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Coordination of development approval processes revisited – *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs & Development Planning of the Western Cape and Others* [2011] 4 All SA 270 (WCC)

1. Introduction

This article deals with the decision-making powers of different spheres of government, in terms of various pieces of legislation, with regard to the development of agricultural land and, more specifically, the subdivision or rezoning of such land. The current approval process to be followed by a developer consists of four phases, namely:

- An application for the amendment of the relevant structure plan;
- The Environmental Impact Assessment (EIA) process;
- The application for rezoning and subdivision, and
- The approval of building plans.

The case under discussion concerns an application for the rezoning and subdivision of agricultural land in order to establish a luxury lifestyle estate in terms of the *Land Use Planning Ordinance* 15/1985 (*LUPO*). In terms of *LUPO*, the Western Cape Provincial Minister granted provisional approval, subject to the condition that final approval be given by the provincial government after a number of processes had been complied with.

Although, in terms of *LUPO*, the George Municipal Council was empowered, in principle, to make a final decision in respect of the proposed development, it was compelled by the condition to refer the matter back to the provincial government for a final determination. The applicant argued, among others, that the Provincial Minister lacked the competence to

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impose conditions or to grant final approval on the basis that only the local authority was competent to do so. However, the Court found that the Provincial Minister was empowered to make a final decision.[1]

The Court focused on the provisions and requirements contained in *LUPO*, but did not directly deal with other legislative measures relevant when land is to be developed. This article concludes that compliance with all relevant legislation must be ensured.

Chapter 3 of the *Constitution*[2] provides for a co-operative government and the co-ordination of actions and legislation. In terms of Schedule 4 (Part A) of the *Constitution*, "agriculture", "environment", "regional planning and development" and "urban and rural development" are areas of concurrent national and provincial competence. On the other hand, both the national and the provincial legislatures may enact legislation in terms of sections 155(6) and (7) regarding "municipal planning". "Provincial planning" is an exclusive provincial functional domain (Schedule 5 (Part A)). The design of the government system results in different functionaries within the different spheres of government having different functions, duties and powers. The responsibilities of different functionaries in terms of *LUPO*, the proposed new planning legislation (*Spatial Planning and Land Use Management Bill* (hereinafter *SPLUMB*) and the *Subdivision of Agricultural Land Act*[3] (hereinafter *SALA*) serve as examples.

The problem is that the different legislative requirements and procedures are not coordinated and, as a result, the application process for the rezoning and subdivision of land is complicated, unclear and inadequate. The article contains certain proposals, which aim to provide assistance to both developers who wish to apply for, and obtain permission for rezoning and subdivision, and the various levels of government.

Different WC Ministers held office in the period during which the application for the rezoning and subdivision of the land concerned, was considered. WC Minister 1 ensured, by granting conditional approval, that her office would have a future decision-making power relating to the matter at hand. The relevance of this fact is that decisions made by WC Minister 1 affected the actions of a successor, WC Minister 3. The validity of WC Minister 3's rejection partially had to be determined by considering the validity of WC Minister 1's approval with conditions. For ease of reference, the different Ministers are referred to as WC Minister 1, WC Minister 2, and WC Minister 3.

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1 After this article was submitted, the applicant appealed against the High Court decision. The Supreme Court of Appeal handed down its judgement in *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* (320/12) [2013] ZASCA 13) on 15 March 2013. See footnote 46 for a brief discussion.

2 *Constitution of the Republic of South Africa*, 1996.

3 Act 70/1970.

2. The facts of the case

The applicant was the developer of a proposed property development – the Lagoon Bay Lifestyle Estate of approximately 655 hectares – near George in the Western Cape.[4]

In accordance with section 4(7) of the (provincial) *LUPO*,[5] the erstwhile Provincial Minister for Local Government, Environmental Affairs and Development Planning,[6] Ms T Essop,[7] approved the application for the amendment of the structure plan of the property on 17 July 2007, subject to certain conditions (among others that the "associated future zoning application in respect of the land concerned shall be subject to approval by the Provincial Government as the location and impact of the proposed development constitutes 'Regional and Provincial Planning'").[8] The municipal council of George Local Municipality[9] subsequently granted the applicant's rezoning and subdivision application on 14 July 2010 in terms of sections 16(1) and 25(1) of *LUPO*, but referred the application back to WC Minister 3, Mr Bredell,[10] "for the necessary further attention" as required by the condition set by WC Minister 1. WC Minister 3 refused the application on 28 April 2011.[11]

