

## **Devolution by court injunction: The case of land use planning and management in South Africa**

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### **Abstract**

In South Africa, the legal and policy framework for land use planning and control underwent a significant transformation in which power over land use planning and control was shifted from provinces to local governments. This shift has taken over fifteen years to materialize as national and provincial governments resisted the devolution of authority. It was ultimately made inevitable by five Constitutional Court judgments in which local government asserted its authority. This article discusses the importance of the reform of planning laws in Africa and outlines key tenets of the recent reform. It discusses the devolution of planning powers to local government and the role played by the judiciary in unlocking the impasse. The central question is whether the court-led transformation of the planning sector was the appropriate mechanism for ushering in change. It is argued that the consequences of devolution for the planning sector in South Africa have been very significant and not all unreservedly positive. It is furthermore argued that the developments in South Africa are relevant for other countries on the continent, particularly as more and more countries constitutionally entrench devolution or decentralization programmes.

### **Introduction: The Importance of (Changing) Planning Law in Africa**

Land use planning and control is essential to the role of cities and towns to shape the future of their communities. The law, underpinning this role, is equally important. In essence, “planning law determines which buildings are legal and which are not” (Berrisford, 2013: P 1). Planning law gives birth to planning instruments that shape economies and influence social and political life in cities and towns. They are adopted and implemented in order to mediate a range of different objectives. Firstly, planning instruments guide infrastructure development. New developments need to be connected to municipal services. Municipal governments must therefore be able to exercise some control over new infrastructure development in order to ensure that the infrastructure is included in the grid of municipal services (water, electricity, sanitation, road networks etc). The erection of new infrastructure without proper connection to municipal services leaves the users of such infrastructure deprived of essential services and is a recipe for underdevelopment and marginalization. Secondly, planning instruments contribute to certainty and predictability with regard to what will be permitted in a particular area and

thus attract and guide private sector investment. Thirdly, the protection of environmental resources is an increasingly important objective served by planning instruments. Land use planning documents and land use management decision making can be used to discourage or prohibit inappropriate development that will compromise environmental resources. Finally, planning is essential to mitigate environmental risks. For example, planning instruments can discourage or prohibit development in areas that are prone to fires, floods and other environmental disasters. They can also be used to mitigate climate change by encouraging densification or to adapt to climate change by insisting on coastal setbacks.

The above mentioned objectives of planning apply in both a developed and a developing context. However, there are further objectives that are specific to the developing context. For example, given the high levels of informality and insecurity of tenure in urban settlements in African cities, planning laws and decisions can play a critical role in ending the exclusion of informal dwellers from urban management systems. If local governments could use their planning instruments to extend greater levels of tenure to informal dwellers, this could improve their connection to public services, their access to capital and make urban life more dignified and more predictable. Planning law systems have often failed to do so. The fact that the majority of urban areas in Africa develop informally has made ‘planned land’ a scarcity. This has driven up the price of the ‘planned land’. These land parcels are often held by powerful elites and in a scenario of collusion between elites and government, there is then little incentive to extend planning into informal areas. In addition, it is far too expensive for informal dwellers to comply with traditional planning regulations. Lastly, planning laws are often used against vulnerable groups (Berrisford, 2013).

One would expect the above considerations to have permeated the laws that govern planning in Africa. However, this is not the case. These considerations and objectives are generally understated and underdeveloped in the laws governing planning in countries on the continent. There are two key reasons for this. Firstly, planning law in Africa often has deep roots in colonial law and, secondly, it has undergone surprisingly little transformation after the colonial powers left. The result, as argued by Berrisford (2013), is a planning regime that is essentially ill-suited for the African context.

Planning law and the transformation of planning law is thus critically linked to issues of service delivery and development in African cities and towns. Consequently, it is imperative that planning laws are reformed in order to facilitate more effective urban management. In South Africa, the legal and policy framework for land use planning and control recently underwent a fundamental transformation. The most fundamental aspect of the reform was the devolution of planning powers to local government. Essentially, power over land use planning and control has shifted from provincial governments to local governments. While the Constitution ‘promised’ this reform as far as 1997, when the Constitution became operative, the reform took long to materialize as national and provincial governments resisted the devolution of authority. It was

ultimately made inevitable by five Constitutional Court judgments in which local government asserted its authority over planning matters.

