was used by the apartheid regime to entrench its segregationist vision.

Chapter two also explained the impact of the 1994 democratic elections on local government. It first highlighted the significant changes brought by the 1993 and thereafter the 1996 Constitution. Although the 1993 Constitution made history when it constitutionally recognised local government under chapter 10 for the first time, the 1996 Constitution went even further when it entrenched local government as a sphere of government with a set of powers which included the municipal planning power.

Chapter two also discussed the key reasons behind the adoption of the Development Facilitation Act of 1995 (DFA). The chapter pointed out that the DFA was intended to be a temporary measure in regulating planning. However, due to the inability of the national government to develop comprehensive planning legislation which would then replace the DFA and govern planning in South Africa, the DFA continued to regulate planning. It was not only the DFA that continued to remain in force. The old order town planning ordinances of the four provinces established under the apartheid regime, as well as national planning laws governing black areas also continued to apply as they contained detailed provisions regarding the establishment of town planning schemes. The concern with these ordinances was that they applied only in those territories that formed part of the old Cape, Natal, Transvaal, and the Orange Free State. They did not apply to the former independent homelands and self-governing territories which were governed by a different system of national planning legislation. It is against this context that the Development Facilitation Act continued to govern land use management in the country despite it being enacted as a temporary stop-gap.

Moreover, explained that the 2000 local government elections marked the final phase of the local government transition process. However, not everything was settled yet. The legislative framework for local government planning was not yet complete. The provincial ordinances continued regulating sectoral matters such as planning. Furthermore, the continuous application of the DFA in regulating planning, as well as the old order town planning ordinances including the apartheid laws which applied in the former homelands began to attract concern and criticism from many quarters. This was based on the ground that township establishment in the country took place in terms of the provincial

ordinances and the municipalities were also empowered by the old order ordinances to be in charge of that process. However, the DFA made provision for property developers to apply for permission from the provincial development tribunals to establish land development areas which would later turn out to be a township establishment. It is this practice that caused headaches for municipalities as they argued that this was an impermissible exercise of their powers to determine township establishment, a power that fell within the schedule 4B function of municipal planning.

Lastly, the chapter discussed the six important judgments of the Constitutional Court dealing with planning and concluded that the role of local government in planning was expanded by the judgments. For instance, the Constitutional Court pronounced that it is only the local sphere of government which has the authority to decide on rezoning and subdivision applications and not the provincial government.

The third chapter gave an overview of the Spatial Planning and Land Use Management Act (SPLUMA). It specifically examined what SPLUMA provides on the five themes so that the study can deal with the main question, namely whether municipalities are implementing SPLUMA. The first theme focused on the role of provincial legislation in SPLUMA. The chapter assessed the provisions of SPLUMA to determine whether the Act envisages a role for provincial legislation in regulating planning. The chapter explained that section 104 (b) (i) of the Constitution empowers each province to pass provincial planning laws. Provincial planning is a competence that falls under Schedule 5A of the Constitution. At the same time, section 155 (7) of the Constitution empowers provinces to regulate municipal planning. Likewise, the chapter noted that each province is accorded the exclusive legislative authority to regulate its own planning by enacting its own provincial planning legislation in terms of Schedule 5A of the Constitution. The first section in SPLUMA which the chapter discussed was section 10 (1) of SPLUMA. Section 10 (1) affirms the role of provincial legislation in regulating municipal planning when it declares that, provincial legislation which is consistent with SPLUMA may provide for matters contained in schedule 1 of SPLUMA as well as matters of provincial interest. The analysis of the provision indicated that SPLUMA envisages the role of provincial legislation under this new planning system.

Secondly, the chapter established that SPLUMA contains provisions which are aimed at strengthening the link between forward planning and land use management. For example, the chapter explained that SPLUMA requires the municipal council of a municipality to adopt a municipal spatial development framework (MSDF) for the municipality. This MSDF needs to be prepared as part of the municipality's integrated development plan in accordance with the provisions of the Local Government Municipal Systems Act. In this regard, the chapter mentioned that section 22 (1) provides that, a Municipal Planning Tribunal or any other authority required or mandated to make a land development decision in terms of SPLUMA or any other law relating to land development, may not make a decision which is inconsistent with the MSDF. However, an exception is provided for in section 22 (2) which provides that, subject to section 42 a Municipal Planning Tribunal or any other authority required or mandated to make a land development decision, may depart from the provisions of a municipal spatial development framework only if site-specific circumstances justify a departure from the provisions of such municipal spatial development framework.

