OPINION

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for

THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM

in respect of

THE SPATIAL PLANNING AND LAND USE MANAGEMENT BILL

by

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Instructed by:

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Ref: B Minnaar: 9222/12/Z59

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INTRODUCTION

1. Consultant is the Department of Rural Development and Land Reform.

2. We are instructed that the National Assembly's Portfolio Committee on Rural Development and Land Reform obtained a legal opinion from Jamie SC on various aspects of the Spatial Planning and Land Use Management Bill[1] ("the Bill"), including his opinion on the constitutionality of the Bill.

3. We are further instructed that the Portfolio Committee has requested Consultant to respond to Jamie SC's opinion.

4. We are required to provide Consultant with our opinion on the issues raised by Jamie SC, and to comment on his opinion so as to assist Consultant in its response to the Portfolio Committee.

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[1] [B14-B2012]

5. As regards the issue of the constitutionality of the Bill, we are instructed that the Portfolio Committee sought Jamie SC's opinion on:

   5.1. The Bill's constitutionality in general; and

   5.2. In particular, its constitutionality in light of the Constitutional Court's ruling in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[2] ("*Johannesburg Metro*"), and the functions of the three spheres of government in relation to spatial planning and land use management in the Bill.

6. Jamie SC concluded that:

   6.1. Chapters 2, 4 and 6 of the Bill "*do not constitute legislation for the purposes of sections 44(2), 154(1) and 155(7) of the Constitution*";

   6.2. Clauses 8(2)(b), 14(2e), and 9(3), and Chapter 4 of the Bill "*constitute arbitrary provisions, that will not stand constitutional scrutiny*"; and

   6.3. Clauses 2(2), 7(a)(vi) and 14(e) of the Bill are "*impermissibly vague and will not stand constitutional scrutiny*".[3]

7. For the reasons set our more fully in this opinion, we are in respectful disagreement with Jamie SC's conclusions and with the approach he

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[2] 2010 (6) SA 182 (CC)

[3] Opinion pg 81, para 178

adopted in his analysis of the Bill for purposes of weighing its constitutionality.

PRINCIPAL MISCONCEPTIONS

8. We have two principal points of difference with Jamie SC's conclusion that the Bill is unconstitutional:

   8.1. In the first instance, Jamie SC proceeds from the premise that to pass constitutional muster, the Bill must, in all respects, meet the requirements of section 44(2) of the Constitution, and that it must be "*necessary*" for one or other of the reasons listed in subparagraphs (b) to (d) of that section. As we explain in more detail below, this premise is incorrect in that section 44(2) of the Constitution has limited application in respect of the Bill, and, critically, it has no application at all in respect of the powers of municipalities regulated under the Bill.

   8.2. In the second instance, Jamie SC's analysis is undertaken without any, or sufficient, regard to the scheme, objects and purport of the Bill, in line with the purposive approach to statutory interpretation required under the Constitution. In our opinion, on a proper, purposive interpretation the provisions of the Bill singled out by Jamie SC are not constitutionally problematic.

9. These misconceptions run through Jamie SC's opinion, and once they are properly understood, much of his criticism of the Bill falls away.

First misconception: the application of section 44(2) of the Constitution

10. Jamie SC expresses the view that clauses 29, 30, 45, 49 and 50 of the Bill, and potentially the whole of Chapter 6, "*cannot be said to be necessary for the purposes of section 44(2)*" and that for this reason they will not pass constitutional scrutiny.[4]

11. Section 44(2) reads as follows:

> "*Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-*
>
> *(a) to maintain national security;*
>
> *(b) to maintain economic unity;*
>
> *(c) to maintain essential national standards;*
>
> (d) *to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.*" (emphasis added)

[4] Opinion, pg 21, para 45, read with footnote 14

12. Section 44(2) must be read in light of the power of Parliament, under 44(1)(a)(ii),

> "*to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5*;" (emphasis added)

13. Read together, these sections:

    13.1. Grant Parliament the general power to pass legislation, even in respect of functional areas listed in Schedule 4 of the Constitution; and

    13.2. Restrict the power of Parliament to pass legislation only in respect of functional areas listed under Schedule 5 of the Constitution, by requiring that such legislation must be necessary, for the purposes listed under section 44(2).

14. Chapter 6, and clauses 29, 30, 45, 49 and 50 of the Bill, which are specifically identified by Jamie SC as being constitutionally unacceptable, all relate to the exercise of power by municipalities, and Municipal Planning Tribunals, which are administered by municipalities. They clearly involve the functional area described as "*municipal planning*", which is listed in Schedule 4 of the Constitution.

15. It follows that the restriction placed on Parliament's power to legislate, under section 44(2) of the Constitution, does not apply in respect of these matters. That restriction only applies in respect of functional areas listed in Schedule 5 of the Constitution.

16. In the circumstances, Jamie SC applies the incorrect standard in assessing the constitutionality of these provisions: the question is not, as Jamie SC posits, whether these provisions are "necessary" for any of the purposes listed in section 44(2). On the contrary, the assessment of their constitutionality must proceed from the premise set out in section 44(1)(a)(ii) of the Constitution, viz. that being a Schedule 4 functionality, matters of municipal planning fall within the general legislative power of Parliament. For this there is no precondition, least alone a threshold of being objectively "necessary".