This article examines how this transformation was managed. It focuses in particular on the advantages and disadvantages of the courts being forced to take centre stage in that transformation. It uses the analysis of literature and law as its methodology. After examining the literature surrounding planning and local government, it examines, in particular, five judgments of the South African Constitutional Court. It is argued that the South African experience with a court-driven devolution of planning powers is relevant for other countries on the continent, particularly as more countries are implementing decentralization laws or even constitutionally entrenching devolution.

The article proceeds with an overview of local government in South Africa. The overview comprises a brief examination of the legal framework as well as an assessment of progress to date in implementing this new framework. Subsequent to that, the article outlines the process of devolution of planning powers to local government. This devolution, and particularly the role of the judiciary in it, is assessed at the end of the article.

### **Local Government in South Africa**

South Africa's land mass spans 1,220,813 square kilometres inhabited by 52 million people. Yet the country has only 278 municipalities, making South Africa home to some of the world's largest local governments in terms of both area and population.

Before 1994, local government in South Africa was designed to implement apartheid. Local government institutions were racially determined and the black majority was denied democratic rights. White municipalities were self-serving entities; they were given exclusive power to tax properties in well-resourced and viable commercial centres without any obligation to use the revenue to improve the lives of township dwellers. Black municipalities were undemocratic and starved of income and authority. They became the subject of large scale service boycotts in the 1980s (Steytler & De Visser, 2007: 1-7; Ismail and Mpaisha, 1997). The 1993 Constitution introduced major reforms; local government was given constitutional recognition and various local government institutions were merged (Steytler & De Visser, 2007: 1-10). Even more fundamental change came with the 1996 Constitution, which further entrenched the role of local government. The new system was put into operation in 2000 and, at the time of writing it was thus only fifteen years old. It now comprises democratically elected political leadership with constitutionally guaranteed authority over functional areas. One of these areas is "municipal planning" (Schedule 4 Part B Constitution). The Constitution thus reserves executive authority over "municipal planning" for municipalities. As will become clear in this article, this is a critically important aspect of the constitutional framework for land use planning in South Africa.

The Constitution also secures local government's authority with regard to certain important financial matters. It empowers municipalities to impose surcharges on fees for services provided and to impose property rates (s 229), and entitles local government to an 'equitable' share of nationally generated revenue (s 214).

As an unequivocal response to the destructive role played by local government in the past, the Constitution posits local government as a sphere of government that is responsible for important developmental matters. The constitutional 'objects of local government' are to: -

1. Provide democratic and accountable government for local communities;
2. Ensure provision of services to communities in a sustainable manner;
3. Promote social and economic development;
4. Promote a safe and healthy environment; and
5. Encourage the involvement of communities and community organizations in the matters of local government (s 152 Constitution).

Municipalities are furthermore instructed to give priority to the basic needs of the community (s 153 Constitution). Municipalities are responsible for important services such as water and sanitation, municipal roads, refuse removal, electricity reticulation, environmental health services and the above-mentioned planning authority. Furthermore, they develop and maintain parks, recreational facilities, markets and local transport facilities. In addition to these constitutionally guaranteed functions, they often perform other functions including housing delivery, primary health care and community services such as libraries and museums. Taken together, these functions place local government at the epicentre of the much needed development in South Africa.

The constitutional, statutory and policy framework for local government in South Africa is sound and the progress made to date is impressive. For example, access to electricity has increased by 10% since 2001, flush toilets by 6% and water by 4% (Department of Cooperative Governance and Traditional Affairs, 2009: 34). However, municipalities are fighting huge service delivery backlogs on the basis of a precarious financial position. Communication and accountability relationships with communities are often poor and many municipalities experience internal governance problems and sometimes even corruption and fraud (Department of Cooperative Governance and Traditional Affairs, 2009). Financial management is too often inadequate, resulting in negative audit opinions issued by the Auditor-General. In September 2014 the Minister of Cooperative Governance and Traditional Affairs, Pravin Gordhan, divided municipalities into three groups: a third of the municipalities were carrying out their tasks adequately; a third was just managing; and the last third was "frankly dysfunctional" (Ministry of Cooperative Governance and Traditional Affairs, 2014).

