

The impact of development on the environment as part and parcel of integrated development planning?

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1 INTRODUCTION

In September 2007 the Supreme Court of Appeal confirmed the order made a year earlier by the Transkei High Court, which ruled that the owners of 16 cottages which had been built without permission along the Transkei coast vacate the sites they had been illegally occupying and demolish and remove the buildings and structures without damaging the natural environment.¹ These buildings and structures had been built in contravention of section 39(2) of the Transkei (Environmental Conservation) Decree 9 of 1992, which requires a permit to clear, develop or build on land in the one kilometre wide strip of land above the high water mark – the coastal conservation area.² Some ten years earlier the Transkei Supreme Court had granted an order, applied for by *inter alia* the Wildlife Society of Southern Africa and members of the Wild Coast Cottage Owners Association, against the Minister of Environmental Affairs and Tourism to enforce the provisions of the Decree.³

The illegal cottages issue is but one example of a situation where both land use planning and environmental procedures must be followed when a decision is taken as to whether to permit a certain development or not. At times these procedures duplicate one another, at times there is uncertainty as to which of a number of procedures must be followed and at times it is difficult to ascertain which is the responsible authority.⁴ Many other examples exist of situations where there is uncertainty about procedures and authorities.

1 *Barnett v Minister of Land Affairs* 2007 SCA 95 (RSA); *Minister of Land Affairs v David Sinclair Barnett* case no 177/2002. See also Carnie T 'Judge rules on illegal Transkei holiday homes' http://www.iol.co.za/general/news/newsprint.php?art_id=vn20051222071307590C19. Yeld J 'Cottage residents appeal court's ruling' [http://www.iol.co.za/general/news/newsprint.php?art_id=vn200604732283C39](http://www.iol.co.za/general/news/newsprint.php?art_id=vn200604732283C39;); Wingate-Pearse G 'E Cape govt bulldozes illegal Wild Coast homes' <http://www.moneyweb.co.za/property/655492.htm>.

2 The repair and removal of illegal cottages is addressed in s 60 of the National Environmental Management: Integrated Coastal Management Bill 2007/07/13 Department of the Environment. The original draft bill was published in Notice 1829 GG 29476 for comment on 2006/12/14. See also Glazewski J 'Coastal resources need this bill's protection' *Pretoria News* 2007/01/07; Gosling M & Quintal A 'Keeping the coast clear' *Cape Times* 2006/12/08.

3 *Wildlife Society v Minister of Environmental affairs and Tourism* 1996 (3) SA 1095 (TkSC)

4 See also Bosman C, Kotzé L and Du Plessis W 'The failure of the Constitution to ensure integrated environmental management from a co-operative governance perspective' (2004) *SAPL* 411–421.

These include the construction of a 400 metre long road which will impact on heritage resources,⁵ the erection of an entertainment complex in the coastal protection zone in an area zoned as public open space,⁶ the construction of filling stations in residential areas,⁷ the erection of telecommunication masts for cellular phone networks⁸ and the establishment of golf and wildlife estates on agricultural land.⁹ For each of these examples land use planning and environmental legislation applies which sets out procedures to obtain permission to proceed with the proposed development. Such permission is the 'environmental authorisation' to proceed with the development.¹⁰ The granting of the permission or authorisation is based on the submission of some sort of assessment, variously known as a 'basic assessment',¹¹ 'scoping and environmental impact assessment',¹² 'environmental impact assessment',¹³ 'integrated environmental authorisation',¹⁴ 'environmental evaluation'¹⁵ or 'impact assessment report'.¹⁶ Not only the terminology, but also the content, procedures to be followed and responsible authority for each of these tools differs.

This results in uncertainty as to which legislation and, consequently, which procedures are applicable in a particular case. This situation was sketched by Brauteseth as long as ten years ago when he pointed out that there is still a wide body of disparate legislation bearing on environmental management and land development generally.¹⁷ Despite attempts to address the situation, South Africa is not much closer to rationalising the legislation containing procedures for permission to undertake development.

It is clear that land use planning and environmental issues do not and cannot exist independently of one another. The point at which they intersect is the examination of the impact of the development on the environment. In the face of the different sectoral statutes which are applicable, as well as the differing procedures and authorities which must deal with applications

5 See sub heading, National Heritage Resources Act, 2.3 below.

6 See sub heading, National Environmental Management: Integrated Coastal Management Bill, 2.7 below.

7 See, for example, *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 (5) SA 161 (W); *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W). See also Field TL 'Sustainable development versus environmentalism: competing paradigms for the South African EIA regime' (2006) *SALJ* 409–436.

8 See Basson JHE 'Retrospective authorisation of identified activities for the purposes of environmental impact assessments' (2003) *SAJELP* 133–150.

9 See Van Wyk J 'Getting golf estates right...' (2006) *SAPL* 371–381.

10 Glazewski J *Environmental law in South Africa* (2ed 2005) 248

11 In terms of the National Environmental Management Act 107 of 1998. See sub heading, National Environmental Management Act, 2.2 below.

12 *Ibid.*

13 In terms of the Mineral and Petroleum resources Act 2 of 2002. See sub heading, Mineral and Petroleum Resources Development Act, 2.6 below.

14 In terms of the National Environmental Management: Integrated Coastal Management Bill. (See fn 7 above).

15 In terms of the Development Facilitation Act 67 of 1995. See sub-heading, Development Facilitation Act, 2.4 below.

16 In terms of the National Heritage Resources Act 25 of 1999. (See fn 6 above).

17 Brauteseth N 'Possibilities for coastal zone management in the proposed Planning and Development Act in KwaZulu-Natal' (1997) *SAJELP* 207–222

to develop land, the question can be asked whether it is not desirable to introduce some rationalisation into these different processes and make any investigation into the impact of land development on the environment part of the process of integrated development planning.¹⁸

This article will firstly examine some of the statutes which regulate aspects of land development from both the land use planning and environmental perspectives. For each of these statutes an indication is given as to which type of procedure is employed to determine the impact of development on the environment so that a permit or authorisation can be granted. A discussion of the problems arising from the different procedures follows.

Against this background, a vision for integrating land use planning and environmental processes are discussed.

2 OVERVIEW OF RELEVANT LEGISLATION AND POLICY

2.1 Land use planning and environment

Legislation pertaining to land use planning and environment is both diverse and voluminous. At the heart of both of these disciplines is land. Land has different uses and purposes.

