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ENVIRONMENTAL LAW MASTERS

MINI-THESIS

An analysis of the legal and practical application of an agreement in terms of section 29 of the Spatial Planning and Land Use Management Act 16 of 2013 for state infrastructure planning, using the South African National Roads Agency SOC Ltd (SANRAL) as an example.

Abstract

Through the relevant case law and legislation, this paper explores the context of planning law in South Africa as it relates to the implementation of state infrastructure. With the adoption of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) in 2015, the planning of state infrastructure needed to comply with the provisions contained therein. It necessarily follows that those organs of state responsible for this planning need to rethink their processes and procedures relating to planning. The overlapping of constitutional planning competencies between the spheres of government has made planning for the implementation of state infrastructure increasingly complex and difficult. As a result, while there are a number of provisions in SPLUMA that obliquely relate to planning for the implementation of state infrastructure, there are numerous practical and legal difficulties associated with each one. It is revealed that the most legally and practically appropriate approach is an agreement in terms of Section 29 of SPLUMA. Using the South African National Roads Agency SOC Ltd (SANRAL) as an example of an organ of state who undertakes this type of planning, one is able to illustrate clearer the practical consequences in this regard.

Chapter 1: Introduction

The definition of planning law in South Africa is somewhat vague but basically encapsulates ‘the area of law that provides for the creation of a sustainable land management planning framework as well as for the management of land development with the purpose of ensuring the health, safety and welfare of society as a whole’.¹ South African planning law has undergone some drastic and fundamental changes in the past two decades. These changes have been precipitated through numerous planning statutes which determine the way in which planning in South Africa is regulated. The changes in planning legislation are coupled with a growing precedent of judicial decisions clarifying, restricting and expanding the roles of the various spheres of government in relation to the planning powers conferred on them through the Constitution² and planning legislation.

The Spatial Planning and Land Use Management Act³ (SPLUMA) was adopted in July of 2015 in partial response to the declaration by the Constitutional Court in the case of *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*⁴ of the partial invalidity of SPLUMA’s predecessor, the Development Facilitation Act⁵ (DFA). In this case, the court held that the Constitution confers certain planning competencies on all spheres of government by allocating ‘regional planning and development’ concurrently to the national and provincial spheres; ‘provincial planning’ exclusively to the provincial sphere; and ‘municipal planning’ exclusively to the local sphere.⁶ The court held further that these functional areas, while not contained in hermetically sealed compartments, remain distinct from one another.⁷ SPLUMA thus became the framework planning legislation and the answer to the constitutional conundrum on the various planning competencies and functions often overlapping the spheres of government: national, provincial and municipal.

SPLUMA encapsulated the growing precedent reinforcing municipalities’ autonomy in local planning matters to the extent that all development applications need now be submitted to a municipality as the authority of first instance.⁸ This has inevitably led to a situation in which

¹ J van Wyk “The law on planning and the environment”, in ND King, HA Strydom & FP Retief (eds), *Fuggle and Rabie’s Environmental Management in South Africa*, 3 ed., Juta, (2018), chapter 22 1135.

² Constitution of the Republic of South Africa, 1996.

³ Act 16 of 2013.

⁴ 2010 (6) SA 182 (CC).

⁵ Act 67 of 1995.

⁶ J van Wyk “The law on planning and the environment”, in ND King *et al*,(eds) *Fuggle and Rabie’s Environmental Management in South Africa*, 1141.

⁷ Paras 54 to 55.

⁸ SPLUMA section 33(1).

organs of state and provincial departments responsible for implementing and developing infrastructure in the national and provincial interest (hereinafter referred to as state infrastructure) are left to the behest of a local or district municipality in whose jurisdiction the state infrastructure will be located. A situation is arising which may lead to the grinding halt of state infrastructure. Organs of state may attempt to steamroll municipalities. Municipalities may refuse to relinquish even the slightest planning control and essentially attempt to veto state infrastructure projects consequently. The state infrastructure development may well be in the provincial or national interests, but a municipality may not deem it desirable for one reason or another.

Such an approach is, however, at odds with the legislative measures providing for the co-operation of the spheres of government and an integrated decision-making process which should take place where a planning decision falls into the category of regional and/or provincial planning as well as municipal planning encapsulated in, among others, SPLUMA and the Constitution. This also relates to situations where legislation may enable an authority to give authorisations which are not out and out planning authorisations but which will have planning consequences. An example of this would be a decision by South African National Roads Agency Ltd (SANRAL)/Transnet/Eskom in terms of their enabling legislation to proceed with the implementation of state infrastructure. This paper will focus on the example of SANRAL and specific reference will be made to SANRAL's enabling legislation, the South African National Roads Agency Limited and National Roads Act,⁹ throughout.

This paper will explore and unpack the legislative provisions which dictate the manner in which spheres of government are required to engage each other in order to expedite a decision for the implementation of state infrastructure. After contextualising this approach in the legislation, specific attention and amplification will be given to section 29 of SPLUMA which provides for a written agreement between a municipality and another sphere of government responsible for planning in terms of other enabling legislation. Such an agreement allows for the parties to reach consensus on a planning process for development authorisations and which process can be agreed on outside of the restrictions of a municipality's bylaws. A section 29 agreement is therefore not constrained by the often onerous and prescriptive processes in a municipality's planning bylaws which, if applied rigidly to state organs, would result in a scenario whereby an entity acting in the national or provincial interest would be relegated to the status of an

⁹ Act 7 of 1998.

ordinary developer in a municipality's eyes. Such a scenario would frustrate service delivery and have serious consequences for ordinary citizens who would be deprived of having such infrastructure development being implemented and constructed without delay.

This paper will also provide comment on the practical application of a section 29 agreement and how administrative action could be taken against municipalities if the agreement is not framed appropriately. Using SANRAL as an example of an organ of state responsible for the implementation of state infrastructure which has planning consequences through its enabling legislation, the arguments motivating the necessity of a section 29 agreement can be explored and illustrated in line with practical realities.

The question which needs to be answered is, how does one expedite the implementation of state infrastructure (often administered by the provincial and national spheres) while at the same time respecting and adhering to the exclusive constitutional mandate of municipalities with regard to 'municipal planning'?

SPLUMA seemingly provides a number of possible avenues that an organ of state can utilise in order to answer this question. These avenues include:

1. reliance on the integrity and 'trickle down' effect of the spheres' respective Spatial Development Frameworks (SDFs);¹⁰
2. pursuing an exemption from the provisions of SPLUMA for certain pieces of land or an area earmarked for the implementation of state infrastructure;¹¹
3. utilisation of the provisions of section 52 of SPLUMA which provides for development applications affecting the national Interest;¹²
4. consultation and agreement between a municipality and organs of state responsible for land development. This would obviously include organs of state responsible for developing land for state infrastructure.¹³

It will be shown that while avenues one through three may seem to be better fitted to deal with the question, this is practically not the case. It will be argued that the answer to the question, practically and legally, lies in section 29 of SPLUMA and the entering into of a written agreement between an organ of state and a municipality.

¹⁰ SPLUMA Chapter 4. This is discussed in detail at page 17.

¹¹ Section 55. This is discussed in detail at page 25.

¹² This is discussed in detail at page 26.

¹³ Section 29. Discussed in detail at page 28.

Chapter 2: Planning roles and functions of the spheres of government

The Constitution

In order to understand why section 29 of SPLUMA is the most appropriate provision to deal with state infrastructure, it is helpful first to have a complete understanding of the different constitutional planning roles of the spheres of government and look at examples of where an organ of state has been given specific planning authority in terms of its enabling legislation.

One needs also to understand the legislative obligations imposed on the spheres of government to ensure co-operation with each other and to avoid conflict where there may be an apparent overlap in competencies. In a planning context generally, it is important to bear in mind that ‘planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land’.¹⁴ This statement emphasises the degree and scope of the overlap. It brings into stark reality the significant and virtually impossible task of balancing the governmental spheres’ constitutional competencies with their respective constitutional functions.

The Constitution is the supreme law in South Africa, which is significant as it follows that any law or conduct in conflict with the Constitution is invalid.¹⁵ The Constitution moved South Africa away from the previously adopted hierarchical ‘tiers’ of government, being the national, provincial and then municipal in descending order, to a government comprised of three ‘spheres’. This shift from tiers to spheres ensures that no sphere can impose its will on another unless the Constitution allows for it or where constitutional processes and procedures have been followed. This enables the autonomy of each sphere to exercise its powers and functions within its own area.¹⁶ Furthermore, no sphere of government may assume any power or function except those conferred on it in terms of the Constitution and it should exercise its powers and perform its functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.¹⁷ The spheres are ‘distinct from one another and yet inter-dependent and inter-related’.¹⁸

¹⁴ *Wary Holdings (Pty) Ltd v Stalwo* 2009 (1) SA 337 (CC) para 128.

¹⁵ J Van Wyk, *Planning Law*, 2nd Edition, Juta, (2012), 75.

¹⁶ *Ibid* 143.

¹⁷ *Ibid* 143.

¹⁸ *Gauteng Development Tribunal*, para 43.

