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RESEARCH PAPER

MUNICIPAL LEGISLATIVE ALIGNMENT AND ENABLEMENT ANALYSIS REPORT

South African Cities Network (SACN)

Built Environment Integration Task Team (BEITT)

April 2021



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Acknowledgements

This report was compiled by a team of researchers at the South African Research Chair in Cities, Law and Environmental Sustainability (CLES) at the Faculty of Law of the North-West University. Anél du Plessis (main investigator), Oliver Fuo, Felix Dube, Johandri Wright, Maricéle Botes and Onkarabile Osiele conducted the research for this report. Bernalee Anthony provided editorial support.

The research was partially funded by the National Research Foundation of South Africa (NRF) (Grant No: 115581), the French Development Agency (AFD) and the Development Bank of Southern Africa (DBSA). All views and errors are the authors' own.

CLES further acknowledges the valuable contribution of every research and workshop participant and the SACN BEITT as well as the key insights of Geoffrey Bickford, Kayla Brown and Sipehelelisiwe Ntombela.

List of Abbreviations

BEITT	Built Environment Integration Task Team
CLES	South African Research Chair in Cities, Law and Environmental Sustainability
Constitution	Constitution of the Republic of South Africa, 1996
DORA	Division of Revenue Act
ICT	Information and Communications Technology
IDP	Integrated Development Plan
IUDF	Integrated Urban Development Framework
LUMS	Land-use Management Systems
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
NDP	National Development Plan
PFMA	Public Finance Management Act 1 of 1999
SACN	South African Cities Network
SALGA	South African Local Government Association
SDBIP	Service Delivery Budget Implementation Plan
SDF	Spatial Development Framework
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013

Executive Summary

South Africa's spatial transformation project is ongoing. It finds itself challenged in manifold ways, one of which is the regulatory environment within which spatial transformation should be executed. Spatial transformation is at the heart of spatial justice, which is necessary for the safety, inclusivity, resilience and sustainability of every city and town in South Africa. It follows that the combination of applicable regulatory instruments should be complementary and enabling and such that can yield tangible transformative outcomes.

This report forms part of a continuous process of questioning the slow progress of spatial transformation in South African cities. There are many factors at play, ranging from institutional barriers and the depth of the historically created spatial divide to inadequate political commitment, competing development priorities and insufficient resources. Part of the frustration of planning officials is the excessive focus on strict legal compliance (mostly with financial management legislation) at the expense of transformation. This report concerns the tricky interplay between two key pieces of legislation that inform and steer spatial transformation initiatives in every municipality, namely the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) and the Spatial Land-Use Management Act 26 of 2013 (SPLUMA). This is not the first time that these Acts have been critically explored. Some work has already been done by National Treasury, among others.

The objective of this study was to provide an alignment and enablement analysis of the two Acts as they impact on spatial transformation practice in municipalities, and to deepen the understanding of their co-existence in relation to municipal practice. In more simplistic terms, the objective was to establish whether or not the demands arising from the co-existence and joint implementation of two diverse pieces of law could be one of the causes of the slow spatial transformation in South African cities, especially those involved in the SACN's Built Environment Integration Task Team. The combination of desktop research and the inputs of local government officials and practitioners showed that the content, objectives and provisions of the MFMA and SPLUMA are aligned with developmental local government objectives and complement the spatial transformation project of South Africa. The challenge lies not in the letter of the law but may rather lie in the interpretation, application, implementation and enforcement of the legislation – matters that will understandably differ from one municipality to the next and that are matters beyond the control of the law.

Background

The South African Cities Network (SACN) has a dedicated programme of research on the integration of the built environment and has established a Built Environment Integration Task Team (BEITT) comprising a group of municipal practitioners working in areas of the built environment to address institution-related issues and strengthen the ability of cities to drive spatial transformation.

The State of Cities Report IV reiterates that spatial transformation requires integrated planning and delivery - “Across government, a concerted effort is needed to move away from a traditional silo approach whereby the various sector departments have their targets, directives and resources aimed at meeting their sector mandate” (SACN, 2016: 79). The institutional dimension of separated, unintegrated planning and different departmental priorities and practices is important to understand. Integration is certainly not a new idea in South African urban development circles. In fact, it is central to the National Development Plan (NDP)¹ and the Integrated Urban Development Framework (IUDF).² The challenges often lie in the details of practice and implementation.

One of the critical informants of municipal practice is the suite of legislation that exists to govern municipal operations and performance. The BEITT has raised questions around the extent to which the existing legislative environment is capable of enabling municipalities to drive spatial transformation; specifically, in relation to how the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) enables and complements the objectives of the Spatial Land-Use Management Act 16 of 2013 (SPLUMA). With so many pieces of legislation in place for the local government sphere, the BEITT feels it is important to investigate the degree of alignment in terms of the detail of the legislation, as this is seen as a critical component informing the integrated approach to urban development. Part of the frustration of planning officials is further the excessive focus on strict legal compliance (mostly with financial management legislation) at the expense of transformation.³

¹ National Planning Commission *National Development Plan 2030 Our Future – Make it Work*.

² Department of Cooperative Governance *Integrated Urban Development Framework*.

³ The issue of a dominating compliance culture and its effects also received attention in an earlier report of the SACN, “The Rule of the Game: A Practitioner-centric Review of the Municipal Performance Management System in Five South African Cities” (2020) https://www.sacities.net/wp-content/uploads/2021/01/Rules-of-the-Game-Report_final-draft-1.pdf.

The objective of this commissioned study was to provide an analysis of the alignment and enablement of some of the critical legislation (in the present report, the MFMA and the SPLUMA) that impacts on the practice of spatial transformation in municipalities, and to deepen the understanding of the co-existence of legislation in relation to municipal practice, to:

1. Indicate the levels of alignment between the pieces of legislation;
2. Be specific on how alignment exists or does not exist; and
3. Understand how the legislative environment relates to practice, and in this context provide insight into the relationship between theory and reality.

Against the background of the above, the South African Research (SARChI) Chair in Cities, Law and Environmental Sustainability (CLES) at the Faculty of Law of the North-West University was appointed to perform a review of the MFMA and the SPLUMA. The aim was to identify any provisions that affect spatial transformation in a positive or negative way with a view to critically assessing the possible reasons and remedies for legislative fragmentation and the cleavages between the letter of the law and its implementation in the silos between the municipal departments responsible for spatial transformation.

