The legacy of the 1913 Black Land Act for spatial planning*

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1 Introduction

On 19 June 1913 the Natives Land Act 27 of 1913[1] was promulgated, signalling the commencement of legalised discriminatory land legislation in South Africa. By setting aside land for occupation and use by black people, the Act resulted in the unequal distribution of land between black and white people.[2] Together with its sister Act, the Development Trust and Land Act 18 of 1936, the area allocated for black people comprised 13% of the land while the white population enjoyed the remaining 87% of the land,[3] despite the fact that the white population was one fifth the size of the black population.

The 1913 Act is usually viewed in the context of the inequality and discrimination with regard to land tenure. However, for spatial planning, the application of the Act and its successors had severe consequences that are still felt throughout South Africa even now, 100 years after its enactment and 22 years after its repeal by the Abolition of Racially Based Land Measures Act 108 of 1991. When we look at towns and cities as well as the rural areas throughout South Africa today, we are confronted with the legacy of the Act. We see segregation and division, with black townships located on the peripheries of towns and cities or black settlements scattered throughout the countryside. Very little integration is visible. The planning system still comprises a sophisticated scheme of planning in respect of land originally earmarked for white occupation, while a separate

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[1] Later known as the Bantu Land Act and the Black Land Act.

[2] An apology must be made for terminology used in this article that may be offensive. However, in the historical context, the terms 'white' and 'black' were used to designate persons of different race groups.

[3] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 41.

system of land use, based on an intricate web of legislation, is employed on land designated for use by blacks. Multiple laws still regulate planning in different areas of South Africa, resulting in confusion, inequality and fragmentation, impeding the proper planning of land use[4] and perpetuating the deep inequalities of the past.

The 1994 Constitution aimed to be the bridge between that past and a future free from discrimination and inequality.[5] However, these aims will not be entirely fulfilled until the planning system has rid itself of all traces of its discriminatory past.

In sketching the role of the 1913 Black Land Act for spatial planning in South Africa, this article will look at the division of land in terms of race, trace the legislation enacted to regulate planning in the different areas, indicate the role of the Constitution in eliminating the inequality caused by the Act and examine present legislative initiatives with regard to planning.

2 Division of land

The 1913 Land Act set aside certain areas for occupation by black people. This in turn was traditionally divided into rural and urban areas.[6] Rural areas comprised the following:

(i) South African Development Trust (SADT) land;
(ii) self-governing territories; and the
(iii) TBVC states (Transkei, Bophuthatswana, Venda and Ciskei).

Outside these areas black people were accommodated in urban areas – 'locations' or 'townships' – in 'white South Africa'. The remainder of South Africa was 'white South Africa'.

The following map indicates the Bantustan territories – those territories that fall under (i)-(iii) above – within the pre-1994 provinces:

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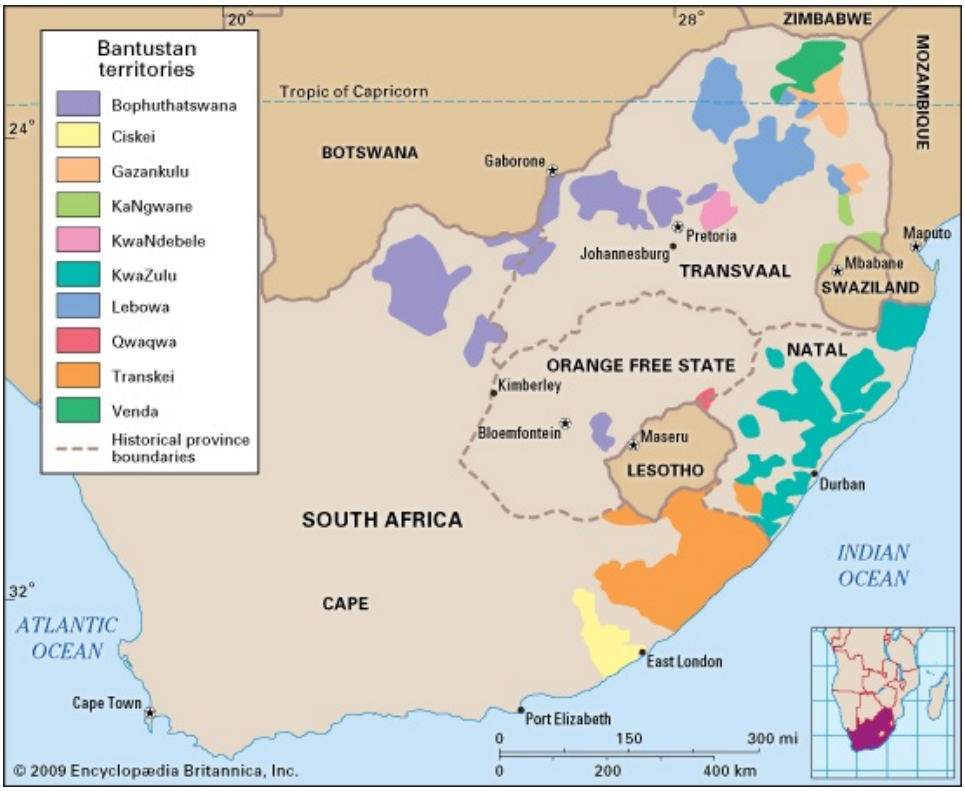
[4]See further Van Wyk 'ICPLA II, public participation in planning and the South African connection' (1993) 8 *SAPR/PL* 205; Van der Walt 'Land reform in South Africa since 1990 – An overview' (1995) 10 *SAPR/PL* 1; Pienaar 'Planning, informal settlement and housing in South Africa: The Development Facilitation Act in view of Latin American and African developments' (2002) 35 *CILSA* 1; Berrisford 'Unravelling apartheid spatial planning legislation in South Africa: A case study' (14 June 2011) *Urban Forum* (DOI 10.1007/s12132-011-9119-8); Van Wyk *Planning law* (2012) (2nd ed) 31-49.