3. The application to the Western Cape High Court

The applicant approached the Western Cape High Court[12] on an urgent basis for an order setting aside the decision of WC Minister 3 taken on 28 April 2011, in which he refused a rezoning and subdivision application after the George Municipal Council had granted the application on 14 July 2010, as it believed that he lacked the functional competence to decide zoning and subdivision applications.[13] The applicant argued, among others, that the WC Minister could not approve the amendment of the structure plan subject to the condition that further approval by the WC Minister would be necessary, and that the WC Minister did not have the competence to decide the rezoning and subdivision application. The applicant also applied for a declaration that the approval by the George Municipal Council on 14 July 2010 constituted the required approval.[14]

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4 Hereinafter referred to as "the applicant".
5 15/1985, hereinafter referred to as "*LUPO*".
6 Hereinafter referred to as "the WC Department".
7 Hereinafter referred to as "WC Minister 1".
8 Paragraph 4 of the judgement.
9 Hereinafter referred to as "George Municipal Council".
10 The first respondent.
11 Paragraphs 1 and 2 of the judgement.
12 Hereinafter referred to as "*Lagoon Bay*".
13 Paragraph 5 of the judgement. This case was widely publicised. See, for example, Bonthuys 2009; Kruger 2009a, 2009b; Gunning 2011a, 2011b, 2011c, 2011d; Nel 2011a, 2011b; Kloppers 2011.
14 Paragraph 5 of the judgement.

4. The legal issues

Even though the Court did not specifically distinguish the legal issues from each other, the questions in law were as follows:

- Did WC Minister 1 have the competence to approve the application to amend the structure plan subject to conditions?
- Did WC Minister 1 have the competence to approve the application to amend the structure plan subject to the specific condition (providing for the further approval by the Provincial Minister)?
- Was WC Minister 3 competent to decide the rezoning and subdivision application?
- Were the reasons provided by WC Minister 3 for refusing the application sufficient?
- Were the considerations that were taken into account by WC Minister 3 for refusing the application, relevant?

4.1 The approval process

Griesel J divided the approval process to be followed by a developer such as the applicant into four phases,[15] namely:

- An application for the amendment of the relevant structure plan in terms of section 4(7) of *LUPO*, in this case from agriculture/forestry to township development. WC Minister 1 approved said application on 17 July 2007 subject to certain conditions, among others that the "associated future zoning application in respect of the land concerned [Phase 3 below] shall be subject to approval by the Provincial Government as the location and impact of the proposed development constitutes 'Regional and Provincial Planning'";[16]
- The Environmental Impact Assessment (EIA) process.[17] The (second) provincial Minister who succeeded WC Minister 1, Mr P Uys (WC Minister 2), granted the relevant approval on 5 May 2009;[18]
- The application for rezoning and subdivision in terms of sections 16(1) and 25(1) of *LUPO*. The George Municipal Council approved same on 14 July 2010 (which, according to the applicant, constituted the final approval in this regard). However, the above-quoted condition set by WC Minister 1 (in Phase 1) resulted in the George Municipal

15 Paragraph 4 of the judgement.
16 Paragraph 4 of the judgement.
17 In terms of the *Environment Conservation Act* 73/1989 and the *National Environmental Management Act* 10/1998 (hereinafter referred to as "*NEMA*").
18 According to the Court, the third respondent brought a review application regarding this approval in another case – Cape High Court case 22855/09 (paragraph 4).

Council feeling obliged to refer the application to WC Minister 3 for further attention. WC Minister 3 refused the rezoning and subdivision application, and

- The approval of building plans,[19] "once all the other approvals had been obtained".[20]

4.2 WC Minister 1's functional competence to impose conditions; WC Minister 3's competence and decision to reject the application for rezoning and subdivision

The first series of arguments related to the conditions attached to the approval by WC Minister 1. The applicant attacked WC Minister 1's functional competence in this regard. The condition in question was that the provincial government should approve the future zoning application as the location and impact of the proposed development constituted "regional planning and development" (Schedule 4 (Part A) of the *Constitution*) and "provincial planning" (Schedule 5 (Part A) of the *Constitution*). According to the applicant, it was *ultra vires* the empowering provision in *LUPO* (section 4) and constitutionally unlawful as it offended against the provisions of the *Constitution*.[21] However, the Court found that section 42(1) of *LUPO* authorises the provincial Minister (in this instance WC Minister 1) to grant an application subject to conditions.[22]

With regard to the validity of the contents of the particular condition, the applicant's argument was that the WC Minister 3 did not have the functional competence to decide rezoning and subdivision applications. The imposition of the above conditions was allegedly constitutionally unlawful as it offended against the *Constitution* on the basis that section 156(1) determines that a municipality has both the executive authority and the right to administer local government matters listed in Schedule 4 (Part B), which includes "municipal planning".[23]

19 In terms of the *National Building Regulations and Building Standards Act* 103 /1977, similar to the second phase, the fourth phase is also not relevant to the case under discussion.