17. This being the case, insofar as these provisions are concerned, Jamie SC's conclusion that they are unconstitutional because they are not "*necessary*", in accordance with section 44(2), cannot be accepted as valid. The same holds true for all the other instances where Jamie SC concludes that provisions dealing with municipal planning are constitutionally unacceptable because they do not meet the necessity requirement laid down in section 44(2) of the Constitution.[5]

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[5] See in this regard, *inter alia*, Jamie SC's conclusions regarding:
(a) Clause 5(1)(c) of the Bill: Opinion pg 28, paras 60-61;

18. This is not to suggest that section 44(2), and the requirement that national legislation must be "*necessary*", has no application to the Bill, in any respect, because it clearly does. However, the application of section 44(2) is limited to those provisions that relate to "*provincial planning*", which, unlike municipal planning, is a functional area identified in Schedule 5 of the Constitution.[6]

19. It follows from the above that in gauging the constitutionality of the Bill, with regard to the functions of the different spheres of government, a distinction must be drawn between provincial and local government along the following lines:

    19.1. Insofar as the provincial planning competencies of provincial government is concerned, it is appropriate to consider whether the relevant provisions of the Bill satisfy the requirements of section 44(2);

    19.2. However, this is not a competent question in respect of the municipal planning competencies of local government;

    19.3. Insofar as the municipal planning competencies of local government are concerned, the constitutionality assessment must be made primarily within the context of:

(b) Clause 7 of the Bill, insofar as they apply to municipalities: Opinion pg 98, paras 63-64; and

(c) The various provisions dealing with municipal spatial development frameworks: Opinion pg 48-9, paras 107-8

[6] Jamie SC correctly identifies that: "The exclusive provincial competence being intruded upon by the proposed legislation is that of 'Provincial planning'": Opinion pg 16, para 29

19.3.1. Section 154(1) of the Constitution, and the question of whether the Bill is a measure (or introduces measures) that "*support(s) and strengthen(s) the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions*" within the meaning of that section; and

19.3.2. Section 155(7) of the Constitution, and the question of whether the Bill gives effect to the authority of national and provincial government 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*".

20. In our view, Jamie SC did not take sufficient cognisance of this distinction in his assessment of the Bill. Furthermore for reasons we detail later, we are of the view, contrary to the conclusion of Jamie SC, that when the Bill is assessed in this light, it is not constitutionally problematic.

Second misconception: the scope and purport of the Bill

21. The Constitution requires a purposive approach to statutory interpretation.[7] This involves paying attention to the context of the statute in question, and

[7] *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) ("*Bertie van Zyl*") at para 21

having regard to its purpose in order to clarify the scope and intended effect of the law.[8] In this regard, the Constitutional Court has endorsed the dictum of Schreiner JA in *Jaga v Dönges, NO*[9] to the effect that:

> "*Often of more importance (than the language of the rest of the statute) is the matter of the statute, its apparent scope and purpose, and within limits, its background.*"

22. The Constitutional Court has also laid down that:

> "*…when the constitutionality of legislation is in issue, (courts) are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*"[10]

23. Therefore, courts must read legislation in conformity with the Constitution, provided such a reading does not unduly strain the legislation.[11] Even if legislation is open to a meaning that would be unconstitutional, provided it is reasonably capable, and without being unduly strained, of being read in conformity with the Constitution, a constitutional meaning should be adopted.[12]

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8 *Bertie van Zyl* at para 21

9 1950 (4) SA 653 (A)

10 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) ("*Hyundai*") at para 22

11 *Bertie van Zyl* at para 23

12 *Hyundai* at para 24

24. These prescripts must be followed in considering and commenting on the constitutionality of the Bill.

25. Jamie SC's opinion contains a number of far-reaching assertions regarding what he considers to establish the Bill's unconstitutionality. These include the following:

    25.1. Clause 5(1)(c) does not achieve, or is not reasonably capable of achieving, the core object of the Bill;[13]

    25.2. Clause 5(1)(c) significantly intrudes into the area of a municipality's executive authority and the right to administer its affairs without indicating the limits of the intrusion;[14]

    25.3. It will be hard, if not impossible, for any of the different spheres of government to know where the powers of one ends and the other begins;[15]

    25.4. Clauses 7 and 8, as well as many of the provisions of, in particular, Chapters 2, 4 and 6 are prescriptive, and involve a level of intervention going beyond what the national government is permitted to do in terms of section 155(7) of the Constitution;[16]

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13 Opinion pg 22-3, paras 47-49, read with pg 29, para 62
14 Opinion pg 23, para 49
15 Opinion pg 28, para 60
16 Opinion pg 32, para 70, read with pg 29-30, paras 63-69

25.5. The provisions of the Bill dealing with municipal spatial development frameworks ("SDF") are inconsistent with the provisions of the Local Government: Municipal Systems Act ("*the Systems Act*"),[17] and the Regulations[18] enacted thereunder;[19]

25.6. There are internal inconsistencies in the Bill, including an inconsistency between clauses 22(3) and 9(3);[20]

25.7. Clause 8(2)(b) permits the Minister to impose desirable settlement patterns on municipalities;[21]

25.8. The Bill fails to provide how the various SDF are to interact with each other and to clarify which SDF will prevail in a case of conflict between any national, provincial and municipal SDF.[22]

26. With respect, these assertions, and the conclusions Jamie SC reaches regarding the constitutionality of the Bill, are made without due engagement with, and proper consideration of, the context of the Bill, its background, scheme, purpose and intended effect. Rather than adopting the required purposive approach in gauging the constitutionality of the Bill, Jamie SC proceeds on the basis of picking out individual provisions, placing an interpretation on them, and, without reference to the overall scheme of the

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17 Act 32 of 2000
18 Local Government: Municipal Planning and Performance Management Regulations
19 Opinion pg 42, para 90
20 Opinion pg 44-5, para 96
21 Opinion pg 46, para 97
22 Opinion pg 47, para 103

Bill, concluding that chapters 2, 4 and 6 are unconstitutional on the basis of his interpretation of the individual clauses.

27. This approach is not in accordance with the rules of constitutional interpretation, nor is it very helpful in determining whether the Bill complies with the requirements of the Constitution in respecting the different functions of the three spheres of government. Such a determination can only properly be made if due consideration is given to the scheme of the Bill as a whole, viewed in its context and with its overall purpose and effect in mind.

CHAPTERS 2, 4 AND 6 OF THE BILL DO NOT FALL FOUL OF THE CONSTITUTIONAL SCHEME OF GOVERNMENT

28. As we indicated earlier, Jamie SC's first conclusion is that chapters 2, 4 and 6 of the Bill "*do not constitute legislation for purposes of sections 44(2), 154(1) and 155(7) of the Constitution*". We understand Jamie SC's criticism to mean that in his view these chapters of the Bill fall foul of the scheme of government established under the Constitution. For the reasons set out more fully below, we are in respectful disagreement with his conclusion.