In terms of section 44(1)(a)(ii) of the Constitution, the national sphere has the power to pass legislation on a matter included in Schedule 4. The national sphere is excluded from passing any legislation within a functional area listed in Schedule 5 unless specific factors are apparent (these are provided for in section 44(2)). In terms of spatial planning, ‘regional planning and development’, ‘urban and rural development’, and ‘municipal planning’ are listed in schedule 4 thus indicating that the national sphere is imbued with the power and function to legislate on these matters. SPLUMA is an example of the national sphere legislating on these matters, including ‘municipal planning’. The aforementioned competencies are concurrent with the provinces’ powers also to legislate on these matters. Section 104(1)(b)(ii) gives provinces the exclusive power and function to legislate on ‘provincial planning’¹⁹. Section 156(1)(a) of the Constitution gives municipalities executive power and the right to administer ‘municipal planning’²⁰. Section 156(2) gives municipalities a further right to make and administer bylaws in pursuance of their executive powers and rights of administration. An important point which should be kept in mind is that section 44 of the Constitution allows the national sphere to legislate on planning matters which fall within Schedule 4 (including ‘municipal planning’), but it does not give the national sphere executive and administrative powers over ‘municipal planning’. This explains why the national sphere can pass legislation such as SPLUMA, but why SPLUMA does not permit executive functions and powers encompassed in ‘municipal planning’ to be undertaken by the national and provincial spheres. I will expand on the constitutional mandate and scope of ‘municipal planning’ shortly. First, it is necessary to understand what these various constitutional planning competencies are and how they overlap and relate to one another.

‘The boundaries between these four functional areas of planning are opaque, their precise content is not readily apparent, and overlaps, conflicts and uncertainty may occur’.²¹ As mentioned, ‘regional planning and development’ and ‘urban and rural development’ are within the concurrent control of the national and provincial spheres.²²

While this paper primarily focuses on the implementation of state infrastructure by organs of state as a national competency, it is nonetheless beneficial to define ‘provincial planning’ within the four functional areas of planning. This will provide the necessary context within

¹⁹ The Constitution, Schedule 4 Part A.

²⁰ Ibid, Schedule 4 Part B.

²¹ J Van Wyk, ‘Planning in all its (dis)guises: Spheres of government, functional areas and authority’, *Potchefstroom Electronic Law Journal*, 2012 (15) 5, 288.

²² The Constitution, Schedule 4 Part A.

which to understand the definitions of the other three functional areas of planning. In *Wary Holdings* the court held that ‘provincial planning’ does not include ‘municipal planning’.²³ While this may seem logical, obvious and ultimately unhelpful, the ever-expanding definition of ‘municipal planning’ thus affects the definition of ‘provincial planning’, which, by definition, becomes clearer by what it cannot be. Therefore, ‘provincial planning’ is provincial planning and development excluding ‘municipal planning’.

‘Urban and rural development’ was defined in the *Gauteng Development Tribunal* case as ‘the establishment of financing schemes for development, the creation of bodies to undertake housing schemes or to build urban infrastructure, the setting of development standards to be applied by municipalities, and so on.’²⁴ The term ‘development’ within the context of ‘urban and rural development’ was held to be interpreted restrictively in order to preserve the veracity of ‘municipal planning’.²⁵ Thus, ‘urban and rural development’ is concerned with the setting and maintaining of essential national standards and providing for uniformity in development across the country.²⁶ Similar to ‘provincial planning’ though, it is also defined partly in terms of what it is not – ‘municipal planning’.

‘Regional planning and development’ as listed in Schedule 4 refers to the forward planning of a specifically demarcated region, geographical or otherwise, for a specified purpose.²⁷ A ‘specified purpose’ would include the implementation of state infrastructure such as roads, railways and power lines. Thus, ‘regional planning and development’ is the functional area of planning in which the implementation of state infrastructure resides. Again, the definition does not however extend to the planning functions as defined in ‘municipal planning’.

Given the substantial impact of ‘municipal planning’ on the other three functional areas of planning, it is vital that one understands the scope and content of ‘municipal planning’. In the *Gauteng Development Tribunal* case, the Constitutional Court agreed with the definition provided in the SCA:

²³ Para 127.

²⁴ Para 62.

²⁵ Para 63.

²⁶ J Van Wyk, ‘Planning in all its (dis)guises: Spheres of government, functional areas and authority’, 305.

²⁷ *Ibid.*

‘planning’, in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land’.²⁸

Succinctly put, ‘municipal planning’ is ‘the control and regulation of land use at a municipal level, the zoning of land and establishment of townships.’²⁹ As discussed extensively above, the other three functional planning areas cannot usurp a municipality’s control in this regard. Any control exercised by a national or provincial authority in pursuance of the other functional planning areas which included or provided for an aspect covered by ‘municipal planning’ would be unconstitutional. Examples of this will be gleaned from a study of the case law below.

A much-quoted dictum from the *Gauteng Development Tribunal* case is:

‘It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. This is the position even in respect of functional areas that share the same wording like roads, planning, sport and others. The distinctiveness lies in the level at which a particular power is exercised.’³⁰

It has, however, been argued that by distinguishing the powers such as zoning, sub-divisions, township establishment, and the general control of the use of land as part of ‘municipal planning’ the proposition is created that this element of planning is in fact hermetically sealed.³¹ Therefore, where, for instance, the planning and establishment of a national road instituted in terms of ‘regional planning and development’ resulted in a change of zoning or required sub-divisions, this part of the planning could not constitutionally be incorporated in that level/area of planning. It would require separate ‘municipal planning’ approval lest it encroached into that functional planning area reserved for municipalities. This concept will be revisited later when considering the decision of *Maccsand (Pty) Ltd v City of Cape Town*.³²

Now that one understands the content and meaning of the constitutional functional planning areas, it is necessary to consider the extent of their application. ‘Municipal planning’ encompasses the complete geographical extent of South Africa. This is because of the adoption of ‘wall-to-wall’ municipalities. Briefly, section 151(1) of the Constitution requires the

²⁸ Para 27.

²⁹ *Le Sueur v eThekweni Municipality* [2013] ZAKZPHC 6 (30 January 2013) para 16.

³⁰ Para 55.

³¹ T Humby, ‘Hands on or hands off? The Constitutional Court’s denial of a provincial municipal planning role’, *TSAR*, 2015(1), 184.

³² 2012 (4) SA 181 (CC).

establishment of local authorities, protecting their status as the third sphere of government, throughout the overall territory of South Africa. ‘The effect of this section is that the whole territory of South Africa must be demarcated to fall in the jurisdiction or under the control of local government’.³³ This total demarcation is often referred to as ‘wall-to-wall’ municipalities.³⁴ The effect of wall-to-wall municipalities is that there is no geographical area which is excluded from ‘municipal planning’.

Case Law clarifying the Constitutional position on the functional areas of planning law

Planning competencies within the context of wall-to-wall municipalities were initially raised in the case of *Wary Holdings* and then dealt with in more detail in the *Gauteng Development Tribunal* case. *Wary Holdings* dealt with the application of the Subdivision of Agricultural Land Act³⁵, which forbids the subdivision of agricultural land (farms) without the Minister of Agriculture’s consent. As mentioned previously, the subdivision of land falls squarely within the purview of municipalities whose geographical jurisdiction, with the adoption of wall-to-wall demarcations, naturally included all agricultural land. The question which had to be determined in *Wary Holdings* was whether the Minister of Agriculture (representing a national department) still had jurisdiction over these subdivisions in terms of Act 70 of 1970 (national legislation) or whether the establishment of wall-to-wall municipalities, where subdivisions clearly fell into the category of ‘municipal planning’, altered this position. The majority decision in the Constitutional Court held that the duration of a classification of land as agricultural would continue³⁶ and decided the matter on the literal meaning of the *provisio* rather than through the avenues of planning competencies of the spheres of government and planning law principles.³⁷ The minority judgment preferred to decide the case on the functional areas of planning and held that to continue to allow this planning function to be controlled by the Minister of Agriculture (the national sphere of government) would negate the role of ‘municipal planning’ and was not constitutionally permissible. This was the first inkling one got that in the new planning regime, a top down approach to planning, whereby the national sphere had an open hand insofar as planning decisions and authorisations were concerned,

³³ Bekink B, ‘South African local government demarcation 2000: some points of interest’, 33 *De Jure* (2000), 321.

³⁴ *Ibid.*

³⁵ Act 70 of 1970.

³⁶ Para 62.

³⁷ Van Wyk J, *Planning Law*, 187.

would not pass muster. It spelt the end of an era where the previous tiers of government could impose their planning will on the next tier down.

Following *Wary Holdings* this inkling was confirmed. The issue of planning competencies and functions between the various spheres of government arose again in the Constitutional Court in the *Gauteng Development Tribunal* cases. As seen, this judgement has had a profound effect on the interpretation of constitutional planning competencies and consequently how planning law is conducted in South Africa. Briefly, the facts giving rise to the ultimate constitutional challenge arose out of three matters dealing with planning decisions taken by the Gauteng Development Tribunal. The Gauteng Development Tribunal was established in terms of the DFA– national legislation. The Tribunal was a provincial body established in terms of the DFA to make planning decisions in terms of that Act. Concurrently, the Johannesburg Metropolitan Municipality was competent to take the same or similar decisions in terms of their planning policies established in terms of the Town Planning and Townships Ordinance³⁸. The Ordinance was provincial legislation but which gave a municipality, such as the Johannesburg Metro, the power to make planning decisions within their jurisdiction. This created a situation where there were parallel processes in practice and an applicant essentially had a choice of making a planning application to either the Johannesburg Metro or the Gauteng Development Tribunal. This was bound to create a conflict where one authority approved or rejected a planning application which the other authority deemed undesirable/desirable and in the same circumstances would have approved/rejected the application. Sure enough, three such decisions did just that.

One decision related to a rezoning and the other two related to housing developments (township establishments) all within the Johannesburg Metro geographical area and planning jurisdiction. In these instances, planning applications were made to the Gauteng Development Tribunal in terms of the DFA. The Johannesburg Metro, for various reasons, opposed all three planning applications. Nonetheless, the Gauteng Development Tribunal approved the applications despite the Johannesburg Metro's objections. The Johannesburg Metro unilaterally took the position not to recognise the approvals granted by the Development Tribunals. The Metro approached the High Court for a declaratory order relating to the powers granted to the Gauteng Development Tribunal and Appeal Tribunal in terms of the DFA. The Metro also sought to have the aforementioned approvals reviewed and set aside.