20 Paragraph 4 of the judgement.

21 Paragraphs 5 and 6 of the judgement. Section 156(1) of the *Constitution* provides as follows: "(1) A municipality has executive authority in respect of, and has the right to administer –
(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
(b) any other matter assigned to it by national or provincial legislation".

22 Paragraph 7 of the judgement. Section 156(1) read with Schedule 4 (Part B) of the Constitution.

23 Paragraph 6 of the judgement.

In an earlier Constitutional Court judgement in *Johannesburg Municipality v Gauteng Development Tribunal and Others*,[24] the said Court interpreted "municipal planning" to refer to the "control and regulation of the use of land, including the zoning of land and the establishment of townships".[25] As a result, it was argued by the applicant, the George Municipal Council had the exclusive power and authority to decide the application under the rubric of "municipal planning". The applicant submitted that WC Minister 3's decision regarding the rezoning application was in violation of the *Constitution* and invalid.[26]

WC Minister 3, however, read the judgement in the *GDT* case restrictively, and submitted that certain planning decisions will have extra-municipal impacts, affecting the larger region, which will exceed the boundaries of "municipal planning" and fall within the ambit of "regional planning and development"[27] and/or "provincial planning".[28] In addition, it was argued that the proposed development fell into this category, as the "extra-municipal" issues exceeded the boundaries of municipal planning.[29]

The Court agreed with WC Minister 3's reasoning, and stated that the *GDT* case did not deal with the "complex constitutional relationships" between municipalities and provincial governments.[30] According to the Court, provincial government has supervisory, monitoring and support powers and functions with regard to local government[31] (the Court referred to sections 155(6)[32] and 155(7),[33] and section 139(1),[34] as well as Schedule 4 (Part B)[35] of the *Constitution*). As a result, the Court stated that it was not

24 2010 (6) SA 182 (CC), hereinafter referred to as "the *GDT* case". See also the Supreme Court of Appeal decision in *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA).

25 Paragraph 8 of the judgement, with reference to paragraph 57 of *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA).

26 Paragraph 5 of the judgement.

27 Schedule 4 (Part A) to the *Constitution*.

28 Schedule 5 (Part A) to the *Constitution*.

29 Paragraph 10 of the judgement.

30 The case dealt with, among others, the authority of tribunals established in terms of the *Development Facilitation Act* 67/1995. The Court referred to Woolman *et al.* 2002.

31 Paragraph 12 of the judgement.

32 Provincial governments are obliged to provide for both the monitoring and support of local government.

33 Provincial governments have the executive (and legislative) authority to "see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)".

34 This section empowers provincial government to directly intervene in the responsibilities ("executive obligation") of municipalities if certain criteria are met.

35 The executive authority is exercised by municipalities with respect to the listed matters, but to the extent as set out in sections 155(6)(a) and (7) and, therefore, subject to the supervisory, monitoring and support powers of the provincial government. With reference to the First Certification judgement (*Ex*

only permissible, but also appropriate for WC Minister 1 to have reserved the right of final approval to the provincial government.[36] The condition was, therefore, neither invalid nor unconstitutional.[37]

The second set of arguments related to WC Minister 3's decision regarding the application for rezoning and subdivision. The Court found that sections 16 and 25 of *LUPO*, relating to the granting of authority to the provincial Minister (WC Minister 3) to approve such applications, are not repugnant to the *Constitution*. This flowed from the applicant's argument that sections 16(1) and 25(1) of *LUPO* were, by way of implication, repealed or amended by the *Constitution* (with regard to specified functional domains) as the power to grant or refuse applications for rezoning and subdivision now vests exclusively in a municipal council, and not the provincial Minister (WC Minister 3). The Court made it clear that the said sections have neither been, by way of implication, repealed nor amended.[38]

4.3 Other grounds of review: The applicant's attack on the reasons provided by WC Minister 3 and the considerations that were taken into account

The applicant argued that there were perceived differences between the reasons given by WC Minister 3 during a radio interview, and those provided to the applicant in writing. The Court found these "differences" were only differences in emphasis, and that the written reasons, furnished in terms of the *Promotion of Administrative Justice Act*,[39] were relevant.[40]

The applicant also submitted that WC Minister 3 took irrelevant and erroneous considerations into account – considerations that were already

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Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)), the Court made it clear that the competences "facilitate a measure of provincial government control over the manner in which municipalities administer those matters in Parts B of … schs 4 and 5" (see paragraphs 12 and 371 of the said judgement).

