

Steps towards resolving problems inherent in obtaining multiple authorizations' for a development

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Jeannie van Wyk

‘Development’?

- National Environmental Management: Integrated Coastal Management Act 24 of 2008
- ‘development’, in relation to a place, means **any process** initiated by a person to **change the use, physical nature or appearance of that place**, and includes –
- (a) the construction, erection, alteration, demolition or removal of a structure or building;
- (b) a process to rezone, subdivide or consolidate land;
- (c) changes to the existing or natural topography of the coastal zone; and
- (d) the destruction or removal of indigenous or protected vegetation.

That process often requires a **variety of authorisations /permits/approvals-**

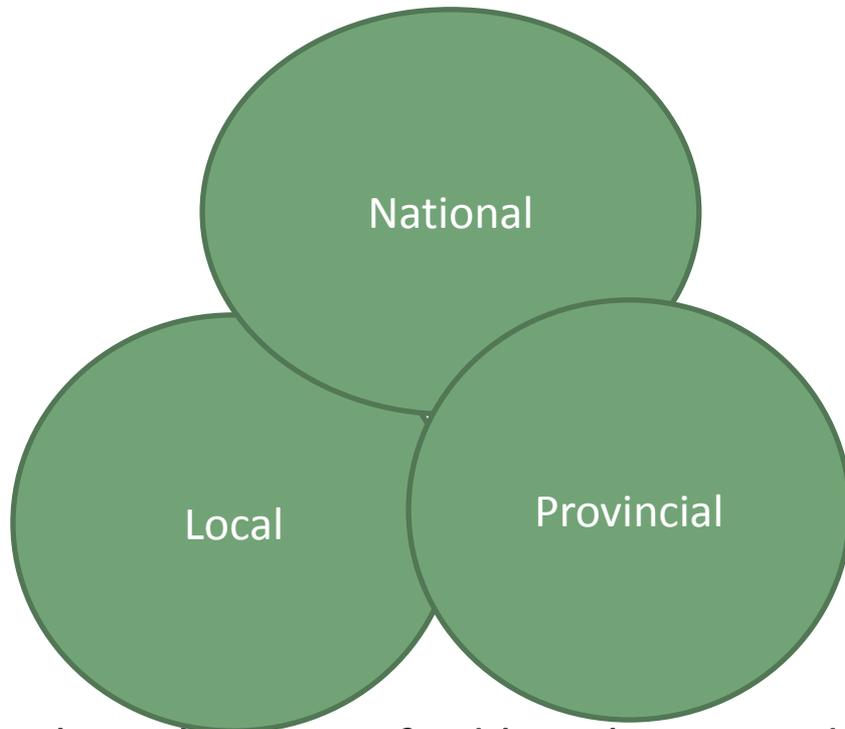
- Land use right for development (provincial legislation) incl rezoning, departures, consent uses
- EIA ito National Environmental Management Act 107 of 1998 (NEMA)(basic assessment/S&EIR) for a listed activity
- Environmental authorisation ito the NEMA: Integrated Coastal Management Act 24 of 2008(NEM:ICMA)(s 63)
- Environmental assessment ito National Heritage Resources Act 25 of 1999 (NHRA)(s 38)
- Mining right/permit ito Mineral and Petroleum Resources Development Act 28 of 2002(MPRDA)
- Water use licence/authorisation ito the National Water Act 36 of 1998 s 39-40
- Permission to subdivide agricultural land ito the Subdivision of Agricultural Land Act 70 of 1970

In many cases more than one authorisation is required

- Eg
- Land use right, mining right (*Fuel Retailers, Maccsand*),
- Land use right, EIA and mining right (*Maccsand*),
- Land use right and EIA (*Lagoon Bay*),
- EIA, water use licence (*Eye of Africa v Shear*),
- Land use right and environmental assessment ito NHRA
- Land use right and EIA (ICMA)

Possibilities for rationalisation?

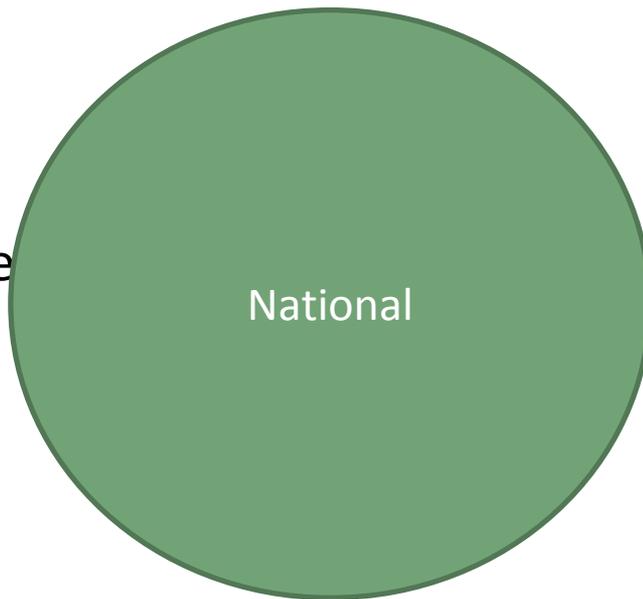
Spheres of government



- Each sphere has specified legislative and executive competences in the Constitution (Schedules 4 and 5)

