

Judicial Delineation of Local Government Spatial Planning Powers in South Africa

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Abstract

The indistinct division of spatial planning-related powers and functions in the Constitution of the Republic of South Africa, 1996, often leads to the overlap, conflict, and confusion of responsibilities between the national, provincial, and local spheres of government. Due to much uncertainty, municipal planning powers are a subject of massive intergovernmental contentions, coupled with an array of litigations. This article, therefore, examines the judicial delineation of local government spatial planning powers in South Africa. Through a critical analysis of relevant case law and legislation, particularly the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), this study explores the tensions between local government autonomy and the national and provincial regulatory frameworks pertinent to spatial planning powers. The research reveals that the judiciary plays a pivotal role in shaping spatial planning policy, often balancing competing interests and constitutional imperatives. Accordingly, judicial recourse has delineated spatial planning powers and asserted the autonomy of municipal planning. The findings highlight the need for legislative clarity on the division of spatial planning powers, the importance of an integrated and viable co-operative spatial governance, professional development initiatives, a more proactive approach in judicial interpretation of spatial planning laws, and meaningful community participation in spatial planning processes, to cumulatively ensure that local governments promote equitable development. This study contributes to the ongoing debate on local government powers and spatial planning in South Africa, offering valuable insights for policymakers, scholars, and practitioners.

Keywords: judicial review; local government; municipal planning; South Africa; spatial planning; SPLUMA



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Introduction

The Constitution of the Republic of South Africa, 1996,¹ has established a multi-level government system made of the national, provincial, and local spheres of government.² Each sphere of government is allocated legislative and executive powers within the functional areas listed in Schedule 4 and Schedule 5 of the Constitution. Part B of Schedule 4 of the Constitution enumerates “municipal planning” as a functional area allocated to local government. The Constitution further provides that “a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4.”³ Local government plays a critical role in spatial planning. Within the uniform regulatory frameworks set by the national and provincial governments,⁴ local government is responsible for the promulgation, development, and implementation of municipal planning by-laws and policies in its area of jurisdiction.

The unclear and contested division of planning-related powers and functions in the Constitution, as well as the overlap between development, provincial planning, and municipal planning, often leads to much uncertainty and several intergovernmental disputes. Indeed, “powers over municipal planning have become hotly contested in South African law” (Bronstein 2015). With spatial planning encompassing several functional areas administered by different spheres, the probability of overlap, conflict, and confusion is strong (Van Wyk 2012). As a result, there is an array of litigations.

The judicial delineation of local government spatial planning powers in South Africa has been a contentious issue, with various court decisions shaping the understanding of these powers. Scholars such as Humby (2015), De Visser (2016), and Mudau (2020) argue that the court’s decisions in cases like *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*,⁵ *Maccsand (Pty) Ltd v City of Cape Town and Others*,⁶ and *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others*,⁷ have significantly influenced the interpretation of spatial planning powers. These decisions have clarified the roles and responsibilities of national, provincial, and local governments in spatial planning, emphasising the importance of co-operative governance.

However, researchers like Van Wyk (2012) and Bronstein (2015) contend that judicial decisions have also created uncertainty and conflicts around spatial planning powers. For instance, *City of Johannesburg Metropolitan Municipality v Gauteng Development*

1 Hereafter referred to as the “Constitution”.

2 *ibid* s 40(1).

3 *ibid* s 156(1)(a).

4 *ibid* s 155(7).

5 *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* (SCA) [2012] ZASCA 116.

6 *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) para 42.

7 *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others* [2021] 4 All SA 69 (WCC).

*Tribunal and Others*⁸ highlighted the tensions between local government autonomy and national and provincial regulatory frameworks. Furthermore, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) has been subject to varying interpretations, leading to inconsistent application across jurisdictions. This ambiguity underscores the need for further research on the judicial delineation of local government spatial planning powers to promote effective governance and sustainable development.

From this backdrop, this article critically examines the extent to which judicial decisions have clarified, shaped, or complicated local government spatial planning powers in South Africa. It also provides recommendations for reform or improvement. Included in the article, are some of the key contestations over municipal planning powers. Various important features of court judgements that made attempts to clear much of these uncertainties are analysed to delineate the breadth of local government's spatial planning roles, powers, functions, and responsibilities. The article uses doctrinal legal research which is crucial when selecting key court judgments on local government and spatial planning powers. In the absence of a clear definition of responsibilities or distinction of competencies to legislate, "legally relevant conflict is bound to arise at some point for the courts to resolve" (Du Plessis 2018). This type of methodology helps to identify and analyse the main legal principles and precedents that shape the relationship between local government and spatial planning. The article is organised eightfold. Firstly, the introductory section offers the background to the key issues of the article. Secondly, spatial planning and related key concepts are defined. Thirdly, the evolution of municipal spatial planning powers is described. Fourthly, the constitutional framework for municipal spatial planning powers is outlined. The fifth section focuses on how the courts delineate spatial planning powers and entrench municipal autonomy over the planning functional competence. In the sixth section, the article unpacks how the SPLUMA, as the primary legal framework for spatial planning and land use management in South Africa, has allocated spatial planning powers, functions, responsibilities, and roles, to local government. The seventh and finally eighth sections provide the conclusion and recommendations, respectively. This study contributes to the ongoing debate on local government powers and spatial planning in South Africa, offering valuable insights for policymakers, scholars, and practitioners.