36 The Court also interpreted the *GDT* case, and stated as follows: "Seen in this light, I do not read the *GDT* judgment as having decided (a) that *all* questions involving the zoning of land and the establishment of townships invariably, regardless of the circumstances, fall exclusively under the rubric of 'municipal planning'; or (b) that all such questions must be determined exclusively by municipalities; or (c) that provincial government can never have authority, as part of its function of monitoring and oversight, to decide planning issues, merely because they happen to fall within the category of 'municipal planning'" (paragraph 14 of the judgement).

37 Paragraphs 11 to 15 of the judgement.

38 Paragraphs 16 to 18 of the judgement.

39 Act 3/2000.

40 Paragraphs 19 to 20 of the judgement.

taken into account in another phase of the approval process.[41] However, the Court stated that this argument held no merit, as WC Minister 3 had to decide whether the proposed development was desirable or not.[42] WC Minister 3 was of the opinion that the development was not desirable, as it was not sustainable.[43] The Court stated that it is sufficient to hold that the WC Minister 3 was entitled to have regard to the factors that he considered, and that it was not for the Court to decide whether his decision was right or wrong.[44]

The Court lastly stated that each phase of the application process does not take place "in a vacuum which is separate and distinct from the other phases" – different decision-makers apply different tests (which are dictated by different pieces of legislation). The Court made it clear that

> [i]f this should eventually result in conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels of local and provincial government, then this is the unfortunate result of a fragmented and cumbersome administrative process which 'cries out for legislative reform', as re-emphasised by the Constitutional Court in the *GDT* case.[45]

The Court, therefore, found that:

- WC Minister 1 did have the competence to approve the application to amend the structure plan subject to conditions.
- WC Minister 1 did have the competence to approve the application to amend the structure plan subject to the specific condition (providing for the further approval by the Provincial Minister).
- WC Minister 3 was competent to decide the rezoning and subdivision application.

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41 The considerations were: "the social, economic and environmental impact of the proposed development, including the sustainability and assessment of the socio-economic benefits and advantages thereof", which were considered in the second phase (as quoted in paragraph 21 of the judgement).

42 Paragraph 22 of the judgement, with reference to section 36(1) of *LUPO*: "shall be refused solely on the basis of lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability …". The Court also referred to *Hayes v Minister of Finance & Development Planning, Western Cape* 2003 (4) SA 598 (C) paragraphs 624J to 625A in which it was stated that test of desirability is conclusive, and "is the presence of a positive advantage which will be served by granting the application". The Western Cape High Court in *Lagoon Bay* stated in this regard that "this test raises policy-laden issues which do not give rise to a single wrong or right answer" (paragraph 24 of the judgement).

43 See also Gunning 2011a; Nel 2011a.

44 Paragraph 24 of the judgement.

45 Paragraph 25 of the judgement, footnote omitted.

- The reasons provided by WC Minister 3 for refusing the application were sufficient.
- The considerations that were taken into account by WC Minister 3 for refusing the application were relevant.

5. The court order

The Court decided not to set aside WC Minister 3's 28 April 2011 decision, and dismissed the application with costs in respect of the first and third respondents (WC Minister 3 and Cape Windlass Environmental Group) (including the costs of two counsels).[46]