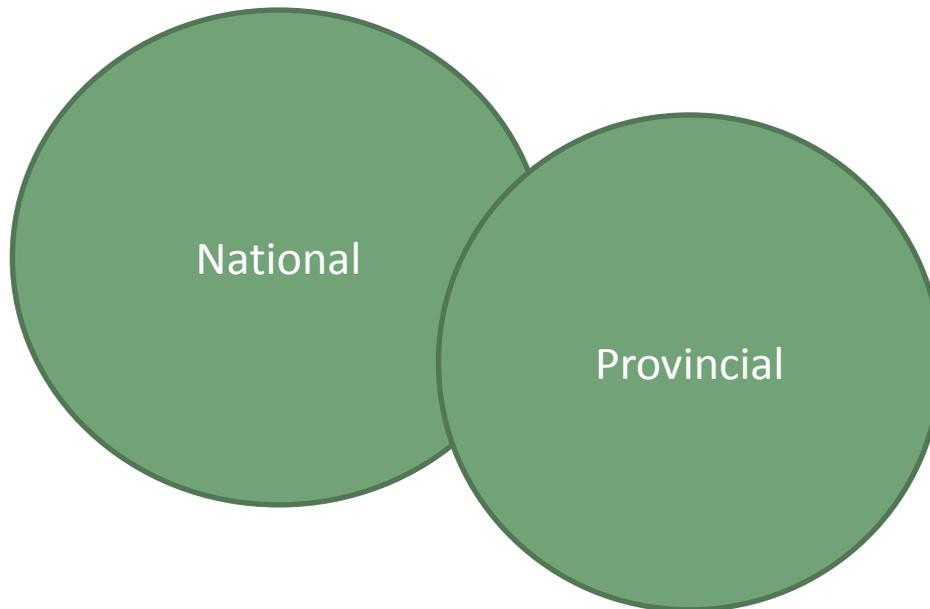
Legislative and executive competences of national government (not listed in Sch 4 and 5)

- Mining
- Land
- Agriculture
- Water



Concurrent legislative and executive competences (Sch 4)

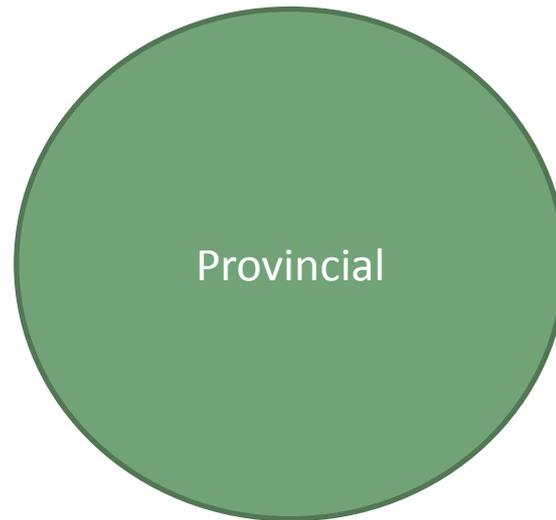
- Regional planning and development (Part A)
- Urban and regional development (Part A)
- Environment (Part A)



- Municipal planning (Part B)

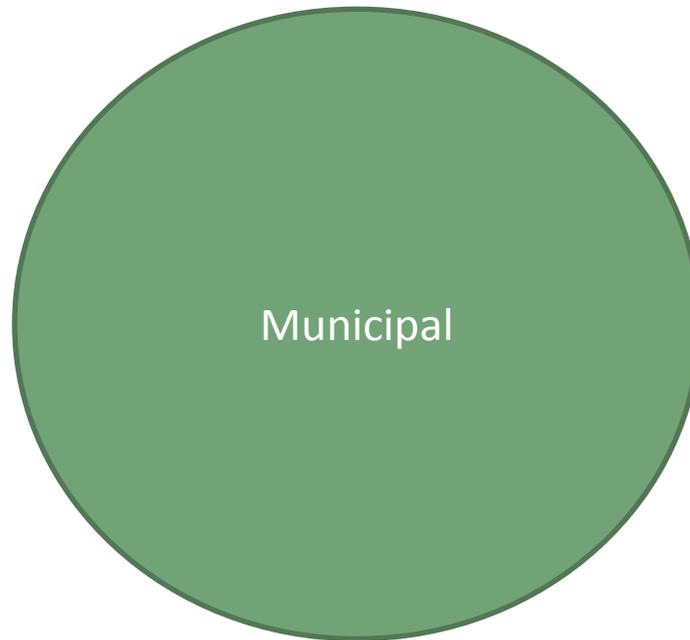
Exclusive legislative and executive competence (Sch 5)