Defining Spatial Planning and Related Key Concepts

Spatial planning "anchors national visions, goals, programmes, policies and plans to human settlements of varying sizes at different spatial scales" (Acheampong 2019, 12). It is a vital instrument for creating sustainable frameworks that integrate various sectors such as housing, transport, industry, and energy. Spatial planning therefore aims:

to create a more rational territorial organization of land uses; to balance demands for development with the need to protect the environment; to achieve social and economic

⁸ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) para 53.

objectives; to coordinate and improve the impacts of other sectoral policies on land use; to achieve a more even distribution of economic development within a given territory than would otherwise be created by market forces. (Yoshida 2020)

Land is the basis of the planning system (Kivell 2003, 7). In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*,⁹ Yacoob J, delivering a minority judgement by the Constitutional Court, stated: “Planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land.”¹⁰ The process of spatial planning organises and designs the physical environment in a manner that is economically, socially, and environmentally sustainable (Economic Commission for Europe 2008). It involves the development of policies and strategies that guide the use of land, resources, and infrastructure within a geographic area or jurisdiction (Weber et al. 2016). The goal is to promote the wellbeing of all residents and to ensure a high quality of life. Spatial planning is closely related to development, which, as Tabane et al. (2021, 78–79) states “shapes the urban fabric in terms of organising land-uses, responsible growth of urban spaces, enabling accessibility through various transportation modes, [and enhancing] adequate human settlements which are resilient to natural disasters and conducive to human quality of life.”

According to Li et al. (2022, 1), it is extremely difficult to accurately assess the success of spatial planning. Spatial planning typically involves five steps: (1) analysis, (2) visioning, (3) policy development, (4) implementation, and (5) monitoring and evaluation. Several components and perspectives of cities may be spatially analysed (Weber et al. 2016). The process in the first step is about collecting data for the purpose of analysing the prevailing conditions in the area because various factors may impact spatial development (Tabane et al. 2021). Common factors encompass population trends, transportation networks, and environmental conditions. This step embodies conducting assessments of current housing stock, demographic and economic trends, and the identification of gaps in housing supply and demand.

The second step is based on the outcomes of the analysis: the spatial visualisation of a specific area or jurisdiction (De Visser and Poswa 2019). This step pronounces a vision for future developments. It refers to “the ability to ‘see’, inspect, and reflect on spatial objects, images, relationships and transformations” (Battista 2007, 843). The vision sets the goals and priorities for land use, regional equity, housing development, transportation, environmental sustainability, and other aspects of spatial development (Weber et al. 2016). The third step concerns the development of policies and strategies that guide the achievement of the vision for the area. For instance, based on the results of the housing needs assessment, a local government may develop zoning and land use regulations to guide the location and design of housing (Battista 2007; Weber et al. 2016). The process includes developing transportation plans, environmental

⁹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) 384D.

¹⁰ *ibid* para 30.

regulations, and other policies that support sustainable spatial development (Rubin 2008).

Once policies and strategies are in place, the fourth step is to implement them through a variety of tools, including land use regulations, and other mechanisms (Li et al. 2022). Finally, the effectiveness of spatial planning policies and strategies is monitored and evaluated to ensure that they are achieving their intended goals and to identify areas where improvements can be made. Overall, spatial planning is an important tool for a collaborative approach that integrates physical, social, and economic considerations into the planning process. In the South African context, spatial planning is based on prescriptions outlined in Spatial Development Frameworks (SDFs) adopted at local, regional, provincial, or national levels (De Visser and Poswa 2019).

Land use involves “the control of land-use through planning policies, regulations and enforcement; the implementation of construction planning through granting of permits; and the adjudication of land use conflicts” (Department of Rural Development and Land Reform 2017, 26). It is the result of the decision-making process that determines the allocation and management of land, and it has a significant impact on the socio-economic well-being of residents. Land use management refers to the officially recognised systems that determine and regulates the management of land use as well as the granting of individual rights to use the land or legal entities with plans to actualise land development. As a sub-component of the broader concept of land management, land use management is premised on five dimensions: (1) land accessibility and acquisition; (2) legal security of tenure conferred on individuals, households, and communities; (3) the regulation of land use; (4) the systems of land development; and (5) the trading of land (Booth 2009, 154; Rubin 2008, 3). About land use planning, Van Wyk (2010, 222) expounds that:

Plans can either be policy plans or regulatory plans. Policy plans include integrated development plans, structure plans and spatial development frameworks while regulatory plans include zoning schemes, land use management plans or town planning schemes. [The planning function includes] a determination of the size of erven in certain areas, the determination of building restrictions and the imposition of height restrictions.

The process of land use planning is given effect through the granting of zoning rights or decisions on various types of land use applications. A zone is “a defined category of land use which is shown on the zoning map of a land use scheme” (SPLUMA sec 1). Zoning is a land use planning tool used by local governments to regulate the use of land in a particular area. It is a process of dividing land into different zones, each with specific regulations that govern the types of activities that are allowed in that zone. It is typically used to control the location and intensity of different land uses. The land use schemes have different types of zones and reservations (Forbes, n.d.). Included are residential, commercial, industrial, agricultural, recreational, institutional, administration, open space, educational, and special zones. In most societies, the

classification of land use has three categories: urban development; urban regeneration areas; and urban expansion from unbuilt land (UN-HABITAT 2022).

Other zones are specifically not used for urban development, including agricultural lands that are crucial for food and water security, urban cultural-heritage protection zones (Lopes et al. 2019), and urban buffer zones to protect sensitive ecosystems and natural environments such as forests, wetlands, etc. (Lv et al. 2022). In all forms of land use, residential zones (for housing) have the largest impact on urban land transformation (Turok 2016). Public institutions, individual firms, and households influence urban land use in a market economy concerning housing, shopping, jobs, and many other urban activities. “Each of these requires land and the activity which can outbid all others will acquire the site” (Kivell 2003, 14-15).

A major distinction between spatial planning and land use management is “that the latter grants actual land-use rights, while the former does not” (De Visser and Poswa 2019, 2). The contents and object of local government planning tend to refer to planning in relation to land use (Mabin 2002). In South Africa, spatial planning entails tools or instruments used to determine specific types of land uses (Wüst 2022). These tools include Integrated Development Plans (IDPs), SDFs, and land use schemes.