[5]Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) *SAJHR* 31.

[6]See, in general, Latsky 'Developing new urban land delivery systems for the poor: Reviewing the policy of first world technicality' paper read at the SA Institute of Town and Regional Planners 1992 National Biennial Conference Port Elizabeth (12-14 October 1992) 333.



2.1 SADT land, self-governing and independent states

The notorious 1913 Black Land Act divided land on a racial basis by setting aside 'scheduled areas' for exclusive occupation and acquisition by black people.[7] As a result of the land shortage for black people, the 1936 Development Trust and Land Act extended the operation of the 1913 Act by providing for the acquisition of 'released areas' for eventual occupation and acquisition by black people.[8] In these areas or reserves, where the land was held in trust by the state, black people lost the right to purchase land and were obliged to utilise land administered by tribal authorities.[9] These Land Acts were the key statutes that

[7] *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 12; Robertson 'Black land tenure: Disabilities and some rights' in Rycroft *et al* (eds) *Race and the law in South Africa* (1987) 119 at 120; Olivier 'Property rights in urban areas' (1988) 3 *SAPR/PL* 23; Robertson 'Dividing the land' in Murray and O'Regan (eds) *No place to rest* (1990) 122 at 126.

[8] See *MEC for KwaZulu-Natal Province, Housing v Msunduzi Municipality* 2003 4 BCLR 405 (N); *Tongoane v Minister of Agriculture and Land Affairs* (n 7) paras 12-15.

[9] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3) paras 76-77.

determined where black people could live and they established a clear distinction between white areas and reserves for black people.[10] The resultant 87% white and 13% black divide echoes every time the land issue arises.[11]

After 1948, when apartheid was introduced and refined further, the National Party government decided that the black reserves would become the homelands or 'bantustans' separate from the South African state. This would effectively, in government's eyes, remove the black citizens of these states from South Africa.[12]

Legislation was the means by which this removal and separation was effected, the first of which was the Black Laws Amendment Act 56 of 1949 that specifically excluded the application of the legislation that applied in 'white areas' from SADT areas.[13] Instead, a vast array of regulations regarding township establishment and development in the urban areas was promulgated in terms of the Black Administration Act 38 of 1927[14] and the Development Trust and Land Act 18 of 1936.[15] The Black Administration Act became:

> … the most powerful tool in the implementation of forced removals of Africans from the so-called 'white areas' into the areas reserved for them. This geographical plan of segregation was described as forming part of 'a colossal social experiment and a long term policy.[16]

The most important set of regulations was Proclamation R293 of 1962 entitled Regulations for the Administration and Control of Townships in Black Areas.[17]

Chapter 1 of the Proclamation dealt with the establishment and abolition of townships, defined the ethnic character of the population of the township, made provision for the publication of directions, notices and by-laws relating to the township and prescribed requirements for agreements of sale or lease in the township. These regulations continued to apply until amended by the competent national state authority.[18] A series of proclamations partially repealed Proclamation R293 in 1988 and 1989[19] but left the remainder in force.