A significant part of these problems are caused by a crippling scarcity of skills in engineering and financial management but also in the field of planning (Abrahams & Berrisford, 2012) In 2010, Steytler and Powell (2010: P159) commented as follows:

[T]he municipal system is ... beset with several problems: Corruption and rent- seeking are widespread, if not endemic to local government. The technical and managerial base is thin. Assets are wasting as a result of poor maintenance. And funding is inadequate for local government to meet its constitutional mandate of providing basic municipal services. It is estimated that addressing the existing infrastructure backlogs by 2014 will cost almost the entire country's annual budget.

Communities across South Africa are dissatisfied with the progress made in local government. The image of communities protesting against municipalities has become a common occurrence. Recent research indicates that, from 2007 to 2014, the annual number of protests in municipalities never came far below 100, with 2014 recording an all-time high of 218 protests. Not only is the number of protests on the increase, they are also becoming more violent, with 83% of protests turning violent in 2014 (Powell, O'Donovan & De Visser, 2014: 3 and 5). With more than 50% of the grievances recorded in these protests relating directly to local government (Powell, O'Donovan & De Visser, 2014), it is clear that local government is experiencing serious challenges.

## **The Devolution of Planning to Local Government**

### **Definitions**

Before outlining the devolution of planning powers to local government, it is useful to define two key terms that will be used often in this article. They relate to two distinct components of the broader spatial planning concept as it is applied in South Africa. The definitions put forward here are thus working definitions. However, the function and objective of the two components is likely to resonate in other jurisdictions too. The first concept is *land use planning*. In South Africa, this refers to the adoption of spatial plans that articulate a spatial vision for a specific area. Section 12(1) of South Africa's new Spatial Planning and Land Use Management Act 13 of 2013 (SPLUMA), which will be discussed below, defines a spatial development framework as a framework that interprets and represents the spatial development vision of the responsible level of government. These plans generally do not confer any specific land use rights to anyone but indicate broadly where government envisages development to take place and what type of development that may be. In South Africa, these plans are called 'spatial development frameworks'. They can, for example, be compared to the 'master plans' that are common in other jurisdictions. The second concept is *land use management* and it is distinct from *land use planning*. In South Africa, *land use management* refers to the conferring of land use rights to individual land owners or users. Section 1 of SPLUMA defines land use management as "the system of regulating and managing land use and conferring land use rights through the use of schemes and land development procedures". For example, the allocation of a specific zoning to a land

unit or the alteration of that zoning would determine what the land may be used for (i.e. residential, business, industrial etc.). Similarly, the decision to allow the subdivision of one land unit into two or more land units also confers specific land use rights to the owners of those land units. This may be compared to town planning schemes, zoning schemes or land use schemes.

### **Planning Law before the 1996 Constitution**

Ever since the South Africa Act of 1909 which brought the former British colonies together into the Union of South Africa, and throughout the periods of the Constitutions of 1961 and 1983, South Africa's provinces were firmly in charge of the regulation of 'town and regional planning'. The position at the beginning of the 1990s was thus one of planning law reflected in provincial laws ('the Ordinances'). This at least was the position in the formerly white areas of the country. Provincial governments not only were the source of most law regarding planning, they were also the administrators and thus took most planning decisions. Gradually, local governments were 'authorised' to take certain planning decisions. However, the pace of decentralization was carefully controlled and tutelage over local governments firmly in place. In the former homelands and bantustans there were 'national' planning laws and regulations.

### **Planning Under the 1996 Constitution**

The 1996 Constitution changed this and brought the new democratic local government system prominently into the picture. There were a number of drivers for this. First, the African National Congress and other liberation movements opposed the creation of strong provinces, which were favoured by other parties to the negotiating table, in particular the outgoing National Party government and the Inkatha Freedom Party. This undoubtedly influenced the decision to empower local governments in the post-apartheid dispensation (De Visser, 2005: 66). The Constitution therefore ended the provincial monopoly over planning authority and signalled the empowerment of local authorities by allocating planning powers there. It was going to take a long time, though, before this constitutional change was implemented.