Introduction

The slow pace of spatial transformation in South African cities is a testament to the deep scars of apartheid and to how long it takes to design and secure a different future. Spatial transformation in the South African context requires an overhaul of spatial inequality and exclusion in the face of deteriorating existing infrastructure, the vulnerability of the existing socio-ecological systems, and a weak economy. It is people – especially people in power – that must commit to the spatial transformation project. Politicians and administrators operating in the three spheres of government (national, provincial and local) as well as in its three branches (the legislature, executive and judiciary) have to understand, appreciate and commit to sustainably transforming the space where people live, work and play. It follows that there are many role-players in this governmental matrix aimed at transforming South African spaces, urban and rural.

Spatial justice depends on spatial transformation. Put differently, without spatial transformation in our presently divided towns and cities, for example, a state of spatial justice remains but a pipe dream. Globally, spatial justice has been referred to as “the most important current political and legal issue” and as being subject to “legal and political boundaries”.⁴ Spatial justice in this context builds on the founding work of Henri Lefebvre and Ed Soja, who describe it as “an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice” involving “the fair and equitable spatial or physical distribution of socially valued resources and the opportunities to use them.”⁵ Van Wyk explains with reference to the South African context that the three most prominent forces behind spatial discrimination are class, race and gender, and indicates that any spatial environment that is determined and steered by these discriminatory forces “is unjust” and the breeding ground for spatial injustice.⁶

Spatial justice further concerns *social* and *physical* space as two inseparable sides of the same coin.⁷ An important tool in the quest for spatial justice is the law and policy framework that articulates the goals to be attained and that sets the legal boundaries, while

⁴ Andreas Philippopoulos-Mihalopoulos “The movement of spatial justice” *Mondi Migranti* 1/2014 8.

⁵ Jeannie van Wyk “Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?” *South African Public Law* 2015 (30) 28.

⁶ Jeannie van Wyk “Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?” *South African Public Law* 2015 (30) 28.

⁷ Andreas Philippopoulos-Mihalopoulos “The movement of spatial justice” *Mondi Migranti* 1/2014 9.

simultaneously steering people and human action towards those goals. It follows that any country's legal framework has to be oriented towards the transformation of and transition in social and physical space if the law is to meaningfully enable spatial justice. However, the enabling power of the law relies heavily on how it is interpreted, implemented and enforced. It also depends on the coherence and cohesion of the applicable legal framework and the processes, procedures, structures, systems and decisions it creates and gives rise to. It is no straightforward task to attain such coherence and cohesion. Spatial justice concerns a plethora of different governance and legal sectors, including but not limited to physical infrastructure, land, mobility (transport), housing, and bulk municipal services and infrastructure – and these need to be affordable. It involves the conservation of and access to natural resources and cultural heritage, access to economic hubs and other amenities. If there is to be justice, it also commands the opportunity to voice needs, frustrations and new ideas in relation to shared social space. Admittedly, these governance and legal issues could easily draw attention away from the important combination of “a phenomenological, consciousness-centred conceptualisation of social justice” and understanding social justice as a structural problem of exclusion.⁸ In this vein Van Wyk explains that the South African conception of spatial justice as envisioned by the Spatial Land-Use Management Act 16 of 2013 (SPLUMA) “contains an own brand of spatial justice, the subthemes of which are integration, inclusivity, diversity, participation and location. These sub-themes complement Susan Fainstein's three hallmarks of urban justice, namely equality, diversity and democracy.”⁹ In short then: spatial justice is a concept and a process in response to the phenomenon of structural exclusion and spatial injustice.

This paper probes into a small aspect of the much larger enterprise of understanding and responding to spatial injustice and the slow spatial transformation in South Africa's cities. The focus is not as much on case studies and an analysis of the persisting spatial injustices in specific cities. Instead, this study focusses on the relevant legal premises. It specifically questions the extent to which the design, provisions and methods of implementation of the SPLUMA and the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) as legal instruments potentially thwart the goal of transforming social and physical

⁸ Andreas Philippopoulos-Mihalopoulos “The movement of spatial justice” *Mondi Migranti* 1/2014 11.

⁹ Jeannie van Wyk “Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?” *South African Public Law* 2015 (30) 29.

space in South African cities. And if they do, how can this be changed.

The paper has four sections. The first investigates the legislative environment for spatial transformation, explaining how existing South African law affects social and physical space generally. The second reflects on some practitioner inputs, giving a cursory overview of some of the perceptions and views held by an admittedly limited number of local government officials. The third part relies on theory (several scholarly views) to contemplate legislative fragmentation as an inevitable feature of a semi-federal government structure such as that of South Africa. The fourth part offers a few preliminary recommendations towards easing some of the perceived negative impacts of legislative fragmentation on the spatial transformation project and the quest for spatial justice in South African cities.

Methodology

As indicated above, the research captured in this report is based on a combination of a) desktop research of literature and legislation and, b) responses to questions and feedback during engagements (virtual meetings and two workshops) with stakeholders in local government. The first workshop took place in Johannesburg as part of the delineation of the research scope at the beginning of the project with approximately ten people in attendance, and the second was a virtual workshop which took place once the draft report was drafted in order to get feedback on the findings and to further refine the conclusions (approximately twenty people in attendance). Participation in this project was voluntary and invitation-based. Many of the participants are members of the BEITT. Mostly metropolitan municipalities participated in the engagements, most of which were structured as discussions around the BEITT's initial inputs and later around the draft version of this report. Participating officials hailed from the financial management, risk management, procurement and city planning divisions of the participating municipalities.

The state of play: the legislative environment for spatial transformation in South Africa

South African law boasts a constitution and legal framework dedicated to social justice and a transformed democratic society. The mainstay of the legal framework is the Constitution of

the Republic of South Africa, 1996 with its extensive Bill of Rights¹⁰ and various arrangements for the division of public authority and functional areas of governance in a government system comprising of three inter-related spheres.¹¹ The Constitution envisions a government where the national, provincial and local spheres as well as different line functions in each sphere work together and co-exist in a system of good co-operative government and in the interest of the well-being of the people of the Republic.¹² The Constitution does not expound on every aspect of what is required to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”¹³ The details of the workings of the democratic government towards social justice, including spatial justice, are similarly left to the devices of the legislature, the executive and the judiciary. While this report is focussed on the legislature and on two specific pieces of national legislation on local government (the SPLUMA and the MFMA), the cardinal role of the executive (e.g. local government officials) in the consistent and reasonable interpretation and implementation of these laws cannot be ignored. This speaks to one of the key messages in the State of the Cities Report IV: “In order to transform space, the power relations, institutions and capabilities in the system also need to be transformed.”¹⁴ In short: a look into the legislative environment around spatial transformation alone is unable to reveal the full state of affairs of an entire governance system that must synergistically respond to spatial injustice.