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[10] *Tongoane v Minister of Agriculture and Land Affairs* (n 7) para 11.
[11] Ross *A concise history of South Africa* (2008) (2nd ed) 95-96. See also *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3) para 2.
[12] http://users.iafrica.com/a/au/augusart/online_itcsa.html.
[13] Section 33.
[14] Section 25(1).
[15] Section 21(1). See further Pienaar 'Toekenning en registrasie van grondregte in die nasionale state' (1989) *TRW* 1.
[16] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3) para 41.
[17] Government Gazette 373 (1962-11-16).
[18] National States Constitution Act 21 of 1971 s 30(1)*(b)*. See also Pienaar (n 15).
[19] Proclamation R29 entitled Land Tenure in Towns, Proclamation R30 entitled Registration Office Regulations, Government Notice R402 entitled Regulations for the Disposal of Trust Land in Towns, Government Notice R403 entitled Regulations for the Registration of Deeds in Towns, Government Notice R404 entitled Regulations for Land Use in Towns and *Government Notice* R405 entitled

A sister regulation to Proclamation R293 was Proclamation R188 of 1969 entitled Black Areas Land Regulations.[20] Whereas Proclamation R293 was concerned with township establishment in urban areas, Proclamation R188 dealt with land tenure matters in rural areas. It contained no land use planning provisions as such. Although it applied in a rural context and did, therefore, not deal with spatial planning in any detail Proclamation R188 did play an important role as the basis of the legislation in SADT areas, self-governing territories and independent states.

Other regulations relevant to planning were Proclamation R154 of 1983 entitled Regulations for the Establishment and Development of Towns,[21] applicable to SADT land, and repealed in 1990.[22] Replacement regulations were promulgated in the same year in Government Notice R1886, entitled Township Development Regulations for Towns, dealing with procedures involved in the establishment of townships.[23] After 1994 these regulations were assigned to the new provinces.[24] Government Notice R1888 of 1990[25] entitled Land Use and Planning Regulations provided for all procedures in connection with structure plans and town planning schemes. After 1994 these regulations were assigned to the new provinces.[26] Despite the repeal of the Black Administration Act of 1927 in terms of the Repeal of the Black Administration and Amendment of Certain Laws Act 28 of 2005 and the 1913 Land Act in terms of the Abolition of Racially-Based Land Measures Act of 1991,[27] the planning regulations were not repealed and are still applicable today to regulate township establishment and town planning in those areas that were reserved in terms of the 1913 and 1936 Land Acts.[28]

The areas reserved for blacks formed the basis for the establishment of ethnically based homelands. The Promotion of Bantu Self-government Act 46 of

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Regulations for Local Authorities all published in the same *Government Gazette* 11166 (1988-03-09) and Proclamation R95 of 1989 *Government Gazette* 11965 (1989-06-23). See also *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3).

[20] *Government Gazette* 2486 (1969-07-11).

[21] *Government Gazette* 8933 (1983-10-14).

[22] It was repealed by Proclamation R131 of 1990.

[23] *Government Gazette* 12688 (1990-08-10). See further Du Plessis 'Dorpstigting: Suid-Afrikaanse Ontwikkelingstrust en selfregerende gebiede' (1991) 54 *THRHR* 444.

[24] Eastern Cape, Free State, Mpumalanga, KwaZulu-Natal and Limpopo in terms of the interim Constitution s 235(8) or the Provincial Government Act 69 of 1986. See Proclamation 139 *GG* 15951 (1994-09-09), Proclamation R26 *GG* 13906 (1992-03-31).

[25] *Government Gazette* 12691 (1990-08-12). It repealed the regulations published under Government Notice R404.

[26] Eastern Cape, Free State, Gauteng, Limpopo, Mpumalanga, Northern Cape and Western Cape in terms of the interim Constitution s 235(8). See Proclamation R12 *GG* 17754 (1997-01-27); Proclamation 139 *GG* 15951 (1994-09-09)

[27] Abolition of Racially-Based Land Measures Act 108 of 1991 s 11(2).

[28] Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The law of property* (2006) (5th ed) 590.

