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PLANNING IN ALL ITS (DIS)GUISES: SPHERES OF GOVERNMENT, FUNCTIONAL AREAS AND AUTHORITY

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1 Introduction

In a somewhat unusual manner, the South African *Constitution* provides for three 'distinctive, interdependent and interrelated' 'spheres' of government[1] instead of the more conventional 'levels' or 'tiers', where the lower tier is beholden to the higher. Each of these three spheres of government is accorded legislative and executive authority by the *Constitution* in a manner that requires careful and nuanced interpretation to give effect to the spirit and meaning of the *Constitution*.

Against the background of the legislative and executive authority of the different spheres of government, this article will attempt to unravel the content of the four functional areas directly relating to planning. These areas, as listed in Schedules 4 and 5 of the *Constitution*, are 'regional planning and development', 'urban and rural development', 'provincial planning' and 'municipal planning'. As will be shown, the boundaries between the four functional areas are opaque, their precise content is not readily apparent, and overlaps, conflicts and uncertainty may occur. That much is evident from a number of recent judgments of the courts, including the Constitutional Court.

In dealing with the relationship between the spheres of government, three further constitutional matters need to be taken into account. One is the power of the national sphere to intervene by legislation or executive authority in provincial affairs, and the power of a province to intervene where a municipality fails to fulfil an executive obligation.[2] The second is the power of provincial government to monitor and support

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1 Section 40(1) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

2 Sections 44(2), 100 and 139 of the *Constitution* respectively.

local government.[3] The third is contained in chapter 3 of the *Constitution*, on the principles of cooperative government. These principles clearly go against the notion of hierarchy that characterised the South African constitutional model before 1994. Yet giving practical effect to cooperative government and intergovernmental relations in South Africa is easier said than done, not least because of the allocation of functions to the different spheres by the *Constitution* itself.

2 Legislative and executive authority of the different spheres of government

The legislative and executive authority of the different spheres of government is determined according to the functional areas set out in Schedules 4 and 5 of the *Constitution*. Legislative competence entails the power to enact legal rules while executive competence entails the power to give effect to legal rules.[4]

In essence, national legislative authority is vested in Parliament and confers on the National Assembly the power to amend the *Constitution*, to assign legislative power to the other spheres of government, and to pass legislation on any matter, including a matter within a functional area listed in Schedule 4, entitled 'Functional areas of concurrent national and provincial legislative competence', but excluding a matter within a functional area listed in Schedule 5, called 'Functional areas of exclusive provincial legislative competence'.[5] The exclusion is subject to the provision that Parliament may pass legislation with regard to a matter falling within a functional area in Schedule 5 when it is necessary to maintain national security, economic unity or national standards, to establish minimum standards required for the rendering of services, or to prevent unreasonable action taken by a province that is prejudicial to the interests of another province or to the country as a whole.[6]

3 Section 155(6)(a) of the *Constitution*.
4 Burns and Beukes *Administrative Law* 41.
5 Section 44(1)(a) of the *Constitution*. See *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) (hereafter *Maccsand (WCC)*) 71J-72B.
6 Section 44(2 of the *Constitution*). See *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 55.

The executive competence of the national sphere of government is vested in the president.[7] The president exercises the executive authority together with the other members of cabinet. National executive authority is exercised by preparing, initiating and implementing national legislation, developing and implementing policy, co-ordinating the functions of state departments and administrations, and preparing and initiating legislation.[8]

The *Constitution* provides that provincial legislatures may adopt a provincial constitution, pass legislation on matters listed in Schedules 4 and 5, and assign legislative power to municipal councils.[9] Provinces have exclusive legislative competence over the matters listed in Schedule 5.[10] 'Provincial planning' is a functional area of exclusive provincial legislative competence as set out in Schedule 5 Part A.[11] A provincial legislature has concurrent legislative competence with Parliament over matters listed in Schedule 4,[12] and it may make laws reasonably necessary for or incidental to the effective exercise of any matter listed in Schedule 4.[13] Schedule 4 matters include 'regional planning and development' and 'urban and rural development'.

Provincial executive power is exercised by preparing, initiating and implementing provincial legislation in the province, implementing national legislation within the functional areas listed in Schedules 4 and 5 and legislation outside those functional areas that has been assigned to the province, developing and implementing provincial policy, co-ordinating the functions of the provincial administration and its departments,[14] and performing any other function assigned to the provincial executive.[15]

7 Section 85(1) of the *Constitution*.
8 Section 85(2) of the *Constitution*.
9 Section 104(1)(a)-(b) of the *Constitution.*
10 See *Swartland Municipality v Louw* 2010 5 SA 314 (WCC) (hereafter *Swartland (WCC*)) para 30.
11 Section 104(1)*(b)*(ii) of the *Constitution*. Madlingozi and Woolman "Provincial Legislative Authority" 7; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) 384D; *Swartland (WCC)* para 29.
12 See generally *Swartland (WCC)* para 29; *Maccsand (WCC)* 69I-71E.
13 Section 104(4) of the *Constitution*.
14 Section 125(1)-(2) of the *Constitution*.
15 Section 125(2) of the *Constitution*.

Certain matters relating to planning are shared by the national and provincial spheres. In the context of planning, 'regional planning and development' and 'urban planning and development' are listed as areas of concurrent legislative competence in Schedule 4 Part A. 'Municipal planning' is listed in Schedule 4 Part B. Both Parliament and provincial legislatures can, therefore, pass legislation on all of these functional areas.

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 and Part B of Schedule 5, and any other matter assigned to it by national or provincial legislation.[16] It may make and administer by-laws for the effective administration of the matters it has the right to administer.[17]

Jafta J reiterates that the *Constitution* allocates 'regional planning and development' and 'rural and urban development' concurrently to the national and provincial spheres, 'provincial planning' exclusively to the provincial sphere and 'municipal planning' to the local sphere, and that these functional areas are not contained in hermetically sealed compartments but that they nevertheless remain distinct from one another.[18] This is confusing, because the contents of these functional areas overlap[19] and there is uncertainty regarding the responsibility for and precise contents of the functional areas relating to planning. This is evidenced by a number of interesting and important court decisions dealing with the ambit of the functional areas that relate to planning. The first was the 2002 ruling in *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government.*[20] However, since the provisions of the interim *Constitution* were applicable then and they differ from related provisions in the 1996 *Constitution* this

16 Section 156(1) of the *Constitution*. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) *(*hereafter *Wary Holdings (CC))* para 16; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 73; *Swartland Municipality (WCC)* para 27; *Maccsand (WCC)* 69J; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) (hereafter *Gauteng Development Tribunal (CC)*) paras 45-46; *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) (hereafter *Maccsand (SCA)*) para 12; *Louw v Swartland Municipality* [2011] ZASCA 142 (23 Sep 2011) (hereafter *Swartland Municipality (SCA)*).