In distributing planning authority across the three levels (or 'spheres') of government, the 1996 Constitution uses no fewer than five constitutional powers that either directly refer to land use or have a significant impact on it. The Constitution distributes these over all three spheres of government. Firstly, the Constitution lists "municipal planning" as a municipal competence. This means that local governments have authority to legislate and administer municipal planning and that national and provincial governments have limited oversight powers with regard to "municipal planning". Secondly, "provincial planning" is listed by the Constitution as an exclusive provincial competence. Provincial governments may legislate and administer provincial planning. Thirdly, "urban and rural development" is a power shared by national and provincial governments. Both may legislate and administer urban and rural development. Should conflicts arise, they are ultimately resolved by the courts. Fourthly, "regional planning and development" is also a power shared by national and provincial

governments. In addition to the above four planning related powers, the power to legislate and administer “environment” deserves mention. Again, the Constitution allocates this to national and provincial governments concurrently (see also Van Wyk: 2012).

### **1996-2010: An Uncertain Planning Framework**

While government intended to transform the planning framework to achieve the objectives mentioned at the beginning of this article, this complex intergovernmental arrangement has had a paralysing effect on government’s efforts to transform (Abrahams & Berrisford, 2012: 16). Government really only mustered two legislative measures on planning with significant transformative impact. The first was the Development Facilitation Act of 1995 and the second one was the Municipal Systems Act of 2000.

In 1995, shortly before the adoption of the 1996 Constitution, Parliament passed the Development Facilitation Act (DFA). It was adopted shortly after the first democratic elections and was designed to facilitate the implementation of the Reconstruction and Development Programme (RDP), the incoming ANC government’s ambitious and progressive plan to roll out pro-poor infrastructure development. The DFA provided, amongst other things, for a far-reaching and progressive set of general principles for land development and the establishment of an inclusive Development Tribunal for each province. The Act was intended to be a temporary stop-gap, pending the enactment of comprehensive land use legislation that would rationalize the existing laws. However, over time it assumed “a measure of permanency” mostly as a result of the absence of an alternative (Berrisford & Kihato, 2008; 381). The Act was controversial in local government circles as it essentially placed the power to approve developments in the hands of provincial planning tribunals, albeit with local government representation.

In 2000, government introduced legislation regulating integrated development planning by municipalities. In the Local Government: Municipal Systems Act 32 of 2000, municipalities were instructed to produce and annually review Integrated Development Plans (IDPs) intended to be the building blocks for the entire government’s service delivery and infrastructure planning. These IDPs must include a so-called ‘spatial development framework’ in which the municipality expresses a spatial vision for the municipal area. The 1996 Constitution suggested a strong role for municipalities and close cooperation between national and provincial governments. The Municipal Systems Act took its cue from this constitutional imperative and implemented this vision. However, it only did so with respect to *land use planning*, i.e. the formulation of these so-called spatial development frameworks with a spatial vision for the municipal area. The rest of the statutory framework, dealing with *land use management* remained at odds with this constitutional vision and limped along on the basis of dated provincial ordinances and the Development Facilitation Act (Abrahams & Berrisford, 2012: 9). No national planning would see the light of day between 1996 & 2013. In the meantime, the four provincial ordinances continued to place land use

management decision making in provincial governments, contrary to the constitutional vision of local governments responsible for “municipal planning”. Some provincial governments, particularly those with a longer history of local government would authorize municipalities to take decisions and thus gradually commence the devolution of planning authority. However, the provincial tutelage remained and municipal decisions could be overturned by provinces. The Ordinances did not apply to former homelands and self- governing territories so a parallel planning system applied there. In between, and among all of this, was the Development Facilitation Act which placed parallel decision making power in provincial tribunals.

The planning framework was therefore highly fragmented and uncertain. This thwarted the transformative potential of land use planning and land use management and also preserved unjust planning laws. As Abrahams and Berrisford (2012: 22) comment: “areas in which Blacks traditionally have lived are governed by the planning laws designed for those areas by the apartheid government, while the same applies to the areas in which Whites lived under apartheid. This is not only hugely inefficient ... but also patently inequitable”.

Cities did not feel sufficiently empowered to take bold steps in land use planning and management because they dubiously shared authority with provincial governments. For a variety of institutional and political reasons, the national government proved unable to take the lead in establishing a progressive new land use planning framework that recognized the constitutional role for local government.

### **The Courts Step in**

In June 2010 this impasse was finally broken by a decision of the Constitutional Court. In subsequent years, a further four Constitutional Court decisions provided further clarity on the division of responsibilities between national, provincial and local government.