1959 divided blacks into ten 'national units' on the basis of their language and ethnicity. These were North Sotho, South Sotho, Tswana, Zulu, Swazi, Xhosa (arbitrarily divided into two groups), Tsonga, Venda, and Ndebele – on the basis of these 'national units' ten homelands were set aside out of the existing reserves to become self-governing territories.[29]

These were Transkei, Bophuthatswana, Venda, Ciskei Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa.[30] The policy of disassociation was taken a step further with the promulgation of the National States Constitution Act 21 of 1971 providing that self-governing territories could eventually become 'independent states'.[31] The homelands that did opt for independence were Transkei, Bophuthatswana, Venda and Ciskei. They were able to promulgate their own legislation on land matters.[32] Proclamation R293 and Proclamation R188 were applied, amended and, in some cases, repealed. As time passed, these independent states each enacted their own land laws, mainly as amendments to these two proclamations. Included are the Bophuthatswana Township Regulation Amendment Acts 21 of 1981 and 4 of 1982, mainly to amend Proclamation R293 in Bophuthatswana, the Venda Land Affairs Proclamation 45 of 1990 to provide for the development, use and subdivision of land as well as the removal of restrictive conditions and the Ciskei Land Use Regulation Act 15 of 1987, providing for a Land Use Planning Board, land use planning and the control of land use rights, subdivision of land and removal of restrictions. This legislation is still in force in the relevant area. After Transkei, Bophuthatswana, Venda and Ciskei became independent, the remaining self-governing territories were Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa. Each self-governing area could lay down its own town planning and township establishment procedures.[33] Proclamation R293[34] and Proclamation R188 continued to apply until amended by the competent national state authority.[35] These proclamations still apply, mainly in amended form, in most of these areas. As far as planning matters are concerned, KwaZulu enacted the Land Affairs Act 11 of 1992, while other self-governing territories have, since 1991, retained their respective town planning measures.[36]

Despite its repeal,[37] the legacy of the 1913 Black Land Act lives on in numerous regulations dealing with spatial planning, the most important of which

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[29] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3) para 42.
[30] *Ibid*.
[31] *Tongoane v Minister of Agriculture and Land Affairs* (n 7) para 26.
[32] Badenhorst, Pienaar and Mostert (n 28) 587.
[33] National States Constitution Act 21 of 1971 Item 28 of Schedule 1 refers to the 'planning, establishment, maintenance and management of towns'. Badenhorst, Pienaar and Mostert (n 28) 587.
[34] As amended by Proclamation R153 of 1983 *GG* 8933 (1983-09-14).
[35] National States Constitution Act 21 of 1971 s 30(1)*(b)*. See also Pienaar (n 15).
[36] With the repeal of the Abolition of Racially-Based Land Measures Act 108 of 1991.
[37] Abolition of Racially-Based Land Measures Act 108 of 1991 s 11(2).

are the Township Development Regulations for Towns and the Land Use and Planning Regulations. The system that commenced with the 1913 Act has perpetuated the total separation of land use and planning measures based on race, resulting in a severe and lasting impact on land use and planning measures in South Africa as a whole.[38]

2.2 Urban areas in 'white South Africa'

Outside of the SADT areas and the self-governing and independent states, in the areas described as 'urban areas in what was … "white South Africa"'[39] blacks were officially excluded.[40] However, the reality was that black labour was required to power South Africa's economy that relied largely on the mining of gold and diamonds. As stated in the *DVB Behuising* case:[41]

> Under this scheme cities and towns fell outside of the areas reserved for Africans. However, the policy had to yield to economic imperatives – the need for cheap labour to run the economy in urban areas and towns. This was openly acknowledged:
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> > 'Assuming that the ideal to be arrived at is the territorial separation of the races there must and will remain many points at which race contact will be maintained, and it is in the towns and industrial centres, if the economic advantage of cheap labour is not to be foregone, that the contact will continue to present its important and most disquieting features. The ... figures are eloquent of the number of natives in the towns in 1911; that number has increased and will increase to an ever greater extent as the industrial future of the country develops. It is in the towns that the native question of the future will in an ever-increasing complexity have to be faced.'