³⁸ 15 of 1986.

The court *a quo* determined that the DFA operated as parallel planning legislation which provided applicants with a constitutionally permissible alternative.³⁹ The Metro appealed to the SCA which upheld the appeal.⁴⁰ The SCA based its decision on the definition of ‘municipal planning’ and the fact that ‘municipal planning’ was an exclusive competency of the local sphere. The SCA held that the Constitution could not be interpreted to confine the powers of municipalities in terms of ‘municipal planning’ to the preparation of plans in the abstract with no power to implement them.⁴¹ It held further that to allow the Development Tribunal the power to intervene with the decisions and objectives of the Municipality is a recipe for chaos and would be disruptive to a system of orderly planning and development within a municipal area.⁴² The SCA therefore determined that Chapters 5 and 6 of the DFA were indeed unconstitutional.

The matter was referred to the Constitutional Court to confirm the order of invalidity and decide a number of ancillary issues. The Constitutional Court delved into an examination of the various forms of planning conferred on the different spheres of government. The outcome of this examination clarified (although not entirely so) the four different functional areas of planning law. This has been dealt with in detail above but essentially it was held that ‘urban and rural development’ is not broad enough to encompass the powers forming part of ‘municipal planning’.⁴³ For this reason, the authority exercised by a provincial body (the Development Tribunal) in terms of national legislation (DFA) for the establishment of townships, rezoning, and sub-divisions could not pass constitutional muster and thus the legislation granting such powers stood to be set aside. So as not to create pandemonium within the planning fraternity, the invalidity of the offending Chapters in the DFA was suspended for a period allowing parliament to correct the defect or enact new legislation.⁴⁴ Ultimately, parliament elected to enact new legislation and this legislation would be SPLUMA.

Following the *Gauteng Development Tribunal* case, the case of *Maccsand* arose. The facts in this matter were that Maccsand had applied and had been granted mining rights in terms of the Minerals and Petroleum Resources Development Act⁴⁵ (MPRDA). Maccsand commenced mining an area which had not been zoned appropriately in terms of the Western Cape Land

³⁹ 2008 (4) SA 572 (W).

⁴⁰ 2010 (2) BCLR 157 (SCA).

⁴¹ Para 38.

⁴² Para 12.

⁴³ Para 63.

⁴⁴ J Van Wyk, *Planning Law*, 194.

⁴⁵ Act 28 of 2002.

Use and Planning Ordinance⁴⁶ (LUPO) to allow the use of the land for mining. The City of Cape Town Municipality argued that Maccsand could not mine the property without first having attained the necessary planning authorisation zoning the land appropriately. Maccsand argued that once a mining right or permit had been granted, the holder has a right to undertake mining at the location and no other law or authority may ‘veto’ the decision taken by the relevant minister or delegate.⁴⁷ The argument relied on the supposition that national legislation and interests outweighed provincial and municipal legislation and interests. ‘The view of the Department of Mineral Resources was that the granting of mining rights and the control over mining activities was the exclusive preserve of the national government and that no other authorisation was required’.⁴⁸ The matter also made its way to the Constitutional Court, where again the question of the various constitutional functions between the spheres of government was to be considered. The court held that mining was indeed an exclusive competence of the national sphere of government, but that the planning legislation did not seek to regulate mining.⁴⁹ The planning legislation enabled the exercise of ‘municipal planning’ an exclusive competence of local government. The laws serve different purposes: one regulates mining (a national competency); the other regulates municipal planning (a municipal competency). ‘An overlap between the two functions occurs owing to the fact that mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments.’⁵⁰ The court held that where a municipality refused a planning application for mining but where a mining right had already been granted in terms of the national legislation, this did not constitute a veto of the decision by one sphere, even though the applicant would not be able to implement his rights granted in terms of the national legislation. Neither sphere is intruding on the functional area of the other; each would be exercising its power within its own competence. There would be no veto as no one sphere is overriding the other. Instead, the refusal would be that the first decision cannot be put into operation.⁵¹ For these reasons, Maccsand’s case was dismissed and they were unable to mine the property for which they had mining rights until they had parallel planning and environmental authorisations.

⁴⁶ 15 of 1985.

⁴⁷ J Van Wyk, *Planning Law*, 196.

⁴⁸ J van Wyk in ND King *et al*, *Fuggle and Rabie’s Environmental Management in South Africa*, 1174.

⁴⁹ Para 42.

⁵⁰ Para 43.

⁵¹ Para 48.

Importantly the court held that in these types of situations ‘the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith and to co-ordinate actions taken with one another’.⁵² It was held further that the difficulties experienced may be resolved through co-operation between the two organs of state, failing which, the refusal may be challenged on review.⁵³ For the purposes of this paper, this case, in particular, is significant as the court was tasked with weighing up a municipality’s powers in relation to ‘municipal planning’ (local sphere legislation) against the implementation of national interests and national legislation apparently in conflict with these planning powers. It stated unequivocally that the spheres should endeavour to co-operate with each other in aligning their authorisations. It also referred to the administrative powers of review, which organs of state may have against one another where co-operation fails. The implication of this case on the implementation of state infrastructure is therefore immense as it is analogous in providing the way in which organs of state should consider ‘municipal planning’ when exercising their duty to implement state infrastructure.

The final case that will be dealt with in detail is *Telkom SOC Ltd v Kalu NO*⁵⁴. This recent case was determined after the adoption of SPLUMA unlike the previous two cases. Kalu, the owner of a property zoned Single Residential 1, entered into an agreement with Telkom. Telkom is a licensee under the Electronic Communications Act⁵⁵ (ECA) but also a state-owned company implementing infrastructure. The agreement permitted Telkom to lease a portion of Kalu’s property and erect a freestanding base telecommunication station (mast) in terms of the ECA. The mast was erected without building plan approval. The municipality’s planning bylaw prohibited the erection of masts with Single Residential 1 zoning.⁵⁶

Telkom argued that the bylaw was in conflict with national legislation and therefore invalid in terms of section 156(3) of the Constitution. They further argued that the bylaw overstepped the boundaries of ‘municipal planning’ and encroached into the area of ‘national planning’.⁵⁷ The functional area of national planning encroached would be ‘regional planning and development’ for the reasons discussed above.

⁵² Para 47.

⁵³ Para 48.

⁵⁴ [2018] ZAWCHC 53.

⁵⁵ Act 36 of 2005

⁵⁶ Paras 5-6.

⁵⁷ Para 10.

Concerning the argument around the bylaw overstepping the boundaries of ‘municipal planning’, the court relied heavily on the interpretation of ‘municipal planning’ arising out of the *Gauteng Development Tribunal* case. It was held that the national and provincial powers exclude the powers of municipalities which had already been ‘carved out’ for municipalities.⁵⁸ The pertinent ‘carvings’ in this instance being ‘the control and regulation of the use of land within the municipal area, where the nature, scale and intensity of the land use do not affect the national interest’⁵⁹ (emphasis added). The court therefore held that ‘municipal planning’ includes the regulation of the use of land for masts.

Regarding the argument that the bylaw was in conflict with national legislation and therefore constitutionally invalid, the court examined the wording of relevant provisions of the ECA and the intention of the legislature. From the basis that the regulation of the land use for masts fell within the ambit of ‘municipal planning’, the court then importantly referred to section 151(4) of the Constitution: ‘the national and provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions’.⁶⁰ The court went on to hold that the bylaw cannot be interpreted to mean that the municipality wishes to regulate the system of telecommunication.⁶¹ Similarly, there is nothing in the provisions of the ECA that indicates that its purpose is to regulate zoning or land use. Furthermore, section 22(1), the provision of the ECA, on which Telkom relied, did not exempt a licensee from obtaining a rezoning as required by law.⁶² As seen, the court relied heavily on the reasoning for the decision in *Maccsand* and stated that the facts contained therein and issues to be determined in the *Telkom* case were similar if not directly analogous.⁶³ It is then not surprising that the court concluded that there was no conflict between the bylaw and the ECA as argued by Telkom. Telkom therefore failed in both arguments. The decision in this case further confirmed, firstly, the powers held by municipalities relating to ‘municipal planning’ and, secondly, the non-conflict of planning bylaws with national legislation that has a planning consequence but does not expressly provide for planning competencies.

⁵⁸ Para 32.

⁵⁹ Para 34.

⁶⁰ Para 39.

⁶¹ Para 40.

⁶² Para 47.

⁶³ Para 22.

Cooperative Governance

Provided for in SPLUMA and a thread running through the case law on the matter as well as stand-alone legislation, is the concept and call for co-operative government and inter-governmental relations. This concept and duty on all spheres of government arises from Chapter 3 of the Constitution. Section 41(1) provides the principles of co-operative government and the following are especially pertinent in the current context. This section provides that all spheres of government and all organs of state within each sphere must: respect the constitutional status, institutions, powers and functions of government in other spheres⁶⁴; not assume any power or function except those conferred on them in terms of the Constitution⁶⁵; co-operate with one another in mutual trust and good faith by informing one another of, and consulting one another on, matters of common interest⁶⁶; and co-ordinate their actions and legislation with one another.⁶⁷

‘The idea behind the list of principles [contained in section 41(1)] is to facilitate the proper exercise of power and functions between the different spheres, especially where there are conflicts or overlaps’.⁶⁸ Fleshing out the principles set out in Chapter 3 of the Constitution is the Intergovernmental Relations Framework Act⁶⁹ (IRFA). This Act must be read alongside the provisions contained in SPLUMA for co-operative governance to get a full picture of the duties and obligations each sphere and organ of state has in relation to the other. The Act also provides for the manner in which disputes between government entities should be resolved. The courts have held that unless the national or provincial legislation specifically provides for municipal planning functions (zoning, sub-divisions, township establishment) to be performed by a national or provincial department then there is no apparent conflict. However, there is certainly an overlap and thus Chapter 3 of the Constitution and the IRFA should be kept in mind when figuring out the way in which to administer national legislation for the implementation of state infrastructure, which naturally overlaps with local planning bylaws. SPLUMA recognises this constitutional obligation and, using the example of SANRAL, the implication and practical challenges in discharging this obligation will be seen below.