The relevant jurisprudence

29. The Constitutional Court has pronounced on the constitutional scheme underpinning the three spheres of government in a number of its judgments, including the judgment in *Johannesburg Metro*. The following basic principles laid down in the judgments are relevant for present purposes:

29.1. The three spheres of government, viz. national, provincial and local, are distinct from each other, yet they are interdependent and interrelated.[23]

29.2. Each sphere has autonomy to exercise its powers and perform its functions within the parameters of its defined space.[24]

29.3. Although the functional areas allocated to the different spheres of government are distinct from one another, they are not contained in "*hermetically sealed compartments*".[25]

29.4. There is potential for overlap between the competences of the different spheres, and such overlap does not constitute an impermissible intrusion by one sphere into the area of another.[26]

29.5. The Constitution accords "*planning*" to all three spheres of government. In this regard, the distinction between the different planning competencies lies at the level at which a particular power is exercised.[27]

29.6. The allocation of powers between the different spheres of government proceeds from a "*functional vision*" of what is

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23 *Johannesburg Metro* at para 43, emphasis added

24 *Johannesburg Metro*, *loc cit*, emphasis added

25 *Johannesburg Metro* at para 55

26 *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 ("*Maccsand*") at para 43
Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 1999 (1) SA 732 ("*Liquor Bill*") at para 47, emphasis added

27 *Johannesburg Metro* at paras 54-5

appropriate to each sphere, and the ambit of each sphere's powers must be determined in light of this vision.[28]

29.7. The meaning of "*municipal planning*" is not defined in the Constitution, but "*planning*" in the context of municipal affairs is a term which has assumed a particular, well-established meaning: it includes the zoning of land, and the establishment of townships, and is commonly used to define the control and regulation of the use of land. It must be assumed that the drafters of the Constitution used the term's common meaning.[29]

29.8. Municipalities are vested with executive authority and the power to administer the matters listed in schedules 4 and 5. However, this power is subject to the following <u>obligations</u> on the other spheres of government:

29.8.1. the obligation on provincial government to provide for the monitoring and support of municipalities in terms of section 156(1)(a) of the Constitution; and

29.8.2. the obligation on both national and provincial government to see to the effective performance of municipalities of their schedule 4 and 5 functions by

[28] *Liquor Bill* at para 51
[29] *Johannesburg Metro* at para 56

regulating the exercise by them of their executive authority, in terms of section 155(7).[30]

29.9. Insofar as the exclusive provincial legislative competences listed in Schedule 5 are concerned, the separation of functional areas in Schedules 4 and 5 "*can never be absolute*", and a single law may touch upon subject matter that falls both within and outside legislative competence.[31]

29.10. The exclusive legislative competence of provinces is limited to the domain of each province. Where provinces are accorded exclusive powers, these should be interpreted as applying primarily to matters that may appropriately be regulated intra-provincially. Where a matter requires inter-provincial regulation, on the other hand, the Constitution ensures that national government has the requisite legislative powers.[32]

30. These principles establish that in the constitutional scheme, planning is a function that involves all three spheres of government. While each sphere may have distinct competences within its specific domain in relation to planning, these will, of necessity, be interrelated, and interdependent with the

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[30] *Johannesburg Metro* at para 47, emphasis added
[31] *Liquor Bill* at para 61
[32] *Liquor Bill* at para 52, emphasis added

planning competences of the other spheres. There may even be overlaps between the planning functions of the different spheres.[33]

31. The jurisprudence also affirms that zoning and land use management, as part of municipal planning, fall within the functional area of municipalities under Schedule 4 of the Constitution. However, even in this respect, the national and provincial spheres have, not only the authority, but in fact the duty, to adopt legislative and executive measures to ensure that municipalities carry out these functions effectively.

32. Accordingly, it is within the constitutional scheme, as interpreted by the Constitutional Court, for Parliament to adopt national legislation that:

32.1. Recognises and gives effect to the interrelationship and interdependence between the planning and related functions of each sphere of government;

32.2. Includes provisions that regulate inter-provincial, or national planning-related matters;

32.3. Regulates the exercise by municipalities of their zoning and land use management functions in order to promote their effective performance; and

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[33] As in, for example, in the *Maccsand* case, which involved the overlap between national government's power to regulate mining, and local government's power to regulate land use.

32.4. At the same time, gives due recognition and effect to the distinct municipal planning functions of local government, and the provincial planning functions of provincial government.

33. In our view, on a proper interpretation of the Bill, it falls within this constitutional scheme. This is apparent from the consideration we give, below, to the context, scheme and overall purpose and effect of the Bill.

The context

34. The preamble to the Bill gives an indication of its background and context. This includes:

34.1. Historical inequality and racial segregation in spatial planning and land use laws and practices, coupled with unsustainable settlement patterns.

34.2. A multiplicity of applicable laws leading to fragmentation, duplication and discrimination in spatial planning and land use management.

34.3. Poor integration of informal and traditional land use processes in formal spatial planning and land use management systems.

34.4. The obligation on all spheres of government to fulfill its constitutional obligations in respect of environmental and socio-

economic rights,[34] all of which have implications for spatial planning, development and land use management.

34.5. The constitutionally mandated shared and exclusive functional areas of the three spheres of government associated with spatial planning and land use management.

35. The Constitutional Court has commented that this is a situation that "*cries out for legislative reform*".[35] Given the fact that there is a clear need to address these issues throughout South Africa, and by all spheres of government, it seems to us to be demonstrably legitimate for government to do so by adopting an Act of Parliament that addresses the various roles that each sphere plays.

36. Jamie SC's opinion does not address the issue of the context of the Bill at all. In our view, this is a critical shortcoming, as the constitutional integrity of the Bill cannot properly be assessed without reference to its context, including the caselaw we have cited.