The Evolution of Municipal Spatial Planning

In colonial and apartheid South Africa, the division of land was based on race which permeated the planning system (Van Wyk 2012). As a result, this led to the development of fragmented parallel planning systems: one for the black population and the other for the white population. The Union of South Africa Act of 1909, passed by the British Parliament, merged the British colonies of the Cape of Good Hope, Natal, Orange Free State, and Transvaal, and formed the Union of South Africa. These four regional territories were established as provinces that were conferred with the delegated regulatory powers to regulate “town and regional planning” (Steytler and De Visser 2007). Apart from enacting provincial planning laws, provinces also administered and took planning decisions. Throughout the periods of the Constitutions of 1961 and 1983, these legislative assemblies promulgated key ordinances: the Town Planning Ordinance 27 of 1949 (Natal); the Townships Ordinance 9 of 1969 (Orange Free State); the Land Use Planning Ordinance 15 of 1985 (Cape of Good Hope); and the Town Planning and Township Ordinance 15 of 1986 (Transvaal). Local government was an implementing agent of provincial planning laws (Steytler and De Visser 2013),¹¹ seeking to widen spatially and preserve racial segregation and fragmentation within towns and cities (Berrisford 2011). Consequently, they entrenched spatial inequalities based on racially skewed spatial planning laws.

¹¹ *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) para 40.

Spatial planning laws and practices determine the feasibility of integrated urban development in towns and cities (Pieterse 2006). The integration process is concerned with physical or geographical change, either through preventing change and preserving the status quo, or inducing change and bringing about improvements (Watson 2002). To this end, one of the vital facets of spatial transformation in post-apartheid South Africa which was steered by the democratisation process was the deracialisation of local government (Powell 2012).

With the advent of constitutional democracy in 1994, the implications of spatial inequalities that were anchored in race and class during colonialism and apartheid periods had to be redressed. Local government was given the task of leading spatial transformation at the grassroots level (De Visser and Poswa 2019). The Constitution abolished the provincial monopoly over planning authority and signalled the empowerment of local authorities by allocating them original planning powers (De Visser 2016). Every law and executive action are subject to judicial review for adherence to the Constitution. The Constitution sets the foundation for overhauling the past racist spatial planning and land use laws and practices (Van Wyk 2015). For a long period, a considerable number of spatial planning and land use management laws, policies, and practices were misaligned with the transformative spirit of the Constitution (Venter et al. 2020).

The planning system in South Africa has witnessed significant transformations as it espouses the notions of democracy, development, and equality (Coetzee 2012). The new planning system recognises and protects everyone's right to equality and dignity in the spatial planning process (Oranje 2014; SPLUMA Preamble). While the post-apartheid planning system pursued the drive to facilitate growth and development, the nature of the processes did not take place as required by the spatial planning laws and policy. As a result, certain areas do not observe the desirable restructurings and changes (Coetzee 2012). For instance, the location and/or design of housing in marginalised, poor, and mostly black areas still show little transformation in spatial form and infrastructural quality, thus failing to provide beneficiaries of government subsidised housing developments with the opportunities to lead a high-quality urban life.

Constitutional Framework

Under the 1996 Constitution, the establishment and composition of municipalities drastically reformed their legal, institutional, and structural makeup (Bronstein 2013). The Constitution empowers municipalities to promulgate municipal by-laws that make provisions for municipal planning (De Visser 2015). The competency of municipal planning entails formulating and implementing a local IDP, incorporating local land use planning, transport planning, infrastructure planning, and the promotion of integrated local economic development (Steytler et al. 2000). As pointed out by De Visser, "municipal planning" is one of the most critical local government powers (De Visser 2019). Municipalities are conferred with the power to control and manage the use of

land, which is commonly referred to as “town planning” (Berrisford 2011), as well as the power to administer land, which is the power to regulate forms of land tenure and ownership.¹²

The Constitution lists five key constitutional powers that directly concern land use and have a significant impact on it. These powers are municipal planning, provincial planning, regional planning and development, urban and rural development, and environment. First, as it appears in Part B of Schedule 4 of the Constitution, municipalities are allocated the functional area of municipal planning. This competency entails the local government’s authority to legislate and administer municipal planning while the national and provincial governments may exercise only limited oversight powers relating to municipal planning.¹³ Secondly, the functional area of provincial planning is an exclusive provincial legislative competence.¹⁴ This means provincial governments have the power to legislate and administer provincial planning.

Thirdly, the power for urban and rural development is a concurrent competency of both the national and provincial governments.¹⁵ Both spheres of government may legislate and administer urban and rural development. The courts must resolve any conflict that may arise between national and provincial legislations.¹⁶ Fourthly, the authority for regional planning and development is also shared by national and provincial governments.¹⁷ Finally, the power for “environment” is also allocated to both the national and provincial governments (n 17). Residual matters, not mentioned in either schedule, are reserved for the national government. “This constitutional division of planning powers was laid over the complex web of national planning laws and provincial planning ordinances that had been adopted under apartheid” (De Visser and Poswa 2019, 6).

Therefore, the Constitution confers planning on all three spheres of government, thus creating an overlap between planning powers and functions (Van Wyk 2012, 245). As noted by the Constitutional Court in the *Gauteng Development Tribunal* (n 8), “it is difficult to conceive any development that can take place without planning”; the complexity in “the division of powers and functions causes uncertainty and complicates an understanding of the different aspects of planning law.”¹⁸ According to Van Wyk (2012, 288), the “boundaries between … [these] … functional areas are opaque, their precise content is not readily apparent, and overlaps, conflicts and uncertainty may occur.”

12 SPLUMA 16 of 2013 s 11(3)(a).

13 Constitution (n 1) ss 155(6) and (7).

14 Constitution sec 104(1)(b)(ii); *Swartland Municipality v Louw* 2010 5 SA 314 (WCC) para 29.

15 Constitution Part A of Schedule 4.

16 *ibid* s 146.