⁶⁴ Section 41(1)(e).

⁶⁵ Section 41(1)(f).

⁶⁶ Section 41(1)(h)(iii).

⁶⁷ Section 41(1)(h)(iv).

⁶⁸ Van Wyk J, ‘Planning in all its (dis)guises: Spheres of government, functional areas and authority’, 312.

⁶⁹ Act 13 of 2005.

SPLUMA

As mentioned, after the decision in the *Gauteng Development Tribunal* case, Parliament elected to overhaul the planning legislation in South Africa and this culminated in the adoption of SPLUMA. SPLUMA had some arguably unintended, yet profound, implications on the implementation of state infrastructure. These will be explored shortly using the SANRAL example.

SPLUMA was enacted on 1 July 2015. As such, it is still a relatively new piece of legislation. The result is that there is little guidance by the courts as to the interpretation of SPLUMA, or the judicial considerations of the constitutionality of a number of the provisions contained in SPLUMA.⁷⁰ The lengthy preamble to SPLUMA sets out, among other things, the erstwhile fragmented system of planning across the spheres of government and speaks to how ‘various laws governing land use give rise to uncertainty about the status of municipal spatial planning and land use management systems and procedures and frustrates the achievement of cooperative governance and the promotion of public interest’.⁷¹ This section of the preamble effectively captures the discussions above.

SPLUMA cements local government’s role and powers insofar as they relate to ‘municipal planning’ by defining ‘land development’⁷² and dictating that an application must be made to a municipality for the approval of any ‘land development’⁷³. ‘Land development’ means the erection of buildings or structures on land, or the change of use of land, including township establishment, the subdivision or consolidation of land, or any deviation from the land uses permitted in terms of an applicable land use scheme’.⁷⁴ It is hard to escape the glaring similarities between this definition of ‘land development’ and the courts’ interpretation of ‘municipal planning’. Thus, it has to be accepted that all land development constitutes, or at least falls within the ambit of, ‘municipal planning’ requiring authorisation from a local authority.

⁷⁰ N Laubscher, L Hoffman, E Drewes, J Nysschen, *SPLUMA A Practical Guide* (Lexis Nexis 2016) vi.

⁷¹ SPLUMA Preamble.

⁷² Section 1.

⁷³ Section 33(1).

⁷⁴ Section 1.

Where state infrastructure is concerned, one would be hard pressed to argue that state infrastructure would not constitute ‘land development’. The erection of power lines, the laying of railway tracks, construction of national roads and so on is clearly the ‘erection of...structures on land’.⁷⁵ Furthermore, as a consequence of the implementation of state infrastructure there will necessarily be sub-divisions, consolidations and rezoning. It follows then that no state infrastructure can be constructed without following the provisions of SPLUMA. This creates far-reaching implications for organs of state tasked with the implementation of infrastructure and has the potential to cause inordinate delays in the delivery of this infrastructure while organs of state await municipal planning approvals prior to construction. The result of such delays would be that the citizens of South Africa are deprived of much needed infrastructure projects pending municipal planning approvals. SPLUMA provides potential remedies for this situation but as will be seen, none of these remedies is as straightforward as they seem.

SPLUMA – Spatial Development Frameworks

SPLUMA provides for the adoption of Spatial Development Frameworks at national, provincial and municipal level. An SDF can be defined as ‘a strategic indicative framework that seeks to guide overall spatial distribution of current and desirable future land uses within a specific sphere in order to give effect to development vision, goals and objectives’.⁷⁶ Section 12(2)(a) states that the spheres of government must participate in the spatial planning and land use management processes that impact on one another to ensure that the plans and programmes are co-ordinated, consistent and in harmony with each other. Unlike the spheres of government, where hierarchical ‘tiers’ have been eliminated, SPLUMA provides clearly for ‘tiers’ of SDFs. The tiers are created because a provincial SDF must be consistent with the national SDF,⁷⁷ a regional SDF must be consistent with a provincial and national SDF,⁷⁸ and a municipal SDF must assist in integrating, coordinating, aligning and expressing development policies and plans emanating from the various sectors of the spheres of government as they apply within the municipal area.⁷⁹

⁷⁵ Section 1.

⁷⁶ Department of Rural Development and Land Reform, SPLUMA Core Training Materials: Participant Workbook, pg 81.

⁷⁷ Section 15(2).

⁷⁸ Section 19(1)(b).

⁷⁹ Section 12(5).

In an ideal situation, state infrastructure plans would be contained in the national SDF which would contain details of current and planned state infrastructure. This information would percolate down through the SDFs so that these current and future plans are incorporated into the provincial, regional and Municipal SDFs. In this ideal situation, the manner of dealing with spatial planning would be first to execute the spatial planning on a macro scale (national, regional and provincial) and then execute the micro spatial planning (municipal and precinct).⁸⁰ However, in reality, the opposite is true. Most municipalities have adopted Land Use Schemes and SDFs while the macro-spatial planning is yet to be finalised. Additionally, the content of the draft national SDF is broad stroked in nature, providing for broad development trends, but scant on the inclusion of detailed infrastructure plans.⁸¹ It is therefore unlikely that intricate details of current and future state infrastructure would be included in municipal SDFs. It also makes the task of organs of state getting the eventual necessary municipal planning approval, that much more difficult.

There is also a clear monetary consequence for organs of state in circumstances where state infrastructure plans have not been catered for by municipalities in their SDF or Land Use Scheme. Where these plans have not been incorporated in the municipal SDF or Land Use Scheme, then a situation may arise where a municipality grants development rights in a property earmarked for state infrastructure. The granting of these rights could drastically increase the value of the property resulting in a premium being paid by the organ of state when it eventually compensates the owner for the property required for the implementation of state infrastructure. In certain circumstances, where a developer has substantially developed a property, it may no longer be viable to implement the state infrastructure and a less desirable route would need to be adopted. This would be to the detriment of the public.

A look at the case of *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*⁸² provides an interesting vantage point. This case dealt with the constitutionality of certain provisions of the provincial Gauteng Transport Infrastructure Act⁸³. The provisions provided for the protection and preservation of historical road corridors needed for the future implementation of provincial road infrastructure – ‘effectively, the area within the road or rail reserve is frozen. It can only be used for its designated purpose’⁸⁴. It was

⁸⁰ N Laubscher *et al*, *SPLUMA A Practical Guide*, 136.

⁸¹ Department of Rural Development and Land Reform, Draft NDF Presentation 27 July 2018.

⁸² 2009 (6) SA 391 (CC).

⁸³ Act 8 of 2001.

⁸⁴ Para 23.

argued that the provisions deprived owners of their property rights and amounted to a form of expropriation, as these affected owners were unable to develop their properties. The Infrastructure Act allowed an owner to make application to the MEC for amendment to the planned corridor so as to enable development in certain circumstances where, for one reason or another, the historical planning was no longer applicable. The court held that the Infrastructure Act ‘strikes a balance between the Province’s legitimate interest in protecting the hypothetical road network on the one hand, whilst ensuring that individual property rights are protected on the other’.⁸⁵ The court appreciated and stressed the importance of preserving the historical infrastructure planning.⁸⁶ The sentiments of the Constitutional Court in this case regarding the importance of the protection of historical infrastructure plans is noteworthy. The decision reiterates the importance of preserving historical infrastructure plans. It is stressed that the best way of protecting the integrity of infrastructure plans is to ensure that a local authority takes account of current and future plans in their SDF and Land Use Management System. If this is done, then by implication it will ensure that inflated compensation is not paid by an organ of state, or that infrastructure plans are not relegated because private development has made them no longer feasible.

SANRAL infrastructure as an example of how implementation of state infrastructure is impeded by local planning authorisations

What has become clear from the growing precedent and interpretation of the Constitutional provisions discussed in detail above is that the implementation of state infrastructure by organs of state in terms of their enabling legislation, does not exempt these organs of state from complying with local planning legislation and getting municipal planning approval. This was put beyond doubt with the enactment of SPLUMA. At this stage, it is helpful to use this supposition and apply it to the example of SANRAL.

SANRAL is an organ of state constituted in terms of national legislation (the SANRAL Act) and constitutionally mandated to implement national road infrastructure in South Africa. The constitutional mandate arises because ‘national roads’ does not appear in either Schedule 4 or Schedule 5 of the Constitution unlike ‘provincial roads’⁸⁷ and ‘municipal roads’⁸⁸. ‘National

⁸⁵ Para 58.

⁸⁶ Para 34.

⁸⁷ Schedule 5 Part A.

⁸⁸ Schedule 5 Part B.

roads' is not listed and has not been assigned by national government to provincial government or local government. The SANRAL Act and the non-assignment of the function to provincial or local government means that the administration of matters relating to national roads and the implementation of national road infrastructure is clearly a functional area of national government.