17 Section 156(2). See also *Wary Holdings (CC)* para 16; *Maccsand (SCA)* para 12.

18 *Gauteng Development Tribunal (CC)* paras 54-55.

19 *Maccsand (CC)* para 47.

20 *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) (hereafter *In re DVB Behuising (CC)*).

case will not be discussed further.[21] In 2009 an important minority judgment in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[22] was handed down by Yacoob J. It dealt with the applicability of the *Subdivision of Agricultural Land Act* 70 of 1970 (SALA). A groundbreaking decision of the CC was *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal,*[23] a case dealing with the constitutionality of chapters V and VI of the *Development Facilitation Act* 67 of 1995 (the DFA). Another equally groundbreaking case was *Maccsand (Pty) Ltd v City of Cape Town.*[24] Together with *Minister for Mineral Resources v* S*wartland Municipality,*[25] the applicability of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA) was determined alongside the *Land Use Planning Ordinance (C)* 15 of 1985 (LUPO). Other recent cases that take this issue further are *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape*[26] and *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning*.[27] All of these decisions develop the ongoing debate of what the content and boundaries of the various functional areas relating to planning are. They will feature in the following discussion of the contents of the different functional areas relevant to planning.

21 Schedule 6 of the interim Constitution listed 'regional planning and development' and 'urban and regional planning' as legislative competences of provinces .

22 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC). See also Van Wyk 2009 *SAPL* 545-562; Kidd *Environmental Law* 213-214. See also *Maccsand (WCC)* 72H.

23 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC). See also the SCA decision in *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) (hereafter *Gauteng Development Tribunal (SCA)*).

24 *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) (hereafter *Maccsand (CC)).* See also *Maccsand (WCC)*; *Maccsand (SCA).*

25 *Minister for Mineral Resources v Swartland Municipality* [2012] ZACC 8 (12 Apr 2012) (hereafter *Swartland Municipality (CC)*). See also *Swartland Municipality (WCC); Swartland Municipality (SCA)*.

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

27 *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 (WCC) (hereafter *Shelfplett (WCC)*).

3 Functional areas relating to planning

3.1 Planning in general

In a planning context generally, the important minority judgment in *Wary Holdings* stands out with Yacoob J's statement that: [28]

> 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.

The Constitutional Court was asked to decide whether or not the Minister of Agriculture still had jurisdiction over the subdivision of agricultural land after the establishment of the new municipal system in South Africa that provides for so-called 'wall to wall' municipalities. The CC was divided in its judgment. Seven members of the court held that the Minister continued to have a say. Based on their understanding of the constitutional arrangements for land use and planning, a minority of three came to a different conclusion.

The facts of the case were that *Wary Holdings (Pty) Ltd* sold plots in a proposed subdivision of portion 54 of the farm No. 8 Port Elizabeth to Stalwo (Pty) Ltd. The land was zoned as agricultural land but Stalwo wanted to use it for industrial purposes. An application by Wary Holdings to the municipality for the subdivision and rezoning of the land was approved but subject to the condition that Wary Holdings effect substantial improvements to the land. Since the cost of these improvements was significant and the land had in the meantime increased in value, Wary Holdings requested an increase in the purchase price. Stalwo refused. Wary Holdings then took the view that the agreement was invalid and unenforceable. Stalwo approached the High Court for a declaratory order that the agreement was binding and that Wary Holdings must effect transfer of the property to it. The High Court examined the effect of the proviso to the definition of 'agricultural land' in SALA. It held that the proviso provided a point in time with reference to which it had to be established if land qualified as agricultural land. If, at that point in time, it was

28 *Wary Holdings (CC)* para 128. See also *Swartland Municipality (WCC)* para 30.

regarded as agricultural land, it remained so despite any changes to local government structures and their boundaries.[29] Stalwo's application was dismissed. On appeal, the Supreme Court of Appeal (SCA) ruled that the amendment to the definition of 'agricultural land' by the insertion of the proviso was intended only temporarily to preserve the status of agricultural land. The proviso was meant to operate only for as long as the land situated there remained in the jurisdiction of a transitional council.[30] Once transitional councils were replaced by municipal councils in 2000, the classified land lost its agricultural character unless specifically declared by the Minister to be agricultural land. As a result, the SCA found that the land in question was not agricultural land and that the provisions of SALA did not apply to the agreement between the parties. Wary Holdings then appealed to the CC, which reversed the decision of the SCA. In holding that SALA was still applicable, the majority judgment examined the issue in the context of the structure of municipalities in South Africa and concluded that the duration of the classification of land as agricultural land was not tied to the life of transitional councils but that it would continue and remain so classified.[31]

The minority judgment of Yacoob J, supported by Nkabinde J and O'Regan ADCJ, gave a specific planning law complexion to the matter. Yacoob J emphasised that as far as SALA 'is concerned with zoning, subdivision and sale of land, it is not concerned with agriculture but with the functional area of planning'.[32] This view was not new. The 1997 *White Paper on South African Land Policy* stated that: [33]

> Although the…Act was primarily designed to prevent the subdivision of farms into uneconomic units…its principal role has been to operate as a zoning regulation.

Central to the decision was Yacoob J's reference to the division of powers and functions. He indicated that the way in which the power concerning planning is managed in the *Constitution* is crucial, explaining the relationship between 'regional

29 *Wary Holdings (CC)* para 25 referring to the unreported High Court decision *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Registrar of Deeds, Cape Town* EC Case No 5349/05 (26 Jan 2006).

30 *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA) (hereafter *Stalwo (SCA)*) para 24.

31 *Wary Holdings (CC)* para 62. For a discussion of the majority judgment, see Olivier and Williams 2010 *Journal for Juridical Sciences*.