46 Paragraphs 21 to 26 of the judgement. According to a newspaper report, the applicant considered taking the matter on appeal, bringing a new application with an amended development plan and/or holding discussions with parties opposed to the development (Gunning 2011d). Nel (2011b) stated that the applicant approached the Supreme Court of Appeal in September 2011 for leave to appeal. However, according to a 25 July 2012 newspaper article, the applicant applied to the Western Cape High Court for condonation of submitting a late notice of intention to appeal in May 2012. In such application, the applicant "revealed significantly changed plans, with one of the golf courses being dropped in favour of a farming estate that included a retirement village". WC Minister 3 responded that a new application and approvals would be required for the applicant's revised plan (Anon 2012a). According to an article dated 12 June 2102, the new plans proposed by the applicant include the "twin-course luxury golf estate being dropped in favour of a smaller agricultural estate that includes a 173-unit retirement village". Rand Merchant Bank has reportedly taken over control (it is alleged that the Bank had "sunk more than R300 million into the project"). According to the applicant, the reasons for the delay in submitting an appeal were the fact that the company faced financial crisis and their attorneys insisted on their fees being paid, as well as the need for renegotiations with landowners (Anon 2012b). According to the Supreme Court of Appeal court roll, the matter was set down for 25 February 2013. A recent report in the *Sunday Times* stated that the Minister of Agriculture, Forestry and Fisheries, Ms Joemat-Pettersson's involvement in Lagoon Bay emerged in documents before the Supreme Court of Appeal. The Minister received a letter from one of the Lagoon Bay shareholders (dated 30 March 2010), appealing the Minister to reverse an earlier "inappropriate decision". The Minister's delegate replied on 13 May 2010, confirming that the negative decision by her delegate has been withdrawn, and that "… the application is recommended on condition that the rezoning permit is available from George municipality". However, another letter from the Department (dated 17 May 2010) included certain onerous conditions. An affidavit stated that an incorrect reference number was used and that the letters were not in the Lagoon Bay file. WC Minister 3 instructed officials to report the matter to the fraud unit of the South African Police Service. The Minister's office denied any wrongdoing and stated that both the 13 and 17 May 2010 letters were genuine (Jordan 2013). The Supreme Court of Appeal handed down its judgement in *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* (320/12) [2013] ZASCA 13 on 15 March 2013. Ponnan JA (with Nugent, Tshiqi, Majiedt JJA and Salduker AJA concurring) found that WC Minister 1's decision did

6. Current legislative *status quo*, as well as analysis of the judgement

6.1 Constitutional framework

According to Chapter 3 (Co-operative Government) of the *Constitution*, the three spheres of government (national, provincial and local) are "distinctive, interdependent and interrelated".[47] Section 41 contains the binding principles of co-operative government and intergovernmental relations, and determines, among others, that all three spheres of government (as well as all organs of State within each of the three spheres) must:

> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
>
> (h) co-operate with one another in mutual trust and good faith by –
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> ...
> (iii) informing one another of, and consulting one another on, matters of common interest;
> (iv) coordinating their actions and legislation with one another;
> ...

The above framework determines the manner in which the three spheres of government should cooperate in the performance of their functions. This also includes the manner in which the WC Department and the George Municipal Council should work together in order to finalise applications for rezoning and subdivision (in circumstances such as those in *Lagoon Bay*).

In terms of Schedule 4 (Part A) of the *Constitution*, "agriculture", "environment", "regional planning and development" and "urban and rural development" are functional areas of concurrent national and provincial legislative (and concomitant executive) competence. On the other hand, "municipal planning" is a Schedule 4 (Part B) functional domain in respect of which both the national and the provincial legislatures may enact

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not amount to an unconditional approval (paragraph 9), and the rezoning application had to be decided exclusively by the municipality (the condition set out by WC Minister 1 was not capable of fulfilment and, as a result, her final decision became impossible of performance) (paragraph 10). WC Minister 3 lacked the authority to make a decision regarding the rezoning application, and such decision was consequently set aside by the Supreme Court of Appeal (paragraph 11). The Municipality's decision to approve the rezoning and subdivision (17 July 2010) was confirmed. The Court remitted the applicant's application for the amendment of the structure plan from agriculture/forestry to township development to WC Minister 3 for reconsideration (paragraph 12). This reconsideration refers to Phase 1 of the approval process, as set out in 4.2 above.

47 Section 40.

legislation to the extent set out in sections 155(6)(a) and (7). "Provincial planning" is an exclusive provincial functional domain (Schedule 5 (Part A)).

Within this context, a distinction must be made between national legislation administered by national government departments (e.g., *SALA* by the Department of Agriculture, Forestry and Fisheries[48]); national legislation administered by provincial government departments (e.g., parts of *NEMA* by the WC Department); provincial legislation administered by provincial government departments; provincial legislation administered by municipalities (e.g., parts of *LUPO* by the George Municipal Council), and municipal legislation administered by municipalities. In each of these cases, different functionaries within different spheres of government are responsible for the performance of functions, execution of powers and carrying out of duties vested in each individual functionary. For all the required approvals to be obtained by a developer, the different functionaries must, in terms of their various pieces of relevant legislation, be satisfied that the applicant has complied with all the legislative requirements. In certain instances, the national government, provincial government, and municipality concerned must all approve related applications in accordance with their different sets of empowering legislation, before development on agricultural land may take place.