In terms of SANRAL's planning competencies arising out of the SANRAL Act, SANRAL 'is responsible for and given power to perform all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic'⁸⁹ (emphasis added). Further, section 26(w) allows SANRAL to do anything else which is reasonably ancillary to any of its main functions and powers in terms of section 25. In pursuance of these objects, section 41 of the SANRAL Act gives SANRAL the power to recommend that the Minister expropriate properties and portions of property which are required for national road purposes.

A national road is declared by description or coordinates and this declaration is gazetted.⁹⁰ The effect of a declaration is that all the statutory provisions and uses associated with national roads in terms of the SANRAL Act are then applicable to the area declared.⁹¹ Another pertinent provision of the SANRAL Act, which directly relates to spatial planning, is section 49. This section provides that SANRAL's approval is necessary where land is to be subdivided but falls within a national road reserve or building restriction area. While not exactly the same, other organs of state implementing state infrastructure have similar empowering legislation and powers which have an impact on spatial planning and particularly 'municipal planning', which facilitate and expedite the implementation of state infrastructure.

Historically when a national road was designed, affected owners were consulted and their property was acquired by agreement or, where necessary, by expropriation for the purposes of the national road. Sometimes, whole properties were acquired; sometimes only portions of properties were acquired for these purposes. This resulted in numerous subdivisions and, occasionally, consolidations having to be registered. Furthermore, as mentioned above, the declaration of an area as a national road effectively changed the land use. This is particularly so after the road was constructed and the land use of a Road Reserve was clearly used for

⁸⁹ SANRAL Act Section 25(1).

⁹⁰ Section 40(1).

⁹¹ Section 1(xiii)(a).

national road purposes. From the discussion above, it is clear that these actions all fall within the ambit of ‘municipal planning’ and are now subject to SPLUMA.

Historically, Surveyor General Diagrams (SG Diagrams) for the abovementioned subdivisions and consolidations were prepared and approved by the Surveyor General in terms of the Land Survey Act⁹² and the properties were registered in SANRAL’s name in terms of the Deed’s Registries Act⁹³ read with section 55 of the SANRAL Act. Section 6(1)(b) of the Land Survey Act provides that before any registration is effected in a deeds registry, an SG must examine and approve diagrams which have been prepared in accordance with the Act and, when applicable, are in accordance with any statutory consent. Prior to the enactment of SPLUMA, the only statutory consent required by the SG in these instances was SANRAL’s in terms of the planning provisions referred to in section 25 of the SANRAL Act above. SANRAL and other organs of state are exempt from requiring the Minister of Agriculture’s consent in terms of the Subdivision of Agricultural Land Act 70 of 1970.⁹⁴

Prior to the implementation of SPLUMA, the contention is not that no spatial planning had been undertaken by an organ of state, but rather that the relevant local municipality had not always formally endorsed or even been aware of the spatial planning undertaken. After the enactment of SPLUMA, the registration of these subdivisions and consolidations was no longer possible. Section 53 of SPLUMA states ‘the registration of any property resulting from a land development application may not be performed unless the municipality certifies that all requirements and conditions for the approval have been complied with’. As mentioned, the implementation of national roads, which is state infrastructure, fell within the SPLUMA definition of ‘land development’. In terms of the Land Survey Act, an SG is now obliged to request the section 53 consent from a local authority and as such, statutory consent clearly falls within the ambit of section 6(1)(b). Furthermore, SPLUMA provides that:

‘except as provided for in this Act, no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with this Act.’⁹⁵

Therefore, the planning provisions in organs of states’ enabling legislation must yield to the provisions of SPLUMA where there is a conflict. This means that, following the enactment of

⁹² Act 8 of 1997.

⁹³ Act 47 of 1937.

⁹⁴ Section 2.

⁹⁵ Section 2(2).

SPLUMA, despite empowering provisions in other legislation, no subdivision or consolidation diagram will be approved by an SG without an accompanying municipal consent. This obviously creates a problem with the historical way in which the state infrastructure was implemented, as prior to the enactment of SPLUMA, no consent was required. Organs of state thus need to adapt the way in which they design and plan state infrastructure in order to ensure that they are able to formalise this planning with municipalities in due course.

The issue of land use and zoning of state infrastructure also needs to be addressed in the context of ‘municipal planning’ and SPLUMA. The reason for this is that the implementation of state infrastructure, in the majority of instances, results in the changing of one land use to another. Following the SANRAL example, the use of the land is typically changed from ‘agriculture’ to ‘transportation’. This change of land use need not necessarily lead to a rezoning and the concomitant land development application for such. ‘One should be mindful of the fact that ‘municipal planning’ for the purposes of SPLUMA has a wider meaning to include strategic planning and not only land use management as in the common meaning of municipal planning’.⁹⁶ The change of land use and zoning falls within the definition of ‘land development’⁹⁷ and would ordinarily require that a development application be submitted to a municipality in terms of section 33(1). In this context, it is argued that land use and zoning for state infrastructure is not directly affected by the enactment of SPLUMA but should, nonetheless, be formalised and aligned between local authorities and organs of state in the interests of co-operative government as discussed in detail above.

‘Land Use’ is defined in SPLUMA as ‘the purpose for which land is or may be used lawfully in terms of...any other authorisation, permit or consent issued by a competent authority, and includes any conditions related to such land use purposes’.⁹⁸ It is important to note that the way in which this definition is framed means that there are a number of ways in which land use can be lawfully exercised including authorisations, permits or consents issued by a competent authority.⁹⁹ An organ of state may be a competent authority where its enabling legislation provides planning competencies connected to such organ of state’s duty to utilise land for state infrastructure. An organ of state acting in terms of a permission, permit or consent, issued in terms of that enabling legislation, would therefore not be acting in conflict with the provisions

⁹⁶ N Laubscher *et al*, *SPLUMA A Practical Guide*, 53.

⁹⁷ Section 1.

⁹⁸ Section 1.

⁹⁹ N Laubscher *et al*, *SPLUMA A Practical Guide*, 33.

of SPLUMA. This is in line with idea of SPLUMA providing a framework for ‘strategic planning’ and not just ‘municipal planning’. An organ of state’s enabling legislation would also not fall foul of section 2(2) in this instance, as the land use provisions in its enabling legislation would be consistent with SPLUMA. It would still be necessary though to integrate and align these lawful land uses with a municipality’s Land Use Management Scheme and SDF. This would further be in line with the duty imposed in section 9(3) of SPLUMA and the principles of co-operative government already discussed.¹⁰⁰

Another issue arising and not addressed in SPLUMA is the scenario where an expropriation takes place and illogical planning consequences potentially follow. In terms of the Expropriation Act¹⁰¹, ownership passes to the authority expropriating the property on date of expropriation.¹⁰² The date of expropriation is the date stated in the notice of expropriation delivered to the owner of the property.¹⁰³ The minister may also expropriate portions of immovable property in terms of the Act.¹⁰⁴ Where a minister expropriates a portion of a property, then sufficient particulars must be given in order for an owner to determine the position and extent of that portion in relation to the whole property.¹⁰⁵ The result of this is that a determinable portion of property may be expropriated in which ownership in that expropriated portion vests in the state but where this portion has not been recorded separately in the SG’s office or registered in the Deeds Office. Therefore, a subdivision is created through expropriation and vesting of ownership but not formalised until a separate SG diagram is approved and title registered in terms of section 31 of the Deeds Registries Act. As dealt with, the approval of the SG diagram is again subject to the planning consent of a municipality in terms of SPLUMA. The illogical consequence arises where a municipality potentially refuses to give subdivision planning approval. This creates a situation where the ownership in a determinable portion of land is vested in the State but where the State is not able to subdivide and formally take transfer of this portion as they cannot get the SG to approve it and subsequently will not be able to get registered title. This situation can be rectified through an agreement in terms of section 29 of SPLUMA, which will be discussed in the following chapter, or where a municipality provides for the situation in their bylaws.

¹⁰⁰ Ibid 101.

¹⁰¹ Act 63 of 1975.

¹⁰² Section 8(1).

¹⁰³ Section 7(2)(b).

¹⁰⁴ Section 2.

¹⁰⁵ Section 7(2)(a).

Possible ways in which SPLUMA and municipal bylaws can be utilised to avoid a full development application

On the topic of municipal bylaws, at this stage it is important to note that most, if not all of the issues raised can be resolved through municipalities' land use and planning bylaws if provision for them has been made therein. As one will appreciate, following the discussion of wall-to-wall municipalities, there are 278 municipalities in South Africa, comprising eight metropolitan, 44 district and 226 local municipalities.¹⁰⁶ This means that there may be up to 278 different sets of planning bylaws each providing for a different process to be adopted in considering and making decisions regarding land development applications (which includes state infrastructure as mentioned). Chapter 6 of SPLUMA provides the framework within which a municipality develops land use and planning bylaws which deal with land development applications. In terms of section 54(e) of SPLUMA, the Minister may make regulations consistent with SPLUMA prescribing procedures concerning the lodging of applications and the consideration and decision of such applications. The Spatial Planning and Land Use Management Regulations: Land Use Management and General Matters, 2015 were published by the Minister in March 2015¹⁰⁷ and came into operation on 13 November 2015^{108, 109}. 'Regulation 14(1)(a) stipulates that a municipality must determine the manner and format in which land development and land use applications must be submitted.'¹¹⁰

In certain instances, a municipality, in its bylaws, has exempted organs of state from having to make development applications for the implementation of state infrastructure or sub-divisional approval for expropriations (City of Cape Town¹¹¹, and a number of municipalities in the Eastern Cape for example). In this instance, one need only draw the attention of the SG and Deeds Office to the relevant exemption in order to formalise the planning of that organ of state. Some municipalities make provision for a process to apply for exemption from making application in certain circumstances (City of Johannesburg for example¹¹²). The exemption issued by the municipality is then provided to the SG and Deeds Office. Others may opt for a

¹⁰⁶ Government website: <https://www.gov.za/about-government/government-system/local-government>.