32 *Wary Holdings (CC)* para 129.

33 Department of Land Affairs *White Paper* para 3.14.

planning and development', 'provincial planning' and 'municipal planning' as set out in Schedules 4 and 5 of the *Constitution*.[34] Yacoob J's view was that to continue to accord the planning function to the (then) national Minister of Agriculture and Land Affairs in relation to agricultural land would be at odds with the *Constitution* in two respects. First, it would negate the municipal planning function and, secondly, it might well trespass into the sphere of exclusive provincial competence of provincial planning.[35]

3.2 Municipal planning

Since the content of the different functional areas seems to be determined by the content of 'municipal planning' it is important to first determine what 'municipal planning' comprises. Yacoob J, in the *Wary Holdings* case, stated that 'municipal planning' is a local government function over which both national and provincial government exercise legislative competence.[36] So, said Yacoob J, municipalities must engage in integrated development planning as set out in the *Local Government: Municipal Systems Act* 32 of 2000.[37] An integrated development plan must include a spatial development framework that must set out the objectives that reflect the desired spatial form of the municipality as well as strategies to achieve those objectives. The strategies must indicate desired patterns of land use, address the spatial reconstruction of the municipality, and relate to the nature and location of development in the municipality. Moreover, the spatial framework must set out the basic guidelines for a land use management system in the municipality.[38]

The issue of the content of 'municipal planning' was thrashed out in the 'GDT' cases.[39] These cases were initiated by the City of Johannesburg Metropolitan Municipality in an attempt to perform its statutory functions in regard to municipal

34 *Wary Holdings (CC)* para 127.
35 *Wary Holdings (CC)* para 131.
36 *Wary Holdings (CC)* para 127.
37 *Wary Holdings (CC)* paras 132-135.
38 *Wary Holdings (CC)* para 136.
39 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 4 SA 572 (W) (hereafter *Gauteng Development Tribunal (W)*); *Gauteng Development Tribunal (SCA)*; *Gauteng Development Tribunal (CC).*

planning without the interference of the Gauteng Development Tribunal, a provincial body established under the DFA. A practice had developed whereby applications for land development were being made and approved, not in terms of the provincial *Town-planning and Townships Ordinance* 15 of 1986 (T), but in terms of the DFA.

Three events gave rise to the action by the City of Johannesburg. The first was the approval by the Gauteng Development Tribunal of the rezoning of a single residential property in Linden to permit the establishment of a restaurant and gift shop.[40] The second was the approval of an application by Ivory Palm Properties 20 CC to establish a township on the farm Roodekrans comprising 21 erven, of which 19 would be zoned 'Residential 1', one 'Agricultural' and one 'Special' for the purposes of access to the township. The third was the approval of an application for the establishment of a land development area on the farm Ruimsig 265 IQ, zoned 'Agricultural'. The zoning did not permit residential development or township establishment, and the properties fell outside the municipality's urban development boundary.[41] The municipality opposed the applications on the grounds that the proposed use as a township would be inconsistent with and compromise the town planning scheme, the integrated development plan, the applicable spatial development frameworks and the urban development boundary.

In August 2005, the City of Johannesburg Metropolitan Municipality unilaterally announced that it would no longer recognise approvals in terms of the DFA. Simultaneously, it brought an application in the (now) South Gauteng High Court for declaratory orders relating to the powers that the Gauteng Development Tribunal and the Gauteng Development Tribunal Appeals Tribunal have under the DFA to amend town planning schemes and to approve the establishment of townships. It further applied to review and set aside the decisions approving the applications and for an order interdicting the developers from using the Roodekrans and Ruimsig properties for the establishment of land development areas. Gildenhuys J, in the Witwatersrand High Court,[42] decided that the DFA was in fact parallel legislation that

40 *Gauteng Development Tribunal (W)* para 19. The decision of the SCA is discussed in an article by Van Wyk 2010 *PER* 214-234.

41 *Gauteng Development Tribunal (W)* paras 93 and 99.

42 *Gauteng Development Tribunal (W)*.

could be employed alternatively to the procedure set out in the provincial ordinances, and turned down the application.

This necessitated an appeal to the SCA, where the principal issue to be determined was the constitutionality of chapters V and VI of the DFA.[43] In deciding that these chapters were unconstitutional, the court expanded on the manner in which land use is regulated under the provincial ordinances and related legislation[44] as well as the claimed parallel powers that were given to provincial development tribunals in terms of the DFA.[45] The court looked at the structure of government and concluded that certain powers of government are conferred directly by the *Constitution* on the lower tiers of government.[46] The only real question was whether the functional area described as 'municipal planning' included the functions that have always been and continue to be performed by municipalities. If so, these were matters reserved to municipalities and could not be assigned to another body such as a provincial development tribunal.[47] The SCA held that 'planning' refers to the control and regulation of land use, and the prefix 'municipal' confines it to municipal affairs. These include the functions assigned to municipalities under the provincial ordinances, including township establishment and town planning.[48] The court's view was 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.[49] It is clear from Nugent JA's decision that the DFA is not part of 'municipal planning'. The court declared chapters V and VI of the DFA invalid in their entirety.[50] It suspended the declaration of invalidity for 18 months to enable Parliament to remedy the defects identified by the court.[51]

In order to confirm the invalidity order, to seek leave to appeal against certain ancillary orders relating to the suspension of the declaration of invalidity as well as to

43 *Gauteng Development Tribunal (SCA)* para 4.
44 *Gauteng Development Tribunal (SCA)* paras 5-11.
45 *Gauteng Development Tribunal (SCA)* paras 13-18.
46 *Gauteng Development Tribunal (SCA)* paras 24-29.
47 *Gauteng Development Tribunal (SCA)* para 30.
48 *Gauteng Development Tribunal (SCA)* para 31.
49 *Gauteng Development Tribunal (SCA)* para 1.
50 *Gauteng Development Tribunal (SCA)* para 43.
51 *Gauteng Development Tribunal (SCA)* para 50.

seek leave to appeal against the dismissal of its appeal in relation to the review of two decisions of the tribunal, the City of Johannesburg turned to the Constitutional Court. Determining the meaning of 'municipal planning', Jafta J agreed with the SCA and held that: [52]

> '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.