The objectives, scheme and effect of the Bill

37. The objectives of the Bill are contained in clause 3. They are:

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[34] The preamble notes the following specific rights and obligations: the environmental right in section 24; the obligation to adopt measures to ensure the equitable access to land under section 25; the obligation to provide access to adequate housing under section 26; and the obligation to take reasonable legislative measures to achieve the progressive realisation of the right to sufficient food and water under section 27.

[35] *Johannesburg Metro* at para 33

37.1. To provide for a uniform, effective and comprehensive system of spatial planning and land use management for South Africa;

37.2. To ensure that the system promotes social and economic inclusion;

37.3. To provide for development principles and norms and standards;

37.4. To provide for the sustainable and efficient use of land;

37.5. To provide for co-operative government and intergovernmental relations among the three spheres of government; and

37.6. To redress the imbalances of the past and to ensure that there is equity in the application of spatial development and planning and land use management systems.

38. These objectives appear to us to be rationally aligned with the need for the legislation as indicated by its background and context.

39. The extent to which the Bill achieves its objectives in a constitutionally sound manner depends on its scheme and effect.

40. On our reading of the Bill, we understand its general scheme to be as follows:

40.1. It is intended to be in the nature of framework legislation, aimed at guiding each sphere of government in the exercise of their distinct functional areas, and within their specific domain, insofar as these functional areas are implicated by development, spatial planning and land use needs.

40.2. Although it is focused primarily on spatial planning and land use matters, the Bill is underpinned by the constitutional imperative of ensuring that all spheres of government meet their obligations in terms of the broader transformative agenda of the Constitution. These include government's obligation towards overcoming discrimination and inequity, and achieving socio-economic and environmental justice.

40.3. Therefore, inherent in the scheme of the Bill is an attempt to promote greater uniformity and consistency in government planning, while at the same time allowing for sufficient flexibility for the different spheres of government to operate within their own, distinct functional areas.

41. This scheme is indicated by the following features of the Bill:

41.1. The spatial planning system outlined[36] in the Bill requires each sphere of government to prepare its own spatial development

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[36] Clause 4, read with the clauses 12 to 21. Clause 4 provides that:

framework ("SDF"). These SDFs essentially act as the planning and development policy documents for each sphere, and are intended to guide the exercise by each sphere of their functional competences in respect of matters relating to spatial planning and land use management.

41.2. Jamie SC is correct in pointing out that insofar as municipal SDFs are concerned, these are also dealt with in the Local Government: Municipal Systems Act, and the regulations adopted under that Act.[37] However, the Bill spells out in far greater detail than is provided for in that Act and those regulations, what municipalities should consider and include in their SDFs. We could not find any inconsistencies between the Bill and the Act and regulations in this regard.

41.3. The categories of spatial planning outlined in clause 5 of the Bill are based on, and aligned with the functional areas of each sphere of government recognised in the Constitution, and by the Constitutional Court jurisprudence. Thus:

"The spatial planning system in the Republic consists of the following components:
(a) Spatial development frameworks to be prepared and adopted by national, provincial and municipal spheres of government;
(b) Development principles, norms and standards that must guide spatial planning, land use management and land development;
(c) The management and facilitation of land use contemplated in Chapter 5 through the mechanism of land use schemes; and
(d) Procedures and processes for the preparation, submission and consideration of land development applications and related processes as provided for in Chapter 6 and provincial legislation."

[37] Act 32 of 2000

41.3.1. Zoning and land use management within municipal areas is preserved for municipalities, as are each municipality's spatial development, infrastructural and related concerns.[38]

41.3.2. Provincial planning, provincial legislative powers and the monitoring of municipalities in the exercise of their functions are preserved for provinces.[39]

41.3.3. National planning and the monitoring and support of the other spheres in respect of their functions is reserved for national government.[40] Regional

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38 In terms of clause 5(1), clause 21, Chapter 5 (land use schemes) and Chapter 6 (land development management through Municipal Planning Tribunals). Clause 5(1) provides that:

"Municipal planning, for the purposes of this Act, consists of the following elements:

(a) The compilation, approval and review of integrated development plans;
(b) the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and land use scheme; and
(c) 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 provincial planning mandate of provincial government or the national interest."

39 In terms of clause 5(2), clause 10 and clauses 15-17. Clause 5(2) provides that:

"Provincial planning, for the purposes of this Act, consists of the following elements:

(a) The compilation, approval and review of a provincial spatial development framework;
(b) monitoring compliance by municipalities with this Act and provincial legislation in relation to the preparation, approval, review and implementation of land use management systems;
(c) the planning by a province for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land the change of land use; and
(d) the making and review of policies and laws necessary to implement provincial planning."

40 In terms of clause 5(3), clauses 13-14. Clause 5(3) provides that:

"National planning, for the purposes of this Act, consists of the following elements:

(a) The compilation, approval and review of spatial development plans and policies or similar instruments, including a national spatial development framework;

planning is also primarily identified as the function of national government, with the obligation to consult with the affected provincial and municipal spheres.[41]

41.4. In this regard we do not share Jamie SC's view that the meaning of clause 5 (and particularly clause 5(1)(c)) is opaque[42] and that it will be difficult, "*if not impossible, for the different spheres of government to know where the powers of one end and the other begins*".[43] The functional areas of each sphere of government are derived from the Constitution. While the Bill seeks to regulate these functional areas, the ambit of the powers of the different spheres of government must be determined primarily with reference to the Constitution, rather than the Bill. The descriptions of the categories of spatial planning set out in clause 5 of the Bill give implicit recognition to this. In our view, therefore, and contrary to that expressed by Jamie SC, the ambit of the powers of the different spheres of government can readily be determined.

41.5. In line with the Constitutional Court's jurisprudence discussed earlier, the Bill recognises the interrelated and inter-dependent

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(b) the planning by the national sphere for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and
(c) the making and review of policies and laws necessary to implement national planning, including the measures designed to monitor and support other spheres in the performance of their spatial planning, land use management and land development functions."

41 In terms of clauses 18-19

42 Paragraph 49

43 Paragraph 60, and see paragraph 62

nature of the different functional areas associated with each sphere of government. This is apparent from, among others, the following:

41.5.1. Clause 12(2)(a) provides that the various spheres must participate in the planning and processes of the other spheres that impact on them so as to ensure co-ordination, consistency and harmony between them.