17 *ibid* Part A of Schedule 4.

18 *Gauteng Development Tribunal* (CC) para 54.

The Constitution merely lists the functional areas without any detailed definitions of each functional area. Christmas and De Visser (2009, 110) argued that “this lack of clarity has often resulted in duplication of duties, confusion, inefficiencies, and arguably even deterioration in the delivery of services to communities.” Concerning the allocation of spatial planning powers in multi-level systems of government, the Economic Commission for Europe (n.d., 11) advises that there is a need to avoid a rigid allocation of competencies between different levels of government because, in practice, the interconnectedness of decisions means that competencies will inevitably be shared between them. Ultimately, the overregulation of local government planning laws oftentimes exacerbates the contestation of powers and functions in spatial development plans and land-use management systems.

The Constitution lists several functional areas of local government that relate to different types of land use activities and bear significant impacts on the enjoyment of urban life. This includes local amenities, beaches and amusement facilities, childcare facilities, firefighting services, local sports facilities, local tourism, markets, municipal airports, municipal health services, municipal parks and recreation, municipal roads, municipal public transport, public places, pounds, street lighting, and traffic and parking.¹⁹

Judicial Delineation of Spatial Planning Powers

The so-called “wall-to-wall” municipalities arose from section 151(1) of the Constitution which requires that municipalities must be established for the whole of the territory of the country. This means, that every part or land of the country falls within the jurisdiction of a municipality and that all municipalities share borders to cover the entire breadth of the South African territory. The establishment of wall-to-wall municipalities has virtual implications for spatial planning and land developments, prompting the Supreme Court of Appeal, in *Lagoonbay Lifestyle Estate*,²⁰ to point out that: “A use right in relation to land is a right to utilise that land in accordance with a category of directions setting out the purpose for which the land may be used. The authority to regulate the use of land within a municipal area is conferred upon a municipality, whilst the authority to regulate the use of land within a particular region is a provincial competence.”

Hence, Van Wyk (2012, 314) alludes that “to resolve the remaining uncertainties will, invariably, be facilitated by the courts, in their interpretation of the relevant constitutional provisions.” Several cases illuminate how courts have interpreted and asserted municipal autonomy in relation to spatial planning. The Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town and Others*, held that “the control and regulation of the use of all land” falls under municipal planning, a functional area

19 Constitution (n 1) Parts B Schedules 4 and 5.

20 *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* (320/12) [2013] ZASCA 13 para 8.

constitutionally allocated to the local sphere of government,²¹ which includes the zoning of land and the establishment of townships. A township means “any land laid out or divided into or developed as sites for residential, business or industrial purposes.”²²

The prefix “municipal” restricts it to municipal affairs. In *Gauteng Development Tribunal and Others*, Jafta J held that “‘planning’ in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land.”²³

Having established that the zoning of land and the establishment of townships fall under municipal planning,²⁴ the Constitutional Court also decided that “the scope of the functional area of ‘urban and rural development’ … is not broad enough to include powers forming part of “municipal planning.”²⁵ On the other side, usurping the power of municipalities in managing “municipal planning” amounts to intrusion into the autonomous status of local government. Nugent J also stated that the functional area of urban development is a concurrent legislative competence of national and provincial governments, but the authority to micro-manage the use of land for any development is reserved for municipalities.²⁶

In *Gauteng Development Tribunal* (SCA), before the Supreme Court of Appeal, Nugent J stated that: “The existence of parallel authority in the hands of two different bodies, with its potential for the two bodies to speak with different voices on the same subject matter, cannot but be disruptive to orderly planning and development within a municipal area.”²⁷ Subsequently, in the same matter, the Constitutional Court held that: “Different planning responsibilities are conferred on each of the three spheres of government in accordance with what is appropriate to each sphere. To reduce the term to its bare minimum, planning comprises the control and regulation of the use of land” (n 8). In this matter, the local government’s right to exercise executive and administrative authority over municipal planning was enforced by the Court, hence, affirming the local government’s autonomy/executive authority over the administration of the functional area (n 27). In this matter, Jafta J reiterated that the constitutional allocation of functional areas remains distinct, with concurrent competencies of “regional planning and development” and “rural and urban development” assigned to both the national and provincial spheres of government; “provincial planning” is exclusively allocated to the provincial government; and “municipal planning” directly devolved to the local

21 *Maccsand* (n 6) para 42.

22 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) para 8.

23 *Gauteng Development Tribunal* (CC) (n 8) para 57.

24 *ibid.*

25 *ibid* para 13.

26 *Gauteng Development Tribunal* (SCA) (n 22) para 41.

27 *ibid* para 1.

government.²⁸ However, the attempts of Jafta J to provide a distinction are regarded as “confusing, because the contents of these functional areas overlap” (Van Wyk 2012, 291).

The subject of contention was the constitutionality of chapters 5 and 6 of the Development Facilitation Act 67 of 1995 (DFA) which empowered the provincial development tribunals to determine applications for the rezoning of land and the establishment of townships. Provinces administered and took planning decisions in accordance with the DFA and ordinance procedures (Van Wyk 2010). As a result, this led to parallel provincial and municipal planning processes. To developers, chapters 5 and 6 of the DFA had less cumbersome application processes before tribunals in contrast to the lengthy municipal route. The City of Johannesburg Metropolitan Municipality disputed that the empowerment of the Gauteng Development Tribunal to exercise these powers within the municipal area of the city was constitutionally invalid. The Court declared the DFA as unconstitutional for empowering provincial tribunals to grant applications for rezoning land and establishing townships. To correct the defects, Parliament was ordered to enact new legislation.²⁹