Land use planning can be divided into two separate and independent processes, namely, forward planning (also known as plan creation, planning of land use, or integrated development planning), and development control (also known as the management of changes to the use of land, or land use management).¹⁹ Initially a plan, framework or blueprint for future development must be drawn up. Typically, such a plan or framework would include an integrated development plan, a spatial development framework and a town-planning scheme. Each of these instruments must correspond with one another. This process is generally a local authority function where inputs from communities with regard to the desirability of the land uses proposed for the area must be obtained. Provision must then be made to manage changes or alterations to an original plan or framework. Examples of changes in land use are township establishment and the removal of restrictive conditions. Development control can only take place once proper forward planning has been done. Changes to land use are usually initiated by owners and developers of property who must get approval from a land use regulator,²⁰ subject to inputs from third parties. This process is regulated in terms of provincial land use planning legislation.²¹

18 The idea of rationalising Integrated Environmental Management as part of Integrated Development Planning was mooted in an article by Retief FP and Sandham LA 'Implementation of Integrated Environmental Management (IEM) as part of Integrated Development Planning (IDP)' (2001) *SAJELP* 77–87.

19 *Wise Land Use: White Paper on Spatial Planning and Land Use Management Government Gazette* 22473 dated 2001/07/20 77; Claassen P & Milton J 'Land use planning' in Fuggle R & Rabie A *Environmental management in South Africa* (1992) 715–738

20 In terms of the Land Use Management Bill (2007) this can be either a municipality, the Land Use Tribunal, the Appeal Tribunal or the Minister – see s 27. A draft Land Use Management Bill was originally published in *Government Gazette* 22473 dated 2001/07/20. The later version is referred to here.

21 See sub heading, Provincial legislation, 2.8 below.

In both legs of land use planning environmental issues are pertinent, as is seen from the discussion below of the various statutes regulating the environmental aspects of land use planning. At least four different procedures, in terms of different statutes, are applicable to determine the impact of a particular development on the environment before the development may be authorised or not. These procedures are discussed against the background of some general, introductory aspects of the relevant statute.

2.2 National Environmental Management Act

In 1998 The National Environmental Management Act (NEMA)²² was introduced as framework legislation to regulate the environment with principles of sustainable development at its core.²³ Sustainable development is a recurring theme in land use and environmental planning, demanding a holistic approach to land development so that the long-term negative impacts of current land use or development decisions can be minimised.²⁴ Land use planning and environmental management must function as a unit. This view is supported by the definition of sustainable development in NEMA as

the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.²⁵

NEMA stresses this issue again where it provides that development must be socially, environmentally and economically sustainable.²⁶ The idea of integration is central, the NEMA principles providing that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment.²⁷

Chapter 5 of NEMA, entitled *Integrated Environmental Management (IEM)*,²⁸ aims to promote the application of appropriate environmental management tools in order to secure the integrated environmental management of activities.²⁹ The general objectives of IEM include promoting the integration of principles of environmental management in decision-making which may have a significant effect on the environment, as well as identifying and employing the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management.³⁰ In order to give effect to the general objectives of IEM, the potential impact of listed activities on the environment, on socio-economic conditions and on our cultural heritage must be considered, inves-

22 107 of 1998

23 See generally Glazewski (fn 11) 12-15; Field (fn 8 above) 411-432.

24 *Wise Land Use* (fn 20 above) 72

25 S 1. See also *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* (fn 8 above)

26 S 2(3). See *Sasol Oil (Pty) Ltd v Metcalfe NO* (fn 8 above) at 171F; *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* (fn 8 above).

27 S 2(4)(b)

28 The term IEM is variously interpreted. See Nel J and Du Plessis W 'Unpacking integrated environmental management – a step closer to effective co-operative governance?' (2004) *SAPL* 181-190.

29 S 23(1)

30 S 23(2). See also Retief and Sandham (fn 19 above) 79

tigated, assessed and reported on to the competent authority charged with granting the relevant environmental authorisation.³¹ The main procedures to obtain an authorisation to perform an activity which may have detrimental effect on the environment are contained in NEMA³² together with the Environmental Impact Assessment Regulations 2006.³³ These regulations have only been in existence since April 2006. They supersede the EIA Regulations in terms of the partially repealed Environment Conservation Act.³⁴

In order to undertake an activity that might have a detrimental effect on the environment an authorisation must be obtained. NEMA provides that the Minister, and every MEC with the concurrence of the Minister, may identify issues for which an environmental authorisation is required and which may not commence before the authorisation is obtained from the competent authority.³⁵ These issues include activities, geographical areas based on environmental attributes, or individual or genetic existing activities which may have a detrimental effect on the environment.³⁶ The Act prescribes procedures for the listing of specified activities – so-called listed activities – in the *Government Gazette*.³⁷

A listed activity is an activity contained in one of two lists of activities. These lists are contained in GN R386 and GN R387 respectively.³⁸ The activities in GN R386 are activities which have a less severe impact on the environment while those contained in GN R387 are activities which have a more severe and detrimental effect on the environment.

If the activity to be performed is an activity listed in either of these two lists then a specific procedure to obtain an authorisation must be followed. GN R385 entitled 'Regulations in terms of Chapter 5 of the National Environmental Management Act 107 of 1989' contains the procedures in terms of which the impact of activities on the environment must be assessed. Two different procedures are applicable. The less detailed basic assessment must be applied in respect of an activity listed in GN R386, while the more detailed scoping and environment impact assessment must be applied in respect of a GN R387 activity.³⁹

After completion and submission of the assessments a decision on whether to grant the authorisation is made. In terms of the regulations the decision must be made by either the environmental authority in the province in which the activity is to be undertaken, the Minister in certain circumstances,⁴⁰ or an

31 S 24(1). See also Field (fn 8 above) 427–432

32 S 24(4)

33 GG 28753 dated 2006/04/21. The Regulations comprise GN R385, GN R386 and GN R387

34 73 of 1989 s 21(1). The Regulations were contained in GN R1182, GN R1183. See generally Glazewski (fn 11 above) 229-232; Scheepers T A A *practical guide to law and development* (2000) 129-138; Kotzé LJ and Van der Walt AJ 'Just administrative action and the issue of unreasonable delay in the environment assessment process: A South African perspective' (2003) *SAJELP* 39-66.