41.5.2. In its SDF, national government must integrate and co-ordinate provincial and municipal SDFs.[44]

41.5.3. In their SDFs, provincial governments must co-ordinate, integrate and align their plans and strategies with those of national government. They must also co-ordinate, integrate and align the plans, policies and development strategies of the municipalities within the province.[45]

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[44] Clause 14(c), which requires that the national spatial development framework must:

"coordinate and integrate provincial and municipal spatial development frameworks"

[45] Clause 15(3), which provides that:

"Provincial spatial development frameworks must coordinate, integrate and align-

(a) provincial plans and development strategies with policies of national government;
(b) the plans, policies and development strategies of provincial departments; and
(c) the plans, policies and development strategies of municipalities."

41.6. While the Bill promotes alignment between, and consistency in the planning and development policies of the different spheres, it is not within the scheme of the Bill that one sphere of government can dictate to or override the policies, plans and strategies included in a SDF of another sphere. So, for example:

41.6.1. There is no provision for national government to vet and approve or disapprove the policies, plans and strategies included in the SDFs of provincial government or municipalities.

41.6.2. Nor is there provision for provincial government to vet and approve or disapprove the SDFs of municipalities in the province.

41.6.3. Each municipality is required to determine its own land use scheme for its municipal area, which must give effect to its SDF.[46] A land use scheme must promote the effective implementation of national and

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[46] Clause 24(1) provides that:

> "A municipality must, after public consultation, adopt and approve a single land use scheme for its entire area within five years from the commencement of this Act."

Clause 25(1) provides that:

> "A land use scheme must give effect to and be consistent with the municipal spatial development framework and determine the use and development of land within the municipal area to which it relates in order to promote-
> (a) economic growth;
> (b) social inclusion;
> (c) efficient land development; and
> (d) minimal impact on public health, the environment and natural resources."

provincial policies.[47] However, neither national government nor provincial government has any power under the Bill to vet and disapprove of a land use scheme.

41.6.4. Under Chapter 6 of the Bill the authority to consider and make decisions on land use and development applications lies in the hands of municipalities. The internal appeal procedure prescribed in the Bill from a decision of a Municipal Appeal Tribunal similarly is a municipal government process.[48]

41.6.5. It is only in respect of development applications affecting the national interest that the Bill makes provision for national government to play a role, generally alongside the municipality, in decision-making. In this regard, the Bill requires the Minister to prescribe criteria, after public consultation, to guide the identification of applications that affect the

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[47] Clause 24(2)(f) provides that a land use scheme must:

> "include land use and development provisions specifically to promote the effective implementation of national and provincial policies"

[48] Clause 51 provides that appeals must be submitted to the municipal manager, who must submit the appeal to the executive authority of the municipality as the appeal authority. It allows some flexibility in this regard in that it further provides in sub-clause (6) that: "a municipality may, in the place of its executive authority, authorise that a body or institution outside of the municipality or in a manner regulated in terms of a provincial legislation, assume the obligations of an appeal authority in terms of this section."

national interest, and the procedures to be followed.[49]

41.7. This is in accordance with the recognition by the Constitutional Court that the constitutional scheme of government envisages the autonomy of each sphere of government to exercise its powers and functions within the parameters of its domain, and at the level that each planning function is exercised.

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[49] Clause 52(1) provides that:

> "Subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), a land development application must be referred to the Minister where such an application materially impacts on-
> (a) matters within the exclusive functional area of the national sphere in terms of the Constitution;
> (b) strategic national policy objectives, principles or priorities, including food security, international relations and co-operation, defence and economic unity; or
> (c) land use for a purpose which falls within the functional area of the national sphere of government."

Clause 52(2) provides that:

> "A land development application must be referred to the Minister where the outcome of the application-
> (a) may be prejudicial to the economic, health or security interests of one or more provinces or the Republic as a whole; or
> (b) may impede the effective performance of the functions by one or more municipalities or provinces relating to maters within their functional areas of legislative competence."

Clause 52(5) provides that, in respect of applications that affect the national interest, the Minister:

> "(a) may join as a party in such application; or
> (b) may direct that such application be referred to him or her to decide"

Clause 52(6) provides that:

> "The Minister must, before the exercise of a power or the performance of a function contemplated in this section and after public consultation prescribe a set of criteria to guide the implement of this section, including-
> (a) the types, scale and nature of land development applications that affect the national interest; and
> (b) measures to guide Municipal Planning Tribunals, municipalities and parties to land development applications in determining applications which are regulated in terms of this section."

Clause 52(7) provides that:

> "Nothing in this section authorises the lodgment or referral of an application for land use or land development to the Minister without such application having first been lodged and considered by the relevant municipality in terms of section 33(1)."
> (emphasis added)

41.8. It follows, in our view, that Jamie SC's conclusion that the Bill allows significant intrusion into municipal government's sphere of executive and administrative functions, without indicating the limits of such intrusion, is not well founded.

41.9. His concern that the Bill does not clarify which SDF will prevail in a case of conflict between SDFs arising from different spheres is similarly not well founded. SDF's are essentially strategy and policy documents and, as we have indicated, the scheme of the Bill does not support the notion of one SDF trumping another, as they apply in respect of different functional areas. Insofar as there is inconsistency between them, the Bill provides two mechanisms to resolve this. These mechanisms are consistent with this scheme:

41.9.1. In the case of inconsistency specifically between a provincial and municipal SDF, clause 22(3) requires the provincial Premier to provide the necessary support in revising both SDF's to ensure consistency. This is in keeping with the constitutional obligation on provincial government to monitor and support municipalities. In our view, it is neither practical nor appropriate for the Bill to attempt to spell out how this

must be done.[50] Much will depend on the particular exigencies involved in each case.