In *Maccsand*, as adjudicated by the Supreme Court of Appeal, it was also noted that the “division of powers envisaged by the Constitution … would have the effect of eradicating a municipality's planning function whenever a national competence impacted on land use.”³⁰ This case established a preliminary legal view requiring mining companies to consider local land use regulations despite holding mining rights as the matter reached the Constitutional Court. The core question was whether a mining right trumps the need for local land use planning permission. The Constitutional Court in *Maccsand* clarified a tricky situation arising from the interplay in the mining sector of three pieces of legislation: the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), the National Environmental Management Act 107 of 1998 (NEMA), and the Land Use Planning Ordinance 15 of 1985 (LUPO). Provincial governments were empowered by chapter 2 of the LUPO to make scheme regulations that determined land use by the zoning applicable to the land. The primary objective of scheme regulations is to control zoning. Thus, a landowner was required to apply to the municipality for rezoning if the purpose of land use was not permitted in the zoning scheme or regulations. In addition, permits were required in terms of the NEMA.³¹ Nonetheless, *Maccsand*, a private party, and the Minister for Mineral Resources, a state party, argued that the LUPO, which required rezoning, does not apply to land used for mining. The Constitutional Court rejected this argument and held that the national law and local government law served different purposes which fell within the competencies of the local and the national spheres of government. Each law had different objectives and did not purport to serve the purpose of the other. Thus, each sphere of government

28 *Gauteng Development Tribunal* (SCA) (n 22) paras 54–55.

29 *Gauteng Development Tribunal* (CC) (n 8) para 100.

30 *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) para 7.

31 NEMA 107 of 1998 s 24(2).

exercises constitutionally allocated powers while regulated by the relevant legislation. In addition, with all the Constitutional Court Justices concurring, Jafta J, in *Maccsand*, summed up the solution for intergovernmental disputes that may arise from overlapping powers as follows:

The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.³²

The Constitution allocates different spheres of government with specific responsibilities. The national government manages mineral resources, while local governments regulate land use planning. These powers can co-exist. Obtaining a mining right does not automatically grant permission to mine in any location. *Maccsand* still needed to comply with the Municipality's land use planning requirements for the specific area zoned for residential purposes. The impact of this case is that it has clarified the relationship between national mineral rights and local land use planning in South Africa. It established that mining companies must adhere to both national mining regulations and relevant local zoning laws. National or provincial legislation that purports to confer those powers upon a body other than a municipality will be constitutionally invalid (n 34). Given the persistent contestations over municipal planning powers between different spheres of government, the jurisprudence on "municipal planning" adds to a viable co-operative government and intergovernmental relations (Humby 2015).³³

Additionally, a municipality may make and administer by-laws for the effective administration of the matters it has the right to administer,³⁴ including municipal planning. Regardless of the cumbersome nature of dealing with all municipal planning decisions, including zoning and subdivision, this function rightly belongs to municipalities. Similarly, in *Lagoonbay Lifestyle Estate*,³⁵ the Supreme Court of Appeal ruled in favour of the municipality and stated that it is the competent authority to consider and determine all applications for rezoning and subdivision in respect of proposed developments.

Hence, the interpretation of the term "urban and rural development" does not include the power to approve applications for the rezoning of land and the establishment of

32 *Maccsand* (n 6) para 47.

33 *Minister of Local Government, Western Cape v The Habitat Council (City of Johannesburg Metropolitan Municipality Amicus Curiae)* 2014 5 BCLR 591 (CC) (2014).

34 Constitution (n 1) s 156 (2).

35 *Lagoonbay Lifestyle Estate* (n 20) para 12.

townships. Such an interpretation would infringe on the principles of co-operative government which requires that all spheres of government must respect the constitutional powers and functions of the other spheres and must not assume any functions or powers not conferred on them by the Constitution or encroach on the functional integrity of the other spheres.³⁶ Nugent J further elaborates that the “establishment of financing schemes for development, the creation of bodies to undertake housing schemes or to build urban infrastructure, the setting of development standards” and so forth, are applied by municipalities (n 38).

In the *Gauteng Development Tribunal*, the Constitutional Court stated that provinces cannot “exercise the executive powers of municipalities outside the purview of section 139 of the Constitution.”³⁷ The national and provincial governments may therefore regulate how municipalities exercise their executive authority about municipal planning. The integration and coordination of land use between the provincial and local governments do not confer one of them with the power to usurp the powers of the other.

The *Minister of Local Government, Western Cape v The Habitat Council (City of Johannesburg Metropolitan Municipality Amicus Curiae)*³⁸ was a landmark decision by the Constitutional Court concerning the division of powers between provincial and local governments regarding planning decisions. The matter arose from two planning decisions. Firstly, when the Municipality failed to timeously process an application for residential development, the developer appealed to the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape (Provincial Minister) in terms of section 44(1)(d) of LUPO. “The Provincial Minister upheld the appeal, granting planning approval and permitting the property’s rezoning and subdivision in terms of sections 16 and 25 of LUPO.”³⁹

In the second matter, owing to the pressure of the Habitat Council, the Municipality rejected a development proposal on a historical site due to heritage concerns. However, subject to section 44 of the LUPO, the Provincial Minister overturned the Municipality’s decision and approved the development. The Habitat Council and the City of Cape Town challenged the Minister’s decision in court. Hence, the case centred on the constitutionality of section 44 of LUPO, which granted the provincial governments the power to hear appeals from local municipalities’ planning decisions and replace them with their own decisions. The Constitutional Court unanimously declared section 44 of LUPO as unconstitutional and invalid.⁴⁰ The Court further states that: “All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within

36 *Gauteng Development Tribunal* (SCA) (n 22) para 58. See also Constitution (n 1) ss 41(2)(e), (f), and (g).

37 *Gauteng Development Tribunal* (SCA) (n 22) para 65.

38 *Minister of Local Government, Western Cape v The Habitat Council (City of Johannesburg Metropolitan Municipality Amicus Curiae)* 2014 5 BCLR 591 (CC) (2014).