What does the South African legislative environment for spatial transformation look like? And who is responsible for making the applicable legal framework “work” for the people in the country?

Firstly, the spatial transformation agenda is dispersed across the Acts and Regulations of the various government sectors referred to earlier. In other words, one finds legal principles and provisions of relevance to spatial transformation in national transport legislation, legislation on land and property, housing legislation, environmental legislation, spatial planning legislation, legislation on building regulations, trade, investment and business legislation etc.¹⁵ These sectors and sectoral laws all find relatively “direct” application to the regulation

¹⁰ Chapter 2 of the Constitution.

¹¹ See chapters 3, 4, 6, 7, 10 and 12 and Schedules 4B and 5B of the Constitution.

¹² Sections 40 and 41 of the Constitution.

¹³ Preamble of the Constitution.

¹⁴ South African Cities Network (SACN) “State of the Cities Report 2016” 46.

¹⁵ Depending on the sector and the sphere of government responsible for it, it is possible for national, provincial or local government to pass legislation / bylaws of relevance.

of space in cities. There are various other laws, however, that also find application by virtue of the manner in which they help steer municipal governance processes. These laws range from legislation applicable to municipal contracts, finance and procurement management to legislation regulating municipal performance, inter-governmental cooperation within and beyond local government, the involvement of traditional leadership in municipal decision-making and access to development information held by municipalities and others. In addition, some provincial laws and municipal bylaws also affect the relationships between people and space in cities. In a nutshell: the legislative environment for spatial transformation comprises a complex web of national laws and is highly fragmented. This is understandable given the systemic dynamics of cities, and because “how cities are configured, grow and change is inherently linked to other aspects of city performance”.¹⁶ The law cannot be expected to respond to these dynamics with a single law or legal code or with law-making in a single sphere of government. The legal framework is as much a non-linear multi-piece puzzle as the city environment it applies to.

Secondly, the chief national legislation for spatial transformation in South Africa is the **SPLUMA**. The Act has been in operation since July 2015 and provides for a single land development process. In terms of the SPLUMA, local government is responsible for drafting and implementing bylaws, local spatial development frameworks (SDFs) and land-use management systems (LUMS). The promulgation of the SPLUMA signalled important opportunities for spatial transformation in South African cities as previously explained in the State of the Cities Report IV¹⁷ and most recently confirmed in the ground-breaking *Adonisi*-case decided in the Western Cape High Court.¹⁸ The SPLUMA is regarded as a transformative tool, considering how it informs the SDFs and LUMS of municipalities and how

¹⁶ South African Cities Network (SACN) “State of the Cities Report 2016” 48.

¹⁷ South African Cities Network (SACN) “State of the Cities Report 2016” 65. Also see the discussion of Angela van der Berg 2019 *Municipal Planning Law and Policy for Sustainable Cities in South Africa* 142.

¹⁸ *Adonisi v Minister for Transport and Public Works Western Cape; Minister of Human Settlements v Premier of the Western Cape Province* (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020) (hereafter the *Adonisi*-case). This case concerned the sale of a government-owned property without the necessary considerations, by the MEC for Transport and Public Works of the Western Cape, of social development and integrated sustainable human settlements as required by the Government Immovable Asset Management Act 19 of 2007 to give effect to the constitutional and legislative rights to access to adequate housing and land in terms of sections 25 and 26 of the Constitution. In the selling of the property in question, and not taking it into account for a social housing development, it was further argued that the City and Provincial Government failed a) to address the rampant legacy of apartheid spatial planning and the spatial inequalities faced by the poor working class of Cape Town, as well as b) their constitutional and statutory duties in terms of legislation such as the Housing Act 107 of 1997, the Social Housing Act 16 of 2008 and SPLUMA.

it caters for informal and formal uses. The objects of the Act are instructive, namely to:

- Provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic;
- Ensure that the system of spatial planning and land use management promotes social and economic inclusion;
- Provide for development principles and norms and standards;
- Provide for the sustainable and efficient use of land;
- Provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government; and
- Redress the imbalances of the past and ensure that there is equity in the application of spatial development planning and land use management systems.

The SPLUMA further provides for five legal principles that apply to spatial planning, land development and land use management in every South African city:

- The principle of spatial justice;¹⁹
- The principle of spatial sustainability;²⁰
- The principle of efficiency;²¹
- The principle of spatial resilience;²² and
- The principle of good administration.²³

For present purposes it merits to flag that the SPLUMA's principle of efficiency requires, for example, that decision-making procedures be designed to minimise negative financial, social, economic and environmental impacts, that development application procedures be efficient and streamlined, and that timeframes be adhered to by all parties. Its transformative potential has also been summarised by the Western Cape authorities in a pronouncement that:²⁴

... SPLUMA is the very legislation that seeks to advance the breaking down of the barriers of apartheid spatial planning, and both the Province and the City are duty bound to implement it to the best of their abilities. While they may have not done so in the past, they are obliged to do so, both presently and in the future.

¹⁹ Section 7(a) of SPLUMA.

²⁰ Section 7(b) of SPLUMA.

²¹ Section 7(c) of SPLUMA.

²² Section 7(d) of SPLUMA.

²³ Section 7(e) of SPLUMA.

²⁴ The *Adonisi*-case par 444.

As suggested earlier, the SPLUMA is not the only national Act applicable to the spatial transformation project in cities. One other prominent piece of cross-sectoral law is the **MFMA**, which finds application to spatial transformation (and virtually to all other sectors of local governance) in the sense that it steers the management of all the fiscal and financial affairs and processes of municipalities. The spatial transformation project understandably requires financial support and allocations which depend on budgeting and financial planning as well as the co-ordination of different processes of local government. The overarching object of the MFMA is to “secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements.”²⁵ These norms, standards and requirements as applicable across all sectors in local government are deemed necessary to:

- Ensure transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
- Manage the revenues, expenditures, assets and liabilities and the handling of the financial dealings of municipalities;
- Manage budgetary and other financial planning processes and the co-ordination of those with the processes of organs of state in other spheres of government (e.g. National Treasury);
- Regulate borrowing;
- Assist with the handling of financial problems in municipalities;
- Regulate supply chain management; and
- Deal with other financial matters.