The first judgment was *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC). It concerned a case between the City of Johannesburg and the province of Gauteng’s Development Tribunal, established in terms of the interim law, the Development Facilitation Act. The City of Johannesburg, ‘authorised’ as it was in terms of the applicable provincial ordinance to take land use management decisions, had taken issue with the Gauteng Development Tribunal also taking land use management decisions in its jurisdiction. It argued that this compromised its effort to effectively plan for city infrastructure and service delivery. These powers fall within the City’s constitutional power over “municipal planning”, so the argument went. Provincial governments should not be doing the same as municipalities. The Court agreed with the City of Johannesburg and struck down those parts of the Development Facilitation Act that established and empowered the provincial tribunals to take land use management decisions. This was a victory for municipal autonomy and provided direction to the stalled law reform efforts. It cast doubt over

the strong role hitherto played by provinces in land use planning matters. The Court was also clear that there was a need for far-reaching law reform and effectively gave the national government two years within which to do this, setting a deadline of mid-2012.

The second judgment was handed down in 2012 and built on the precedent set by the *Gauteng Development Tribunal* judgment. In *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsands (Pty) Ltd and The City of Cape Town and Others* [2012] ZACC 10, the setting was the City of Cape Town and the dispute was triggered by Maccsands, a mining company. Maccsands had obtained a mining license from the national government to mine for sand in a residential area on the outskirts of Cape Town. The question was whether Maccsands' national mining license obviated the need for the City of Cape Town's approval to change the permitted use of the site in Mitchell's Plain. Maccsands, supported by the national Minister of Minerals and Energy argued that the granting of a mining license trumps municipal authority over "municipal planning": otherwise national government's exclusive authority over mining would be usurped by the municipality. The Court dismissed this argument and made it clear that possession of a national mining license does not mean that town planning approvals suddenly become unnecessary. *Maccsands* was again a victory for municipal autonomy and became an important marker in the development of the planning framework.

In the third case, *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and Others*, 2014 (2) BCLR 182 (CC), the dispute revolved around a development in George Municipality, a coastal town in the Western Cape. The planned development included two golf courses, a hotel, a private park and a gated residential community. It was, by all accounts, controversial and its impact stretched far beyond the boundaries of George. The central question was this: who decides land use management applications, such as rezoning and subdivision, with respect to such large developments that are 'bigger than the municipality'? Can the municipality still decide autonomously or should the provincial government have the power to veto the municipal decision? The provincial government argued that the decision had an impact far beyond the area of the municipality and that it therefore had the power to veto the municipality's decision. The developer, on the other hand, argued on the basis of the *Gauteng Development Tribunal*, that only municipalities may decide on rezoning and subdivision. The Constitutional Court agreed with the developer and made it clear that the municipality will always be the decision maker when it comes to applications for rezoning and subdivision. No matter how big the development and no matter what its effects across municipal boundaries are, the municipality decides the application for rezoning, subdivision. For the third time in a row, municipal power over planning authority was successfully asserted in the Constitutional Court.

Number four of the quintet of Constitutional Court judgments on municipal powers in land use planning is *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Others* [2013] ZAWCHC 112. It dealt with the power of provincial governments to set aside municipal planning decisions on appeal. An important feature of the four provincial ordinances, carried forward into the new dispensation was that persons aggrieved by a land use control decision taken by a municipality, may appeal to the provincial executive. The provincial executive may then decide to set aside the decision and replace it with a provincial decision. While the provincial governments saw it as a necessary corrective on errant decision making by municipalities, the cities saw this as provincial tutelage. The Court agreed with the cities and held that the appeal system was unconstitutional as it intruded on the autonomy of municipalities. The provincial government had urged the Constitutional Court to retain the provincial appeal authority in cases where the development had impact beyond the municipality's boundary. Without the provincial executive 'surveillance', the provincial government would be powerless to stop big decisions with extra-municipal effects, so it argued. The Court disagreed and reiterated that no matter how big the development, provinces must use powers of their own to stop the undesirable ones instead of relying on a power to reverse municipal decisions.