39 *ibid* para 2.

40 *ibid* paras 15 and 31.

the competence of municipalities.”⁴¹ Provincial and national governments may have extensive planning power decisions. However, their powers do not include the authority to veto municipal zoning and subdivision decisions, or subject them to appeal.

The Constitution has assigned the functional area of municipal planning to local governments. Section 44 of LUPO infringed local government’s autonomy regarding planning powers and has violated the constitutional and legal principles of co-operative government and intergovernmental relations. In addition, the provincial government already had other mechanisms (e.g., provincial planning frameworks) to guide and oversee local planning decisions. This case reaffirmed the power of local governments regarding spatial planning decisions within their jurisdictions. It emphasised the importance of respecting the division of powers enshrined in the Constitution. The Court also held that “the Province is obliged to use its constitutional powers, which are not insubstantial, to assist municipalities to make planning decisions properly.”⁴² This decision has implications for similar provincial legislation across the country regarding spatial planning and local government autonomy.

Unpacking the Spatial Planning and Land Use Management Act (SPLUMA)

SPLUMA was passed in 2013 in the aftermath of the Constitutional Court judgment that declared the DFA unconstitutional.⁴³ The introduction of SPLUMA has drastically altered the legal framework for spatial planning and land use management in South Africa. Accordingly, SPLUMA has corrected the deficiencies in legal and policy frameworks as it prioritises the achievement of equitable access to infrastructure, a national priority from early post-apartheid.⁴⁴

SPLUMA is South Africa’s primary legislation that makes provision for the role, powers, functions, and responsibilities of local government pertinent to spatial planning. It seeks to restructure South Africa’s cities, towns, and settlements, consistent with the constitutional imperatives for redressing the past spatial injustices while establishing a just society that can realise spatial equity. Through aligning integrated spatial planning, integrated human settlements, urban resilience, local economic development, and sustainable local development, SPLUMA has the potential to forge and sustain an equitable share of opportunities and access to services for all as well as the ability to promote physical, social, and economic inclusivity. The Western Cape Court in *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others* recognises that the Preamble of SPLUMA “is important in setting the legislative and socio-economic background which the act seeks to remedy.”⁴⁵ The Preamble of

41 ibid para 19.

42 ibid para 27.

43 *Gauteng Development Tribunal (CC)* (n 8) para 99.

44 *Lagoonbay Lifestyle Estate* (n 20) para 8.

45 *Adonisi* (n 7) para 81.

SPLUMA indicates that the promulgation of the Act is to give effect to several constitutional rights, including a protected environment,⁴⁶ equitable access to land,⁴⁷ access to adequate housing,⁴⁸ and the right to sufficient food and water.⁴⁹

Within the reformed planning framework, SPLUMA empowers municipalities to be involved in decision-making authority on the control and regulation of land use (De Visser and Poswa 2019, 8). The Preamble of SPLUMA also notes that “municipal planning is primarily the executive function of the local spheres of government.”⁵⁰ The Act provides a uniform, recognisable, effective, and comprehensive framework for the country.⁵¹ The Act prescribes that South Africa’s spatial planning system consists of four components: (a) the separate and distinct spatial development frameworks of the three spheres of government; (b) the development principles, norms, and standards that guide spatial planning, land use management and land development; (c) the management and facilitation of land use based on the mechanism of land use schemes; and (d) the procedures and processes for preparing, submitting and considering land development applications and related processes.⁵²

The Western Cape High Court in *Adonisi* held that SPLUMA seeks to rationalise the erstwhile fragmented legislative planning and land use management system.⁵³ At the same time, the Court views SPLUMA as a solution to transform racially and spatially divided settlement patterns while promoting socio-economic benefits, consistent with the rights protected under section 25 and section 26 of the Constitution (note 55). Section 3(f) of the SPLUMA stipulates that one of the Act’s objectives is to “redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems.” The primary aim of this provision is unquestionably equivalent to the promotion of spatial equity. Other objects of SPLUMA include ensuring a spatial planning and land use management system that promotes social and economic inclusion, provisions for sustainable and efficient use of land, and provision of co-operative government and intergovernmental relations.⁵⁴

SPLUMA facilitates critical areas of land use management from provincial governments to local governments. Local government seems to have a clearly defined role in SPLUMA. The Act confers local autonomy to a municipal council to adopt an SDF for the municipality.⁵⁵ Notwithstanding the above, De Visser and Poswa (2017) argue that SPLUMA lacks a detailed outline of how municipalities can effectively

46 Constitution (n 1) s 24(a).

47 *ibid* s 25(6).

48 *ibid* s 26.

49 *ibid* s 27(1)(b).

50 SPLUMA 16 of 2013 Preamble.

51 *ibid* s 3(a).

52 *ibid* s 4.

53 *Adonisi* (n 7) para 82.

54 SPLUMA 16 of 2013 s 3.

55 *ibid* s 20.

execute their municipal planning functions. In turn, provinces are constitutionally empowered to promulgate provincial planning laws that regulate municipal planning within their respective jurisdictions and regulate planning at the provincial level.