41.9.2. In addition, clause 9(3) makes provision for the Minister to prescribe procedures to resolve and prevent conflicts and inconsistencies between SDFs in the different spheres of government generally. There is no conflict between clause 9(3) and clause 22(3) as suggested by Jamie SC. We also do not agree with his view that this power of the Minister is unfettered: in prescribing these procedures, the Minister must respect the constitutional scheme of government, and the requirements of co-operative government. If he or she fails to do so, the prescribed procedures will be open to challenge. However, this does not render clause 9(3) itself open to constitutional attack.

41.10. The inclusion in the Bill of general development principles, in clause 7, and provision for the Minister to prescribe land use management and development norms and standards, in clause 8, is consistent with the Bill as a form of framework legislation. The principles and provision for norms and standards are included in

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[50] Opinion: pg44, para 94

the Bill with the express intention of guiding[51] the different spheres of government in their distinct functional areas.

41.11. In keeping with the constitutional scheme of government, the principles and norms and standards clearly are not intended to be prescriptive, and it is for this reason that they are broadly couched. Contrary to Jamie SC's view, flexibility and variation in the application of these broad principles by each sphere of government is an essential component of the constitutional scheme. This does not mean, as he suggests,[52] that the Bill is incapable of meeting the objective of promoting greater consistency and uniformity in the spatial planning and land use management functions of the different spheres of government.

41.12. The principles listed in clauses 7, and the guidelines for norms and standards described in clause 8 are directly related to the objects of the Bill. They are aimed at addressing the historical problems and inequalities inherent in existing spatial planning and land use systems. These are matters of fundamental constitutional importance, and the inclusion of these measures in the Bill clearly serves a legitimate and critical government purpose.

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51 This is the wording expressly used in clause 4(b), and in clause 6(1), cited elsewhere

52 Opinion pg 35-6, paras 80-82

41.13. Therefore, we cannot agree with Jamie SC's criticisms directed at clauses 7 and 8 of the Bill and with the conclusions he reaches in this respect.

The implications of Chapters 2, 4 and 6 for the functional areas of municipal planning and provincial planning

42. As we indicated earlier, an assessment of the constitutionality of Chapters 2, 4 and 6 of the Bill in respect of the municipal planning function of municipalities must be made with reference to sections 154(1) and 155(7) of the Constitution. From our detailed examination of the Bill we conclude in this regard that:

42.1. To the extent that the provisions of Chapters 2, 4 and 6 of the Bill have implications for the exercise by municipalities of their municipal planning functions, they are measures aimed at regulating these functions. The roles established for national and provincial government in relation to municipal planning fall within the constitutionally mandated sphere of supporting and strengthening the capacities of municipalities to manage their affairs and perform their municipal planning functions effectively as envisaged in sections 154(1) and 155(7) of the Constitution.

42.2. The Bill does not permit national or provincial government to usurp the municipal planning functions of municipalities. In this regard there are important distinctions between the Bill and the provisions

of the Development Facilitation Act[53] ("the DFA") that were struck down by the Constitutional Court in *Johannesburg Metro*.

42.2.1. The impugned provisions of the DFA established a parallel provincial system for considering and determining zoning and land development applications. The provisions permitted provincial government to override applicable municipal instruments.[54] It was on this basis that the provisions were struck down as constituting an impermissible usurpation of the municipal planning function.

42.2.2. Chapter 6 of the Bill establishes a system of Municipal Planning Tribunals to consider and determine land use and development applications. It also provides a framework for their composition and processes, consistent with the objective of promoting greater uniformity and consistency in land use management procedures within local government. Critically, however, as we noted earlier, municipal government is responsible for implementing and administering the system, and for determining the outcomes of applications. Unlike the situation under

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[53] 67 of 1995

[54] *Johannesburg Metro* para 38

the DFA, there is no parallel provincial structure that carries out the same function.

42.3. A full consideration of the objects, scheme and effect of the Bill does not support the conclusion reached by Jamie SC to the effect that Chapters 2, 4 and 6 fall outside the scope of sections 154(1) and 155(7) of the Constitution.

43. For all of the above reasons, we are of the view that these Chapters are not unconstitutional in respect of the municipal planning competence of municipal government.

44. As far as the provincial planning function of provincial government is concerned, as this is a Schedule 5 functional area of exclusive provincial legislative competence, any intervention by way of national legislation must be necessary for one of the purposes listed in section 44(2). From our detailed examination of the Bill we conclude in this regard that:

44.1. The Bill expressly preserves the authority of provincial government to legislate in respect of, *inter alia*, "*matters of provincial interest*", provided such legislation is consistent with the Bill.[55] In this

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[55] Clause 10(1) provides that:

"Provincial legislation which is consistent with this Act and the Intergovernmental Relations Framework Act may provide for-

(a) matters contained in Schedule 1 to this Act;
(b) matters of provincial interest;
(c) remedial measure in the event of the inability or failure of a municipality to comply with an obligation in terms of this Act or provincial legislation or
(d) matters not specifically dealt with in this Act."

regard, the Bill recognises the exclusive legislative competence of provincial government in respect of matters that are appropriately regulated intra-provincially.

44.2. As we indicated earlier, the Bill preserves for provincial government the authority to determine its own policies, plans and strategies for purposes of its SDF, although these must be consistent, and aligned with those of national government.

44.3. Provincial government must also be guided by the general development principles set out in clause 7 in carrying out its spatial planning and land use management functions.[56] However, these principles play a framework role for provincial government and are not prescriptive. In addition, these development principles relate to matters that require regulation not only intra-provincially, but also inter-provincially. In this respect, they fall outside the

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Clause 10(2) gives further flexibility to provincial government in exercising its legislative function by providing that:

> "Provincial legislation not inconsistent with the provisions of this Act may provide for structures and procedures different from those specifically provided for in this Act in respect of a province."