Since that labour had to come from the reserves there had to be some place of residence near areas of economic activity. From the beginning of the 1900s, blacks in urban areas were accommodated in so-called 'locations'.[42] The Blacks (Urban Areas) Act 21 of 1923 provided the Native Affairs Department with the power to plan and create the 'locations', which became the predominant places of residence for a large portion of the population.[43] Later, recognised townships were established in terms of the Blacks (Urban Areas) Consolidation Act 25 of

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[38]Badenhorst, Pienaar and Mostert (n 28) 590.
[39]Robertson 'Land options' (1989) 21 *Columbia Human Rights LR* 193, 195; Olivier (n 7) 25.
[40]Davenport and Hunt (eds) *The right to the land* (1974) 62; Robertson (n 39) 195; Olivier (n 7) 25.
[41]Paragraph 43.Here the court referred to Davenport and Hunt (n 40) 70.
[42]In terms of *inter alia* the Native Reserve Locations Act 40 of 1902 (C); two provisions in Natal, namely the Native Reserve Locations Act 2 of 1904 (N) 'to enable town councils to establish locations' and the Native Locations Act 37 of 1896 (N) for 'the better management of native locations' and numerous regulations in Transvaal issued between 1903 and 1905.
[43]See also Harrison, Todes and Watson *Planning and transformation: Learning from the post-apartheid experience* (2008) 24.

1945[44] and its so-called '1036 Regulations' entitled Regulations Concerning the Control and Supervision of an Urban Bantu Residential Area.[45] The 1945 Act authorised the local authority to:

> set apart and lay out one or more areas of land for the occupation, residence and other reasonable requirements of natives. Only Africans who were 'necessary to supply the reasonable labour requirements of the urban area[s]' were allowed to remain in these areas and 'redundant natives' were liable to be removed from urban areas. Unemployed or 'idle' Africans were liable to be sent to their 'home[s]' or sent to and detained for a period not exceeding two years in a farm colony, work colony, refuge, rescue home or similar institution …[46]

Land development was regulated in terms of Chapter IV of the Black Communities Development Act 4 of 1984 (BCDA) and planning measures were contained in regulations entitled Regulations Relating to Township Establishment and Land Use.[47] These regulations were assigned to the new provinces in 1994.[48] The BCDA repealed the 1945 Act but continued the '1036 Regulations'.[49] In turn the BCDA, also excluding the township establishment and land use regulations, was largely repealed by the Abolition of Racially-Based Land Measures Act 108 of 1991. The regulations in terms of the Act are still applicable in townships inEastern Cape, Free State, Gauteng, Limpopo, Mpumalanga and Western Cape.[50]

The Group Areas Act 41 of 1950 zoned the country into areas based on race, and a member of one group was not permitted to reside in a group area meant for another group. The Group Areas Act 36 of 1966 regulated the acquisition, alienation and occupation of land for whites, coloureds and Indians.[51] It stipulated which parts of South Africa could be occupied by specific race groups. Land was made available for members of a particular group for whom that area had been proclaimed. Millions of black people, especially, could therefore no longer stay where they were but were removed to the neighbouring reserve or 'bantustan'.[52] In

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[44]Section 2.
[45]Government Notice 1036 *GG* 2096 (1968-06-14).
[46]*Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3) para 44.
[47]Proclamation R1897 of 1986 *GG* 10431 (1986-09-12).
[48]Eastern Cape, Free State, Gauteng, Limpopo, Mpumalanga and Western Cape in terms of Proclamation R162, R163 or R164 of 1994-10-31.
[49]Regulations promulgated under the repealed Blacks (Urban Areas) Consolidation Act 25 of 1945 are deemed to have been continued under the Black Communities Development Act 4 of 1984 section 66. See further Robertson (n 7) 119-138, 119; Olivier (n 7) 26-29; Badenhorst, Pienaar and Mostert (n 28) 587.
[50]See (n 48) and Badenhorst, Pienaar and Mostert (n 28) 590.
[51]See Robertson (n 7) 122-124; Dodson 'The Group Areas Act: Changing patterns of enforcement' in Murray and O'Regan (eds) *No place to rest* (1990) 137. See also *Abrams v Allie NO* 2004 9 BCLR 914 (SCA) contains an example of the practice in terms of these statutes in the framework of race classification
[52]Harrison, Todes and Watson (n 43) 25-26.

this way the 1913 and 1936 Land Acts continued to play a role. Some of the more notorious removals were those from District 6 in Cape Town and Sophiatown in Johannesburg, which had become white areas.