Municipal planning by-laws can establish zoning, including simplified processes consistent with, and subject to, provincial and SPLUMA frameworks. To avoid duplication where possible, there must be consultation with other land development authorities to coordinate activities.⁵⁶ It must be noted that each sphere of government has its independent authority. SPLUMA allows provincial governments to designate “matters of provincial interest” subject to provincial requirements. The potential jurisdictional question is subject to the given nature or site of the land. Issues regulated under municipal planning “impact intra-municipally” (Van Wyk 2015, 302). Where activity requiring authorisation is also regulated by another law, authorities may issue separate authorisations or an integrated authorisation.⁵⁷ The issuing of separate or integrated authorisations by different spheres of government (based on the Constitution and/or legislation) has been judicially embedded by the Constitutional Court in its *Maccsand* judgement.⁵⁸

Additionally, SPLUMA makes provision for five principles that apply to spatial planning, land development, and land use management. These principles are: spatial justice;⁵⁹ spatial sustainability;⁶⁰ spatial efficiency;⁶¹ spatial resilience;⁶² and good administration.⁶³ As embodied in SPLUMA, all three spheres of government must ensure that there is an integrated approach to land use and land development that is guided by the spatial planning and land use management systems (n 66). With these principles, SPLUMA has been lauded for its approach to social justice and equity (Nel 2016). As a result, municipalities have the requisite power and capacity to transform urban spaces into compact and densified living, working, and recreational spaces (Hendler 2015, 2). For example, the practical provision of access to social housing and well-designed spatial developments that wholly cater to human welfare, empowers historically disadvantaged social groups.

The SDF, which is developed as part of the IDP,⁶⁴ must be adopted by the municipal council of a municipality.⁶⁵ Section 5(1) of SPLUMA provides that municipal spatial planning consists of the following elements:

56 ibid s 29.

57 ibid s 30.

58 *Maccsand* (n 6) para 47.

59 SPLUMA 16 of 2013 s 7(a)(i).

60 ibid s 7(b)(vi) and s 7(b)(vii).

61 ibid s 7(c)(i).

62 ibid s 7(d).

63 ibid s 7(e)(i).

64 ibid s 20(2).

65 ibid s 20(1).

- (a) [t]he compilation, approval and review of integrated development plans;
- (b) the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and
- (c) the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.

As the authority of the first instance, all land development applications must be submitted to a municipality.⁶⁶ In determining applications for land use and development within its municipal area, a municipality may establish a Municipal Planning Tribunal.⁶⁷ Cognisant of the fact that SPLUMA seeks to redress past spatial injustices, restructure cities and towns, and establish a spatially just society, the decision-making authority of the Municipal Planning Tribunal must be executed to achieve spatial equity.

For a municipal land use scheme to be valid, it must comply with the provisions of chapter 5 of SPLUMA. Subject to section 24(3)(b) of SPLUMA, a land use scheme may provide for specific requirements involving special zones identified to address the municipal development priorities. Its purpose and content include the promotion of economic growth, social inclusion, efficient land development, and minimal impact on public health, the environment, and natural resources.⁶⁸ The quest to address spatial inequalities requires the promotion of inclusive human settlements and integrated urban development. Hence, the land use scheme issues specific requirements for special zones that may be identified for social housing development; this is an opportunity to prioritise the spatial interests of the urban poor. Accordingly, Gurran and Bramley (2017, 337) indicate that the development of appropriate “mechanisms range from planning system incentives through to mandatory requirements for dedicated affordable housing within planning laws through to voluntary and negotiated agreements.”

The Local Government: Municipal Systems Act 117 of 1998 complements the objectives of SPLUMA. The provision of the IDP in chapter 5 of the Municipal Systems Act sets a firm foundation for the framework of the Municipal Spatial Development Framework (MSDF) as provided in SPLUMA. Section 23(1) of the Municipal Systems Act stipulates that a municipality must undertake developmentally oriented planning. This form of planning must fulfil three mandates: (a) the achievement of local government’s objects as outlined in section 152 of the Constitution; (b) the attainment of its developmental duties as required by section 153 of the Constitution; and (c) the contribution towards the progressive realisation of selected “socio-economic rights”, including the right of access to adequate housing as contained in section 26 of the

66 ibid c 33(1).

67 ibid s 35(1).

68 ibid s 25(1)(a)–(d).

Constitution. The Municipal Systems Act provides for the core components of the IDP. A municipality's IDP must be reflective of the MSDF which includes basic guidelines for its land use management system,⁶⁹ the identification of communities without access to basic municipal services,⁷⁰ and applicable disaster management plans.⁷¹ To successfully carry out its developmental objectives, the IDP's implementation plan must be aligned with the resources and capacity of the municipality.⁷²

The Municipal Systems Act in section 21 establishes a varied set of criteria that needs to be included in the MSDF, such as:

- a) a five-year spatial development plan for the spatial form of the municipality;
- b) a longer-term spatial development vision statement for the municipal area which indicates a desired spatial growth and development pattern for the next 10 to 20 years.⁷³

A municipality might consider calling on national support, based on the national government's obligation under sections 9(1) and (2) of SPLUMA. Moreover, a municipality might also request provincial support regarding capacity building.⁷⁴ Section 11 of SPLUMA makes provision for "municipal differentiation" which requires the national and provincial governments to monitor and support the performance of the functions of municipalities in terms of SPLUMA and other related legislation. This municipal differentiation is in line with the constitutional and legislative supervisory powers that the national and provincial governments exercise over local governments. The intention is to ensure that municipalities can optimally execute their spatial planning, land development, and land use management duties and responsibilities. Therefore, when supervising local government, the national and provincial governments must consider the unique circumstances of each municipality, based on the identified criteria. The criteria comprise: (a) the categories of municipalities;⁷⁵ (b) national or provincial legislation relating to the supervision of local government; and (c) the financial resources, capacity, and financial viability of a municipality.⁷⁶

Conclusion

This article dealt with the spatial planning landscape in South Africa from the interplay between local government and the judiciary. Judicial delineation of spatial planning

69 Municipal Systems Act (n 100) s 26(e).

70 *ibid* s 26(b)t.

71 *ibid* s 26(g).

72 *ibid* s 25(1)(b).

73 *ibid* s 21(b), (c), (e), (f), (g), (h), (i), (n), and (o).

74 SPLUMA 16 of 2013 se 10(5).

75 Constitution (n 1) s 155(1) provides for three categories of municipalities: metropolitan, local, and district municipalities.