Notably, the MFMA sets out to “modernise budget, accounting and financial management practices by placing local government finances on a sustainable footing in order to maximise the capacity of municipalities to deliver services to communities. It also aims to put in place a sound financial governance framework by clarifying and separating the roles and responsibilities of the council, mayor and officials.”²⁶ It follows that the MFMA aims to maximise the fiscal capacity of municipalities *inter alia* to help transform local space and to deliver on their developmental mandate.

²⁵ Section 2 of the MFMA.

²⁶ National Treasury “MFMA”, available at <http://mfma.treasury.gov.za/Pages/Default.aspx>.

This indicates that the actualisation of the SPLUMA's objectives understandably depends on its alignment and compliance with the provisions of the MFMA as the umbrella law for all municipal finance affairs. Considering the background to this commissioned report, the question facing municipal planners is, however, whether a) the text (the proverbial "nuts and bolts" on paper) of the SPLUMA should align with the details of the written MFMA text, or b) whether it is the *implementation* (and operation) of the SPLUMA provisions as a responsibility of the executive in local government that line up with the dictates of the MFMA, and vice versa.

A desktop evaluation of the potential areas of misalignment between the two Acts yielded the following insights:

- Both the MFMA and SPLUMA are in line with the rights, duties and values of the Constitution as far as their scope, objectives and provisions are concerned;
- Both Acts have been adopted in Parliament as per the prescribed processes for the passing of national legislation;
- The MFMA and the SPLUMA can both be categorically described as so-called framework or cross-sectoral local government legislation intended to steer and regulate different yet interrelated areas and sectors of local governance in South Africa. The MFMA is fully cross-sectoral and applies to virtually every function and operational activity of a municipality;
- Both Acts serve as legislative extensions of the policy objectives for developmental local government in the White Paper on Local Government, 1998 as well as the objectives of local government in the Constitution;²⁷
- The MFMA requires broad-ranging financial planning and has fixed procedural requirements and processes to be followed by all line divisions and in the daily operations of municipalities;
- The SPLUMA requires visionary interpretation and application and creates a legislative canvas against which every municipality should paint a unique, transformed, social and physical space of the kind earlier described by Van Wyk. Such transformation will require long- and short-term municipal projects, programmes, developments and plans that are likely to depend on financial support from municipal capital and operational budgets and investments as regulated by the fixed norms,

²⁷ Section 152 of the Constitution.

standards and requirements of the MFMA and other national financial laws;

- Different competent authorities in the national, provincial and local spheres of government are responsible for the implementation, monitoring and enforcement of the principles and provisions of the MFMA with a notable role played by the National Treasury. The extensive capacity building and research done by National Treasury on the local government finance environment in South Africa is commendable;²⁸
- Planning authorities in the three spheres of government are responsible for the implementation, monitoring and enforcement of the SPLUMA with a notable role played by municipalities in charge of local space and land;
- Unlike SPLUMA, the MFMA contains very specific, auditable requirements, rules, and enforceable provisions involving municipal fiscal matters. As one may expect, none of these cross-sectoral requirements, rules, and provisions aims specifically at spatial transformation as a dimension of spatial justice;
- Some of the SPLUMA's provisions translate into aspirational principles and seek the adoption of spatial planning instruments at the discretion of municipalities. The SPLUMA principles and instruments aim at spatial transformation and spatial justice generally but appear not to have been developed with any specific municipal finance management processes and requirements (e.g. procurement rules and budget cycles) in mind. In other words, as a sectoral Act with a dedicated aim, the SPLUMA understandably does not align with the operational details and requirements of the MFMA. Such alignment appears to be left to the devices of the executive and not the legislature; and
- **There are no observable or specific incongruities and contradictions concerning the principles and provisions of the MFMA and the SPLUMA as they find expression on paper;**
- A desktop study alone is limited in its ability to properly identify and analyse the full extent to which the MFMA potentially weakens or clogs the implementation of the SPLUMA and the attainment of local spatial transformation. The points made above should be read against this methodological limitation.

What does the above then mean for a reflection on social justice as a constitutional imperative

²⁸ See, National Treasury "MFMA", available at <http://mfma.treasury.gov.za/Pages/Default.aspx>.

for which the entire South African government and every person in the country are morally responsible? As stated at the outset, *spatial justice* is key for *social justice*, considering the country's history and apartheid design, and it is essentially the responsibility of everyone. The SPLUMA underscores the role of the entire government (all spheres and all branches) by stating explicitly that its principles of general development (listed earlier) “apply to *all organs of state and other authorities* responsible for the implementation of legislation regulating the use and development of land.” By extension, this means that municipalities, national authorities and provincial authorities are jointly responsible for making the applicable legal framework (the SPLUMA and the MFMA) work for the people of South Africa and for seeing it result in spatial justice, spatial sustainability, efficiency, spatial resilience, and good administration. On the question of what the legislative environment looks like, it is possible to conclude that national spatial planning envisions social and economic inclusivity of and equality in (social) space, and a uniform, effective and comprehensive system of planning and land use management that is complemented by co-operative government and good intergovernmental relations. In addition to the substantive law about spatial transformation and justice, however, the legal framework also comprises of cross-sectoral law (such as the MFMA) that regulates the total municipal body at work.

Some practitioner views and experiences

In the hope to have the problem as experienced by the BEITT more clearly defined, telephonic, electronic and virtual workshop-style discussions were held with local government officials and representatives of National Treasury during 2020 and 2021. The objective was for government officials' on-the-ground experience to inform the findings of the basic desktop review, and to get more clarity on the manner in which the MFMA is perceived to obstruct efforts (municipal projects, plans etc.) towards spatial transformation. Officials in the budget, planning and risk management offices of a select few metropolitan municipalities participated in the discussions.