The most recent judgment of Constitutional Court in *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 1, builds on the *Habitat Council* judgment and also deals with the provincial appeals. KwaZulu-Natal, one of South Africa's nine provinces operated in terms of a provincial law that made provision for appeals against municipal decisions. However, the appeal body was not the provincial executive but a quasi-independent body. Whilst it was appointed by the provincial executive, it was staffed by experts and took its decisions free of provincial control. This should insulate the appeal construction from the accusation of provincial interference, so the argument of KwaZulu-Natal went. The Constitutional Court was unconvinced, however, and ruled that the alleged independence of the provincial tribunals did prevent them from being unconstitutional.

After more than a decade of indecision, the national government was thus confronted with no fewer than five Constitutional Court decisions that establish a firm and consistent trend on municipal powers. The first judgment in *Gauteng Development Tribunal* had already forced government to end a decade of prevarication around the issue of devolving planning authority to local government.

Before examining the impact of this court-driven transformation of the planning framework, it is important to point out the role of South Africa's largest cities in this. The *Gauteng Development Tribunal* case was pursued by the City of Johannesburg that saw provincial planning tribunals frustrate its development planning. The *Maccsands* case was pursued by South African's second largest city, the City of Cape Town, which

saw its land use management powers interfered with by a national department issuing ‘sovereign’ mining licenses. In the *Habitat Council* matter, it was again the City of Cape Town defending its right to be freed from provincial tutelage while in the *Tronox* matter, the eThekweni Metropolitan Municipality was at the forefront. The *Lagoon Bay* matter was the only one triggered by a smaller municipality, George Local Municipality. However, it is worth noting that this municipality presides over one of the country’s fastest growing economies. The charge against national and provincial interference in municipal planning powers was thus not led by small, maverick towns presided over by overly confident political leaders. Instead, it was led by the country’s largest cities, led by political leaders who appreciate the risks of litigating against national and provincial governments. After weighing these risks against the prospect of greater ability to steer infrastructure development and the roll-out of service delivery, they chose to assert their constitutional powers and emerged victoriously on four successive occasions.

## New Planning Legislation

The *Gauteng Development Tribunal* judgment put the national government on notice to finalise the national planning legislation. The other four judgments further emphasised and confirmed that this planning legislation needed to put local governments centre stage and that the provincial government’s stronghold over land use management powers had ended.

In 2013, the national government passed the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). This Act provides a national framework for spatial planning and land use management. It instructs national government to adopt a National Spatial Development Framework with a national spatial vision. It instructs each provincial government to adopt a Provincial Spatial Development Framework with a provincial spatial vision. Finally, it instructs each municipality to adopt a Municipal Spatial Development Framework with a municipal spatial vision. Each of these three levels of forward planning documents is adopted by the executive authority in that specific sphere. While the Act instructs collaboration between spheres of government, no sphere is to tell the other sphere what the content of their spatial development framework ought to be.

On the land use management side, the Act makes it very clear that municipalities now receive, consider and decide all land development applications. Each municipality is expected to establish a Municipal Planning Tribunal that operates independently from local politics and is populated by municipal officials and outside experts. These tribunals will be the authorities of first instance in all land use development applications. In addition, municipal executives (i.e. mayors or executive committees) will have to sit in judgment on appeals against decisions of the Municipal Planning Tribunal. In a limited number of circumstances, the national government will seek to play a role in decision making on specific land development application. However, its role will be in addition to, not instead of, the municipal role.

There is no doubt that this is a fundamental change to the land use planning framework and it is occasioning a large scale devolution programme. Municipalities will now be at the forefront of land use planning and will thus have to deal with a range of new responsibilities and challenges. A few are outlined below.

First, each municipality must now adopt a land use scheme for their entire municipal jurisdiction, i.e. each piece of land in the municipality must be allocated a ‘zoning’ that indicates what the land may be used for. Large parts of the country do not fall under any land use scheme as land use is unregulated or regulated by traditional institutions. For municipalities that used to rely on provincial governments taking land use decisions, this will be a tremendous task, for which the Act provides a five-year timeframe.

Secondly, each municipality must now ensure that town planning decisions, i.e. decisions to alter the permitted use of land, are insulated from corruption. The alteration of permitted land uses may instantaneously enhance the value of land and it is thus a decision-making power that is vulnerable to corruption wherever it is exercised. Municipalities, as the custodians of this responsibility will thus have to guard against undue influence.

