



Reference: 15/2

Circular: EADP 0010/2016

THE USE OF THE LAND REFORM: PROVISION OF LAND AND ASSISTANCE ACT 1993 (ACT NO 126 OF 1993) FOR TOWNSHIP ESTABLISHMENT PURPOSES

1. It has been brought to the attention of this Department that the *Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993)*, as amended, ('PLAA') has been or is being used by some municipalities to establish townships or subdivide farms as a means to circumvent the correct procedures. The purpose of this Circular is to alert municipalities to the fact that this practice is not only unconstitutional, but may lead to judicial reviews which could have negative impacts on the communities which our municipalities are trying to serve. It should be noted that the content of this Circular has been consulted with the Western Cape Regional Office of the Department of Rural Development and Land Reform ('DRD&LR').

2. Background

2.1. PLAA was drafted and came into effect prior to the new Constitutional dispensation in South Africa and provides for the Minister of Rural Development and Land Reform (and his delegated officials) to "designate" "certain land" for the "purposes of settlement" in order, as per section 1A of the Act (as amended):

2.1.1. "to give effect to the land and related reform obligations of the State in terms of section 25 of the Constitution of the Republic of South Africa, 1996";

2.1.2. "to effect, promote, facilitate or support the maintenance, planning, sustainable use, development and improvement of property contemplated in this Act";

2.1.3. "to contribute to poverty alleviation"; and

- 2.1.4. *"to promote economic growth and empowerment of historically disadvantaged persons"*.
- 2.2. Once the land has been designated in terms of PLAA, section 2(4) of the Act states that *"the laws governing the subdivision of agricultural land and the establishment of townships shall not apply in respect of land referred to in subsection (1) unless the Minister directs otherwise in the notice in question"* and section 5 states that *"the developer may, subject to the conditions contemplated in section 2 (3), subdivide the designated land or cause it to be subdivided in accordance with the provisions of this Act into pieces of land for small-scale farming, residential, public, community, business or similar purposes"*.
- 2.3. As was made clear in the Constitutional Court's Gauteng Development Tribunal judgement, amongst others:
- "...planning in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land."*
- 2.4. The Constitution of the Republic of South Africa *"...specifically requires the spheres of government to respect the functions of other spheres, not to assume any functions or powers not conferred on them by the Constitution and not to encroach upon the functional integrity of other spheres. This is amplified by section 151(4) which precludes the other spheres from impeding or compromising a municipality's ability or right to exercise its powers or perform its functions."*
- 2.5. The abovementioned judgement goes on to recognise that *"...the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs."*
- 2.6. Referring to the Wary Holdings Constitutional judgement, it was further stated that *"...this Court recognised concurrency of powers between the national and local governments..."* and that there *"is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of 'agricultural land', the one may in effect veto the decision of the other."*
- 2.7. The judgement goes on to note that *"...in granting applications for rezoning or the establishment of townships the development tribunals encroach on the functional area of municipal planning. The form that such encroachment takes matters not."*

- 2.8. Similar to the findings of in the Gauteng Development Tribunal case, it is clear that in as far as PLAA empowers the Minister of Rural Development and Land Reform to assume the function or power of "municipal planning" in terms of the designation ("rezoning") of land, establishing townships and controlling and regulating the use of the land in question, PLAA causes Rural Development and Land Reform to assume the function/power of "municipal planning" which it no longer has, and in doing so Rural Development and Land Reform is encroaching on the functional integrity of, and impeding and compromising the ability and rights of municipalities to exercise their powers and to perform their functions. As such, the relevant sections of PLAA are inconsistent with the Constitution (specifically section 156 of the Constitution read with Part B of Schedule 4).
- 2.9. Likewise, "provincial planning", which is an exclusive provincial function/power, may not be assumed, encroached on, impeded or compromised by Rural Development and Land Reform when administering PLAA.
- 2.10. In terms of the relevant sections of PLAA being inconsistent with the Constitution, it must be stressed that while section 2(4) of PLAA states that "*the laws governing the subdivision of agricultural land and the establishment of townships shall not apply in respect of land referred to in subsection...*", the section goes on to state "*...(1) unless the Minister directs otherwise in the notice in question*".
- 2.11. Section 2(3) also provides that the Minister or his/ her delegate may "...impose conditions for the use of the land designated".
- 2.12. In interpreting the above, while PLAA was used to empower DRD&LR to also perform the "municipal planning" functions prior to the Constitution, this power fell away when the Constitution came into effect. From the date of effect of the Constitution, PLAA had to be administered concurrently with "*municipal planning*" administered by Municipalities. As allowed for by section 2(4) of PLAA, if in certain instances there is still a need to designate land in terms of section 2(4) of PLAA, DRD&LR must, in order to not be inconsistent with the Constitution, in all instances direct that the municipal planning and provincial planning laws also still apply together with any other legislation that also still apply.
- 2.13. It must be stressed that a designation in terms of PLAA would also not result in the National Environmental Management Act, 1998 (Act No. 107 of 1998) ('NEMA') not being applicable. NEMA and the Environmental Impact Assessment Regulations do not govern "*the subdivision of agricultural land and the establishment of townships*", but rather environmental management in terms of specific identified activities.