The trend set by *Wary Holdings* and *Gauteng Development Tribunal* was confirmed in the *Maccsand* and *Swartland Municipality*[53] cases. Both of these cases dealt with the question of whether the holding of a mining permit or mining right granted under the MPRDA exempts the holder from having to obtain authorisation for its mining activities in terms of laws that regulate the use of that land, in particular the provisions of LUPO.

The *Maccsand* case concerns mining in an area zoned as Public Open Space and Rural. The Rocklands Dune (erf 13625) is vacant land zoned as Public Open Space in the residential area of Mitchell's Plain adjacent to private homes and situated between two schools. The Westridge Dune (erven 1210 zoned 'Rural' with an informal settlement on it, 9889 Mitchell's Plain and 1848 Skaapskraal zoned 'Public Open Space') consists of three contiguous erven also located in the residential area of Mitchell's Plain. The city owns these erven, the zoning of which excluded mining. In October 2007 Maccsand (Pty) Ltd was granted a mining permit in respect of the Rocklands Dune,[54] that authorised the mining of sand on the Rocklands dunes but restricted the mining to an area of 1,5 hectares. In August 2008 Maccsand was granted a mining right in respect of the Westridge Dune.[55] In 17 February 2009 it started mining activities on the erven but did not give the City of Cape Town any

52 *Gauteng Development Tribunal (CC)* para 57. *Maccsand (WCC)* 69I-71E; *Maccsand (SCA)* para 27.

53 *Minister of Mineral Resources v Swartland Municipality* [2012] ZACC 8 (12 Apr 2012) (hereafter *Swartland Municipality (CC)*). See also *Swartland Municipality (WCC); Swartland Municipality (SCA)*.

54 In terms of s 27 of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter MPRDA).

55 In terms of s 23 of the MPRDA.

notice of such commencement,[56] prompting the city to launch an urgent application to interdict and restrain Macssand from continuing mining activities on the Rocklands Dune unless and until it obtained the requisite authorisations in terms of LUPO. The city's view was that neither of the zones applicable in respect of the properties authorised the use of the land for mining and that before any lawful mining activity could take place either the zoning scheme would have to be amended to authorise mining on the relevant land or a departure from the existing zoning scheme would have to be granted to allow mining to take place. Maccsand (Pty) Ltd contended that once a mining right or permit has been granted the holder has a right to undertake mining at the location and that no other law or authority may 'veto' the decision taken by the relevant minister or delegate.[57]

With reference to the Constitutional Court decision in *Gauteng Development Tribunal*, Davis J in the Western Cape High Court found firstly that municipal planning includes the control and regulation of the use of land that falls within the jurisdiction of a municipality. Secondly, the national and provincial spheres of government cannot and do not have the power to exercise executive municipal powers or the right to administer municipal affairs.[58] Mining and the provisions of the MPRDA did not 'trump' all other legislation, and therefore the provisions of LUPO were applicable.[59]

When Maccsand and the Minister appealed, the SCA relied on the decisions in *Wary Holdings*[60] and *Gauteng Development Tribunal*.[61] Plasket AJA showed that mining is an exclusive national legislative competence and that the administration of the MPRDA is vested in the national executive.[62] In terms of LUPO, municipalities have the power to regulate land use in their areas of jurisdiction subject to oversight by the provincial government.[63] Since it is not required by the MPRDA, the Minister of

56 In terms of s 5(4) of the MPRDA.
57 *Maccsand (WCC)* 67A-C.
58 *Maccsand (WCC)* 71D-E.
59 *Maccsand (WCC)* 72G.
60 See also Van Wyk 2009 *SAPL* 545-562; Kidd *Environmental Law* 213-214; and *Maccsand (WCC)* 72H.
61 *Gauteng Development Tribunal (SCA)* and *(CC).*
62 *Maccsand (SCA)* para 14*.*
63 *Maccsand (SCA)* para 17.

Minerals and Energy does not have to take into account a municipality's integrated development plan or its scheme regulations. Consequently, [64]

> it cannot be said that the MPRDA provides a surrogate municipal planning function that displaces LUPO. Its concern is mining, not municipal planning. That being so, LUPO continues to operate alongside the MPRDA. Once a mining right or mining permit has been issued, the successful applicant will not be able to mine unless LUPO allows for that use of the land in question.

In the Constitutional Court Jafta J stressed that mining is an exclusive competence of the national sphere of government. The MPRDA is concerned with mining while LUPO governs the control and regulation of the use of all land in the Western Cape Province. These laws serve different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governs mining, LUPO regulates the use of land. The exercise of a mining right granted in terms of the MPRDA is subject to LUPO. An overlap between the two functions occurs due to the fact that mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments.[65] There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws.[66]

The notion that mining cannot take place until the land in question is appropriately rezoned is permissible in our constitutional order. One sphere of government may take a decision whose implementation may not take place until consent is granted by another sphere within whose area of jurisdiction the decision is to be executed. Each is concerned with different subject matter. If consent is refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be

64 *Maccsand (SCA)* para 33.
65 *Maccsand (SCA)* para 43.
66 *Maccsand (SCA)* para 43; *Maccsand (CC)* para 45.

resolved through cooperation between the two organs of state, failing which the refusal may be challenged on review.[67] The appeal therefore failed.[68]

In *Minister for Mineral Resources v Swartland Municipality* [69] The Hugo Louw Trust owned the farm Lange Kloof. It granted Elsana Quarry (Pty) Ltd permission to mine granite.[70] In June 2008 Elsana applied to the municipality to have the farm rezoned so as to allow for mining to be conducted on it.[71] In February 2009 the Minister of Energy and Mineral Affairs[72] granted Elsana a mining right to be effective for a period of 30 years. A quarry site was established where the mining was to be carried out. Soon after mining operations commenced, the owner of the neighbouring farm complained to the municipality, alleging that the blasting of dynamite had an adverse effect on the production of milk from its cows.[73] In reply the municipality indicated that mining operations were not permitted in terms of LUPO. At that time the farm was zoned Agricultural I, which meant that it could be used for agricultural purposes like cultivation of crops or animal farming only. The municipality notified the Trust to apply for rezoning of the farm to Industrial III, which would authorise mining on the land. The Trust argued that the operations were conducted on the strength of the mining right.[74] The municipality then launched an urgent application in the High Court against the Trust, Elsana and the Minister, to restrain the Trust and Elsana from pursuing mining operations on the farm until it had been rezoned in terms of LUPO to allow mining. The Minister argued that LUPO did not apply to land used for mining, which was regulated by the MPRDA. Compliance with the MPRDA was sufficient to authorise the mining operations on the farm.[75]