35 S 24(2)

36 S 24(2)(a)–(d)

37 S 24A

38 See (fn 34 above).

39 GN R385

40 If the application is for an activity contemplated in terms of s 24C(2) of NEMA.

organ of state with delegated powers.⁴¹ Where the land to which the application pertains is situated in a municipal area the application for the planning permission must take place in terms of planning legislation administered by the local authority. No provisions exist to facilitate the interaction between these two spheres of government, which must each decide a different aspect of a single application. Although local government is left out of the environmental decision-making process, it retains authority to determine the land use issue. Despite NEMA stressing a holistic and integrated approach, the legislation, and as a consequence, practice perpetuates a differentiated approach.

The Environmental Impact Assessment Regulations 2006 are the principal procedures available to the provincial authorities to assess the impact of development on the environment. However, other, possibly conflicting, confusing or duplicating procedures are also available.

2.3 National Heritage Resources Act

The National Heritage Resources Act (NHRA)⁴² aims to introduce an integrated and interactive system for the management of national heritage resources⁴³ and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations.⁴⁴

Where certain developments are planned and heritage sites are threatened the Act provides a system to determine the impact of the development on the heritage resources. To this end the NHRA provides that:

Any person who intends to undertake a development categorised as the construction of a road ... exceeding 300 metres in length; the construction of a bridge or similar structure exceeding 50 metres in length, any development or other activity which will change the character of a site exceeding 5 000 square metres in extent ... or the rezoning of a site exceeding 10 000 square metres in extent ... must at the very earliest stages of initiating such a development, notify the responsible heritage resources authority and furnish it with details regarding the location, nature and extent of the proposed development.⁴⁵

If there is reason to believe that heritage resources will be affected by such development the developer must submit an impact assessment report.⁴⁶ Although no definition of 'impact assessment report' is provided, the responsible heritage resources authority must specify the information to be provided in the report. The following must be included: the identification and mapping of all heritage resources in the area, an assessment of the significance of such resources, an assessment of the impact of the development on such resources, an evaluation of the impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived from the development and plans for the mitigation of any adverse effects during and after the completion of the proposed project.⁴⁷ The report must be considered

41 In terms of s 42(1) of NEMA

42 25 of 1999

43 Long title

44 Preamble

45 S 38(1)

46 S 38(2)(a)

47 S 38(3)

by the heritage resources authority which must decide whether or not the development may proceed, whether any limitations, conditions, or protections are applicable, whether compensatory action is required and whether the appointment of specialists is required as a condition of approval of the proposal.⁴⁸ Despite the provision that a provincial heritage resources authority may not make any decision unless it has consulted with the South African Heritage Resources Authority (SAHRA),⁴⁹ the possibility still exists that the different heritage resources authorities will apply the criteria differently.

GN R 386 of the Environmental Impact Assessment Regulations 2006 includes the following as a listed activity:

The construction of a road that is wider than four metres or that has a reserve wider than six metres, excluding roads that fall within the ambit of another listed activity which are access roads of less than 30 metres long.⁵⁰

There is clearly duplication between these provisions and those in the NHRA, as well as uncertainty as to which provisions are applicable. In addition, there is confusion as to which authority is the competent authority to assess the construction of a road wider than four metres which impacts on heritage resources. Is it the NHRA, or the provincial environmental authority, or both? In addition, the local authority, which must approve the development in terms of land use planning legislation, is also involved.

The NHRA does attempt some rationalisation. It provides that if an evaluation of the impact of a specific development on heritage resources is required in terms of the (partially repealed) Environment Conservation Act,⁵¹ IEM guidelines or the (repealed) Minerals Act,⁵² the provisions of section 38 in the NHRA do not apply.⁵³ However, the proviso to this section states that the consenting authority must ensure that such an evaluation must fulfil the requirements of section 38(3) of the NHRA.⁵⁴ What is envisaged here is that the environmental authority must apply the additional provisions of the NHRA when it determines the impact of the specific development on the environment. Despite this section and its proviso separate procedures and different authorities in fact still exist. Furthermore, if heritage resources are situated in the coastal environment, the provisions of not only the Environmental Impact Assessment Regulations 2006 in terms of NEMA,⁵⁵ but also the of the proposed Integrated Coastal Management Act⁵⁶ could be applicable. Over and above these, the provincial land use planning legislation must be applied to determine the granting of the planning permission.

48 S 38(4)

49 S 38(5)

50 Clause 15. (See also fn 12 above)

51 73 of 1989. The relevant statute is now NEMA

52 50 of 1991. The Act was repealed by the Mineral and Petroleum Resources Development Act 28 of 2002. Similar provisions apply. See 2.6 below.

53 S 38(8). The provisions of the Environment Conservation Act 73 of 1989 and its EIA regulations (R1182, R1183 and R1184 GG 18261 of 1997-09-05) have been replaced by NEMA and the *Environmental Impact Assessment Regulations 2006*. (See fn 12 above).

54 S 38(3)

55 See (fn 12 above)

56 See (fn 14 above).

Where a person would like to see rationalisation of all the procedures relating to the submission of an environment impact assessment, the above is evidence of the fragmentation and uncertainty with regard to the decision as to whether a development may take place or not.

2.4 Development Facilitation Act

In 1995 the Development Facilitation Act (DFA)⁵⁷ introduced a new normative planning ethos in South Africa, providing for principles to govern land use planning and development. The DFA was, however, only an interim measure to bridge the gap between apartheid planning and a new planning system.⁵⁸ A draft Land Use Management Bill⁵⁹ aims to repeal the DFA.⁶⁰ However, until this happens provisions of the DFA remain relevant.

The Act provides for general principles for land development, stressing efficient and integrated land development in order to encourage environmentally sustainable land development practices and procedures.⁶¹ Furthermore, policy, administrative practice and laws should promote sustainable land development at the required scale in that they should promote the sustainable protection of the environment.⁶² The Act also introduced Land Development Objectives (LDOs) containing the idea of planning for land use in an integrated and strategic manner.⁶³ LDOs had to include objectives relating to urban and rural growth and the form or type of development in the relevant area, including objectives in relation to the sustained utilisation of the environment.⁶⁴ However, LDOs were soon replaced by Integrated Development Plans (IDPs).⁶⁵

In order to facilitate the speedy provision of housing, two chapters in the DFA are devoted to establishing land development areas in urban and rural contexts respectively.⁶⁶ The DFA contains its own set of procedures to determine the impact on the environment of the development of these land development areas. The procedures provide that on approving an application for land development a development tribunal may impose a condition of establishment relating to the environment or environmental evaluations.⁶⁷ An environmental evaluation is

an evaluation of the environmental impact of a proposed land development, conducted in accordance with the integrated environmental management guidelines which are from time to time issued or amended by the Department of Environment Affairs and Tourism.⁶⁸

57 67 of 1995. See generally Glazewski (fn 9 above) 207-212; Van Wyk J *Planning Law* (1999) 141-150; Scheepers (fn 34 above) 62-65.