As is the case with land in the SADT, self-governing and independent territories, the main statutes were repealed, but regulations, especially the Regulations Relating to Township Establishment and Land Use made in terms of these statutes still continue to apply throughout South Africa.[53] For planning in South Africa, this resulted in planning measures being applied to the black townships that had been established near the towns and cities of 'white South Africa', where other measures applied.[54]

2.3 'White South Africa'

During the last two decades of the 19th century, the four territories that became provinces of the Union of South Africa in 1910 systematically enacted legislation providing for town planning and the establishment of new townships. At Union, South Africa comprised of the four provinces of Cape Province, Natal, Orange Free State and Transvaal. These provinces existed until 1994 with the formation of the new provincial system. Outside of SADT land, self-governing territories and independent states 'white' South Africa consisted of these four provinces. Planning, much of which was inherited from English law, was regulated in terms of legislation that applied to the relevant province.[55]

The Townships Ordinance 13 of 1927 (C) was the first comprehensive ordinance regulating the establishment of townships in the Cape Province. It was soon replaced by the Townships Ordinance 33 of 1934 (C) that applied until 1985 with the introduction of the Land Use Planning Ordinance 15 of 1985 (C) (LUPO). LUPO still applies in the Eastern Cape, Western Cape and parts of North West.

In Natal the first piece of legislation dealing with the establishment of townships was the Townships Law 11 of 1881 (N). For a long time the Town Planning Ordinance of 27 of 1949 (N) applied, but a comprehensive new KwaZulu-Natal Planning and Development Act 6 of 2008 became operative on 1 May 2010.

In the Orange Free State legislation regulating the establishment of townships was introduced in 1894 in terms of the Recognition of Townships Law 6 of 1894 (O). This was replaced by the Townships Ordinance 9 of 1969 (O), which still applies in the Free State.

In Transvaal the earliest statute was the Proclamation of Townships Ordinance 19 of 1905 (T). The legislation still in place is the Town-planning and Townships Ordinance 15 of 1986 (T). This ordinance is still in force in Gauteng, Mpumalanga, Limpopo and North West.

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[53]Proclamation R1897 of 1986. See also Badenhorst, Pienaar and Mostert (n 28) 590.
[54]*Ibid*.
[55]Van Wyk (n 4) 28-30.

While most provinces still apply the legislation that was in force in 'white South Africa' new comprehensive legislation is applicable in Northern Cape.[56] Other provinces considering new legislation are Western Cape, Eastern Cape, Free State, Gauteng, Mpumalanga, North West and Limpopo. These should replace all the discriminatory legislation that still applies.

3 The Constitution and its impact on planning

In 1994, South Africa became a constitutional democracy, aiming to dismantle centuries of inequality and discrimination. Both the interim Constitution of 1993 and the final Constitution of 1996 had the potential to significantly alter the face of planning law in South Africa. Numerous aspects of the Constitution are significant for the multi-faceted nature of planning law. The Bill of Rights, with its rights to equality,[57] human dignity,[58] freedom of religion, belief and opinion,[59] housing[60] and property[61] have been the subject of court decisions and a number of cases have criticised the continued application of the discriminatory legislation.[62] Other cases such as *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government*[63] that looks at the division of powers and functions in terms of the Constitution and *Tongoane v Minister of Agriculture and Land Affairs*[64] that dealt with the constitutionality of the Communal Land Rights Act 11 of 2004 (CLARA)[65] clearly sketch the impact of the 1913 and 1936 Acts.

In examining the application of Proclamation R293 in North West the Constitutional Court, in the *DVB Behuising* case,[66] indicates that the Proclamation:

> … discloses an orchestrated scheme for the establishment, management and regulation of informal townships and establishment of local government. It authorised the establishment of informal townships 'for the occupation, residence and other reasonable requirements' of Africans. It regulated who might lease or buy a house in the township. Occupation of houses in the township was based on ethnic affiliation and race, consistent with the Promotion of Bantu Self-government Act, 46 of 1959. It controlled every aspect of the lives of the residents of the

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[56] Planning and Development Act 7 of 1998.
[57] Section 9.
[58] Section 10.
[59] Section 15.
[60] Section 26.
[61] Section 25.
[62] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3); *Tongoane v Minister of Agriculture and Land Affairs* (n 7).
[63] See (n 3).
[64] See (n 7).
[65] On the constitutionality of CLARA see Mailula 'Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue?' (2011) 4 *Constitutional LR* 73.
[66] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3) para 48.

> townships, from birth to death. It regulated general sanitation (Chapter 4), the use of communal halls (Chapter 5), public meetings (Chapter 6), cemeteries (Chapter 7), and the establishment of township councils (Chapter 8). It created a range of criminal offences for those who failed to comply with its provisions. The purpose of this management and regulation of townships was to prepare ground for apartheid-based local governments in townships.