- Provincial planning



Executive competence

- Municipal planning



Responsibilities

Mining/Water
Agriculture

MPRDA
SALA
NWA

National

Environment/
Prov planning

NEMA
ICMA
NHRA

Provincial

Land use

LUPO/TT
O, TO,
KZNPDA

Local

Authority

- “MPRDA and LUPO are directed at different ends” (*Maccsand SCA* par 34)
- “Each sphere would be exercising power within its own competence” (*Maccsand CC* par 47)
- “There is no reason why ‘two spheres of control cannot co-exist’ and that where ... one operates from a municipal perspective and the other from a national perspective they each apply their own ‘constitutional and policy considerations’” (*Maccsand SCA* referring to *Wary Holdings* par 34)

Possible consequences

- Complex and potentially confusing legal environment exists
- Processes and procedures are governed by different institutions.
- Inefficiency is the result of the numerous and unco-ordinated planning and environmental measures.
- Control is divided, accompanied by
- Duplication and
- Fragmentation, and
- Intergovernmental conflict may arise between local and provincial authorities or between two provincial authorities.
- Expensive
- Time-consuming

Solutions –

1 Cooperative government

- S 41 of the Constitution and the IGRFA .
- Section 41(1)(e)(f) and (g) of the Constitution provides that each sphere of government must:
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution; (and)
- (g) exercise their powers and functions in a manner that does not encroach on the Geographical, functional or institutional integrity of government in another sphere. (g) exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

Solutions

2 NEMA

- **24K Consultation between competent authorities and consideration of legislative compliance requirements of other organs of state having jurisdiction**
- (1) The Minister or an MEC may **consult** with any organ of state responsible for administering the legislation relating to any aspect of an activity that also requires environmental authorisation under this Act **in order to coordinate** the respective requirements of such legislation and to avoid duplication.
- (2) The Minister or an MEC, in giving effect to Chapter 3 of the Constitution and section 24 (4) (a) (i) of this Act, may after consultation with the organ of state contemplated in subsection (1) **enter into a written agreement with the organ of state in order to avoid duplication** in the submission of information or the carrying out of a process relating to any aspect of an activity that also requires environmental authorisation under this Act.
- (3) The Minister or an MEC may-
 - (a) after having concluded an agreement contemplated in subsection (2), consider the relevance and application of such agreement on applications for environmental authorisations; and
 - (b) when he or she considers an application for environmental authorisation that also requires authorisation in terms of other legislation **take account of**, either in part or in full and as far as specific areas of expertise are concerned, **any process authorised under that legislation as adequate for meeting the requirements of Chapter 5 of this Act**, whether such processes are concluded or not and provided that section 24 (4) (a) and, where applicable, section 24 (4) (b) are given effect to in such process.

Solutions

2 NEMA

- **Alignment of environmental authorisations**
- **24L.** (1) If the carrying out of a listed activity or specified activity is also regulated in terms of another law or a specific environmental management Act, the authority empowered under that other law or specific environmental management Act to authorise that activity and the competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of that activity **may exercise their respective powers jointly** by issuing—
 - (a) **separate authorisations**; or
 - (b) **an integrated environmental authorisation.**
- (2) An integrated environmental authorisation may be issued only if—
 - (a) the relevant provisions of this Act and the other law or specific environmental management Act have been complied with; and
 - (b) the environmental authorisation specifies the
 - (i) provisions in terms of which it has been issued; and
 - (ii) relevant authority or authorities that have issued it.
- (3) A competent authority ... in respect of a listed activity or specified activity may regard such authorisation as a sufficient basis for the granting or refusing of an authorisation, a permit or a licence under a specific environmental management Act if that specific environmental management Act is also administered by that competent authority.