6.2 LUPO

LUPO was promulgated by the then Cape Province Administrator on 22 November 1985, with commencement on 1 July 1986. According to item 2(2) of Schedule 6 to the *Constitution*, old order (pre-27 April 1994) legislation that continues to be in force as contemplated in item 2(1), continues to be administered by the executive authority that was responsible for its administration during the period between the commencement of the interim *Constitution* and the 1996 *Constitution* (27 April 1994 and 3 February 1997).

LUPO was assigned to the Western Cape Premier. As a result, *LUPO* became provincial legislation in accordance with section 239 of the *Constitution*. The Western Cape Premier subsequently assigned the administration of *LUPO* to the Western Cape Minister responsible for the WC Department.

It is suggested that *LUPO* should also be deemed to be provincial legislation as contemplated in section 155(6) and (7) of the *Constitution*, insofar as it provides that the provincial government by legislative or other means must "provide for the monitoring and support of local government in the province" and "see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by

48 Hereinafter referred to as "*DAFF*".

regulating the exercise by municipalities of their executive authority referred to in section 156(1)".[49]

Rezoning is defined in *LUPO* as "the alteration of a zoning scheme under section 14(4), 16 or 18 in order to effect a change of zoning in relation to particular land".[50] Section 17 provides for applications for rezoning submitted by an owner of land. According to section 16, the relevant provincial authority (the provincial Minister) "or, if authorised thereto by the provisions of a structure plan, a [municipal] council may grant or refuse an application by the owner of land for the rezoning thereof". Zoning must in all cases precede subdivision.[51] However, applications for rezoning and for subdivision may be considered simultaneously.[52] Subdivision applications are dealt with in accordance with section 24 and must be approved by the provincial Minister or the municipal council (if duly authorised in terms of the scheme regulations concerned).[53]

Taking into account the fact that the George Municipal Council was empowered in terms of the provisions of the relevant structure plan and the relevant scheme regulations to approve respectively the rezoning and subdivision application,[54] the question arose whether there was any need for the matter to be referred to WC Minister 3 for a final decision. As decided by the Court, the condition imposed by WC Minister 1 that the final decision should be taken by the WC Minister, was a valid and enforceable condition (which was binding on the George Municipal Council).[55]

6.3 Recent Constitutional Court case on the relationship between *LUPO* and the *Mineral and Petroleum Resources Development Act*

In a recent case, the Constitutional Court made it clear that an authorisation granted by the functionary concerned in terms of one Act does not obviate the obligation to require an authorisation required in terms of another Act. The Court explored the relationship between *LUPO* and the *Mineral and Petroleum Resources Development Act*[56] in *Maccsand (Pty) Ltd v City of Cape Town and Others*.[57] The Constitutional Court made it clear that *LUPO*and the *MPRDA* serve different purposes – authorisation or the granting of a right in terms of one Act does not cancel out the application of the other Act. These two Acts fall within the competence of two spheres

49 See, in this regard, also paragraph 12 of *Lagoon Bay*.
50 Section 2.
51 Section 22.
52 Section 22(2).
53 Sections 23-25.
54 Paragraph 4 of *Lagoon Bay*.
55 Paragraph 7 of *Lagoon Bay*.
56 Act 28/2002, hereinafter referred to as "the *MPRDA*".
57 CCT 103/11 [2012] ZACC 7, hereinafter referred to as "the *Maccsand* judgment".

of government, but the Court stated that this is not an "impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments".[58] Different pieces of legislation have different objects, do not serve each other's purposes, and operate alongside each other and, as a result, may be applicable to one set of facts. It is suggested that these *Maccsand* principles are also relevant to *Lagoon Bay* as regards the relationship between the performance of provincial functions by the provincial Minister, and the performance of municipal functions (allocated by means of provincial legislation (*LUPO*) to specific municipalities), by the municipal councils of such municipalities.

It is suggested that a proper reading of *Maccsand* would require that all authorisations, permissions, approvals, and so on required in terms of national, provincial and municipal legislation need to be obtained prior to the implementation of any proposed development. It is unfortunate that the respondents did not provide arguments relating to other legislative measures with which the applicant also had to comply. This would have provided further support to the respondents' case, as the Court would then have had to examine the applicant's adherence thereto in accordance with *Maccsand*.