The officials were asked to reflect on whether and how they deem the SPLUMA and the MFMA to be in conflict as far as the on-the-job pursuit of the objectives of spatial transformation is concerned and what, if any, are some of the practical challenges that one would not necessarily pick up from a legal textual analysis. Approximately twenty officials and representatives from National Treasury participated in the discussions and their inputs and

views can be summarised as follows:²⁹

On the <u>MFMA</u> & function of municipal financial officers	On the <u>SPLUMA</u> & functions of municipal planning practitioners	On operational (in)congruencies between MFMA & SPLUMA
<p>To be understood as an Act intended to “regulate”:</p> <ul style="list-style-type: none"> • Fiscal discipline • Financial governance processes 	<p>Spatial transformation in a municipality needs a vehicle with the necessary capacity to drive the process e.g. the integrated development planning (IDP) process.</p>	<p>It is necessary for municipal financial officers to be involved in spatial planning projects and initiatives from their inception.</p>
<p>“The Act is one instrument in a suite of instruments on public finance management and the division of revenue in South Africa. The national resource allocation process by way of the Division of Revenue Act (DORA) also feeds into the difference between planning and implementation at the municipal level.”</p>	<p>“The most exciting feature of the SPLUMA is that it takes spatial transformation decision-making to the municipal level where it belongs.”</p>	<p>“Engaging community members such as artists and community-based organisations in the projects of a city is key for spatial transformation but the MFMA makes this difficult.”</p>
<p>The Act was “translated” from the Public Finance Management Act (PFMA) and should be interpreted in this context.</p>	<p>Spatial transformation is directly linked to developmental local government, which is the mandate and responsibility of each and every department in</p>	<p>Municipalities embark on too many new capital projects every year while many projects never reach the stage of completion, which does not make sense from a fiscal</p>

²⁹ Some of the statements captured are paraphrased, while some are presented as verbatim quotations.

	a municipality – not only the department responsible for spatial planning.	discipline perspective.
Planning in terms of the Act is mostly short-term financial planning while spatial transformation requires a long-term vision and long-term planning.	The Act is aimed at reform, transition and change and the outcomes it envisions are long-lasting. The ideals of the SPLUMA transcend the lifespan of an elected Municipal Council.	The municipal grant system creates a perverse incentive for the development and initiation of projects that sometimes turn out not to be sustainable. The grant framework is driven by tangible outputs and has specific conditions attached to it. The grant system is all about numbers; spatial transformation is not.
The Act creates an accountability cycle in a sound financial management framework aimed at revenue generation etc. driven by National Treasury. All operations of a municipality must “fit” into this cycle.	Spatial justice of the kind envisioned in the Act cannot be translated into monetary terms or financial value. It rather speaks to social gain and lasting positive impact on human health and well-being.	A local governance framework is needed that determines how silo-based operations in the municipality should be avoided.
Municipal fiscal discipline is all about efficiency (of scale), effectiveness, equity and what is economical.	Projects or initiatives that may contribute to spatial transformation in a city do not necessarily present themselves in line with the procedural cycles and requirements for budgeting as stipulated in the Act. Put differently, a new venture or opportunity will not necessarily present itself during a budgeting process – it may	Municipal operations must be re-engineered, taking into account that municipalities are not organic.

	arrive at any time during the year and may become an opportunity lost if the municipality does not invest and investigate fast enough.	
“Financial management is also about resource and budget allocation in combination with the will to make a change in local government.”	“Changes in municipal councils add to the complexity of seeing spatial transformation projects through at the ward level, for example.”	“A lack of co-operative government among practitioners and at the technical level is the problem as opposed to the letter of the national legal framework and tensions between the administration and Council.”
The local government municipal finance management space is over-regulated, considering the rules and procedures accompanying budget and adjustment budget processes.	The Act aims at large, long-term social benefit.	Spatial transformation projects receive an amount for the year in the municipal budget and this should be optimally used.
The MFMA is characterised by inflexibility and a focus on compliance, which is needed for fiscal discipline but which can admittedly discourage project development.		Spatial transformation projects must be conceptualised and developed with all local government processes, services and functions in mind, e.g. bulk infrastructure services.
The rationale of some of the rules, norms, standards and prescriptions of the MFMA is not self-evident and may have to be explained in lay terms for it to resonate with local government		The budget for a specific project is often requested and decided only when the project reaches the implementation stage, which is too late from a municipal financial

<p>officials and practitioners working in other departments / sectors such as the planning department.</p>		<p>management perspective, bearing budgetary cycles and budget planning in mind.</p>
<p>The supply chain management processes outlined in the MFMA appear to speak to the procurement of products as opposed to the procurement of services such as those typically needed for spatial transformation initiatives.</p>		<p>Municipal planning practitioners should be and indeed are part of the annual municipal budget process.</p>
<p>Strict tender process requirements take the flexibility and human interaction out of discussions around future working relationships between municipalities and companies or sub-contractors, for example.</p>		<p>All spatial transformation projects cannot be equally important from a financial management perspective and project prioritisation must be done.</p>
		<p>There are prescribed financial processes to ensure that a new project (e.g. a new property or open-space development) is ready by budget time.</p>
		<p>Planning departments in municipalities are generally not good at providing estimates of expenditure.</p>
		<p>Planning departments are aware of and should respect municipal finance timeframes.</p>

		<p>Planning and other departments in some municipalities lack project management and proper planning skills, which can potentially result in financial risk.</p>
		<p>Budgeting for spatial transformation projects should commence during the conceptualisation phase, and not much later - when a project nears the implementation stage.</p>
		<p>There are several opportunities for communication between planning practitioners and financial officers of a municipality e.g. discussion forums in some municipalities - but participation must be improved if it is to be meaningful and constructive.</p>
		<p>The South African Local Government Association (SALGA) can play a role in assisting municipalities with improved communication between the municipal officials responsible for planning and those responsible for sound financial management.</p>

		<p>The timeframes in the SPLUMA and the MFMA applicable to supply chain management and municipal (capital) budgeting do not line up with and do not take into account the time that goes into property development, for example.</p>
		<p>Municipalities have problems in defining the actual specifications needed for some spatial transformation projects in a way that people can cost/quote on them appropriately and in a way that renders comparisons possible.</p>
		<p>There is a perception that there is a hierarchy of Acts, and that the MFMA sits quite high on it. Related to the point above, there is a misconceived impression among government officials that those involved in the implementation and enforcement of the MFMA are higher ranked than those responsible for implementing the SPLUMA or any local laws that have emanated from it.</p>
		<p>Political turmoil in a municipality and multi-party Councils in a municipality affect</p>

		<p>how decisions are made in terms of the SPLUMA and the MFMA. Neither the MFMA nor the SPLUMA has been written in a way that acknowledges coalition governments. Instead, they were drafted assuming that there would be a majority government in every municipality.</p>
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Despite the interventions and inputs above, several of the local government officials consulted (many of whom are not part of the BEITT) felt that the MFMA is a meaningful piece of legislation and could not imagine how it actually thwarts the objectives of the SPLUMA. At the same time, the proponents of a new or amended law on local government finance (planning practitioners) did not provide concrete examples of how exactly the provisions of the MFMA create a stumbling block on the road to spatial transformation. The discussions revealed that: a) there is no consensus about what exactly it is in the regulatory environment that frustrates planning practitioners and others that are directly responsible for the spatial transformation project; and b) spatial transformation has to occur within and align with the dictates of a fragmented legal dispensation.