Thirdly, the chapter provided that SPLUMA contains provisions aimed at creating a framework for dealing with informality. In the chapter it was found that SPLUMA provides a framework for the incremental upgrade of informal areas through the progressive introduction of administration, management and land tenure rights to areas situated outside existing planning legislation. For example, SPLUMA instructs the national, provincial spheres of government and each municipality to prepare a spatial development framework that includes informal areas such as disadvantaged areas, areas under traditional leadership, rural areas, informal settlements and slums. This would then enable the municipality to expedite the process of introducing the incremental upgrading of these informal

areas because they are areas that have already been identified and located in the MSDF of the municipality

In relation to the fourth theme, the study discussed the issue of red tape, particularly on how it relates to the aspect of multiple approvals, as well as the general burden of land use management procedures and concluded that SPLUMA intended to reduce red-tape through various mechanisms. First, section 30 (1) of SPLUMA which deals with the alignment of authorisations was pointed out as one of the provision which can assist in reducing red-tape in planning processes. Secondly, the chapter also explained how the provisions of SPLUMA which aim to commit municipalities to pre-determined timeframes when deciding land use applications will contribute in reducing red tape. Lastly, the chapter found that SPLUMA contains provisions which provide for an appeal mechanism in case where a land development application is not considered within a prescribed time.

The fifth theme which was discussed under chapter three relates to capability solutions. The chapter established that SPLUMA contains provisions that provide for capability solutions. The study pointed out that SPLUMA provides for mechanisms in terms of which municipalities could share capacity by establishing a Joint Municipal Planning Tribunal or District Municipal Planning.

### **3. FINDINGS**

The main findings of this study are captured in chapter four. The study commenced its examination of the by-laws with Dikgatlong and Sol Plaatjie municipality with the aim of ascertaining whether they included any provisions which required the by-law to work in conjunction with provincial legislation. The study found that the by-laws contained no provisions which made reference to provincial legislation. The Northern Cape province does have planning legislation which was promulgated before the arrival of SPLUMA. It was not clear whether the by-laws by not making reference to provincial law suggested that they will not operate in conformity with the provincial law or not. Another question was whether this means that planning in the Northern Cape will be regulated by only SPLUMA and the by-laws since provincial legislation is not mentioned in the by-laws?

Moving along, municipalities such as Mbombela, Johannesburg, Engcobo, Kouga, Ubuhlebezwe, Nongoma, Madibeng, Rustenburg and George, all included provisions in their by-laws which required the by-law to work in conjunction with a provincial law. Consequently, this meant that 60% of the by-laws examined in this study contained provisions which subjected the by-law to work in conjunction with provincial law.

In relation to the second theme, namely whether the by-laws include any provisions aimed at strengthening the link between spatial planning and land use management, over 93% of the by-laws contained provisions that sought to strengthen the link between spatial planning and land use management. In this regard, the municipalities demonstrated an intent to give effect to the provisions of SPLUMA that aim to strengthen the link between spatial planning and land use management.

With respect to the third theme which focused on informality. Most of the by-laws appeared to differentiate between formal, informal and communal areas. However, the study pointed out that the by-laws of Dikgatlong, Sol Plaatjie and George did not provide any differentiation amongst formal, informal or communal areas. The study noted that it would become a challenge for these municipalities to implement the provisions of SPLUMA dealing with informality, if their by-laws do not provide for such differentiations. It is without doubt that the issue of informality is a very serious one. It is an issue which directly reflects the legacy of apartheid insofar as the spatial design of cities and towns across the country is concerned. In an attempt to tackle this legacy of apartheid in the form of spatial injustice, SPLUMA provides a framework in terms of which local government may progressively address the issue of informality. It is understandable that it will take time for municipalities to be able to develop their own frameworks which they can use to address the issue of



informality. However, if municipalities intend to address the issue of informality, it is therefore expected that they would at least differentiate between formal, informal or communal areas.

With respect to sub-theme two, only seven municipalities provided definitions of what are informal and communal areas. For example, section 1 of Engcobo and Kouga by-law defined communal land.