76 SPLUMA 16 of 2013 s 11(b).

powers, responsibilities, functions, and roles has asserted municipal autonomy concerning spatial planning. Each sphere of government exercises constitutionally allocated powers while regulated by the relevant legislation. The courts play a crucial role in reviewing decisions made by local governments regarding spatial planning, including decisions that may arise from shared competencies, and overlapping functional areas that relate to planning. This ensures adherence to the Constitution, SPLUMA, and other relevant legislation. This article demonstrates that courts can interpret SPLUMA and other relevant legislation, clarifying the scope of local government powers and addressing potential conflicts between different spheres of government.

Municipal planning is directly devolved to the local government. Municipalities have the primary responsibility for developing and implementing spatial plans within their jurisdictions. These plans guide land use, development, and infrastructure within the municipality. Local governments can establish zoning regulations and enact by-laws to regulate land use activities and ensure compliance with spatial plans. Municipalities have the authority to approve or reject development applications based on their adherence to spatial plans and relevant by-laws. SPLUMA is the primary legislative framework for spatial planning. It emphasises the devolution of planning powers to local governments, giving them significant authority in spatial planning, land use management and land development. Additionally, the SPLUMA confers municipalities with substantial planning powers. A combination of land uses in urban areas in South Africa requires a coordinated and collaborative approach between the different spheres of government.

The concurrent competencies of regional planning and development and rural and urban development are assigned to both the national and provincial spheres of government; provincial planning is exclusively allocated to the provincial government. The interpretation of the term urban and rural development excludes the power to approve applications for the rezoning of land and the establishment of townships. The usurping of the power of municipalities in managing municipal planning would constitute an intrusion into the autonomous status of local government. The national and provincial governments may regulate how municipalities exercise their executive authority concerning municipal planning. Nonetheless, the “power to regulate the exercise of a municipality’s executive authority … does not authorise any intrusion in connection with a municipality’s legislative authority in any manner or form.”⁷⁷ Intergovernmental coordination requires effective spatial planning. This involves collaboration between the different spheres of government to ensure regional coherence and address cross-border issues. The judicial entrenchment of municipal planning protects its powers and autonomy against intrusive encroachments from the national and provincial

⁷⁷ *Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd and Others* 2022 (4) SA 167 (WCC) para 27.

governments that are constitutionally bound to exercise supervisory powers over local government.

Recommendations

Given the overlap, conflict and confusion concerning spatial planning-related powers and functions in the Constitution between the national, provincial, and local spheres of government, this section provides recommendations for obtaining resolutions to the predicaments.

Firstly, the national government should provide clearer guidelines and regulations to ensure consistency in the application of spatial planning laws across different spheres of government and municipalities. Clarity to the spatial planning powers requires a lucid amendment of SPLUMA wherein this key legislation would clearly define and delineate the roles and responsibilities among national, provincial, and local spheres of government. In the process, detailed provisions on the powers, functions, roles and responsibilities of local governments in spatial planning should be provided.

Secondly, the article calls for a viable co-operative spatial governance. In section 41(1), the Constitution prescribes the principles of co-operative governance and intergovernmental relations. Notably, the Constitution requires the three spheres of government to assist and support one another,⁷⁸ along with co-ordinating their actions and legislation with each other.⁷⁹ The national and provincial spheres of government must recognise that local government is constitutionally and legally given the task of leading spatial transformation at the grassroots level and assigned the primary developmental duties and service delivery mandate. Hence, there is a need to eliminate competitive governance to promote and attain integrated and viable co-operative spatial governance wherein the three spheres of government can jointly coordinate their activities in the quest to address spatial inequalities and promote access to land in South Africa. This involves allowing municipalities to exercise their spatial planning powers fully, and to implement IDPs, SDFs, and land use schemes within the framework of national and provincial legislative and policy frameworks.

Thirdly, capacity building and training programmes should be implemented to enhance the knowledge and skills of local government officials in guiding spatial planning, land use management, and land development. This would enable them to make informed decisions that balance competing interests and priorities. The aspect of knowledge and skills enhancement perfectly resonates with the legal dimensions of spatial equity-based professional development initiatives. This involves considering legal frameworks and regulations that impact how land use development projects are planned, implemented, and ultimately, achieve equitable outcomes. Planners must ensure compliance with fair

⁷⁸ Constitution (n 1) s 40(1)(h)(ii).

⁷⁹ *ibid* 40(1)(h)(iv).

laws and policies, including the respective municipal by-laws and policies that explicitly prohibit discrimination based on race, socio-economic status, disability, etc.

Fourthly, the article recommends that the judiciary should take a more proactive approach in interpreting spatial planning laws to ensure that local governments prioritise sustainable development, social justice, and environmental protection. This could involve adopting a more nuanced understanding of the concept of “spatial equity” and recognising the impact of the colonial and apartheid spatial planning decisions on black vulnerable communities that are mostly located in the urban peripheries (Mudau 2020).

The last recommendation is that civil society organisations and community groups should be empowered to participate meaningfully in spatial planning processes, ensuring that local governments are held accountable for their decisions. By implementing these recommendations, South Africa can move towards a more equitable, sustainable, and spatially just future.

An important area for further study should concern “rural-urban interdependency” and the role of small towns and rural municipalities in the achievement of spatial equity in South Africa. Due to rapid urbanisation, urban centres are bound to play a pivotal role in uplifting large segments of society. Clearly, the post-apartheid decentralisation framework has financially and institutionally set to advance principally metropolitan municipalities and neglects district and local municipalities that share jurisdictions. This framework inadvertently perpetuates the practice of spatial inequalities, separations, and disparities within the system of local government. It aggravates the challenges stemming from an urban-rural interplay. Thus, empowering districts and local municipalities to develop their communities lessens the burden of rapid urbanisation, minimises rural-to-urban migration, and simultaneously addresses regional disparities socially and economically.

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