6.4 Proposed development of a new planning framework for South Africa

The recent decision of the Constitutional Court in the *GDT* case declared a number of key parts (Chapters V and VI) of the *Development Facilitation Act*[59] unconstitutional. Consequently, the *Spatial Planning and Land Use Management Bill*[60] (*SPLUMB*) aims, among others, to provide "a framework for spatial planning and land use management" and "the inclusive developmental, equitable and efficient spatial planning at the different spheres of government" (long title). Clauses 10(1) and 10(2) authorise the continued application of provincial legislation "not inconsistent with the provisions of" *SPLUMB*.[61] Within the context of "provincial planning", being a Schedule 5 (Part A) exclusive provincial functional domain, it may be argued that *SPLUMB*'s narrow provision for the continued application of provincial planning legislation is not fully aligned to the *Constitution*, and that the validity of this *SPLUMB* override may be questioned on constitutional grounds.[62] However, a number of amendments have been effected by the

58 Paragraph 48 of the *Maccsand* judgement.

59 Act 67/1995.

60 [B14–2012 (Re-introduced)], with proposed amendments; hereinafter referred to as "*SPLUMB*". See PMG 2012a.

61 Clause 10(2).

62 It may be questioned whether the manner in which the relevant *SPLUMB* clause is constructed is fully compatible with the Constitutional Court decision in *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), where the requirements for an override of national legislation in respect of a Schedule 5 (Part A) exclusive provincial

Portfolio Committee to clauses of the Bill that might otherwise, possibly, have been challenged on constitutional grounds. Notwithstanding these November 2012 amendments to the Bill, Schedule 1 to *SPLUMB* provides that "matters to be addressed in provincial legislation" must be read in conjunction with, and subject to, the above-mentioned clauses 10(1) and 10(2). This means that such provincial legislation (e.g., *LUPO*) may not be inconsistent with *SPLUMB*.

The finalisation and subsequent enactment of a new planning framework for South Africa that indicates the various roles of, and relationship between, the national, provincial and local spheres of government should accommodate the core thrust of the *Maccsand* decision. Within this context, the interaction between the various (national, provincial and local) sets of planning legislation, on the one hand, and between these planning legislation sets and other legislation (dealing with other, non-planning, functional domains), on the other, should be provided for in the final version of *SPLUMB*.

6.5 Other authorisations required in respect of the rezoning of agricultural land

It is unfortunate that the Court in *Lagoon Bay* did not highlight the applicability and relevance of other pieces of legislation, such as *SALA*, to the matter at hand. *SALA* focuses on providing a framework for the consideration of applications for the subdivision and the rezoning (change in land use) of agricultural land.

It must be borne in mind that, even though there was no explicit reference in this case to the statutory *SALA* requirements, *LUPO* cannot replace *SALA* directly or indirectly. Notwithstanding the fact that a *LUPO* authorisation might have been granted, authorisation also needed to have been given in terms of *SALA*.

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another (Trustees of the Hoogekraal Highlands Trust & SAFAMCO Enterprises (Pty) Ltd* (Amicus Curiae); *Minister of Agriculture & Land Affairs* (*Intervening*)),[63] the Constitutional Court found, among others, that *SALA* remains valid and enforceable. The minority judgement (per Yacoob J), however, was of the

functional domain were set out. See also the Western Cape's inputs in respect of *SPLUMB* to the Portfolio Committee on Rural Development and Land Reform (Western Cape Department of Environmental Affairs and Development Planning 2012a and Western Cape Department of Environmental Affairs and Development Planning 2012b). Submissions were also made by numerous other departments and entities, such as the South African Local Government Association, AgriSA, and the Chamber of Mines (see PMG 2012b, 2012c).

63 [2008] JOL 22099 (CC). For a discussion of this case, see Olivier & Williams 2010:99-128.

view that the matter at hand was really about planning issues, and not about agriculture.[64]

Section 3 of *SALA* prohibits certain actions regarding agricultural land (among others, the subdivision of agricultural land) without the prior written consent of the Minister of the (national) Department of Agriculture, Forestry and Fisheries.[65] Section 4 empowers the DAFF Minister to refuse an application; impose conditions when granting the application, and, if satisfied that the land is not to be used for agricultural purposes, and after consultation with the provincial Member of the Executive Council[66] concerned (on conditions determined by the MEC regarding the purpose for, or manner in which, such land may be used), grant any such application.