[56] Clause 6(1) provides that the general development principles:

> "apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land, and guide-
> (a) the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land;
> (b) the compilation, implementation and administration of any land use scheme or other regulatory mechanism for the management of the use of land;
> (c) the sustainable use and development of land;
> (d) the consideration by a competent authority of any application that impacts or may impact upon the use and development of land; and
> (e) the performance of any function in terms of this Act or any other law regulating spatial planning and land use management."

exclusive provincial domain. Accordingly, it is constitutionally permissible to include them in national legislation. [57]

44.4. Therefore, in all of these respects it is apparent that the Bill upholds the autonomy of provincial government to legislate in the functional area of provincial planning. In this, the Bill differs from the situation that arose in the *Liquor Bill* case. There, national legislation sought exhaustively to regulate the exclusive provincial legislative function of regulating liquor licences. This is not comparable to the scheme of the Bill insofar as its impact on the exclusive legislative competence of provincial planning is concerned. As we indicated above, the Bill establishes a scheme for Municipal Planning Tribunals to consider and determine land use and development applications. This is a municipal planning function that is not reserved exclusively to either provincial or municipal government under Schedule 5.

44.5. To the extent that Chapters 2 and 4[58] have any impact on the exclusive legislative competence of provincial government, in our view this is reasonable and necessary to achieve the legitimate objects of the Bill. In this respect, the Bill meets the criteria of section 44(2) in that it contains provisions aimed at maintaining economic unity, maintaining essential national standards in

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[57] *Liquor Bill* at paras 51-2

[58] Chapter 6 of the Bill has no application to provincial government: it deals with land development management, which is a constitutional function of municipal government

relation to spatial planning, development and land use, and establishing minimum standards for development-related services rendered by provincial government.

44.6. In any event, provincial planning is only one of many functional areas dealt with by the Bill. Other critical functional areas implicated by the Bill include agriculture, the environment, housing, industrial promotion, regional planning and development urban and rural development, and municipal planning. These are all Schedule 4 competences shared with national government. Therefore, there is extensive scope for overlap in the Bill between these Schedule 4, shared competences, and the exclusive provincial planning competence in Schedule 5.

44.7. In the circumstances, in our view it may be asserted that, in terms of section 44(3) of the Constitution, the provincial planning element of the Bill is "*reasonably necessary for, or incidental to*", the exercise of Schedule 4 powers, and that the Bill ought, for this reason, to be regarded for all purposes as "*legislation with regard to a matter listed in Schedule 4*". In this case, it would not be necessary to establish that the Bill meets the requirements of section 44(2).[59]

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[59] *Liquor Bill* at paras 61-2 & 70

45. For all of the above reasons, we are of the view that Chapters 2 and 4 are not unconstitutional in respect of the provincial planning competence of provincial government.

THE BILL IS NOT UNCONSTITUTIONALLY ARBITRARY OR VAGUE

46. Jamie SC concludes that the Bill is constitutionally assailable in that:

    46.1. Various of its provisions, and the whole of Chapter 4 are arbitrary; and

    46.2. Various of its provisions are impermissibly vague.

47. With respect, we do not concur with these conclusions.

48. Jamie SC correctly explains that legislation is arbitrary if it is not rationally connected to a legitimate government purpose.[60]

49. However, Jamie SC reaches his conclusion that the relevant provisions of the Bill fail on this score again without undertaking a proper analysis of the objects, scheme and effect of the Bill, or of the context within which it has been drafted. In other words, in the absence of any proper consideration of the legitimate government purposes served by the Bill, which we have covered extensively above, he concludes that it is arbitrary. In our respectful view, this conclusion is unsustainable.

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[60] Opinion: pg 51, para 111

50. We have already dealt with Jamie SC's view that clause 8 allows the Minister to prescribe to municipal and provincial governments, and we have indicated why, on a proper consideration of the scheme of the Bill, this is not so. We have also dealt, and do not concur with, his view that clause 9(3) conflicts with clause 22(3), and that it is irrational for this reason. Furthermore, on our analysis of Chapter 4, these provisions clearly serve a critical and legitimate government purpose for the reasons we have discussed.

51. Regarding the remainder of reasons given by Jamie SC for his conclusion that the Bill is arbitrary and/or vague and unconstitutional, we comment as follows:

51.1. As regards clause 7(a)(vi)[61]:

51.1.1. We have already explained that the rules of constitutional interpretation require a purposive approach that seeks to give the provision in question a constitutional meaning insofar as this is reasonably possible. In other words, we must determine whether clause 7(a)(vi) is reasonably capable of a meaning that is not arbitrary or vague.

51.1.2. In our view, although clause 7(a)(vi) may not be pellucid, its meaning is relatively clear: in accordance with the

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61 Clause 7(a)(vi) provides that:

"a Municipal Planning Tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion on the ground that the value of land or property is affected by the outcome of the application."

principle of spatial justice,[62] it seeks to ensure, that a Municipal Planning Tribunal does not allow the impact on the value of land to prevent it from giving due weight to other considerations that are relevant to its decision. [63]

51.1.3. This provision does not, as Jamie SC appears to assume, prevent a Tribunal from taking into account the impact on the value of land. Clause 42(1)(c) requires a Tribunal to take into account, among other factors, the facts and circumstances relevant to the case, and the rights of affected persons. This would certainly require a Tribunal to take into account the impact on land value as a relevant factor, and any interpretation to the contrary would provide a basis for a constitutional challenge under section 25(1) of the Constitution.

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[62] It is the sixth element of the principle of spatial justice set out in clause 7(a)

[63] These considerations are listed in clause 42(1), which provides that:

"In considering and deciding an application a Municipal Planning Tribunal must-

(a) be guided by the development principles set out in Chapter 2;
(b) make a decision which is consistent with norms and standards, measures designed to protect and promote the sustainable use of agricultural land, national and provincial government policies and the municipal spatial development framework; and
(c) take into account-
    (i) the public interest;
    (ii) the constitutional transformation imperatives and the related duties of the State;
    (iii) the facts and circumstances relevant to the application;
    (iv) the respective rights and obligations of all those affected;
    (v) the state and impact of engineering services, social infrastructure and open space requirements; and
    (vi) any factors that may be prescribed, including timeframes for making decisions."

51.1.4. In the circumstances, we do not agree with Jamie SC's assessment that this provision is arbitrary or vague on this basis.