The engagements revealed that much of the frustrations with the MFMA relates to supply chain management. Spatial transformation necessarily requires municipalities to engage in certain projects which may range from small neighbourhood renewal to large infrastructure expansion projects. This means that procurement procedures must be followed to gain access to services and goods necessary for these projects. In this regard the MFMA sets out very detailed provisions on how goods and services can be procured with limited space for deviations from these rules. However, the Public Procurement Bill is in its final stages of approval by Parliament, which will ultimately repeal all the provisions in the MFMA (Chapter 11 with all the accompanying regulations) dealing with public procurement. At this point, an analysis of how aligned the Bill is with the SPLUMA is limited because the Bill itself is only a framework and regulations from the Minister are required to give content to the framework.

Assuming, though, that legislative misalignment and fragmentation between the SPLUMA and the MFMA are thwarting aspects of the spatial transformation project (as the basis on which this study was originally commissioned), it may be useful to establish how such misalignment and fragmentation can be addressed. The next section reviews the limited literature available on this topic.

The challenge of legislative fragmentation

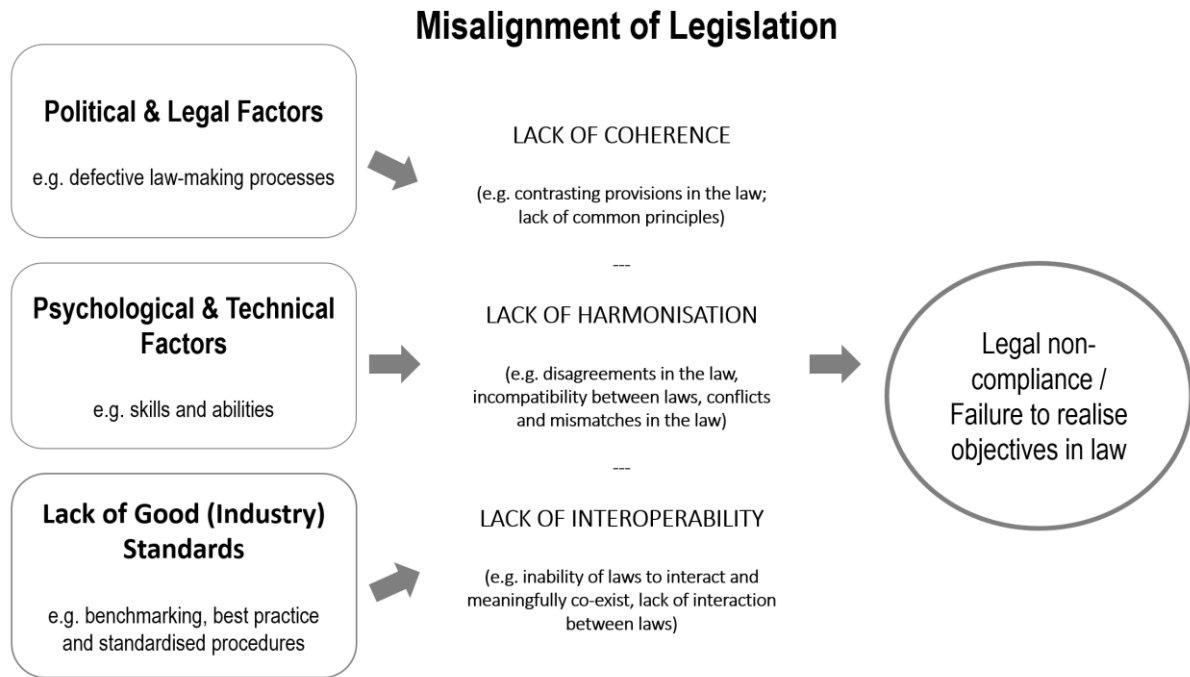
Legislative fragmentation is almost inevitable in a country such as South Africa, where three spheres of government all have law-making authority in relation to a big range of interrelated functional areas of competence. Despite its prevalence in federal democracies and the fact that it is often highly criticised, theory and literature on the causes and impacts of “legislative fragmentation” and incongruence or inconsistencies between laws are not in abundance.

According to Pokwana and Kyobe, “(w)hen the process of law development or reform is inappropriate, this leads to misaligned legislation and subsequently to non-compliance.”³⁰ It may in a similar vein be argued that flawed law-making processes could lead to an Act’s failure to meet its objectives and serve its intended purpose. The authors continue to show that there are three “representations of misalignment of legislation”, namely lack of coherence, interoperability and harmonisation.³¹ They explain the causal factors and one of the results of the misalignment of legislation by way of a figure:³²

³⁰ Unathi Pokwana and Michael Kyobe “Investigating the Misalignment in the existing E-legislation of South Africa” (Association for Information Systems, CON-FIRM 2016 Proceedings) 2-4, available at <https://pdfs.semanticscholar.org/576d/710edcbe0da9501efb35b8bbf861048b8cf.pdf>.

³¹ Unathi Pokwana and Michael Kyobe “Investigating the Misalignment in the existing E-legislation of South Africa” (Association for Information Systems, CON-FIRM 2016 Proceedings) 2-4, available at <https://pdfs.semanticscholar.org/576d/710edcbe0da9501efb35b8bbf861048b8cf.pdf>.

³² The figure presented here is an adapted version of the original published in 2016. See, Unathi Pokwana and Michael Kyobe “Investigating the Misalignment in the existing E-legislation of South Africa” (Association for Information Systems, CON-FIRM 2016 Proceedings) 5, available at <https://pdfs.semanticscholar.org/576d/710edcbe0da9501efb35b8bbf861048b8cf.pdf>.