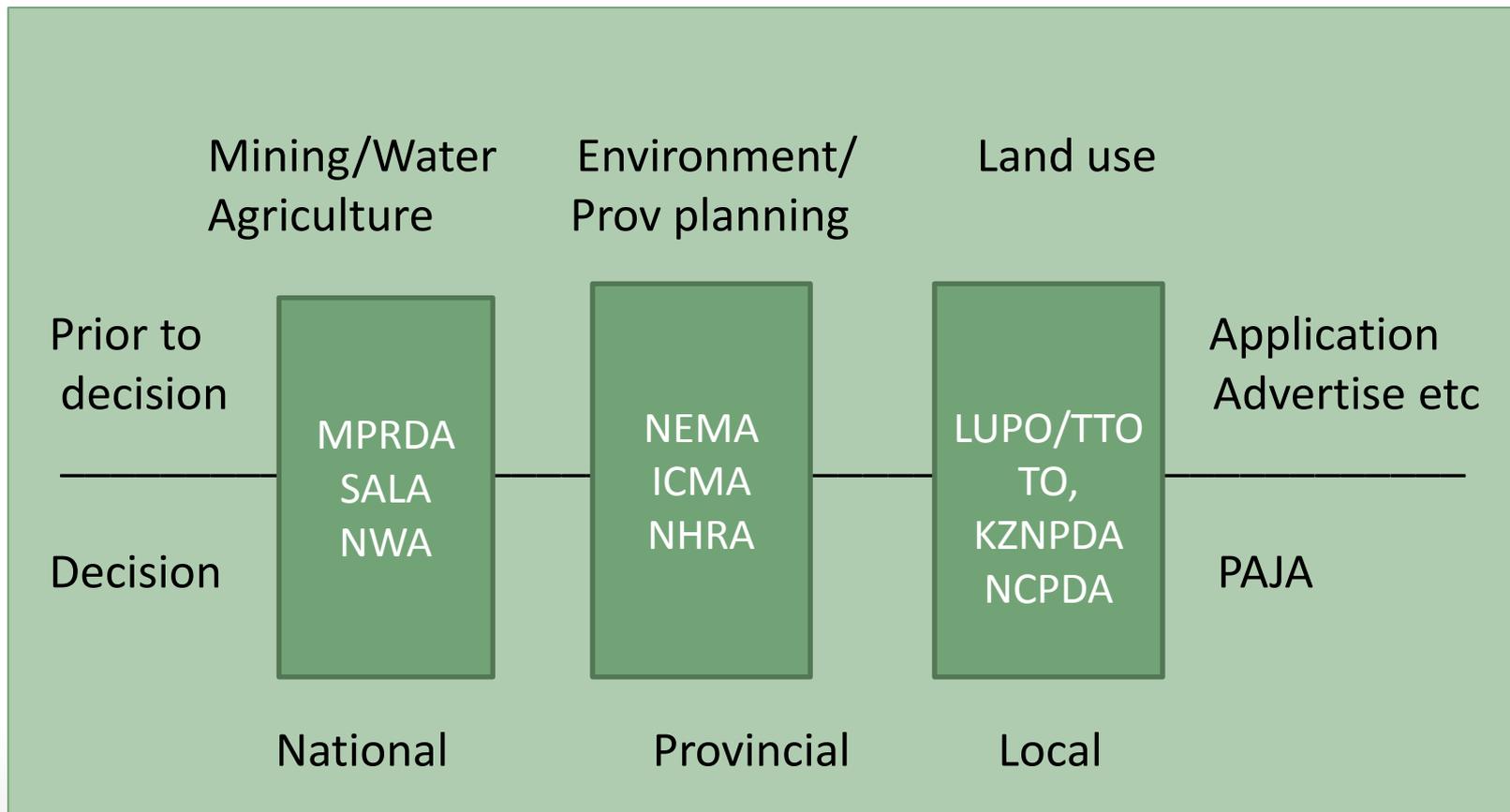
Solutions

3 SPLUMB

- **Alignment of authorisations**
- **30.** (1) Where an activity requiring authorisation in terms of this Act is also regulated
- In terms of another law, **the relevant Municipal Planning Tribunal and the organ of state**
- empowered to authorise the activity in terms of the other law **may exercise their**
- **respective powers jointly** by issuing—
- (a) **separate authorisations**; or
- (b) an **integrated authorisation**.
- (2) An integrated authorisation contemplated in subsection (1)(b) may be issued only
- if—
- (a) the relevant provisions of all applicable legislation have been complied with;
- and
- (b) the integrated authorisation specifies the—
- (i) provisions in terms of which it has been issued; and
- (ii) relevant authorities that have issued it.
- (3) A Municipal Planning Tribunal may regard an authorisation in terms of any other
- legislation that meets all the requirements set out in this Act or in provincial legislation
- as an authorisation in terms of this Act.

Solutions

4 Rationalise processes prior to decision



Processes prior to decision

- 1 an application must be made
- 2 accompanied by documentation
- 3 advertised
- 4 subject to a public participation process
- 5 stakeholders are the same more or less
- 6 objections with certain time limits
- 7 submit objections to competent authorities

Decision

- In terms of constitutional competences to competent authority
- Specific legislation and
- PAJA - authorised decision

Which decision first?

- “The **authority to mine granted** by the Minister after taking into account mining related considerations is ‘ **logically anterior to the procurement of consents** that may be necessary for its execution’” (*Maccsand* SCA referring to *Kyalami*)
- “The fact that in this case **mining cannot take place until the land in question is appropriately rezoned** is ... permissible...” (*Maccsand* CC par 47)

Conclusions?

Thank you