Thirdly, each municipality must design and adopt a municipal planning by-law. This by-law must regulate issues such as the application procedures, zoning categories, public participation on development applications, timeframes for applications, appeal procedures etc. Before the SPLUMA era, these matters were all regulated in provincial laws. Those municipalities that were authorized to perform land use management functions implemented provincial laws but did not make law. For those municipalities that were not authorized to perform town planning functions, they were essentially irrelevant as implementation took place at a provincial level. This situation will now change with all municipalities being expected to adopt laws to regulate town planning.

Fourthly, development management decision-making is more than the mere granting or refusal of approval for a development project. Attendant to most of those approvals are complicated and technical decisions such as the imposition of conditions to safeguard municipal interests, the calculation of development levies to recoup bulk infrastructure investments needed to support the new development and a range of other important considerations. Inadequate decision-making in this area can have disastrous consequences for municipal infrastructure and result in, for example, the collapse of bulk sewerage systems, problems with water provision, electricity provision etc.

The above four matters are but a few examples of the complexities that the devolution of planning powers transfers to local government. It is clear that the devolution of planning authority to local government will have a significant impact on local government’s orientation and capacity needs. This is particularly pertinent in those

areas where municipalities were hitherto not authorized to perform development management functions. It will require an injection of technical skills, particularly with regard to town planning, engineering and infrastructure financing into local government. In addition, it requires political systems that are sufficiently robust to take adequate planning decisions.

The next section discusses the advantages and disadvantages of the manner in which the planning framework has been transformed. It focuses in particular on the impact of the transformation on local government and the role of the Constitutional Court in making the transformation happen.

### **Assessing the Court-Driven Devolution of Planning**

Conventional wisdom in matters related to decentralization has it that it is unwise to devolve powers to a level of government that does not have the capacity to exercise those powers. While this conventional wisdom can be debated, there is no gainsaying the value of nurturing the nexus between the capabilities of a local government and its responsibilities.

In protecting local government's autonomy over municipal planning, none of the above-mentioned five Constitutional Court judgments considered or made reference to the serious capability problems in local government or questioned whether the local government sphere was capable of absorbing these fundamental changes. This is undoubtedly correct from a legal and constitutional point of view. The enquiry in the Constitutional Court was confined to legal and constitutional principle. The Court could not be expected to base its judgment on the availability of resources in local government or on the capacity of municipalities to absorb the correction of what clearly was an unconstitutional situation. This was not a case of government assigning additional powers to local government, in which case the capacity issue enters the legal debate. This was a case of provincial governments unconstitutionally exercising powers which the Constitution itself reserves for local government. Besides, the Constitution provides very clearly in sections 154(1) and 155(6) that national and provincial governments must supervise, support and strengthen local government, a provision that can be easily invoked to counter legal arguments that the devolution will overwhelm local government.

It is important, though, to reiterate the point made earlier that all of the five cases were brought by large cities. The enquiry in the Constitutional Court was led by the arguments of well-endowed and relatively well-functioning municipalities that were chomping at the bit. These large cities knew that they were going to be able to deal with the challenges devolution was going to bring. The Court was not furnished with the perspective of the struggling rural municipality that has never dealt with land use applications before and for whom a new set of responsibilities, constitutional or not, is the last thing it needs. Even among those municipalities that were exercising land use management responsibilities, significant problems have been recorded. For example,

Abrahams and Berrisford (2012: 29) indicate that “systems for internal management of the allocation of land use and development rights have collapsed in numerous municipalities which gravely undermines municipal capacity to undertake even basic urban management tasks”.

The exchange of arguments between the Western Cape provincial government and the Court in *Habitat Council* clearly indicates the Court’s approach. The provincial government, clearly concerned with the unintended consequences of large-scale devolution to a struggling local government sector, pleaded with the Constitutional Court to save its oversight powers in the form of the provincial appeal power. This power would enable the province, so the argument went, to avoid that “parochial municipal interests will triumph”. In other words, the provincial government was concerned about two things. First, it was concerned that municipalities would insufficiently consider the regional impact of their decisions. The second concern is more implicit, namely that municipalities do not necessarily possess the necessary governance capabilities to take adequate decisions. This argument may not be entirely unfounded when viewed against the backdrop of the governance problems in municipalities and the risk of town planning decisions attracting undue influence by wealthy developers. However, the Court responded tersely to the provincial government’s plea by stating that the Constitution precisely intends for those “parochial interests” to prevail in subdivision and zoning decisions “subject only to the oversight and support role of national and provincial government, and to the planning powers vested in them”. In other words, the Constitutional Court showed little sympathy for the provincial fears that municipal decision-making would be led by parochial interests and instructed it to look for other mechanisms to exercise oversight instead of insisting on exercising appeal powers.