The Constitutional Court, in *Tongoane*, was faced with the constitutionality of CLARA. It reviewed the legislative framework created by the 1913 and 1936 Land Acts and, echoing its decision in *DVB Behuising,* stated that:[67]

> Under apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands. This commenced with the creation of 'legislative assemblies' which would mature into 'self-governing territories' and ultimately into 'independent states'. According to this plan, there would be no African people in South Africa, as all would assume citizenship of one or other of the newly created homelands, where they could enjoy social, economic and political rights. Section 5(1)(b) of the Black Administration Act became the most powerful tool to effect the removal of African people from 'white' South Africa into areas reserved for them under this Act and the Development Trust and Land Act. And as we noted in *DVB Behuising*, '[t]hese removals resulted in untold suffering.' The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land.

The issue in the case of *Municipality City of Port Elizabeth v Rudman*[68] was 'whether differences between town planning provisions in areas governed by the zoning regulations in terms of LUPO and those in areas governed by the BCDA regulations were of such a nature to offend against the equality provisions in the interim Constitution or result in unfair discrimination'.[69] It was argued that respondents were being discriminated against because they were subject to more rigid zoning restrictions that applied in the 'white' area in which they lived than the more flexible restrictions of the African areas. The respondents preferred the more flexible zoning provisions because they were prevented from using their residential dwelling as a bakery, take away etcetera in terms of the rigid zoning restrictions. Melunsky J decided that this was a case where legislative provisions differentiated between categories of people, namely people living in areas governed by the previous black local authorities and those who did not. He found that it was difficult to hold that the differentiation amounted to discrimination and that if there were discrimination that it would be unfair. The court held that the differentiation did not fall into this category of discrimination.

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[67]See (n 7) para 25.
[68]1998 4 BCLR 451 (SE).
[69]460E-F.

While the courts, especially the Constitutional Court, have pointed to the inequalities of the past, court decisions cannot really alter the situation on the ground.The only meaningful way to effect real change to the planning system is to repeal the discriminatory legislation. However, repeal cannot happen without new legislation being put in place.

4 New legislation on the horizon

Quite soon into the new dispensation all the signs of speedy legislative intervention were there. The 1991 *White Paper on Land Reform*[70] saw the land issue as a critical aspect of the reform agenda, proposing to broaden access to land rights for the whole population.[71] Some of the proposals that were realised were the promulgation of the Abolition of Racially-Based Land Measures Act 108 of 1991, which repealed the majority of racially based land laws,[72] and the Less Formal Township Establishment Act 113 of 1991.[73] In 1999, a *Green Paper on Development and Planning*[74] was published, followed a few years later by *Wise Land Use: White Paper on Spatial Planning, Land Use Management and Land Development.*[75] However, since then progress has been painfully slow. There have been a few stumbling blocks. The first stumbling block is government's own admission that an area of the Minister's responsibility for land that had been neglected since 1994 was that of planning for and regulation of the use and development of land.[76] It tried to rectify this by setting out the essential elements of a new land use system. These elements were included in the 2001 draft Land Use Management Bill. Revised versions were made available almost every year until 2008. Serious concerns were raised about the 2008 version's constitutionality in the context of the legislative and executive competence of local government,[77] and it was withdrawn.

The second stumbling block is the intricate way in which the Constitution allocates legislative and executive competence for specified functional areas of planning to the different spheres of government.[78] The Constitution indicates that government is constituted as three spheres, namely national, provincial and local.

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[70] WPB-91.
[71] Carey Miller *Land title in South Africa* (2000) 245; Badenhorst, Pienaar and Mostert (n 28) 588.
[72] Eg the Black Land Acts 27 of 1913 and 18 of 1936, the Group Areas Act 36 of 1966, the Black Communities Development Act 4 of 1984. See further Carey Miller (n 71) 249-266.
[73] See also Badenhorst, Pienaar and Mostert (n 28) 588-589; Harrison, Todes and Watson (n 43) 37.
[74] National Development and Planning Commission and the Department of Land Affairs DPC 4/99 (May 1999).
[75] *Government Gazette* 22473 (20 July 2001).
[76] *Wise land use: White paper on spatial planning, land use management and land development* para 1.1.
[77] Land Use Management Bill [B-27]: Public hearings at www.pmg.org.za/report/20080730-land-use-management-bill-b27-2008-public-hearings (accessed 2010-11-06).
[78] See Van Wyk 'Planning in all its (dis)guises – which spheres of government are responsible?' (2012) 5 *PER* 288.

These spheres are distinctive, yet interdependent and interrelated. In the area of planning, national and provincial government have concurrent legislative competence in respect of 'regional planning and development', 'urban and rural development' and 'municipal planning'. Provinces have exclusive legislative competence over 'provincial planning'.