In relation to sub-theme three, Mogalakwena, Ubuhlebezwe and Nongoma had included provisions in their by-laws for the different application fees and liability for notice costs with respect to formal; informal and/or communal areas. For example, section 39 of the Mogalakwena by-law makes provision for application fees, while section 39(6) empowers the municipality to grant exemptions. The municipality must then determine the criteria for exemptions which would then enable the municipality to differentiate the fees applicable between formal, informal or communal areas. Both provisions establish a framework in terms of which different application fees with respect to formal, informal and communal areas apply..

None of the by-laws included provisions that provide for different application fees and liability for notice costs with respect to formal, informal or communal areas. In the same vein, none of the by-laws contained provisions providing for different methods of notification with respect to formal, informal or communal areas. Similarly, in relation to the fifth sub-theme, none of the by-laws made mention of different enforcement and inspection with respect to formal; informal and/or communal areas.

It is only the by-laws of Nongoma, Ubuhlebezwe and Madibeng that make provision for criteria for decision-making with respect to formal, informal and communal areas. For instance, section 30 (1) (xxiv) of the Madibeng by-law distinguishes traditional use applications relating to communal lands from other land use application. The final sub-theme under informality which pertains to the incremental introduction of land use management systems in informal or unplanned areas is also addressed by a few municipalities, namely Johannesburg, Nongoma, Ubuhlebezwe and Rustenburg. The by-laws of the above municipalities contain provisions which are aimed at introducing land use management systems in informal or unplanned areas.

In the fourth theme, the study reported on whether the by-laws make provision for aligned procedures, integrated authorisations, timeframes, and enforcement of timeframes. In total 73% of the by-laws examined in this study included provisions aimed at facilitating aligned procedures, while it was the by-law of only one municipality which contained a provision that provided for both aligned procedures as well as integrated authorisations, namely City of Johannesburg's by-law. Therefore this may suggest that it is too early for municipalities to utilise the integrated authorisations mechanism. Furthermore, 93% of the municipalities examined in this study included provisions in their by-laws which stipulate the period within which a land use decision must be taken. Finally, 73% of the by-laws contained provisions which set out the consequences for non-compliance with specific timeframes. In sum, if the majority of the municipalities across the nine provinces would include such provisions aimed at dealing with red-tape, it is possible that a significant portion of red-tape may be reduced in planning processes. However, that all depends on the extent to which municipalities will continue to take up the opportunities presented by SPLUMA and include them in their by-laws.

In the last theme, 53% of the municipalities examined in this study included provisions in their by-laws that enable municipalities to share municipal capacity by referring to the establishment of a Joint Municipal Planning Tribunal or the District Municipal Planning Tribunal. Most of the by-laws refer specifically to the establishment of either the Joint Municipal Planning Tribunal or District Municipal Planning except for the by-law of the George local municipality which only makes provision for the establishment of a Joint Municipal Planning Tribunal. This may suggest that George does not do not necessarily see a role for districts in matters connected to land use management The inclusion of these provisions in the by-law will go a long way in assisting municipalities that lack capacity. These

provisions will enable municipalities to assist one another to share capacity in the future by either establishing the Joint Municipal Planning Tribunal or the District Municipal Planning Tribunal.

The similarity between some of the by-laws which were examined in this study is striking. These include the by-laws of Engcobo and Kouga representing the Eastern Cape in this study. Nongoma and Ubuhlebezwe representing the KwaZulu-Natal province, as well as Mantsopa and Tswelopele representing the Free State province in this study. The by-laws of the abovementioned municipalities from each province looked very similar. This might suggest one of two things. First, this might suggest that either the national or provincial government is assisting the municipalities in drafting these planning by-laws. The other possible reason is that the municipalities themselves are taking initiative in assisting one another in drafting their planning by-laws.

The study cannot state conclusively whether it is the national or provincial government which might be assisting the municipalities in drafting their planning by-laws in the provinces mentioned above. The study can however confirm that the Western Cape government is assisting municipalities in the Western Cape to develop planning by-laws. This assertion is based on the fact that the George municipality's by-law states that the by-law was adapted from the proposed standard draft by-law on Municipal Land Use Planning compiled by the Western Cape government. Therefore, it is clear that the provincial government of the Western Cape is involved and actually assists the municipalities in developing their planning by-laws.

#### **4. RECOMMENDATIONS**

The findings of this study under chapter four indicate that the municipalities are on the right track in terms of taking up the opportunities offered by SPLUMA. While there is still a lot which needs to be done in ensuring that the new planning system achieves its objectives, it is without doubt that local government will play a critical and important role in ensuring that the vision of SPLUMA translates into a reality. The study puts forward the following recommendations which may assist local government in driving spatial development through the implementation of the provisions of SPLUMA.