58 *Wise Land Use* (fn 20 above) 66

59 (Fn 18 above) s 79

60 Sch 2

61 S 3(1)(c)(viii)

62 S 3(1) (h)(iii). See also *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* (fn 8) 149E-150A

63 *Wise Land Use* (fn 20 above) 69

64 S 28(1)(b)(ii)

65 See sub heading, Integrated development planning, 4.2 below. See also Retief and Sandham (fn 17 above) 81-82

66 Ch 5 and 6

67 S 33(2)(n)

68 S 1

Regulations in respect of the procedure for environmental evaluations were published in January 2000.⁶⁹ Briefly, the procedure is that every land development application must include an environmental scoping report. The scoping report must indicate the extent to which the proposed activity or development will impact on the environment and, where appropriate, deal with prescribed aspects of the environmental impact. The designated officer must recommend to the tribunal whether an environmental impact assessment should be prepared.⁷⁰ On the basis of the environmental scoping report, the tribunal may impose a condition of establishment which relates to the environment or environmental evaluations.⁷¹ Alternatively, the tribunal may require the applicant to prepare an environmental impact assessment.⁷² A comprehensive environmental evaluation must be compiled in accordance with environmental impact assessment or other guidelines,⁷³ which are probably NEMA and the Environmental Impact Assessment Regulations 2006.⁷⁴

The DFA is increasingly being used by developers to authorise developments for which the Act was never intended.⁷⁵ Examples of such developments are petrol filling stations in residential areas and golf estates on land which was previously zoned as agricultural land.⁷⁶ Since the designated officer must recommend to the tribunal whether an environmental impact assessment should be prepared and since it is the tribunal that may impose a condition of establishment relating to the environment or environmental evaluations, it is clear that authorities other than the provincial environmental authorities or municipal land use planning authorities are involved in deciding applications. Moreover, since the DFA is utilised to suspend the provisions of legislation, such as the Subdivision of Agricultural Land Act⁷⁷ to permit contentious golf estates to be established on agricultural land it is clear that different criteria are employed to determine whether a particular development should be permitted.

Although procedures to develop land and to assess the impact of development on land are contained in a single statute, the fact that they are contained in a different statute to NEMA or the provincial statutes regulating land use planning, and the fact that they are administered by a different government department where decisions are taken by different authorities, are further evidence of the fragmentation and confusion which applies in the whole area of environment impact assessment.

The repeal of the DFA by the envisaged Land Use Management Act will mean the demise of the DFA regulations requiring environmental authorisations. While the fact that the draft legislation contains no similar provisions

69 *Government Gazette* 20775 dated 2000/01/04

70 Reg 31

71 S 33(2)(n) or 51(2)(e)

72 Reg 31(3)(b)

73 Reg 31(1) & 31(3)(b)

74 See (fn 12 above).

75 See Van Wyk J 'The relationship (or not) between rights of access to land and housing: De-linking land from its components' 2005 *StellLR* 466–487.

76 Van Wyk (fn 10 above) 377–378

77 70 of 1970

points to a measure of rationalisation it is unclear at this point what the situation will be.⁷⁸

2.5 Land Use Management Bill

The 2007 Land Use Management Bill aims⁷⁹ to

provide for the uniform regulation of land use management in the Republic; to establish principles for land development and land use management in the Republic; to provide for land use schemes ...

The Bill contains five so-called Directive Principles which must guide the formulation, determination, development and implementation of all policies and legislation in the three spheres of government regarding land development and land use management, namely, equality; efficiency; integration; sustainability and fair and good governance.⁸⁰ According to the Bill sustainability envisages '... the sustainable management and use of the resources making up the natural and built environment ...'.⁸¹

The Bill provides for the drafting of land use schemes⁸² and land use regulation.⁸³ In the performance of these functions municipalities do not seem to be expected to take too much cognisance of environmental issues. Where it must take environmental matters into account, it does so indirectly through the local government: Municipal Systems Act (MSA).⁸⁴ The MSA contains the provisions relating to the compilation of the Integrated Development Plan (IDP) – one of the main functions of municipalities.⁸⁵ Against this background the Land Use Management Bill tasks each municipality to align its Spatial Development Framework (SDF), a component of the IDP, and land use scheme with the framework for integrated development planning.⁸⁶ The Bill also provides that a land use scheme must be consistent with section 24 of NEMA.⁸⁷ In addition, a decision on an application to change the use of land must give effect to the Directive Principles, national programmes, policies and norms, as well as the municipal SDFs.⁸⁸ These are convoluted and indirect ways of addressing environmental issues which could quite easily be neglected in the process.

Except for having to give effect to the principle of sustainability,⁸⁹ the Bill makes no further direct reference to environmental issues. This could indicate either a move away from dealing with environmental issues in land use planning legislation or a move towards dealing with environmental issues only in

78 Discussed in sub heading, Land Use Management Bill, 2.5 above.

79 (Fn 18 above) Long title

80 S 9

81 S 13

82 Chapter 4

83 Chapters 5 and 6

84 32 of 2000. See further sub heading, Integrated development planning, 4.2 below.

85 Chapter 5

86 S 16(1). The framework for integrated development planning is set out in s 27 of the MSA. See (fn 37 above).

87 S 19(1)(b)

88 S 33(1)

89 Draft Land Use Management Bill s 13

terms of environmental legislation. Either alternative would be unfortunate because it would perpetuate the dual decision-making process, and with it, the different sets of authorities, with regard to the development of land.

2.6 Mineral and Petroleum Resources Development Act

The Mineral and Petroleum Resources Development Act⁹⁰ replaced the Minerals Act.⁹¹ It places a duty on the Minister to ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards.⁹² The Act provides that mineral and petroleum resources are the common heritage of all the people of South Africa.⁹³ As the custodian of these resources the state may grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, mining right, mining permit and retention right.⁹⁴

Section 38 of the Act places certain responsibilities on the holders of these permits and rights. They must at all times give effect to the general objectives of integrated environmental management as contemplated in NEMA⁹⁵ and must consider, investigate, assess and communicate the impact of their prospecting or mining on the environment.⁹⁶

The procedures as set out in the new Environmental Impact Assessment Regulations 2006⁹⁷ must then be followed⁹⁸.