Relying on the decision in *Wary Holdings*, the High Court granted the interdict.[76] It held that LUPO regulates land use and that it directs every local authority to comply and enforce compliance with its provisions. LUPO played no part in determining

67 *Maccsand (SCA)* para 48.
68 *Maccsand (SCA)* para 51.
69 *Minister for Mineral Resources v Swartland Municipality* [2012] ZACC 8 (12 Apr 2012). See further *Swartland Municipality (SCA); Swartland Municipality (WCC)*.
70 *Swartland Municipality (SCA)* paras 3-4.
71 *Swartland Municipality (SCA)* para 4.
72 In terms of s 23 of the MPRDA.
73 *Swartland Municipality (SCA)* para 5.
74 *Swartland Municipality (SCA)* para 6.
75 *Swartland Municipality (SCA)* para 7.
76 *Swartland Municipality (SCA)* paras 9-10.

applications for mining rights. Then the Minister appealed to the SCA. It held that where LUPO regulates land use planning the MPRDA governs mining. Accordingly, it concluded that LUPO operates alongside the MPRDA with the result that once a party is granted a mining right in terms of the MPRDA, it may not commence mining operations unless the land to which the right applies is appropriately zoned in terms of LUPO.[77]

From the court decisions it is clear that 'municipal planning' regulates issues that impact intra-municipally, and 'includes the zoning of land and the establishment of townships',[78] integrated development plans, and spatial development frameworks,[79] and that it is planning as regulated in the provincial ordinances.[80] These descriptions may not be sufficiently precise, and more detail is required, which could be supplied by provisions in the *Spatial Planning and Land Use Management Bill* (SPLUMB).[81] The SPLUMB indicates that for purposes of the (proposed) Act, municipal planning includes the compilation, approval and review of integrated development plans, spatial development frameworks and land use schemes, and the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use does not affect the provincial planning mandate of provincial government or the national interest.[82] In addition, 'municipal planning' could include the determination of the size of erven in certain areas, building restrictions, township establishment, the subdivision and consolidation of land, height and density restrictions, regulations with regard to rezoning, and the granting of consent uses.

3.3 Provincial planning

'Provincial planning' is an exclusive provincial competence. Yacoob J points out that provincial planning does not include municipal planning.[83] As a result 'provincial planning' is determined by the content of 'municipal planning'. Provincial planning therefore excludes integrated development planning, spatial development

77 *Swartland Municipality (SCA)* para 11.
78 *Gauteng Development Tribunal (CC)* para 57.
79 *Wary Holdings (CC)* paras 132-136.
80 *Gauteng Development Tribunal (SCA)* paras 6-10.
81 *Spatial Planning and Land Use Management Bill* B14-2012 1.
82 Section 4(1) *Spatial Planning and Land Use Management Bill* B14-2012.
83 *Wary Holdings (CC)* para 127.

frameworks, land use schemes, zoning, rezoning, the removal of restrictions, the subdivision of land, the establishment of townships, and all building restrictions that apply within municipalities.

Provincial planning could be interpreted to mean either planning at the provincial scale or all provincial planning and development.[84] Griesel J's judgment in *Lagoon Bay* seems to point to the latter interpretation. While there can be no quarrel with Griesel J's reasoning, some uncertainties do arise. With the system of wall-to-wall municipalities most 'planning' is the responsibility of municipalities unless there is a clear case of cross-provincial development and planning. However, the biggest uncertainty lies in determining precisely when provincial government may intervene[85] or what its powers of supervision, monitoring and support comprise.[86]

A determination of the content of 'provincial planning' is facilitated by the provision in the SPLUMB indicating that for the purposes of the (proposed) Act, provincial planning comprises the compilation, approval and review of a provincial spatial development framework, the planning by a province for the efficient and sustainable execution of its legislative and executive powers in so far as they are related to the development of land, and the change of land use as well as the making and reviewing of the policies and laws needed to implement provincial planning.[87]

3.4 Urban and rural development

'Urban and rural development' is listed as an area of concurrent national and provincial legislative competence in Schedule 4 Part A.[88] By questioning what happens to 'municipal planning' once all of the functions of town planning and township establishment are excised, Nugent JA in effect stated that 'urban and rural

84 Berrisford 2011 *Urban Forum*.
85 Section 139(1) of the *Constitution*. See 4 below.
86 Section 155(6) of the *Constitution*. See 4 below.
87 Section 4(2) *Spatial Planning and Land Use Management Bill* B14-2012. Schedule 1 of the draft Bill includes a list of matters that may be addressed in provincial legislation regulating land development, land use management, township establishment, spatial planning, subdivision of land, consolidation of land, the removal of restrictions and other matters related to provincial planning and municipal planning.
88 See *Gauteng Development Tribunal (SCA)* paras 41-43; *Gauteng Development Tribunal (CC)* para 18; *Swartland (WCC)* para 32. See also Berrisford 2011 *Urban Forum*.

development' is determined by the content of 'municipal planning'.[89]

The term 'development' features prominently in attempts to describe the content of 'urban and regional development'. In essence 'development' includes material changes that take place on land, such as construction, alteration, demolition, and the subdivision and consolidation of land. Being a process, change must be managed and regulated. Land development must consequently be integrated, people-centred, environmentally sustainable and financially viable.[90]

The High Court described 'urban and regional development' as being primarily a national and provincial competence and stated that municipal involvement therein is limited to planning for it, promoting it, and participating therein.[91] This reasoning, according to Nugent JA in the SCA, seemed to approach the matter the wrong way around. He could not accept that: [92]

> …the Constitution was framed so as to confine the powers of a municipality to conceiving and preparing plans in the abstract, with no power to implement them. It is suggested in the judgment of the court below that abstract planning of that kind (without implementation) might have a use in enabling a municipality to assist and participate in development that is undertaken by (or at the behest of) provincial and national government. I fail to see what purpose would be served by reserving power to local government merely to assist or participate in the exercise of powers by another tier of government.