¹⁰⁷ GG No. 38594.

¹⁰⁸ GG No. 39415.

¹⁰⁹ N Laubscher *et al*, *SPLUMA A Practical Guide*, 281.

¹¹⁰ *Ibid*, 184.

¹¹¹ The City of Cape Town Planning By-Law, 2015, Section 67.

¹¹² City of Johannesburg: Municipal Planning By-Law 2016, Section 66.

shortened procedure where it is still necessary to make a land development application in terms of the bylaws but where the application is expedited through shortened timeframes and/or does not require all of the information that would normally accompany a land development application – for instance advertising the development application, and/or having to get comment from a multitude of line departments. Following a shortened procedure, a section 53 consent would be issued and this would be supplied to the SG and Deeds Office to formalise the planning. Finally, some municipalities (City of Tshwane¹¹³) do not make provision for exemption or shortened procedures and treat organs of state as ordinary developers instituting ordinary land development. In this scenario, the organ of state is required to make a land development application in the ordinary course in order to be issued a section 53 consent at the end. This situation can lead to serious delays as a result of the drawn out process of getting comment from various departments, public participation procedures and consideration by Municipal Planning Tribunals. In order to avert these delays, it is necessary to contemplate other approaches provided for in SPLUMA.

Section 55 of SPLUMA provides for exemption from one or all of the provisions of the Act relating to a specified piece of land or area if it is in the public interest.¹¹⁴ It would be relatively straightforward to motivate that the implementation of state infrastructure is in the public interest for obvious reasons. The Minister of Rural Development and Land Reform¹¹⁵ on application would, by Notice in the Gazette, exempt an entity from one or all of the provisions of the Act.¹¹⁶ It is conceivable to use this section to expedite land development applications for the implementation of state infrastructure. Using the SANRAL example, one would specify the area on which a road was to be constructed and apply to the Minister to exempt SANRAL from having to make development applications to the municipality for this area in terms of SPLUMA and the municipal planning bylaws. While this may seem like a good idea, it is fraught with practical difficulties and the section of SPLUMA has come under heavy criticism.

The practical difficulties for an organ of state to rely on this section are numerous. Firstly, the section provides that the Minister may exempt an applicant. Thus, valuable time would be wasted where an application for exemption was made only for the Minister to refuse to grant

¹¹³ City of Tshwane Land Use Management By Law, 2016. However Section 14(2)(b) provides that the Municipality may, after consultation with the relevant National or provincial Department, determine that a planning application is not required.

¹¹⁴ Section 55(1)(a).

¹¹⁵ The empowered Minister in terms of the definitions in SPLUMA.

¹¹⁶ Section 55(1).

the exemption. It is also likely that because such an application would not ordinarily be part of the day-to-day duties that the Minister deals with, a decision and the gazetting where the application was granted, would not be a swift exercise. Secondly, a close reading of the provision reveals that the request may only be made by a municipality or province. This is perhaps an oversight by the legislators, but this nonetheless excludes an organ of state making such a request of their own volition. To utilize this section for state infrastructure, the organ of state would need to motivate to a municipality or a province to make the request on their behalf. Therefore, the organ of state would be completely reliant on the cooperation and agreement of a municipality or province even to attempt to utilise this provision. Finally, it has been argued that ‘the subsection offends against the objects of SPLUMA as set out in section 3 and the [constitutional] principles stated in section 41(1) of the Constitution, and the inclusion thereof in SPLUMA is simply indefensible and unjustifiable’.¹¹⁷ Thus, even if an organ of state jumped through the aforementioned hoops, there is a real possibility that the provision they rely on would not pass constitutional muster if challenged and in that circumstance, their efforts would amount to nought. It would have only resulted in a colossal waste of time. For these reasons, it is submitted that section 55 of SPLUMA is not the answer to the difficulties faced in implementing planning for state infrastructure.

Section 52 of SPLUMA may also seem like an extremely attractive provision that organs of state could rely on for the formalisation of planning for state infrastructure. Section 52 states ‘a land development application must be referred to the Minister where such an application materially impacts on: matters within the exclusive functional area of the national sphere in terms of the Constitution¹¹⁸; strategic national policy objectives¹¹⁹ and land use for a purpose which falls within the functional area of the national sphere of government’.¹²⁰ It is clear from the discussion earlier that state infrastructure falls within the functional area of the national sphere of government. In circumstances where a development application in the national interest has been referred to the Minister, the Minister may join as a party to the application¹²¹ or direct that the application be referred to him to decide.¹²² At face value, this seems like a good way in which planning applications for state infrastructure can be expedited as the Minister can approve them without the necessity of having to follow the often-onerous

¹¹⁷ N Laubscher *et al*, *SPLUMA A Practical Guide*, 248.

¹¹⁸ Section 52(1)(a).

¹¹⁹ Section 52(1)(b).

¹²⁰ Section 52(1)(c).

¹²¹ Section 52(5)(a).

¹²² Section 52(5)(b).

provisions of bylaws discussed. The reality is that section 52, much like section 55, is also fraught with practical difficulties.

Firstly, the provision does not circumvent the necessity of having to first prepare and submit the application in terms of the municipal bylaws as the section expressly provides that the application should first be lodged with the relevant municipality.¹²³ Secondly, the Minister's decision or election to 'join as a party' or 'decide the application' is entirely discretionary and therefore it is not a foregone conclusion that the Minister will determine planning applications for state infrastructure. The Minister may join as a party, provide comment to the municipality that could assist in motivating the approval of the planning application, but would nevertheless not unburden an organ of state from then being embroiled in the often onerous municipal planning application process. The notion that the application be referred to the Minister for a decision is simply untenable. It is in conflict with the precedent set in *Gauteng Development Tribunal* and *Maccsand*. Furthermore, it is in conflict with section 35(1) of SPLUMA which states that a Municipal Planning Tribunal (MPT) determines the development application and not the Minister. This is seemingly reiterated in section 52(7). 'It can safely be assumed that the Minister cannot consider and decide a development application as provided for in this subsection'.¹²⁴ This section then, despite its title, does not provide the answer to implementing planning for state infrastructure.

It will be argued that the answer to the 'planning of state infrastructure' conundrum lies in the oft-overlooked section 29 of SPLUMA. In the following Chapter this section will be explored in detail and it will be shown how the utilisation of an agreement provided for in this section ticks all of the boxes which the previous sections have failed to do. It provides a solution which is constitutionally acceptable, practical, expeditious, embodies the precepts of co-operative governance, and maintains the integrity of the different functions of the role-players involved.

¹²³ Section 52(7).

¹²⁴ N Laubscher *et al*, *SPLUMA A Practical Guide*, 278.

Chapter 3: SPLUMA - Section 29 Agreement

Section 29 comprises only three subsections and is headed ‘consultation with other land development authorities’. This is slightly confusing and would have been more aptly titled ‘agreement with other land development authorities’. However, the title does not derogate from the content. Section 29(1) states:

‘A municipality must consult any organ of state responsible for administering legislation relating to any aspect of an activity that also requires approval in terms of this Act in order to coordinate activities and give effect to the respective requirements of such legislation and to avoid duplication.’

While the onus is placed on a municipality to initiate such consultations, it is submitted that there is nothing barring another organ of state from initiating these consultations. Thus, an organ of state would be well advised to approach and consult with a municipality affected by the implementation of state infrastructure at the early stages of a project to ensure there are no fundamental planning differences between the parties. In the example utilised, SANRAL would be administering the ‘planning’ element provided for in section 25 of the SANRAL Act which planning aspect would also require an approval from a municipality. Section 29(1) would also be applicable where a municipality was granting a planning approval which affected the National Road Reserve as envisaged in section 59 of the SANRAL Act. As discussed above, section 59 requires SANRAL approval before any subdivision or township establishment approval can be granted. ‘The subsection recognises the interplay between different administrators executing different powers and functions in terms of different enabling enactments to authorise or permit the same or substantially the same activity’.¹²⁵

Further, the subsection refers to ‘any aspect of an activity that also requires approval in terms of SPLUMA’ (emphasis added). Thus, the obligation to consult extends beyond only subdivisions, consolidation and zonings and includes approval of IDPs, SDFs, suspension/amendment/removal of restrictive conditions, consent in terms of a condition title, conditions of establishment or an approval for township establishment.¹²⁶ The scope of this subsection is necessarily wide and caters for the provisions of Chapter 3 of the Constitution as well as upholding the principles enunciated in cases such as *Wary Holdings*, *Gauteng Development Tribunal* and *Maccsand*. When interpreting this subsection, one must note that

¹²⁵ N Laubscher *et al*, *SPLUMA A Practical Guide*, 160.

¹²⁶ *Ibid*.

each organ of state responsible for administering planning legislation (or legislation with planning aspects), has to make its own decision according to that enabling legislation and the criteria applicable therein.¹²⁷ Therefore, even where the information being considered by the authorities is the same, such authority must make its decision against the factors and criteria relevant in their respective enabling legislation and the decisions must be reasonable and rational in light thereof. A municipality for instance cannot delegate its municipal planning decision in terms of SPLUMA and its bylaws to an organ of state to do so in terms of that organ's enabling legislation.

Section 29(2) of SPLUMA states:

‘A municipality, in giving effect to Chapter 3 of the Constitution, may, after consultation with the organ of state contemplated in subsection (1), enter into a written agreement with that organ of state to avoid duplication in the submission of information or the carrying out of a process relating to any aspect of an activity that also requires authorisation under this Act.’