Every person who has applied for a mining right must conduct an environmental impact assessment and submit an environmental management programme within 180 days of the date on which he or she is notified by the Regional Manager to do so.⁹⁹ Any person who has applied for a reconnaissance permission, prospecting right or mining permit must submit an environmental management plan.¹⁰⁰ In their preparation the applicant must establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives.¹⁰¹ Furthermore, the applicant must investigate, assess and evaluate the impact of his or her proposed operations on *inter alia* the environment and the socio-economic conditions of any person who might be affected by the operation.¹⁰² The Minister of Minerals and Energy Affairs must then approve these plans and programmes.¹⁰³

90 28 of 2002

91 50 of 1991. Despite the fact that the case *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) was decided in terms of the Minerals Act 51 of 1990 its principles apply equally to the new Act.

92 S 3(3)

93 S 3(1)

94 S 3(2)

95 Laid down in ch 5 of NEMA

96 As contemplated in s 24(7) of NEMA

97 See (fn 12 above).

98 S 38(1)(b)

99 S 39(1)

100 S 39(2)

101 S 39(3)9a)

102 S 39(3)(b)(i)–(ii)

103 S 39(4)

The Mineral and Petroleum Resources Development Act introduces not only duplication into the whole issue of environment impact assessment, but also uncertainty and concern. The Act permits applicants for permits and rights to submit the environmental management plan and programmes – the impartiality of applicants must certainly be compromised where they must themselves compile these documents.

The Minister of Minerals and Energy Affairs is tasked with approving the environmental management plan and programmes. The question can be raised as to whether the competence and expertise of the Minister of Minerals and Energy Affairs extends to such environmental issues.

While an attempt is made to align the provisions with those set out in NEMA, the additional requirements of having to supply environmental management plans or approved environmental management programmes introduce procedures which create uncertainty and duplication. Moreover, a different authority is brought into the picture, a factor which plays into the hands of fragmentation and confusion.

2.7 National Environmental Management: Integrated Coastal Management Bill

Much debate preceded the publication of the draft National Environmental Management: Integrated Coastal Management Bill in December 2006 and the National Environmental Management: Integrated Coastal Management Bill in July 2007.¹⁰⁴ The Bill establishes a system of integrated coastal and estuarine management in South Africa, including norms, standards and policies, in order to promote the conservation of the coastal environment, as well as the ecologically sustainable development of the coastal zone. The Bill also aims to ensure that development and the use of natural resources within the coastal zone is socially and economically justifiable and economically sustainable. Furthermore, it defines rights and duties in relation to coastal areas and prohibits inappropriate development of the coastal environment.¹⁰⁵

In terms of the Bill the coastal zone comprises essentially three components, each of which is extensively defined, namely, coastal public property,¹⁰⁶ the coastal protection zone¹⁰⁷ and coastal access land.¹⁰⁸ The coastal zone also

104 N 2. See also Glazewski J 'Towards a coastal zone management act for South Africa' (1997) *SAJELP* 1–22; Schneier SM 'A coastal zone management policy for South Africa: some perspectives' (1997) *SAJELP* 167–183; Brauteseth (n 5); Schrijvers J 'Towards integrated coastal management for Saldanha Bay and Langebaan Lagoon, South Africa' (2000) *SAJELP* 97–136; Hauck M & Sowman M 'Coastal and fisheries co-management in South Africa: is there an enabling legal environment?' (2005) *SAJELP* 1–21.

105 Long title

106 S 7–15. Coastal public property comprises *inter alia* the coastal waters, land submerged by the coastal waters, existing islands, the seashore and the admiralty reserve.

107 S 16–20. The coastal buffer zone consists of *inter alia* any land declared to be a sensitive coastal area in terms of s 17 of the Environment Conservation Act 73 of 1989, any land unit situated wholly or partially within 1 kilometre of the high water mark with a specified zoning and any land unit excluded from these provisions which is situated wholly or partially within 100 metres of the high water mark.

108 S 18 read with s 26. Coastal access land comprises strips of land adjacent to coastal public property that are designated as such in order to secure public access to the coastal public property.

comprises coastal waters,¹⁰⁹ coastal protected areas,¹¹⁰ special management areas¹¹¹ and coastal set-back lines.¹¹²

The land comprising the coastal zone traditionally forms part of the area of jurisdiction of municipalities and, in principle, the use of the land is regulated in terms of a land use management plan. It is therefore imperative that the legislative provisions regulating environmental issues, on the one hand, and land use issues, on the other hand, be aligned.

Within the context of the integration of land use and environmental issues, the Bill will slot in with NEMA. It does this in terms of the reference to chapter 5 of NEMA in the definition of 'integrated environmental authorisation',¹¹³ as well as the provision that the Bill must be regarded as a 'special environmental management Act' as defined in section 1 of NEMA.¹¹⁴

The Bill contains a section entitled 'Integrated Environmental Authorisations'.¹¹⁵ Where an integrated environmental authorisation is required for coastal activities, the competent authority must take into account all relevant factors, including whether coastal public property, the coastal protection zone or coastal access land will be affected, and if so, the extent to which the proposed development or activity is consistent with the purpose for establishing and protecting those areas.¹¹⁶ Although the integrated environmental authorisation is granted in terms of NEMA, the Bill sets additional requirements and qualifications. These are that the competent authority may issue an integrated environmental authorisation if the very nature of the proposed activity or development requires it to be located within coastal public property, the coastal protection zone or coastal access land or the proposed activity or development will provide important services to the public when using coastal public property, the coastal protection zone, coastal access land or a coastal protected area.¹¹⁷

Furthermore, the Bill sets out certain instances where such an authorisation will not be granted, for example, where the development is situated within coastal public property and it is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations,¹¹⁸ where the envisaged development is situated either in the coastal protection zone or coastal access land and is inconsistent with the purpose for which these areas are designated.¹¹⁹ An authorisation will not be issued if the development or activity for which authorisation is sought is likely to cause irreversible or long-lasting irreversible effects to any aspect of the coastal environment that cannot be successfully mitigated, is likely to

109 S 21

110 S 22

111 S 23–24

112 S 25

113 S 1. NEMA refers to 'environmental authorisation'.

114 S 5(2)

115 Chapter 7 part 3

116 S 63(1)(c)

117 S 63(3)

118 S 63(2)(a)

119 S 63(2)(b)–(c)

be significantly damaged or prejudiced by coastal environmental processes, if it would substantially prejudice the achievement of any coastal management objective or if it would be contrary to the interests of the whole community.¹²⁰

Since the Bill clearly aligns its procedures for environmental impact assessment with those in NEMA, and because the competent authority is the same as that referred to in NEMA, a measure of rationalisation is introduced into the whole system of environment impact assessment. However, because the requirements for environment impact assessment are contained in two different Acts, because additional requirements are set with regard to coastal management, and especially because the land use planning procedures are left out of the picture, duplication and uncertainty could result.