Nugent JA gave some indication of what the content of this functional area is by holding that it could include: [93]

89 *Gauteng Development Tribunal (SCA)* para 31.

90 Pienaar 2001 *Stell LR* 459; Scheepers *Practical Guide* 8. See also the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008, where 'development',
in relation to a place, means any process initiated by a person to change the use, physical nature or appearance of that place, and includes −
(a) the construction, erection, alteration, demolition or removal of a structure or building;
(b) a process to rezone, subdivide or consolidate land; …
The *KwaZulu Natal Planning and Development Act* 6 of 2008 defines 'development' as 'the erection of buildings and structures, the carrying out of construction, engineering, mining or other operations on, under or over land, and a material change to the existing use of any building or land for non-agricultural purposes'.

91 *Gauteng Development Tribunal (W)* para 56. See *Gauteng Development Tribunal (SCA)* para 33.

92 *Gauteng Development Tribunal (SCA)* para 38.

93 *Gauteng Development Tribunal (SCA)* para 41. See also *Swartland Municipality (WCC)* para 32.

> …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 to be applied by municipalities, and so on.

Jafta J stated that a restrictive meaning should be ascribed to 'development' in order to enable each sphere to exercise its powers without interference from the other spheres.[94] He concluded that 'urban and rural development' is not broad enough to include the powers forming part of 'municipal planning'.[95]

The content of 'urban and rural development' could include land development, an approach that has been adopted in the various drafts of the SPLUMB.[96] A reason for treating land development as a national competence and as part of 'urban and rural development' could be to maintain essential national standards in terms of section 44(2)(c) of the *Constitution*, or to provide for uniformity across the country, as is required in terms of section 146(2) of the *Constitution*.

3.5 Regional planning and development

As is the case with 'urban and regional development', 'development' is central in 'regional planning and development'. The prefix 'municipal' in 'municipal planning' puts the competence in the municipal sphere.[97] Similarly 'regional' refers to a context separate from 'provincial' or 'municipal'.

'Planning' is said to entail both forward planning and land use[98] and 'development' envisages change in land use. 'Regional planning and development' as listed in Schedule 4 would refer to the forward planning of a specifically demarcated region, geographical or otherwise, for a specified purpose.

94 *Gauteng Development Tribunal (CC)* para 62.
95 *Gauteng Development Tribunal (CC)* para 63.
96 Berrisford 2011 *Urban Forum*.
97 See *Gauteng Development Tribunal (SCA)* para 1.
98 *Wary Holdings (CC)* para 128. See also *Swartland Municipality (WCC)* para 30.

4 Support and monitoring of municipalities

The above discussion shows that the content of the different planning functional areas is demarcated with reference to the content of 'municipal planning'. Yet, municipalities cannot operate entirely independently and their powers may be curtailed by the following constitutional provisions. Firstly, national government[99] and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority.[100] Secondly, provincial government has the powers of monitoring and supporting local government in the provinces as well as of promoting the development of local government capacity to enable municipalities to perform their functions and manage their affairs.[101] Thirdly, when a province or a municipality cannot or does not fulfil an executive obligation in terms of legislation, the national or the relevant provincial executive may intervene by taking appropriate steps. These steps include issuing a directive to the provincial executive or the municipal council describing the extent of the failure and indicating the measures to be taken to rectify the situation. National and provincial government may also assume responsibility for the relevant obligation in so far as it is necessary to maintain essential national standards or meet established minimum standards for the rendering of a service, to prevent a province or municipal council from taking unreasonable action that could be prejudicial to another municipality or the province, or to maintain economic unity.[102]

The power of provincial government to monitor and support local government in terms of section 155(6) of the *Constitution* was the reason why the clear lines on 'municipal planning' competence drawn by the SCA and the CC in the *Gauteng Development Tribunal* case were given a twist by the Western Cape High Court.[103]

99 Subject to s 44 of the *Constitution* that deals with national legislative competence.

100 Section 155(7) of the *Constitution*. See also *Maccsand (SCA)* para 24; *Lagoon Bay (WCC)* para 12.

101 Section 155(6)*(a)-(b)* of the *Constitution.* See also *Gauteng Development Tribunal (CC)* paras 46-47; *Maccsand (SCA)* para 24; *Lagoon Bay (WCC).* See further the provisions in the draft *Spatial Planning and Land Use Management Bill* B14-2012 (s 10).

102 Sections 100(1) and 139(1) of the *Constitution*. *Gauteng Development Tribunal (CC)* para 58; *Premier, Western Cape v Overberg District Municipality* 2011 4 SA 441 (SCA).

103 *Lagoon Bay (WCC).*

At issue was an application to overturn the refusal by the Western Cape Minister for Local Government, Environmental Affairs and Development Planning to rezone and subdivide land for the proposed Lagoon Bay Lifestyle Estate. In dismissing the application Griesel J adopted a debatable restrictive and qualified reading of the *Gauteng Development Tribunal* case on the question of 'municipal planning'.

The envisaged Lagoon Bay Lifestyle Estate, between Mossel Bay and George, was an ambitious development. It would span 655 hectares of which 166 hectares would be used for two 18-hole golf courses, 7 hectares for a five-star hotel and clubhouse, 63 hectares for landscaped private parks and open spaces and 200 hectares for a private nature reserve. Besides areas for roads and commercial activities, the remaining 194 hectares were earmarked for a residential housing development comprising some 895 single title residential erven, 320 single and fractional lodges and 150 single and fractional apartments. After the refusal of the application to rezone and subdivide certain properties that would constitute the development, the applicant sought an order first to set aside the decision on the grounds that the MEC did not have the functional competence to decide zoning and subdivision applications, and second on various traditional review grounds. Its argument was based on the fact that the rezoning and subdivision of land fall within the exclusive autonomous sphere of local government under the heading of 'municipal planning'.