51.2. As regards clause 23(2),[64] dealing with the participation of traditional councils in the land use management duties of municipalities under Chapter 5:

51.2.1. For reasons similar to those set out in respect of clause 7(a)(vi), we do not concur with Jamie SC's conclusion that this provision is arbitrary or vague.

51.2.2. The purpose of the provision is clearly to ensure that traditional leadership is accommodated by municipalities in its land use management functions.

51.2.3. This is in accordance with section 212(1) of the Constitution, which provides that:

> "*National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.*"

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[64] Clause 23(2) provides that:

> "Subject to the provisions of section 81 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), and the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), a municipality, in the performance of its duties in terms of this Chapter must allow the participation of a traditional council."

51.2.4. The form and method of participation will be determined with reference to both Acts cited in this clause. The clause refers to "*traditional councils*", which is in accordance with the structures of traditional leadership representation in municipal councils established under the later Traditional Leadership and Governance Framework Act.[65] This does not exclude "*traditional leaders*", in the parlance of the earlier, Local Government: Municipal Structures Act,[66] from participating in relevant council proceedings through their traditional councils.

51.2.5. In our view, whatever lack of clarity there may be in this regard arises out of the two underlying Acts, and it does not provide a valid basis on which to conclude that clause 23(2) is unconstitutional on grounds of its being vague or arbitrary.

51.3. As regards Jamie SC's concerns about the Bill's alleged failure to deal sufficiently with customary law forms of tenure and the relationship between the Bill and other legislation dealing with customary tenure:

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65 41 of 2003

66 117 of 1998

51.3.1. The Bill does not deal with the allocation of land tenure rights, whether under the common law, customary law or statute. Accordingly, it does not fall within the purview of the Bill to deal with land tenure issues.

51.3.2. Insofar as the customary use of land, flowing from customary tenure may be affected, the primary source for this lies in the constitutional extension[67] of municipal government to the whole of the country, including traditional areas previously falling outside of municipal boundaries.

51.3.3. The preamble identifies that one of the problems the Bill seeks to address is the poor integration of traditional land use development into formal systems of spatial planning and land use management.

51.3.4. This is carried through in the objectives of the Bill in terms of both the need for social and economic inclusion, and the need to redress the imbalances of

[67] Under clause 151(1) of the Constitution

the past and to ensure equity in spatial planning and land use management.[68]

51.3.5. Clause 7(a) establishes spatial justice as a general development principle. Spatial justice is clearly intended to address many of the issues related to traditional land use. In similar vein, clause 8(1) requires norms and standards that promote social inclusion, special equity, rural revitalisation and sustainable development. Once again, these are all issues critically relevant to traditional land use.

51.3.6. As we have already discussed, the participation of traditional leadership in municipal land use management processes is required under clause 23(2).

51.3.7. In addition, in making a decision, a Municipal Planning Tribunal is required to take into account the development principles and the norms and standards, as well as the facts and circumstances relevant to the application in question, and the rights of those affected.[69] This would include relevant

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[68] Clause 4(b) and (d), cited earlier

[69] Clause 42(1), cited earlier

facts, issues and policies associated with the traditional use of land.

51.3.8. It should be borne in mind that the Bill is in the nature of framework legislation. It is not intended to spell out chapter and verse on how the various spatial planning and land use management issues will be dealt with in specific cases.

51.3.9. In our view, as a form of framework legislation, the Bill establishes a sufficient basis, in conjunction with other relevant legislation, for municipal government to deal appropriately with traditional land use matters arising out of customary law.

51.3.10. Accordingly, we do not concur that the Bill is impermissibly arbitrary or vague in this regard.

51.4. As regards Jamie SC's concerns regarding the alleged vagueness of clause 2(2):

51.4.1. We understand this provision to seek to ensure that, in addition to legislation that is expressly repealed by the Bill (such as the DFA), any other law that provides for parallel or alternative land use

management systems outside of those prescribed in the Bill, is implicitly repealed.

51.4.2. This is consistent with the scheme of the Bill in placing the land use management function fully within the ambit of municipal government. It is also consistent with the objective of promoting consistency in land use management processes.

51.4.3. If we are correct in our understanding of the purport of clause 2(2), then it is reasonably capable of a meaning that is not too vague to render it unconstitutional. However, we agree with Jamie SC that the clause requires further drafting attention for the sake of clarity.

51.5. As far as the concerns with clause 22(2)[70] are concerned:

51.5.1. We agree with Jamie SC that the drafting of this clause, read with clause 22(1) requires attention for the sake of clarity.

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[70] Clause 2(2) 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 the generality of this Act."

51.5.2. We understand the intention of these provisions to be to require Tribunals to apply the SDF in their decision-making processes (clause 22(1)).

51.5.3. However, despite this general duty, it is in the nature of certain applications, such as zone use change applications, that a Tribunal will be required to determine whether an applicant should be permitted to depart from the zone use specified in the SDF, because of specific circumstances pertaining to the particular site, or piece of land in question (clause 22(2)).

51.5.4. If our understanding is correct, then the provision is reasonably capable of a meaning that is not too vague to render it unconstitutional. However, we would recommend drafting changes to provide further clarity.

51.6. Finally, as regards clause 32, we are advised that Consultant intends revising this clause to take into account the criticisms and conclusions reached by Jamie SC. We are of the view that it would be prudent to do so.

CONCLUSION

52. We share some of Jamie SC's concerns regarding the need for greater clarity in respect of certain provisions of the Bill.

53. However, we do not share his key concern that Chapters 2, 4 and 6, are inconsistent with the constitutional scheme of government which recognises and protects the distinct competences of each of the national, provincial and local spheres within their separate functional areas.

54. In our opinion, the scheme established under the Bill, in respect of which Chapters 2, 4 and 6 form a critical part, accords sufficient recognition to, and protection of the distinct functions of each sphere of government implicated in spatial planning and land use management. Of course, the Bill cannot guarantee that the important objectives underlying it will in fact be achieved on the ground by government. However, in our view, the Bill comprises constitutionally compliant framework legislation to facilitate this process.

JJ Gauntlett SC
R M Keightley
Chambers, Sandton
10 December 2012