2.8 Provincial legislation

While national land use planning legislation lays down the normative content, provincial land use planning legislation sets out procedures for both forward planning and development control. Most provincial planning is still contained in the ordinances of the erstwhile four provinces of Transvaal,¹²¹ Orange Free State,¹²² Natal¹²³ and the Cape Province.¹²⁴ These contain no references to environmental issues either in the provisions regarding the drafting of plans or in the provisions regulating land use change.

Four of the nine provinces have enacted new planning and development legislation, namely, Gauteng,¹²⁵ KwaZulu-Natal,¹²⁶ Western Cape¹²⁷ and Northern Cape.¹²⁸ Only the Northern Cape statute is in force.¹²⁹

Vastly different from the legislation presently still applicable, these statutes all contain sections addressing environmental issues. The Northern Cape Planning and Development Act introduces provisions referring to the environment in the section on zoning schemes.¹³⁰ The proposed Gauteng Planning and Development Act provides that environmental considerations must be balanced with economic development in the Principles of Sustainable Development.¹³¹ The proposed KwaZulu-Natal Planning and Development Act contains a section on environmental management¹³² and the proposed Western Cape Planning and Development Act sets out procedures regarding environmental impact assessments.¹³³ Since provisions addressing environmental

120 S 63(2)(d)-(g).

121 Town Planning and Townships Ordinance 15 of 1986.

122 Townships Ordinance 9 of 1969.

123 Town Planning Ordinance 27 of 1949.

124 Land Use Planning Ordinance 15 of 1985.

125 Gauteng Planning and Development Act 3 of 2003.

126 KwaZulu-Natal Planning and Development Act 5 of 1998.

127 Western Cape Planning and Development Act 7 of 1999.

128 Northern Cape Planning and Development Act 7 of 1998.

129 Its date of commencement is 2000/06/01.

130 Ss 37(2)(d)-(e) .

131 S 4(c). The Act is to be supplemented by detailed regulations which will, presumably, further address environmental considerations.

132 S 31.

133 S 67.

issues are contained in the same legislation which sets out procedures to manage land use the same authority assesses both aspects of an application. This is a welcome change. The only problem is that the latter three statutes are not yet operative.

3 PROBLEMS ARISING FROM THE LEGISLATIVE FRAMEWORK

3.1 Different authorities responsible

If one examines which authorities have responsibilities for land development and the environment, it is clear that not only are all spheres of government involved, but that across the three spheres of government different ministries and departments play different roles.¹³⁴

The national Department of Environmental Affairs and Tourism is the lead agent responsible for environmental management in South Africa.¹³⁵ An example of the involvement of national government is that the Minister is the competent authority to determine whether an authorisation is granted for certain activities¹³⁶ and the Minister grants an integrated environmental authorisation in certain circumstances in terms of the Integrated Coastal Management Bill.¹³⁷

The Minister of Minerals and Energy Affairs approves the environmental management plan or programme for prospecting and mining¹³⁸ and the Minister of Land Affairs can be the land use regulator in terms of the Land Use Management Bill if the application affects the national interest¹³⁹

Provinces have authority for the following: The Environmental Impact Assessment Regulations 2006 provide that an application for an authorisation to perform certain listed activities must be submitted either to the MEC or to the provincial department responsible for environment affairs in the province.¹⁴⁰ In terms of the DFA, the provincial tribunal makes decisions on environmental authorisations¹⁴¹ while the Land Use Management Bill provides that a land use regulator can be the provincial Land Use Tribunal.¹⁴²

Local government is the home of integrated development planning. It is responsible for formulating the planning frameworks on which all the decisions on land development should be based.¹⁴³ Local authorities, being the institutions at the coalface of planning, must typically obtain the inputs from communities on planning matters. This is reinforced in the chapter on community participation in the MSA.¹⁴⁴ An example of local government responsibility

134 See also Bosman, Kotzé and Du Plessis (fn 5 above) 411-421.

135 Bray E 'Legal perspectives on global environmental governance' (2005) *THRHR* 357-360 360.

136 See GN R386 in terms of the EIA Regulations. See (fn 12 above).

137 S 64. See (fn 7 above).

138 Mineral and Petroleum Resources Act 2 of 2002 ss 38 and 39. See also (fn 14 above).

139 S 27(f) read with s 32. See sub-heading, Land Use Management Bill, 2.5 above.

140 See GN R386 and GN R387 *Government Gazette* 28753 dated 2006/04/21. See 2.2 above.

141 S 15. See (fn 16 above).

142 S 27(c). See (fn 144 above).

143 *Wise Land Use* (fn 20 above) 89-90.

144 Ch 4.

can be found in the Land Use Management Bill which provides that a land use regulator can be a metropolitan, local or district municipality.¹⁴⁵

Unfortunately, it would appear that the constitutional and other statutory provisions governing co-operative government do not significantly contribute towards facilitating these intricate relationships¹⁴⁶ and few institutions for co-operation, such as the Committee for Environmental Co-ordination, have been established.¹⁴⁷

3.2 Different functional areas

Both *environment* and *regional planning and development* are functional areas of concurrent national and provincial legislative competence,¹⁴⁸ while *provincial planning* is a functional area of exclusive provincial legislative competence.¹⁴⁹ Local authorities have the competence to enact bylaws on the matters listed in Part B of Schedule 4 and Schedule 5 of the Constitution respectively.¹⁵⁰ Included in Part B of Schedule 4 is municipal planning.

Although national government's responsibility is mainly in the legislative arena, it does have some decision-making functions with regard to both land use planning and environmental issues. The national departments already mentioned, namely, the Department of Environment Affairs and Tourism, the Department of Land Affairs and the Department of Minerals and Energy Affairs all have decision-making functions with regard to environmental matters.

Provincial government plays a pivotal role in environmental issues, evidenced mainly by the executive role played by the various provincial departments of the environment, nature conservation and tourism.¹⁵¹ These departments in all the provinces jealously guard their role as decision-makers in the environment impact assessment process.