2.14. With regard to the fact that PLAA must be administered concurrently with the other applicable legislation, the South African Law Reform Commission in their December 2011 Report on the Legislation Administered by the DRD&LR which formed part of Project 25: Statutory Law Revision found that while PLAA was drafted and enacted prior to the Constitution, PLAA was still useful in certain instances, and *“especially useful in that the designations invariably connect environmental and developmental issues with the initial designation of land. This is noteworthy because environmental conservation and the achievement of development goals are not necessarily included in the various individual land redistribution tools as such”* and that *“Published notices also include references to environmental conservation (e.g. the carrying capacity of land is invariably set out in the notice and compliance with the water legislation is usually specifically provided for) and development”*. Find attached, as Annexure A, a copy of a PLAA designation which indicates, amongst others, that:

“The Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983) will apply to the utilization of the land.”

- “The National Water Act, 1998 (Act No. 36 of 1998) shall apply In order to prevent the pollution of the public water.”
- “The National Environmental Management Act, 1998 (Act No. 107 of 1998) together with EIA Regulations shall apply to minimise/prevent negative impact on environment.”

The use of PLAA to designate land for development in conjunction with all other relevant laws is still possible if processed in this way and would be Constitutionally compliant.

2.15. The designations in terms of PLAA that were brought to our attention however do not direct or condition that the other legislation also still applies. Whether or not a designation in terms of PLAA directs or conditions it or not, a designation in terms of PLAA can no longer do away with the “municipal planning”, “provincial planning” and other legislative requirements that are also still to be complied with. The fact that the Minister of Rural Development and Land Reform may have approved a development in terms of the Land Reform: Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993) does not allow for development to commence without all other legislative requirements being met.

2.16. To date all Municipalities in the Western Cape, bar one, have introduced the new planning regime through implementing the Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013) ('SPLUMA'), the Western Cape Land Use Planning Act, 2014 (Act No. 3 of 2014) and their own Municipal Land Use Planning Bylaws.

- 2.17. This new planning regime has to be adhered to when “*the subdivision of agricultural land and the establishment of townships*” are being applied for, as both categories of applications represent “municipal planning” functions.
3. Municipalities and other authorities are encouraged to act responsibly with respect to the use of old order legislation such as the Land Reform: Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993), as amended. The indiscriminate use of this legislation may lead to judicial challenges, which in turn will cause long delays in the delivery of services to communities who can ill-afford it.
 4. If any further assistance is required regarding the contents of this Circular, please direct such request to Theo Rebel on 021 483 8375 or Theo.Rebel@westerncape.gov.za.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Piet van Zyl', with a horizontal line underneath the signature.

PIET VAN ZYL
Head of Department
Environmental Affairs and Development Planning

Date: 15 July 2016

No. 806

27 September 2011

**PROVISION OF LAND AND ASSISTANCE ACT, 1993 (ACT 126 OF 1993):
DESIGNATION OF REMAINDER OF ERF 1178, SITUATED IN THE
EMNAMBITHI/LADYSMITH LOCAL MUNICIPALITY, PROVINCE OF KWAZULU-
NATAL; FOR SETTLEMENT PURPOSES.**

I, Bonginkosi Zulu, in my capacity as the Acting Chief Director of the Department of Rural Development and Land Reform in KwaZulu-Natal, by virtue of powers delegated to me by Minister of Rural Development and Land Reform-

- (a) Hereby designate under section 2(1) of the Provision of Land and Assistance Act, 1993 (Act 126 of 1993).

Remainder of Erf 1178, in extent of 47.6372 hectares for settlement purposes, situated in the EMnambithi/Ladysmith Local Municipality, Province of KwaZulu-Natal.

- (b) Hereby impose under section 2(3) of the said Act, the following conditions for the use of the land so designated:

1. The land may be used for settlement purposes by the EMnambithi/Ladysmith Local Municipality and their intended beneficiaries only.
2. The Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983) will apply to the utilization of the land.
3. The National Water Act, 1998 (Act No. 36 of 1998) shall apply in order to prevent the pollution of the public water.
4. The National Environmental Management Act, 1998 (Act No. 107 of 1998) together with EIA Regulations shall apply to minimise/prevent negative impact on environment.
5. The Department will have the right of first refusal in the event that the Owner intends to sell or donate the Property (including the disposal of any portion thereof or share therein), or the Property is to be repossessed by a development or commercial financial institution.


B.A.ZULU

ACTING CHIEF DIRECTOR: KZN PSSC

DATE: 23/8/11