Both these stumbling blocks crossed paths in the Constitutional Court, first in the *DVB Behuising* case where Schedule 6 of the interim Constitution regarding the functional areas of legislative competence of the provinces was examined and secondly, in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*, where the executive competence of the spheres of government in terms of the final Constitution required interpretation.[79] It found two chapters of the Development Facilitation Act 67 of 1995 to be invalid and gave the legislature two years, until June 2012, to rectify the situation. This finding of the court was the catalyst behind the drafting of national framework legislation to regulate 'provincial planning' and 'municipal planning' to fill the void. In 2011, another, more acceptable, version of the 2001 Bill – the draft SPLUMB – was published that was supposed to become operational in June 2012. This never happened. The present version[80] aims to regulate 'provincial planning' and 'municipal planning' and provide a framework for spatial planning and land use management in South Africa. It proposes inclusive, developmental, equitable and efficient spatial forward planning in the different spheres of South Africa across different geographic boundaries. The Bill aims to address past spatial and regulatory imbalances and to promote greater consistency and uniformity in application procedures and decision-making structures in provincial and municipal authorities responsible for land use decisions and development applications. The SPLUMB does not provide all the answers to remedy the defects in the land use planning system – it remains framework legislation and the old order legislation has not yet been repealed.

Not long after the appearance of the national Bill, the Department of Rural Development and Land Reform initiated the drafting of planning legislation for five of South Africa's nine provinces – to also regulate 'provincial planning' and 'municipal planning'. The remaining four provinces had either already drafted or were in the process of drafting new provincial planning legislation. The result of these initiatives will be that in the near future South Africa will have one national and nine provincial planning statutes that should repeal all the legislation that still applies throughout each of the provinces.

5 Conclusion

The above discussion indicates that South Africa's spatial planning system still

[79]2010 6 SA 182 (CC).
[80]B14-2013.

reflects the divide created by the 1913 and 1936 Land Acts, with separate planning legislation applied to land that was, for a long time treated as 'white' and 'black' land. Much of the legislation that 'anachronistically survived our transition to a non-racial democracy'[81] is still applicable and has become deeply entrenched in the system. Despite the repeal of numerous pieces of apartheid legislation since 1991, the legacy remains in the form of regulations that are still applicable as well as practices on the ground.[82] After almost two decades of democracy, South Africa still operates under fragmented, unequal and incoherent planning legislation.[83] Moreover, the flawed regulatory framework has failed to address the segregated and unequal spatial patterns inherited from the past.[84] The continued operation of the multiple planning laws has economic, environmental and spatial disadvantages – economic, because it impedes investment in land development and fails to establish sufficient certainty in the land market; environmental, because it does not balance the socio-economic needs of the country with those of environmental conservation and spatial, because it fails to address the segregated and unequal spatial patterns inherited from apartheid.[85]

Urgent intervention is required to address the failings in the planning system. Some attempts at intervention have been made. These include severe criticism by the courts of the pernicious system still in place,[86] the drafting of new planning legislation such as the national Spatial Planning and Land Use Management Bill (SPLUMB) and provincial planning legislation in support of SPLUMB as well as engagement with the National Planning Commission's *National Development Plan: Vision for 2030.*[87] The latter reiterates that apartheid planning consigned the majority of South Africans to places far from work where services cannot be sustained and where it is difficult to access the benefits that urban living provide. It recommends the development of a national spatial framework, the strengthening of the spatial planning system, the promotion of a more coherent and inclusive approach to land. Through these initiatives the challenges of apartheid geography can be addressed and the creation of conditions for more humane and environmentally sustainable living and working environments can commence. Simultaneously it indicates that spatial transformation is a long-term project and that the outcomes of spatial change may take decades to be realised.[88]

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[81] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3) para 1.
[82] Badenhorst, Pienaar and Mostert (n 28) 590.
[83] See *Memorandum on the objects of the Land Use Management Bill* (2008).
[84] *Id* clause 2.
[85] *Ibid*.
[86] See *Tongoane v Minister of Agriculture and Land Affairs* (n 7) and *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 3).
[87] Released on 2011-11-11.
[88] National Planning Commission *National development plan: Vision for 2030* (2011) 233-258.

Despite these initiatives, the situation on the ground, for millions of South Africans, has not changed at all and as far as spatial planning is concerned they could still be living 100 years in the past when the Black Land Act was first promulgated.