This section provides the crux of the answer to the conundrum raised at the outset. This subsection provides the legislative authority enabling a written agreement between organs of state and municipalities to be entered into. This vehicle can be used to address and enforce streamlined processes and avoid the ‘red tape’ which often hampers ordinary development applications. Entering into such an agreement, where bylaws have not provided a process to expedite the implementation of state infrastructure, allows the expedition of state infrastructure development outside of the bylaws. A criticism has been raised against this section in that it does not follow the principle in the preceding paragraph that organs of state and municipalities must make their own decision in terms of the relevant enabling legislation.¹²⁸ It is argued that by entering into such an agreement, the parties may abdicate their respective statutory duties by agreeing that the other party can make a decision on their behalf. This may be true depending on the content of the agreement. It is therefore vital that the content of the agreement keeps in mind the specific authorisations and functions of the parties so as not to overstep the constitutional lines articulated in the aforementioned case law.

Going back to the SANRAL example, the agreement would record the processes already carried out as part of the road development design and planning phase. In this instance the public participation undertaken as part of an EIA or the consultation and negotiations with

¹²⁷ *Houtbay & Llandudno Environment Conservation Group v Minister of Local Government, Environmental Affairs & Development Planning*, Western Cape (23827/2010) [2012] ZAWCHC 22 par 27

¹²⁸ N Laubscher *et al*, *SPLUMA A Practical Guide*, 163.

affected land owners and communities, may be sufficient to avoid duplicating a similar consultation process as part of a planning authorisation. Furthermore, the municipality may take account of the proposed subdivisions, consolidations, provisions for alternate accesses, closure of public places and so on, which have been prepared by SANRAL in terms of the planning aspect provided for in the SANRAL Act. A municipality, after satisfying itself that this planning is acceptable, would record as much in the agreement. Where a municipality is unsatisfied with the planning, for instance where a national road will dissect a community, the municipality has the ability during the ‘consultation’ referred to in the subsection to propose a planning solution (such as an overhead walkway) or propose a better suited route in line with the future planning of the municipality. It is submitted that the word ‘consultation’ in the subsection would be more appropriately called a ‘negotiation’ given the eventual consequence of an agreement.

The subsection expressly refers to the agreement as giving effect to Chapter 3 of the Constitution. It is clear then that the intention of the legislature was to promote the spirit of cooperative governance through this process in order to avoid duplication of information and processes which inevitably delay development. It also provides for a scenario where the authorities can sit around a table and avoid the situation that arose in both the *Maccsand* and *Telkom* cases.

While the following discussion is not an exhaustive list of what could be contained in the agreement, it does give one an idea of the power, nature and scope of a section 29 agreement. As mentioned, the agreement could record the non-necessity of a public participation process where some acceptable form of public participation on the project had already been concluded (for instance during an Environmental Impact Assessment in terms of the National Environmental Management Act¹²⁹). The agreement could record the acceptable planning provisions provided in a design of the infrastructure including proposed sub-divisions and consolidations. A municipality could, of their own accord, undertake in the agreement to rezone the area on which the state infrastructure was to be implemented. The municipality could also undertake to amend its SDF in line with the proposed plans. The organ of state could undertake to provide specific acceptable planning solutions to areas of concern which may have arisen as part of the negotiations - the ‘overhead walkway’ situation referred to earlier for example. In terms of processes, the parties could agree to timelines within which planning approvals could

¹²⁹ Act 107 of 1998.

be provided once agreed information had been submitted. The agreement could go so far as to establish a committee or authorised official responsible for monitoring and facilitating the implementation of the agreement. It is envisaged that an agreement of this nature would be accompanied by extensive annexures such as draft SG diagrams, spatial plans illustrating the development, proof and outcomes of public participation undertaken in terms of another process, and any other documentation or information necessary to justify and/or elaborate on the state infrastructure development.

By introducing and fleshing out the practicalities of the development in the annexures to the agreement, the agreement can be as specific or broad as the parties wish. For instance, the agreement could provide for the planning implications of over a hundred properties on a section of road spanning a number of kilometres. Such an extensive area covered by the agreement with the associated plethora of annexures which would need to accompany it may make the agreement cumbersome. It is therefore suggested that the agreement would be project-specific, dealing with up to twenty properties in an agreement in order to make a submission for planning approval in the next phase more manageable.

The agreement would also include provision for a breach. This is vital to the enforceability of the agreement. Necessarily, where one party did not execute an obligation in terms of the agreement the other party could place that party in breach, calling for the breach to be remedied within a reasonable amount of time or a time stipulated in the agreement. Provision could even be built into the agreement where non-performance of the obligations flowing from the agreement results in a penalty being levied against the defaulting party. It must, however, be borne in mind that if a dispute arises, generally following a breach of the agreement, in which legal action is envisaged, the parties will still have to follow the provisions of the Intergovernmental Relations Framework Act. In amplification of this, section 40(2) of the IRFA stipulates that ‘any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance or functions...must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of dispute’. Following this section, it may also therefore be necessary to include provision for arbitration and mediation between the parties where a conflict arises. Not until the parties have followed the processes and procedures stated in the IRFA will they be able to approach a court to settle the dispute. This is inextricably linked to the rights, duties and obligations of the parties encompassed in Chapter 3 of the Constitution and discussed earlier.

The next practical issue which requires resolution is the aspect of signatories to the agreement. At this juncture it is important to stress the difference between signing the section 29 agreement and signing a planning approval arising out of the agreement. The issuing of approvals, and the necessary signing of such approvals, will be elucidated shortly during the discussion of section 29(3). Section 29(2) refers to a ‘municipality’ entering into the agreement. The general principle is that the person signing the agreement from both the organ of state and the municipality, must have the authority to sign the agreement. Using the SANRAL example, the board of directors of SANRAL are imbued with the power to enter into agreements¹³⁰ but may delegate this power to the CEO¹³¹ and allow the CEO to further sub-delegate these powers to employees of SANRAL¹³². Agreements of this nature could therefore be signed by an employee of SANRAL delegated to do so where delegations were provided in terms of the preceding sections of the SANRAL Act. Similarly, the authority of the ‘municipality’ to sign the agreement would lie with the Municipal Manager in terms of section 55 of the Local Government: Municipal Systems Act¹³³ and not the authorised official or chairperson of an MPT as envisaged in SPLUMA. The reason for this is that the agreement is not a planning authorisation. It may become the case, however, that a Municipal Manager sub-delegates the authority to sign a section 29 agreement in terms of section 59 of the Municipal Systems Act. The logical choice for such a sub-delegation would be to the Head of Planning within a given municipality.

A concern to note is that the entering of the agreement by a municipality is discretionary. Section 29(2) states that ‘a municipality may enter into an agreement with an organ of state.’ This obviously has major implications on the certainty of success when proceeding down this avenue as a municipality could legally refuse to enter into such an agreement. The municipality could insist that the organ of state apply for the planning authorisations in the ordinary course as would any ordinary developer in terms of the municipality’s bylaws. As a consequence, the issues giving rise to the necessity of an agreement would not be solved. It is argued that in these circumstances political intervention may be required in order to realise the prescripts of co-operative governance as laid out in Chapter 3 of the Constitution. Furthermore, the refusal by a municipality to enter into an agreement when approached by an organ of state implementing state infrastructure may, in and of itself, be enough to trigger the provisions of

¹³⁰ SANRAL Act section 12(1).

¹³¹ SANRAL Act Section 18.

¹³² SANRAL Act Section 22.

¹³³ Act 32 of 2000.

sections 41 to 44 of the IRFA. An organ of state could declare a formal dispute with the municipality on the basis that the actions or inactions of the municipality in entering an agreement hamper the implementation of national policy and legislation and therefore fall foul of the principles in the Constitution, SPLUMA and the IRFA.

Section 29(3) states:

‘After a Municipality has concluded an agreement contemplated in subsection (2), the relevant Municipal Planning Tribunal may take account of any process authorised under the legislation covered by that agreement as adequate for meeting the requirements of [SPLUMA]’.

The requirements referred to above are captured in section 42(1) and 42(2) of SPLUMA. This section sets out the considerations by an MPT or authorised official in deciding an application. These considerations consist, inter alia, of public interest¹³⁴, transformation imperatives¹³⁵, relevant facts and circumstances¹³⁶, rights and obligations of affected parties¹³⁷, impact on engineering services¹³⁸, timeframes¹³⁹, and environmental legislation¹⁴⁰. As discussed, the content of the agreement would therefore have to include provision for the above factors in order to satisfy an MPT taking account of the agreement that the requirements of SPLUMA have been met. Only after these factors have been considered by an MPT could they issue planning authorisations flowing from the agreement.

As mentioned previously, an MPT faced with a section 29(2) agreement still ‘has to make its own decision, according to its own enabling legislation and the criteria set out in the enabling legislation’¹⁴¹, in this case SPLUMA. It has been argued that section 29(3) seemingly averts this principle, raising the risk that decisions taken by an MPT taking account of an agreement will be susceptible to an appeal and, thereafter, administrative review. In order to avoid a situation where an MPT essentially abdicates its duties in terms of SPLUMA, ‘the MPT must consider an application by applying its collective mind to each of the requirements of SPLUMA, irrespective of whether another organ of state has already considered the same issue in terms of its enabling legislation’¹⁴². The content of the agreement is fundamental to

¹³⁴ SPLUMA Section 42(1)(c)(i).

¹³⁵ SPLUMA Section 42(1)(c)(ii).

¹³⁶ SPLUMA Section 42(1)(c)(iii).