When one adopts Pokwana and Kyobe’s ideas, it would appear that the perceived tension between the SPLUMA and the MFMA is a mix of the three representations of legislative misalignment. It is, however, quite possible for the perceived misalignment between the two Acts to lean more prominently towards one of these representations: e.g. a lack of interoperability.

Some work has been done on the notion of the interoperability of laws. The term is usually used in the context of Information and Communication Technology (ICT), where it “signifies that two or more different systems or devices are able to communicate with each other and work together.”³³ But the notion of legal interoperability has been used mainly with reference to the compatibility of two or more legal systems with three basic kinds of legal interoperability:

1. Same legal system (i.t.o. geography) / Same language
2. Same language / Different legal systems
3. Different legal systems / Different languages

These three kinds of interoperability cannot be transplanted as is to the challenge experienced with the practical incongruences between the SPLUMA and the MFMA.

³³ Amadeo Santosuosso and Alessandra Malerba “Legal Interoperability as a Comprehensive Concept in Transnational Law” 2014 6(1) *Law, Innovation and Technology* 51.

However, it is possible to draw on this typology of legal interoperability for a better understanding of how to make two substantially different pieces of legislation and two sets of specific rules better communicate with each other. In the present context it makes sense to ask the following:

1. Are the SPLUMA and the MFMA part of the same legal system? / Do the SPLUMA and the MFMA adopt the same language?
2. Do the SPLUMA and the MFMA adopt the same language? / Do the SPLUMA and the MFMA regulate and address different governance sectors / systems?
3. Do the SPLUMA and the MFMA regulate and address different governance sectors / systems? / Do the SPLUMA and the MFMA adopt a different language?

While the answers to these questions will not lead us to a complete state of harmony between the SPLUMA and the MFMA, they assist in identifying possible causes of the problem. Santosuosso and Malerba's research revealed that the problem of legal interoperability arises "whenever a legal content or rule is shifted in time and/or space".³⁴ Time and space of the kind referred to here will have a direct influence on the language adopted in a piece of law. This perspective can easily turn highly theoretical but the point is well taken - that the time and space (e.g. the current political climate, the pursuit of a transformative agenda, the clamping down on corruption, embracing the notion of consequence management etc.) in which a law is passed bears relevance to and can contribute to its misalignment with other law(s). Without going into the historical detail at this point, it merits to state that the MFMA dates back to 2003 and the SPLUMA came into being only a decade later, in 2013. This implies that the current co-existence of these Acts should be understood not only regarding the different governance sectors to which they belong (planning and finance) but also with the difference of time and space in mind. This resonates very well with the statement by Buitelaar *et al.* that land-use planning "does not take place in a vacuum; neither does any type of practice. Doing - the central thread of practice is not just doing in and of itself, ... but is always doing in a historical and social context that gives structure and meaning to what we do."³⁵

³⁴ Amadeo Santosuosso and Alessandra Malerba "Legal Interoperability as a Comprehensive Concept in Transnational Law" 2014 6(1) *Law, Innovation and Technology* 51.

³⁵ Edwin Buitelaar, Maaïke Galle and Niels Sorel "Plan-led planning systems in development-led practices: an empirical analysis into the (lack of) institutionalisation of planning law" 2011 (43) *Environment and Planning A* 930, citing the work of Laws and Hajer.

Buitelaar *et al.* further explain, with reference to institutional and legal misalignment, that “(t)he likelihood of incongruence and conflict is greater when the central level [of government] takes insufficient account of the way things work and have become institutionalised at the local level.”³⁶ They agree with Scott, who has held that the “inherent simplicity of generic structures such as legislation” is to be blamed. Individual pieces of legislation are “always more static and schematic than the actual social phenomena they presume to typify.”³⁷ This resonates with the practitioner inputs on the tension between the SPLUMA and the MFMA stated earlier. The research of Buitelaar *et al.* reveals five types of interaction between planning law and institutions (such as other law, for example), from the most to the least congruent:

1. Complementary
2. Accommodating
3. Substitutive
4. Suppressive
5. Competing

Once again, these types of interaction between the SPLUMA and the MFMA do not offer a solution to the problem of their incongruity, but they assist in getting a handle on how to understand the causes of the perceived “tension” between the two Acts. It could be worthwhile to pitch the relationship between the SPLUMA and the MFMA on the continuum between complementary and competing. As part of this exercise, it will probably be necessary to critically question the degree to which the two Acts value, in the words of Buitelaar and Sorel, “legal certainty over flexibility”.³⁸

Transforming urban space in the face of legislative fragmentation: remaining questions and some recommendations

The fragmentation of law relevant to developmental local government is a long-observed

³⁶ Edwin Buitelaar, Maaike Galle and Niels Sorel “Plan-led planning systems in development-led practices: an empirical analysis into the (lack of) institutionalisation of planning law” 2011 (43) *Environment and Planning A* 931.

³⁷ Edwin Buitelaar, Maaike Galle and Niels Sorel “Plan-led planning systems in development-led practices: an empirical analysis into the (lack of) institutionalisation of planning law” 2011 (43) *Environment and Planning A* 931.

³⁸ Edwin Buitelaar and Niels Sorel “Between the rule of law and the quest for control: Legal certainty in the Dutch planning system” 2010 (27) *Land Use Policy* 984.

phenomenon in South Africa that demonstrates an uneven prioritisation of issues and legal requirements. Put differently, the legislative framework applicable to developmental local government appears to be biased by design in that it prioritises conflicting rationalities. The implementation of the SPLUMA and the MFMA offers a case in point. The SPLUMA is a framework Act that regulates land and the use of space. It seeks spatial transformation and provides the legislative contours of some of the actions required of a municipality in order to achieve spatial inclusivity and reform. However, the SPLUMA is not overly prescriptive to the point that it inhibits municipal creativity and meaningful action fit for the unique spatial transformation needs of different municipal areas. The Act sets the goalposts but leaves the step-by-step journey towards those goals up to municipalities and local communities. The SPLUMA is flexible legislation in the sense that its instruments (e.g. SDFs and municipal land use planning) allow for adaptation to changing needs and circumstances, and conformance with the Act is relative.