The Constitutional Court’s decisions not only shaped but also accelerated the devolution. Yet, the narrative of the court-led devolution of land use planning powers in South Africa does beg the question whether this was in all respects the best mechanism for ushering in change. In the *Gauteng Development Tribunal* judgment, the Constitutional Court was confronted with a fragmented legislative framework for land use management, much of which predated the democratic order and a government seemingly unable to break the impasse. Clearly annoyed with government’s inability to address this issue legislatively over a period of more than 15 years, the Court let out an exasperated comment: “This situation cries out for legislative reform” (*Gauteng Development Tribunal* 2010 at para 31).

None of the four judgments, in any measure of detail, dealt with information pertaining to the ability of local governments, particularly the weaker local authorities, to absorb such fundamental change. The end result is that, on the back of the argument by the well-endowed cities in the Constitutional Court, small impoverished rural municipalities must now establish land use management systems in great haste to perform a function that they have never performed in the past. National and provincial governments are now forced to design a creative solution in form of the

joint exercise of planning functions by groupings of municipalities and in the form of the deployment of provincial resources to assist municipalities.

It is suggested that this does not mean that the Constitutional Court overstepped its boundaries or that it would have been better if the Court was never approached with these matters. As argued above, the intervention was far overdue. The judgments ended the impasse caused by the national government's inability to deal with the vexed issue as to who is supposed to perform what land use planning function. If the Courts had not been approached, the paralysis may very well have continued much longer.

The question should rather be: what would have happened if the national government had acted earlier to reform the sector with a new law? What would have happened if either a national or provincial legislature would have applied its mind and adopt a devolution scheme and this was challenged in court? Would the Court have taken the same stern position if it had been confronted with an earnest attempt by a legislature to carefully devolve powers to local government instead of with an argument to preserve old order laws? It is submitted that the Court would have shown more deference to an earnest attempt by Parliament to regulate devolution than it did to the argument that the old order laws should be preserved. It may even be argued that the Court may have been sympathetic towards a devolution programme that was more measured and careful than the current SPLUMA if the county's legislatures had applied their mind and not taken 15 years to do so. Of course, that argument is moot and irrelevant for the new South African context. The judgments are part of history and they spawned a new national framework for land use management in which local government takes centre stage.

However, it is submitted that the argument is relevant for other countries, faced with similar questions. This is particularly so, given that more and more countries are choosing to enhance their decentralization laws or even entrench the role of local government constitutionally. For example, Tunisia's 2014 Constitution provides for the entrenchment of local government and Zimbabwe's 2013 Constitution also strengthens the position of local government. It is not unlikely that the judiciary in these countries, and other countries that are enhancing the status of subnational governments, will be asked to rule on devolution issues. The South African experience with the devolution of planning suggests that national governments, faced with constitutional provisions that demand devolution, are well advised to avoid great delays in implementing such provisions. Once the judiciary is asked to resolve disputes pertaining to the location of constitutional powers, the considerations are necessarily narrowed to legal ones and government may be deprived of opportunities to manage the devolution carefully with due consideration to all the interests at stake.

## **Conclusion**

The South African case shows that courts can play a pivotal role in providing clarity in what may seem like intractable disagreements surrounding devolution. Had it not been

for the four Constitutional Court judgments, the South African planning sector would perhaps still be wondering who is supposed to do what, an untenable position given the importance of this function for service delivery purposes.

However, the South African case also shows that ‘devolution by court injunction’ is necessarily unpolished. Litigation is not the ideal platform for crafting nuanced devolution schemes that consider the interests of all municipalities in a scenario that is highly uneven in terms of local capabilities. While this article seeks to take nothing away from the value of constitutional protection of local government powers, it points towards the need for devolution to be promoted, regulated and guided in legislation. If legislatures forsake their duty to promote, regulate and guide devolution the courts may step in and do it for them. Given the increasing number of countries on the continent that are considering or implementing various forms of devolution or decentralization with a greater role for the courts, the South African experience contains an important lesson.

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