Local government plays a pivotal role in land use planning. In terms of the Constitution, municipalities have the right to administer the local government matters listed in Part B of Schedules 4 and 5 respectively,¹⁵² as well as any other matters assigned to them by national and provincial legislation.¹⁵³ Most importantly though, municipalities are expected to undertake planning which aligns their planning with, and complements, the development plans and strategies of other affected municipalities, organs of state of the province within which the municipality is located, and national organs of state so as to give effect to the principles of co-operative government contained in section 41 of the 1996 Constitution.¹⁵⁴

145 S 27(a)-(c). See (fn 144 above).

146 Chapter 3 of the 1996 Constitution deals with cooperative government. See also the Intergovernmental Relations Framework Act 13 of 2005.

147 Ss7-10. See also Bray (fn 139 above) 357-360.

148 1996 Constitution Sch 4. See also Bray (fn 139 above) 361-363; Bosman, Kotzé and Du Plessis (fn 5 above) 415-418.

149 *Ibid.*

150 1996 Constitution s 156(1)(a).

151 See Glazewski (fn 11) 107 for a complete list for the nine provinces.

152 See (fn 155 above)

153 1996 Constitution s 156(1)(b).

154 MSA S 24(1).

Co-operative government presupposes the sharing of expertise and other scarce resources and generally to work in a co-ordinated manner to avoid the fragmentation of laws and policies and the unnecessary duplication of the administration. However, there is little concrete evidence of successful co-operative governance and it is extremely difficult to find solutions to this problem.¹⁵⁵

3.3 No single procedure

From the discussion above¹⁵⁶ it is clear that at least four different procedures exist to determine the impact of development on the environment. This is referred to in some detail in the 2001 White Paper *on Spatial Planning, Land Use Management and Land Development*.¹⁵⁷ The White Paper indicates that a critical problem is the overlap between the procedures for land use change or land development in terms of planning legislation, and those for environmental impact assessment in terms of environmental legislation. As both the Department of Environment Affairs and Tourism and the Department of Land Affairs were simultaneously rationalising and reforming the legislative frameworks for environmental management, on the one hand, and spatial planning, land use management and land development on the other, the White Paper stated that an extraordinary opportunity existed to ensure that these two procedures were aligned – this, it said, would result in the public being better served, which would increase the quality and extent of public involvement in decision-making. The quality of applications would improve and co-operative governance would be increased, leading to a more efficient use of scarce human resources in the public sector and the reduction of negative ‘turf’ squabbles. The quality of environmental and planning decisions would improve because it would be more difficult to justify a decision solely on *environmental* or *land use* grounds. It stressed that a more integrated approach would have to be adopted.¹⁵⁸

3.4 Consequences

The problems sketched above indicate that there exists a complex and confusing legal environment where processes and procedures are governed by different statutes and institutions. Uncertainty occurs where authorities are unclear on which procedures to apply. Inefficiency is the result of the numerous and unco-ordinated planning and environmental measures. Control is divided, there is duplication and fragmentation, and intergovernmental conflicts may arise between local and provincial authorities or between two

155 Bray (fn 139 above) 370-371.

156 2.

157 (Fn 15 above).

158 83.

provincial authorities.¹⁵⁹ This situation could not be put better than was done by Griesel J in *Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape*¹⁶⁰ who stated that

the statutory framework regulating town planning and building regulations in its present form is fragmented and cumbersome in the extreme. ... It requires a vast bureaucratic machine to administer all these provisions. This inevitably leads to certain 'practices' which develop in the course of time in the administration of these pieces of legislation which may or may not necessarily correspond with the legislative regime which underpins the process. The system also frequently ... gives rise to conflicting and inconsistent decisions by different functionaries, officials and organs at different levels of local and provincial government.

4 VISION FOR INTEGRATING LAND USE PLANNING AND ENVIRONMENTAL PROCESSES

The different statutes containing differing procedures, the various authorities, the duplication and the possible uncertainty and confusion all motivate towards a less fragmented and more rational system to determine the impact of land development on the environment.¹⁶¹ As part of the process of integrated development planning a single system of environmental assessment could accommodate the different processes. This could comprise part and parcel of a competent and strong local government's role of integrated development planning. This vision is underpinned by principles in the 1996 Constitution, by the process of integrated development planning and by the *White Paper on Spatial Planning*.

4.1 1996 Constitution

The impact of section 24 of the 1996 Constitution is significant, evidenced by judicial pronouncements on the matter, such as those by Streicher J, who stated that

It is of considerable importance to an open and democratic society that the environment is protected for the benefit of present and future generations¹⁶²

and Olivier JA who said that

Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect ...¹⁶³

This statement is echoed in another ruling by Claassen J, who observed that environmental considerations have now been given rightful prominence by

159 See *Wise Land Use* (fn 20) 64-68; *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) 417; Claassen & Milton (fn 20) 718; Glazewski (fn 11) 193-225; Page D & Rabie A 'Land use planning and control' in Fuggle R & Rabie A *Environmental concerns in South Africa* (1983) 445-482 477; Pienaar J 'Fisiese beplanning in Suid-Afrika' (1995) TSAR 81-105; Van Wyk J 'Into the 21st century with the reform of planning law' (1991) THRHR 282-289; Bester R *Suid-Afrikaanse grondgebruikbeplanningsreg: Op pad na wasdom?* LLD thesis UP-retoria (2004).

160 2001 (4) SA 294 (C) at 329B-F.

161 See generally Retief and Sandham (fn 19 above).

162 *S v Mumba* 1997 (1) SA 854 (W) at 858I.

163 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) 719C-D.

their inclusion in the Constitution.¹⁶⁴

Section 24 finds support in other parts of the Constitution, notably that one of the objects of local government is to promote a safe and healthy environment.¹⁶⁵ This, says Budlender AJ, is indispensable to the enormous task of restructuring society in the functional areas of local government.¹⁶⁶

Municipalities also have all-important developmental duties, which include that they must structure and manage their administration, budgeting and planning processes to give priority to the basic needs of the community and promote the social and economic development of the community.¹⁶⁷ They must also participate in national and provincial development programmes.¹⁶⁸

The traditional role of local government was one of having to generate sufficient income to provide necessary infrastructure and services. However, since 1994 the nature and functions of local government have changed fundamentally.¹⁶⁹ The one area where this has been experienced most clearly is in development. There now rests a duty on municipalities to ensure that development legislation and policies are introduced. In addition, there rests a duty on officials to make decisions within that developmental framework. Those decisions must, against the background of developmentally oriented planning, address environmental issues.