The MFMA is different from the SPLUMA in a number of ways. The MFMA is fully cross-sectoral and applies to virtually every project and process of the municipality. Due to the nature of financial management, the Act deals with procedures, processes, discipline and absolute conformance. While the Act is critical for the realisation of “higher order local government outcomes” such as equality, spatial justice and resilient communities, it appears not to have been drafted from the perspective of these outcomes. The MFMA has been designed to limit financial risk, to create a sound financial management framework for municipalities and to unlock the capacity of municipalities to generate revenue. It regulates fiscal discipline and good financial governance. It is, for lack of a better description, a more “inflexible” type of legislation in the sense that its instruments (e.g. budgets and supply chain management frameworks) create rules applicable across municipalities and departments in a municipality, follow pre-determined procedures, and set out processes aimed at transparency, accountability and responsibility.

In some sense it is possible to say that the SPLUMA is an outward-facing Act focussed on improving the well-being of people in an equal fashion. The MFMA is an inward-facing Act dedicated to improving the performance, financial capacity and standing of a municipality. Unless means are found for the MFMA and the SPLUMA to complement each other in how they are interpreted and implemented, it will be nigh impossible to achieve stability in developmental local government.

As one of the participants in this project also observed: “law is always expected to be interpreted in context. The rule-based search for certainty in law often neglects the relevance of the context – the strange relationship between space, people and need – which is a dynamic relationship. The preoccupation with rules, unfortunately, locks out innovation and progress and side-lines reality.” There is accordingly something to be said for how and the context in which the letter of the law (especially the MFMA) is interpreted.

Canvassed against the above realisations, there is a need to take a few steps back and identify what is at the heart of the problem(s) as experienced by the BEITT concerning the merger of SPLUMA and the MFMA in practice. Is the problem legislative “alignment” or perhaps something else, e.g.

- Lack of alignment between the operations and planning of line functionaries in the three spheres of government?
- Often too narrow an interpretation of the law or a provision in law, specifically the MFMA?
- Inadequate or absent communication between local government officials / managers responsible for the spatial planning and financial management portfolios in municipalities?
- A general problem with the design, implementation and enforcement of the MFMA that also happens to affect spatial transformation objectives?
- A general problem with the design, implementation and enforcement of the SPLUMA that happens to be intensified by the provisions of the MFMA?
- A dominating compliance culture that tends to play in the favour of the MFMA?

Intervention will be necessary to ensure that the joint implementation of the SPLUMA and the MFMA is complementary and that it serves the mandate of developmental local government. Five of the possible interventions include:

- The relevant authorities should respond to perceptions with the relevant information. Much of what this research has revealed dangerously hinges on the perception of local government officials and practitioners who feel discouraged.
- Awareness-raising and training of Councils and local government officials:
 - responsible for financial management and controls regarding the nature,

requirements and length of the projects, programmes and initiatives typically required for spatial transformation in the South African context. This includes training on the gist and objectives of the SPLUMA, bearing in mind the meaning of developmental local government; and

- responsible for spatial and strategic planning and the spatial transformation project regarding the rationale of the processes, procedures and requirements forming part of financial management in the local government context. This includes training on the MFMA, its Regulations, and relevant circulars of National Treasury. The extensive existing efforts of National Treasury in this regard should be acknowledged.³⁹
- The compulsory establishment of forums or structures in every municipality for joint and coordinated financial and spatial transformation planning and the proper alignment of time-frames as part of proper project management. The forums should focus on breaking down the silos (e.g. finance and planning) as well as the interconnected processes within the silos (e.g. investment planning, budgeting, cost control, built infrastructure project design, land value capturing etc.); and
- The identification of specific provisions in the SPLUMA or activities emanating from it that are irreconcilable with the requirements of the MFMA and the subsequent initiation of a law reform / law revision process to be spearheaded by the South African Law Reform Commission in collaboration with SALGA, for example. Further, only through an in-depth review of real-life examples of misalignment will it be possible to determine to what extent the reform of the SPLUMA and / or the MFMA is necessary, if at all.
- Improvement of the understanding of the critical nexus between a municipality's IDP, the SDF, the Service Delivery and Budget Implementation Plan (SDBIP) as

³⁹ See, for example, the Urban Renewal Taxing Incentive <http://mfma.treasury.gov.za/MFMA/Urban%20Development%20Zones/Urban%20Renewal%20Tax%20Incentive%20-%20Guide%20for%20Investors.pdf>; Costing Methodology Guideline for Local Government <http://mfma.treasury.gov.za/Guidelines/Documents/Municipal%20Costing%20Guide>; Dummy Budget Guide <http://mfma.treasury.gov.za/Guidelines/Pages/DummyBudgetGuide.aspx>; Municipal GRAP Manuals <http://mfma.treasury.gov.za/Guidelines/Pages/grap.aspx>; Cities Support Programme [https://csp.treasury.gov.za/csp/Pages/default.aspx.cities support programme](https://csp.treasury.gov.za/csp/Pages/default.aspx.cities%20support%20programme).

well as the Municipal Planning and Performance Management Regulations. Judging from the practitioner responses received, it seems as if there is a need also to clarify the purpose and function of each of these tools separately to ensure that each serves its rightful purpose in a municipality's pursuit of spatial transformation.

Conclusion

There are many possible reasons for the long drawn out and much longer than expected realisation of spatial transformation in South Africa's cities and towns. These range from corruption, inefficiency, political power-brokering, the excessive focus on legal compliance and the lack of multi-disciplinary skills among local government officials, to the influence of history, the present-day influence of the private sector over built environment decisions and the trajectory of spatial change. The difficulties encountered by planning practitioners (especially the BEITT) concerning the inflexibility of and stumbling blocks created by the MFMA and the high priority which compliance with it enjoys, are only aspects of the frustration experienced in the quest for spatially just, inclusive, safe, resilient and sustainable cities. The MFMA and municipal finance fraternity cannot reasonably take the bulk of the blame for a spatial transformation process that seems to be moribund. Some participants in this project stated that the actual problem is the difficulty of *implementing* the technicalities in the law and the implications this has for measuring outcomes. However, money and financial rules make the local government world go round. It is therefore important that the issues that planning practitioners (the BEITT) experience with the MFMA in an attempt to execute the spatial transformation mandate be heard and acknowledged. That mandate should be sufficiently addressed and taken seriously by municipalities in the collective (the administration and Council alike), as well as by those organs of state responsible for local government oversight and support. Part of this exercise is the acknowledgement that many if not most issues currently experienced in local government are simply not solvable through the application of the law alone, and that implementation is the job of people, not of the law.

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