¹³⁷ SPLUMA Section 42(1)(c)(iv).

¹³⁸ SPLUMA Section 42(1)(c)(v).

¹³⁹ SPLUMA Section 42(1)(c)(vi).

¹⁴⁰ SPLUMA Section 42(2).

¹⁴¹ N Laubscher *et al*, *SPLUMA A Practical Guide*, 162.

¹⁴² *Ibid* 165.

achieving this. The agreement is not merely a statement that the organ of state, in terms of its enabling legislation, has considered the issues and therefore an MPT must as a result ‘rubber stamp’ their planning authorisations. The agreement, as discussed, should contain sufficient detail upon which an MPT can consider all the requirements referred to earlier. The agreement provides the framework for the processes to be followed and a vehicle for the information to be considered. This will avoid a potential review in terms of the Promotion of Administrative Justice Act¹⁴³ (PAJA). The grounds of review are found in section 6(2) of PAJA and an applicant must argue his case on review in terms of one or more of these grounds.¹⁴⁴ Were an MPT to take a decision without taking into account the content of the agreement, they could be accused of a ‘failure to apply the mind’.¹⁴⁵ This failure to apply the mind, ‘can be a reference to either a more specific ground of review (such as a failure to take account of all relevant considerations or misconstruing the facts and the law) or an umbrella phrase referring to all the grounds of review’.¹⁴⁶ Thus in circumstances where an agreement did not contain sufficient detail, or where an MPT did not scrutinise this detail, a decision taken by an MPT on the back of the section 29(2) agreement would be reviewable in terms of section 6(2)(e)(iii) and (vi), (f)(ii) and (h) of PAJA after the SPLUMA appeal process had been exhausted.

SPLUMA is framework legislation providing for, among many other things, the framework for the implementation of municipal planning bylaws. Similarly, it provides the framework for the agreement between organs of state.¹⁴⁷ Thus, it is not necessary that municipal planning bylaws cater for the agreement. The agreement falls outside the provisions and ambit of bylaws and can therefore be dealt with directly in terms of SPLUMA as the enabling legislation.

A question which may arise when the agreement is being considered by an MPT for the issuing of planning approvals, is the authority on which an organ of state is able to make planning applications for properties of which the organ is not necessarily the owner. Section 45 of SPLUMA categorises the parties to a development application. It stipulates who may submit a land development application. These include the owner of the land concerned¹⁴⁸ and a person duly authorised as an agent of the owner.¹⁴⁹ This would in most circumstances require a Power

¹⁴³ Act 3 of 2000.

¹⁴⁴ G Quinot (Ed), J Bleazard, S Budlender, H Corder, M Kidd, P Maree, M Murcott, E Webber *Administrative Justice in South Africa: An Introduction* (Oxford 2015), 111.

¹⁴⁵ N Laubscher *et al*, *SPLUMA A Practical Guide*, 165.

¹⁴⁶ *Ibid*.

¹⁴⁷ SPLUMA Section 29.

¹⁴⁸ Section 45(1)(a).

¹⁴⁹ Section 45(1)(b).

of Attorney (PoA) from the owner of the land. However, section 45 also lists ‘a service provider responsible for the provision of infrastructure, utilities or other related services’¹⁵⁰ as one of the parties who can submit a land development application. A service provider includes a person or institution that performs a function which affects the use, form or function of land.¹⁵¹ Following the SANRAL example, SANRAL is clearly an institution which, by the implementation of national roads, affects the use, form and function of land. Furthermore, SANRAL is responsible for infrastructure. Thus, SANRAL and other similar organs of state implementing infrastructure can rely on these sections in order to avoid the onerous task of arranging PoAs from all affected owners or having to acquire or expropriate these properties before an agreement makes its way before an MPT in terms of section 29(3).

Finally, it is important to explore the extremely beneficial role which norms and standards can play in realising the potential of an agreement in terms of section 29(2). Section 8(1) of SPLUMA provides that the Minister must, after consultation with organs of state...prescribe norms and standards for land use management and land development that are consistent with SPLUMA, IRFA and PAJA.¹⁵² Norms are based on what is common practice, local knowledge and acceptable behaviour while standards deal with minimum sectoral and technical considerations.¹⁵³ The norms and standards must reflect the national policy, national policy priorities and programmes relating to land use management and land development.¹⁵⁴ They must also ensure that land development applications, procedures and timeframes are efficient and effective.¹⁵⁵ Using the SANRAL example, national road infrastructure and specific projects would be considered as part of national policy and certain routes would be considered as national priorities. In these instances, the Minister, at the request of another Minister (in the ongoing SANRAL example, the ‘other Minister’ would be the Minister of Transport) could prescribe norms and standards to guide the related sectoral land development or land use.¹⁵⁶ The sectoral land development and land use in the on-going SANRAL example, would include norms and standards binding municipalities on the way they consider all land development relating to national roads and areas on which a national road is declared. The norms and

¹⁵⁰ Section 45(1)(d).

¹⁵¹ Section 45(7).

¹⁵² Section 8(1).

¹⁵³ KZN Department of Cooperative Governance and Traditional Affairs, SPLUMA Forum presentation, 24 June 2016.

¹⁵⁴ SPLUMA Section 8(2)(a).

¹⁵⁵ SPLUMA Section 8(2)(c).

¹⁵⁶ SPLUMA Section 8(3).

standards could also standardise the preliminary consultation phase prior to the signing of the agreement in order to reduce vastly differing approaches to the consultation being taken by different municipalities. Finally, norms and standards would give credence to the section 29 approach and would go a long way in comforting municipalities that a section 29 agreement was a viable way in which to deal with these hybrid land development applications.

Chapter 4: Conclusion

Using SANRAL as an example, it is plain to see that the interaction, interrelation and overlap between the three spheres of government, insofar as it relates to planning generally, is complex and fraught with nuances, which needs to be unpacked. Unpacking the complexities and nuances is fundamental to ensuring that the planning of state infrastructure is undertaken in a constitutionally acceptable manner which does not impede on the implementation of state infrastructure which will ultimately be detrimental to service delivery.

Cases such as *Wary Holdings*, *Gauteng Development Tribunal*, *Maccsand* and *Telkom* among others, illustrate the importance placed on the concept of ‘municipal planning’. The precedent has shown the increasing ambit of ‘municipal planning’ and consequently the increasing executive and administrative powers of municipalities relating to this. As discussed, this increasing planning power of municipalities has restricted the previously acceptable actions of organs of state relating to the planning for state infrastructure. The case law, however, universally stresses the importance of the constitutional concept of co-operative government in dealing with such overlaps and conflicts.

SPLUMA was a necessary and welcome piece of planning legislation which sought to consolidate the previous fragmented system of planning law in South Africa by providing a framework which was simple and constitutionally acceptable. Unintended consequences of SPLUMA, some of which have been explored in this paper, have meant that issues such as the planning of State of Infrastructure have become more complex as a result. As has been shown, sections 52 and 55 of SPLUMA, which may have been intended to provide the answer to this conundrum. The provisions are partly unworkable due to the unconstitutionality of the provisions therein, or generally ineffective at expediting applications due to the introduction of a further level of bureaucracy. If Sections 52 and 55 are relied on, it will, in all likelihood, lead to further delays rather than expediting state infrastructure planning.

It has been argued and shown how an agreement in terms of section 29 of SPLUMA is the best-fitted provision in SPLUMA to address the difficulties inherent in state infrastructure planning and implementation. Consultation (negotiation) and the resultant agreement in terms of section 29 realises and promotes the constitutional imperative of co-operative government. Having the parties negotiate an agreement around a table during the infancy of a state infrastructure project to align their respective planning competencies and vision will surely avoid the situation that arose in both *Maccsand* and *Telkom*. Furthermore, such an agreement can be utilised swiftly

and effectively to formalise existing state infrastructure planning where necessary, as was shown in the case of SANRAL's historical road network.

A section 29 agreement is not without its own pitfalls and difficulties as has been shown. It is imperative that the content of the section 29 agreement includes sufficient detail and is drafted in such a way to ensure that the parties are not seen to be delegating their constitutional decision making functions to one another. An MPT considering such an agreement should apply its mind to the considerations enunciated in section 42 of SPLUMA before approving an application based on such an agreement. Failure to do the aforementioned may result in a review in terms of PAJA once the SPLUMA appeal process has been exhausted. If the MPT did not sufficiently apply its mind to the agreement, or if the agreement was drafted in such a way as to derogate a party's constitutional decision-making authority, then the eventual decision may be set aside on review or appeal.

The section 29 agreement is a fresh approach to solving the problems inherent in state infrastructure planning. This freshness and being 'out of the ordinary' could well be detrimental factors to its practical acceptance. In terms of section 29, a municipality has the discretion to enter into such an agreement and therefore the fact that this approach is out of the ordinary may well work against the adoption of the agreement. It is possible that a municipality faced with a process outside of the ambit of their bylaws and on which they have received no provincial or national guidance, will be unwilling to exercise its discretion to enter into such an agreement. Thus, it is imperative that norms and standards are prescribed in terms of section 8 of SPLUMA to ensure that the process of consultation and form of the agreement are uniform and will provide some degree of comfort to a municipality exercising its discretion.

Planning law is evolving at a rapid rate. The ever increasing population of South Africa also dictates that the implementation of state infrastructure must happen at a rapid rate. It is therefore vital that the planning and implementation of state infrastructure moves in tandem with the changing approach to planning in South Africa. If it does not, then the ultimate price will be paid by society as a whole where the practical implementation of state infrastructure, necessary for the smooth functioning of society, is impeded by bureaucracy. A section 29 agreement, if embraced, is one potential way in which this situation can be avoided.

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