In response the MEC contended that the *Gauteng Development Tribunal* case should be read restrictively because some planning decisions impact on more than one municipality and should hence be seen as 'extra-municipal' and in the reach of 'regional planning and development' and 'provincial planning'. For reasons not disclosed in the judgment, the MEC was of the view that the Lagoon Bay development belonged in these categories. Griesel J accepted these contentions and added that the constitutional scheme specifically envisages functional areas of concurrent competence where different spheres of government may legitimately exercise powers in relation to the same subject matter.[104] He distinguished the case from the *Gauteng Development Tribunal* case, indicating that provinces are entrusted with extensive powers and functions of 'supervision', 'monitoring' and

104 *Lagoon Bay (WCC)* para 14.

'support' of local government in terms of section 155(6) of the *Constitution*.[105] Griesel J referred to the *First Certification* judgment and stated that the view of the Constitutional Court[106] was that these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters.[107]

In *Lagoon Bay* reference was also made to a provincial government's power of direct intervention when a municipality cannot or does not fulfil an executive obligation in terms of section 139(1). Griesel J indicated that this power is also considerable. As a result he found that not all questions of the zoning of land and the establishment of townships fell exclusively under 'municipal planning', nor should all such questions be determined exclusively by municipalities, nor should provincial government never have authority to decide planning issues.[108]

There is a difference of opinion on the ambit of these provisions. While these powers of monitoring, support, assuming responsibility and intervention seem to have quite a wide ambit, the views expressed by the Western Cape High Court are questionable. The *First Certification* judgment indicates that only where the functioning of a municipality is defective or deficient may its autonomy be compromised.[109] In addition, national and provincial government do not have the power to exercise the executive powers of municipalities outside the purview of section 139. They are

> not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures.[110]

Moreover, each sphere of government must respect the status, powers and functions of the other spheres of government and it may not assume any power except that conferred on it in terms of the *Constitution*.[111]

105 *Lagoon Bay (WCC)* para 12. Plasket AJA, in *Maccsand (SCA)* para 24, also refers to s 155(6) of the *Constitution*.
106 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
107 *Lagoon Bay (WCC)* para 12.
108 *Lagoon Bay (WCC)* paras 13-14.
109 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 373.
110 *Gauteng Development Tribunal (CC)* para 44.
111 Section 41(1)(e) of the *Constitution*. See also *Gauteng Development Tribunal (CC)* para 43.

The *Lagoon Bay* ruling raises questions that should best be answered on appeal. There is no indication in the judgment, for example, that the Lagoon Bay development would straddle municipal boundaries, taking it into the realm of regional or provincial planning, or what other factors or considerations would entitle a provincial Minister to decide when a planning matter is no longer a 'municipal' one. More fundamentally, the court based much of its ruling on the supervisory, monitoring, support and even intervention powers of a provincial government.[112] However, nothing in the judgment suggests that there was a need for monitoring and support or that the Minister disapproved of the application in the exercise of any of those functions.

5 Overlaps amongst different planning functional areas

Legislative and executive powers are not contained in hermetically sealed compartments and an overlap in the exercise of their powers by two spheres can occur. In such a case neither sphere would be intruding into the functional area of the other and each sphere would be exercising power within its own competence.[113]

In *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [114] Cameron AJ's views were that:

> Since, however, no national legislative scheme can ever be entirely water tight…and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation and hence to ascertain in what field of competence its substance falls, and, this having been done, what it incidentally accomplishes.

This view accords with that of Ngcobo J in *In re DVB Behuising (CC),* whose opinion was that a determination of whether or not Proclamation R293 dealt with a matter listed in Schedule 6 of the interim *Constitution* would involve an inquiry into the subject matter or the substance of the legislation, its essence or its true purpose or

112 *Lagoon Bay (WCC)* paras 12-13.
113 *Maccsand (CC)* para 47.
114 *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 62.

effect. Such an enquiry should focus not only on the direct legal effect but also on the purpose for which the legislation was enacted. The preamble and legislative history of a specific piece of legislation illuminate its substance, and they place the legislation in context, provide an explanation for its provisions, and articulate the policy informing it.[115]

In *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning*[116] Rogers J declared the Knysna-Wilderness-Plettenberg Bay Regional Structure Plan (KWP RSP) to be inconsistent with the *Constitution* and invalid. Although this conclusion rendered moot the review of the MEC's decision refusing to amend the RSP, Rogers J nevertheless expressed his conclusions on two grounds of review. The ground that is particularly relevant is that the MEC's decision was reviewable because in reaching it he had intruded impermissibly into the Bitou Municipality's exclusive competency regarding 'municipal planning'.[117]

In order to develop certain portions of the Farm Ganse Vallei No 444 for a golf and polo estate, the KWP RSP required an amendment of the designation of the properties as Recreation to Township Development. Shelfplett 47 (Pty) Ltd, the owner of the properties, applied to the MEC for the amendment. The application was supported by the Bitou municipality. In refusing the application the MEC indicated that his reasons were based on the following considerations: (a) where the local authority failed to establish the required urban edge, the MEC assesses a suitable urban edge to ensure that there is sufficient land for future development while attaining higher densities; (b) the existence of a golf estate and polo estate in the area did not justify a northward shift in the urban edge; (c) township development in a northerly direction was undesirable given the exceptionally attractive landscape; (d) the proposed development would put added pressure on the N2; (e) persons employed at the new development would have to travel substantial distances to reach the property, in conflict with the WC SDF's aim of bringing work opportunities

115 *In re DVB Behuising (CC)* para 36.
116 *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 *(WCC)* (hereafter *Shelfplett (WCC)*).
117 *Shelfplett (WCC)* para 81.

closer to where employees reside and (f) the development would entail potential expense for the Bitou Municipality in providing services and infrastructure.[118]

What had to be determined was whether these considerations were matters of 'municipal planning' or matters of 'provincial planning'.[119] In this regard Rogers J's view was that a false dichotomy is postulated between the *function* entrusted to an authority and the *considerations* that may be taken into account in performing the function. He stated that: [120]

> In the *GDT* case it was the function (the granting of rezonings and subdivision approvals) that was investigated and held to be a *'municipal planning'* function… Once one finds that the function of approving rezonings and subdivisions is a municipal planning function, all the considerations that the governing legislation authorises a municipality to take into account in deciding rezoning applications and subdivision applications may be taken into account. They are *ex hypothesi* valid municipal planning considerations for purposes of the function under consideration. There is in truth no point in labelling the considerations - they take their character from the function to which they relate.