*a) By-laws may have to be adjusted when new provincial laws are introduced.*

Some of the by-laws examined in this study did not mention anything relating to whether provincial legislation may play a role in regulating municipal planning while other by-laws expressly acknowledged the role of provincial legislation in regulating municipal planning. As such, in those provinces where there is no provincial planning legislation or where provincial planning legislation is still being developed, the study recommends that the planning by-laws of municipalities may have to be adjusted when new provincial planning laws are introduced. The adjustment of these by-laws will assist in aligning the provincial laws and by-laws to work together toward a single goal which is to ensure the implementation of the provisions of SPLUMA.

*b) Provinces must develop provincial laws in consultation with municipalities.*

While it is the power of the provincial government to draft and develop its own planning laws, the study recommends that provinces must develop their provincial planning laws in consultation with municipalities. In other words, provinces must include municipalities in the drafting process to ensure that what is contained in the provincial law supplements what is in the by-laws. This will ensure that there is alignment between the requirements contained in the by-law and provincial law.

*c) Municipalities need to follow through on making MSDFs real.*

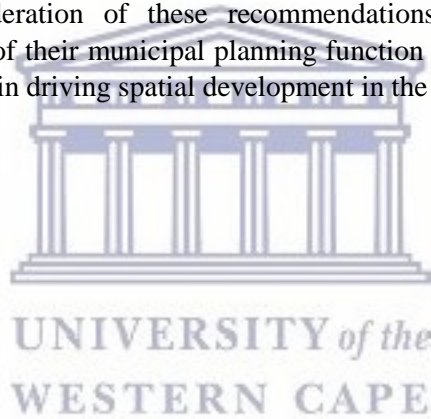
The MSDFs are crucial instruments which help guide the future development of the municipal area. They enable the municipality to identify areas where development can be undertaken. In other words, MSDFs are important instruments which the municipality uses to articulate the spatial vision of its

entire municipal area. Although these plans are very instrumental in the development of the municipal area, there has been little effort in ensuring that such plans are translated into reality. Therefore, the study recommends that municipalities need to put more effort in making MSDFs real and not just articulate ambitious MSDFs which are never realised in practice. The inclusion of the provisions in SPLUMA which deal with MSDFs in the by-laws may contribute significantly in making MSDFs real.

*d) Municipalities need to use their by-laws to deal with the challenges of informality,*

The issue of informality is a serious one throughout the country. As the sphere of government which is closest to the communities, local government is tasked to find innovative ways to deal with the challenges of informality. First, the study recommends that municipalities need to consider how they can use their planning by-laws to deal creatively with the challenges of informality. This can be done by first defining the forms of informality which are prevalent in the municipality's area. Furthermore, it is suggested that municipalities may also consider including provisions in their by-laws that aim to establish a framework in terms of which informality can be addressed. In this framework, the municipality can decide to treat applications differently by providing for different criteria and different procedures which will then apply to specific applications. For example, section 30 (1) (xxvi) of the Madibeng by-law distinguishes traditional use applications relating to communal lands from other land use application.

It is believed that the consideration of these recommendations will assist municipalities to progressively expand the scope of their municipal planning function and in doing so, it is hoped that local government can contribute in driving spatial development in the country.



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## **Annexure 1: Municipal Planning By-laws**

### **List of by-laws**

1. Ubuhlebezwe Local Municipality Spatial Planning and Land Use Management By-law
2. Nongoma Local Municipality Spatial Planning and Land Use Management By-Law
3. Engcobo Spatial Planning and Land Use Management By-Law
4. Kouga Spatial Planning and Land Use Management By-Law
5. Mantsopa Local Municipality Land Use Planning By-Law
6. Tswelopele Local Municipality Land Use Planning By-law
7. Sol Plaatjie Local Municipality Land Use Management By-Law
8. Dikgatlong Local Municipality Land Use Management By-law
9. George Local Municipality Land Use Planning By-law
10. Johannesburg Metropolitan Municipality Spatial Planning and Land Use Management By-law
11. Madibeng Local Municipality Land Use Planning By-Law
12. Mogalakwena Local Municipality Land Use Planning By-Law
13. Rustenburg Local Municipality Spatial Planning and Land Use Management By-Law
14. Mbombela Spatial Planning and Land Use Management By-law
15. Kareeberg Spatial Planning and Land Use Management By-Law



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