SALA[67] is administered by DAFF, in accordance with *Proclamation R102 of 3 June 1994*.[68] No delegation or assignment of *SALA* (or parts thereof) to any of the provinces has taken place. It is, however, recommended that certain powers in terms of *SALA* be appropriately delegated (or assigned) to the provincial MECs concerned to issue authorisations in respect of certain specified land capability classes. In this way, the MEC responsible for agriculture will also have to authorise the change in use of agricultural land, as well as the subdivision of agricultural land.

The facts of *Lagoon Bay* seem to indicate that the applicant had not complied with the provisions of *SALA* and, as a result, its application should have failed on that basis.

6.6 Current reality in South Africa

It would appear that developers, and even certain government departments, do not regard themselves bound by the relevant legislation governing planning and development of land. Especially, the protection and preservation of agricultural land is compromised by the agendas of both developers and municipalities: developers plan luxury housing developments as such developments result in high profits, while

64 He also stated that, in terms of the Constitution, municipal planning must be undertaken by municipalities themselves. In his view, to the extent that *SALA* "is concerned with zoning, subdivision and sale of land, it is not concerned with agriculture but with the functional area of planning" (paragraph 129 of the *Wary* judgement). He stated that to in effect give this planning function in respect of agricultural land to the Minister responsible for agriculture would be unconstitutional, as it would contradict the constitutional municipal planning function and the exclusive provincial functional domain of provincial planning (Schedule 5 (Part A)). See paragraph 131 of the *Wary* judgement.

65 Hereinafter referred to as "*DAFF*".

66 Hereinafter referred to as "the *MEC*".

67 The *Subdivision of Agricultural Land Act Repeal Act* 64/1998 was assented to on 16 September 1998 to repeal *SALA in toto*, but its date of commencement has, however, not been proclaimed.

68 GG 15781 of 1994-06-03.

municipalities favour such developments above low-cost or even middle-income housing developments, as they receive additional income through the payment of higher rates and taxes in the case of high-income owners. Furthermore, payments for services and utilities provided by a municipality contain a significant profit margin that fills the coffers of the municipality concerned.

SALA prohibits subdivision of agricultural land without approval of the national Minister responsible for agriculture. The aim is to control, protect and preserve agricultural land which is a scarce resource in South Africa. Unfortunately, some subdivisions of agricultural land applications (and concomitant changes in land use) are currently approved by municipalities without being referred to the national Minister. The factors taken into account by municipalities, which are likely to have only local interests in mind, differ considerably and significantly from regional and national interests. This omission has a decidedly negative impact, for example on food security for the country as a whole, as scarce agricultural land is lost for food production purposes when applications for subdivision and changes in land use (from agricultural to non-agricultural) are authorised in respect of such land without consideration of all the implications.

7. Conclusion

Even though the *Lagoon Bay* judgement is lacking in certain respects (such as the fact that the Court failed to consider the applicability of *SALA* and other legislation and their impact on the applications concerned), it is submitted that *Lagoon Bay* was correctly decided by the Court, taking into account the provisions of the other applicable legislation. Had *SALA* been considered by the Court, it would have provided an additional reason for dismissing the application to set aside the WC Minister's decision.

The Court reiterated the fact that the phases of the application process do not take place "in a vacuum which is separate and distinct from the other phases", and made it abundantly clear that the administrative process, as currently implemented, leads to conflicting and inconsistent decisions taken by different functionaries.

It is suggested that a proper reading of *Maccsand* entails that all authorisations, permissions, approvals, and so on required in terms of national, provincial and municipal legislation need to be obtained prior to the implementation of any proposed development. However, the current procedures for the planning and development of land is not clearly outlined, including the powers of the different government departments on all levels, as well as the sequencing and timing of steps and actions.

The *Lagoon Bay* saga provides clear evidence for the urgent need to streamline development decisions. It is suggested that government prioritises the development and implementation of an intergovernmental relations framework for expedited decision-making with clear timeframes and indications which processes should happen concurrently

(simultaneously) and which consecutively. This framework should also indicate that the various decisions be taken within a prescribed period of time which, in turn, would ensure that development applications are finalised within a reasonable period. The framework should also contain non-negotiable minimum norms and standards, and indicate, for each type of proposed development, the relevant legislation and its functionary, as well as the type of authorisation, permission or approval concerned. Consideration should also be given to the compulsory establishment of an appropriate institutional framework in order to bring about the full and effective coordination of decision-making processes and their final outcomes within a statutorily prescribed maximum period. Such an approach would be aligned with the constitutional allocation of powers, the roles of various functionaries within the three spheres of government (acting in terms of their own legislation), and the need for developers to operate within a clearly defined legal and administrative framework.

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