In the case of an RSP, the relevant function is the approval or amendment of the RSP. The action of approving or amending an RSP constitutes the performance of a provincial planning function. All the considerations that the empowering legislation entitles or requires the relevant authority to take into account are *ex hypothesi* provincial planning considerations for the purposes of that particular function.[121] This analysis may have the result that some of the considerations that a municipality takes into account in performing its municipal planning function of deciding rezoning and subdivision applications will be the same as or similar to considerations taken into account by the relevant authority in performing the provincial planning function of approving or amending an RSP (for example, containing urban sprawl, conserving the natural environment, and so forth). The *Constitution* distributes legislative and executive competence among the various levels of government. The subjects on which the various levels of government may legislate and the executive functions

118 *Shelfplett (WCC)* para 82.
119 *Shelfplett (WCC)* para 110.
120 *Shelfplett (WCC)* para 113.
121 *Shelfplett (WCC)* para 114.

they may perform are the subject of the distribution, not the reasons and considerations they may take into account.[122]

6 Co-operative government

Planning comprises a number of functional areas administered by different spheres of government. Where different spheres of government have responsibility for different functional areas relating to planning, the potential for overlap, conflict and confusion is significant. A question that arises is what can be done to alleviate such confusion and conflict. Since the functional areas cannot all be the administrative responsibility of one government department and since there is no veto of one sphere over another, the principles of co-operative government must feature substantially.[123]

According to Chapter 3 of the *Constitution*, the three spheres of government– national, provincial and local – are required to observe and adhere to the principles of co-operative government and must conduct their activities within the parameters of these principles.[124] Section 41(1) sets out eight principles of cooperative government and intergovernmental relations. Three principles of specific relevance require every sphere of government to respect the constitutional status and powers of the other spheres; not to assume the powers and functions of another sphere; and to exercise its powers and perform its functions in such a way that it does not impinge on the 'geographical, functional or institutional integrity of government in another sphere.'[125] The idea behind the list of principles is to facilitate the proper exercise of power and functions between the different spheres, especially where there are conflicts or overlaps.

122 *Shelfplett (WCC)* para 115.
123 *Maccsand (CC)* para 47. See also Van Wyk 2009 *SAPL*.
124 S 40(2). See Woolman and Roux "Co-operative Government and Intergovernmental Relations" 10-13; Du Plessis "Interpretation of statutes" para 2C5.
125 Section 41(1)(e)-(g) of the *Constitution. See Uthukela District Municipality v President of the Republic of South Africa* 2003 1 SA 678 (CC) para 19. See Woolman and Roux "Co-operative Government and Intergovernmental Relations" 9-10; Du Plessis "Interpretation of statutes" para 2C5.

Co-operative government, as promoted in chapter 3 of the *Constitution*, features not only between different government departments and organs of state in a single sphere, but also across the different spheres of government. The inclusion of section 41 is challenging in the sense that it is no easy task for the three spheres to co-operate with one another, and it is often difficult to demarcate boundaries and responsibilities. The problem is addressed by the *Intergovernmental Relations Framework Act* 13 of 2005.[126] The object of the Act is: [127]

> to provide within the principle of co-operative government...a framework for the national government, provincial governments and local governments, to facilitate co-ordination in the implementation of policy and legislation.

The Act provides structures and mechanisms to promote and facilitate intergovernmental relations and to settle intergovernmental disputes.[128] These include the creation of the President's Co-ordinating Council and intergovernmental forums where the different spheres of government can raise matters affecting them,[129] provisions for the conduct of intergovernmental relations[130] and procedures for the settlement of intergovernmental disputes.[131]

7 Conclusion

From the perspective of the law of planning, a core issue is the developing and ongoing debate regarding the content of the legislative and executive functional areas relating to 'planning' that are enjoyed by each of the spheres of government. Included are 'regional planning and development' and 'urban and rural development' listed in Schedule 4 Part A of the *Constitution*, 'provincial planning' listed in Part A of Schedule 5 and 'municipal planning' listed in Part B of Schedule 4. The point of departure seems to be that the content of these planning competences must be demarcated with reference to 'municipal planning'. There seems to be consensus

126 See *Gauteng Development Tribunal (W)* par 7; *Swartland Municipality (WCC)* paras 42-44.
127 Section 4 *Intergovernmental Relations Framework Act* 13 of 2005.
128 Section 41(2)*(a)-(b) Intergovernmental Relations Framework Act* 13 of 2005.
129 Chapter 2 *Intergovernmental Relations Framework Act* 13 of 2005.
130 Chapter 3 *Intergovernmental Relations Framework Act* 13 of 2005.
131 Chapter 4 *Intergovernmental Relations Framework Act* 13 of 2005. In *Swartland Municipality (WCC*) para 45, s 45 was held to be not applicable because the applicants launched the proceedings to comply with the provisions of LUPO and not to settle an intergovernmental dispute.

that 'municipal planning' comprises all aspects of intra-municipal planning, such as integrated development planning and land use management, while 'provincial planning' is planning that has an extra-municipal impact. Within the constitutional framework of the powers and functions of local government this is correct. Yet uncertainties remain, occasioned by constitutional provisions that permit the support, monitoring, supervision and intervention by national and provincial government over provinces and municipalities respectively. Moreover, overlapping and conflicting decision-making processes only add to the uncertainty and confusion. In principle the idea of intergovernmental co-operation is laudable. In practice, however, it has yet to find its place in the legislative and decision-making processes in South Africa. While we have come a long way in a relatively short time to have obtained so much clarity on such an intricate issue as the content of the different planning functional areas, there is still some way to go. How to resolve the remaining uncertainties will, invariably, be facilitated by the courts, in their interpretation of the relevant constitutional provisions.

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List of abbreviations

CC	Constitutional Court
DFA	*Development Facilitation Act*
KWP RSP	Knysna-Wilderness-Plettenberg Bay Regional Structure Plan
LUPO	*Land Use Planning Ordinance*
MPRDA	*Mineral and Petroleum Resources Development Act*
PER	Potchefstroom Electronic Law Journal
SALA	*Subdivision of Agricultural Land Act*
SAPL	South African Public Law
SCA	Supreme Court of Appeal
SPLUMB	*Spatial Planning and Land Use Management Bill*
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif van die Suid-Afrikaanse Reg