4.2 Integrated development planning

The MSA is the most important statute furthering all aspects of integrated development planning. In pursuance of constitutional principles,¹⁷⁰ the MSA provides an important first point of departure because it requires a municipality to undertake developmentally oriented planning to ensure that certain rights in the Bill of Rights are progressively realised.¹⁷¹ One of the rights mentioned is section 24: the right to an environment that is not harmful to one's health or well-being. From this section it is clear that environmental issues must be integrated into every aspect of development.

The second amendment to the Local Government Transition Act¹⁷² (LGTA) introduced the Integrated Development Plan (IDP) which is defined as

a plan aimed at the integrated development and management of the area of jurisdiction of a municipality ...¹⁷³

Although this Act was only meant to be transitory, it laid the foundation for integrated development planning as provided for in later legislation regulating local government.

164 *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* (fn 8) 142C.

165 1996 Constitution s 152(1)(d).

166 *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) par 24.

167 1996 Constitution s 153(a).

168 1996 Constitution s 153(b).

169 Bauer C 'The developmental role of local government...' (2000) *Journal for Contemporary History* 89-110 at 89.

170 1996 Constitution s 153.

171 S 23(c).

172 97 of 1996.

173 Ss 33(1) & 10B.

The MSA provides that municipalities must adopt an IDP which is ‘... a single, inclusive and strategic plan for the development of the municipality’,¹⁷⁴ after following a consultative process with the local municipalities and the local community in its area. An IDP must include *inter alia* a reflection of the municipality’s vision for the long-term development of the municipality; an assessment of the existing level of development in the municipality; development priorities, objectives and strategies; the municipality’s Spatial Development Framework (SDF); and applicable disaster management plans. From the provision that municipalities must undertake developmentally oriented planning so as to contribute to the progressive realisation of *inter alia* the right to an environment that is not harmful to one’s health or well-being, it is clear that environmental issues cannot be excluded from the IDP.¹⁷⁵ This is supported by Retief and Sandham, who argue that principles of Integrated Environmental Management (IEM) should be incorporated with the IDP process at different phases to allow for a more holistic approach and ensure sustainable development practice.¹⁷⁶

4.3 Views in *Wise Land Use: White Paper on Spatial Planning*

The White Paper gives us a glimpse of what, in an ideal local government scenario, the solution to integrating land use planning and environmental issues would be.

The White Paper¹⁷⁷ indicates that it would be possible, in situations where both an EIA and a land use change or land development permission are required, that the procedures should be as closely aligned as possible. It argues that to locate the function within one sphere of government, and one institution, would enable that body to determine practical approaches to the problem that would match its own capacity and resources, within the framework set by national government. A number of important steps would have to be taken to ensure that local government would, in fact, be able to fulfil this responsibility effectively. It, therefore, proposes *inter alia* that municipalities be authorised to decide EIA applications, that they incorporate a strategic environmental assessment into their SDFs and that they establish one committee to deal with both EIAs and land use decisions.¹⁷⁸

Although the White Paper realises that to simply collapse the procedures for EIAs and land use change or land development into one would be difficult it envisages that the plethora of different procedures, in terms of different laws, should be replaced in new legislation with a single procedure, providing for thorough, yet speedy, consideration of applications, as well as meaningful involvement of the public in those decisions.¹⁷⁹

174 S 25(1).

175 S 23(1)(c).

176 (Fn 19 above) 86.

177 See (fn 20 above).

178 83-84.

179 83-84.

The White Paper was published in 2001. Since then nothing much has changed in the local government scenario in South Africa. In fact matters may well have deteriorated. While the ideals in the White Paper must find support, a major stumbling block remains the intractable problem of the underperformance and undercapacity of local government in South Africa.

In an area as important as determining whether to grant an authorisation permitting a development which may have a detrimental effect on the environment, development knowledge, expertise and competence are required. Where most of the municipalities in South Africa evidence a severe shortage of skills coupled with mismanagement, the attitude of provincial departments to protect their 'turf' is understandable.

5 CONCLUSION

Despite all the solid arguments in the White Paper for a less fragmented approach, new legislation has not really heeded the call for more integration of processes and procedures to determine, assess and mitigate the effects of development on the environment. A segmented, sectoral approach is still followed. The number of statutes applicable, the fact that some of them overlap and the fact that new land use planning legislation has been on the drawing board for more than six years, reinforce the conclusion that integrated development planning remains a dream.

Part of the problem may be that the legislation relevant in the context of development and the environment is too much of a 'complex totality', to borrow a phrase from Davis J.¹⁸⁰ Or, as Claassen J observed in *BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*,¹⁸¹ government is subject to a range of duties imposed on it when dealing with environmental issues which include complying with its constitutional obligations to respect, promote, protect and fulfil the rights in the Bill of Rights, to develop an integrated environmental management programme, to consider all relevant policies, legislation, guidelines, norms and standards and to promote efficient and integrated land development. Clearly, the integration of land use planning and environmental processes is a necessity. This is confirmed by policy documents and legislation as well.

The discussion above suggests that the policy and the lawmakers – in the national sphere at least – are sufficiently aware of the interplay between development, planning and the environment. The reason for the continuous lack of proper integration, must, therefore, be sought elsewhere. Some tentative suggestions are made.

First, it is well known that the local government sphere is struggling to live up to its constitutional mandates. This is a pervasive problem, not one confined to planning and the environment. The reasons are manifold, and do not need to be canvassed here. However, it is a given that if the first line of service delivery to the public – local government – is weak, the best of laws will not

180 *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye* 2002 (1) SA 478 (C) 488.

181 (Fn 8 above) 150B-151D.

remedy the situation. It would appear that neither the national government nor provincial governments succeed in empowering local government sufficiently to do what it is constitutionally mandated to do.

Flowing from the above, and secondly, co-operative governance as envisaged by Chapter 3 of the 1996 Constitution, and fleshed out by the Intergovernmental Relations Framework Act,¹⁸² has not really taken root, despite its lofty ideals. Literature on the topic confirms that co-operative governance remains limited to high level structures. The recent debacle in Gauteng about the aborted monorail transport project between Soweto and Johannesburg, is a classical example of the unawareness of or disregard for the constitutional and statutory imperatives of cooperative governance between spheres of government.

Finally, planners and developers are sometimes loathe to take sufficient cognizance of the importance of environmental issues in land use planning. In the face of sufficient opportunities to exploit many of the loopholes created by the current legislative structures, it is proposed that the legislature take a fresh look at possible ways of facilitating the integration of land use planning and environmental demands.

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