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2003
SA Public Law
http://hdl.handle.net/10539/12313
Van Wyk, J & Boshoff,B. 2003 The Disaster Management Act 57 of 2002: part panacea or ready recipe for disaster?SA Public Law. Vol. 18 No. 2 pp. 464-474.

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The Disaster Management Act 57 of 2002: part panacea or ready recipe for disaster?*

1 Introduction

Floods, earthquakes, landslides, volcanic eruptions, explosions, runaway fires, and transportation and other accidents are all occurrences with which we are familiar, if only vicariously. These events can presumably all be categorised as 'disasters'. But can the same be said for the dumping of hazardous waste, ships running aground, farm invasions and large-scale evictions, major traffic accidents and the issue of cross-border or internal refugees? When is an event considered a 'disaster', who determines that an event is a 'disaster', who can do what to prepare for the 'disaster' and what can be done to alleviate the effects of the disaster after it has happened?

Our courts (in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 7 BCLR 652 (CC) and *Modderklip Boerderye (Edms) Bpk v President van die RSA* 2003 6 BCLR 638 (T)) have started to address the issue of 'disasters' and have held that plans must be put in place to accommodate the effects of 'disasters' (see 2 below).

Legislation, in the form of the Local Government: Municipal Systems Act 32 of 2000 provides, in chapter 5, more specifically section 26(g), that a disaster management plan must be included in the Integrated Development Plans (IDPs) of every municipality. The IDP is a principal strategic planning instrument, which guides and informs all planning, budgeting, management and decision making in a municipality. As such, disaster management is part and parcel of the development planning process (see eg *White Paper on Disaster Management* (GN 23 *GG* 19676 dated 15-01-1999 para 2.3.1); Scheepers *A Practical guide to law and development* (2000) 267-268).

At the end of 2002 the Disaster Management Act 57 of 2002 was published. Addressing the situation of disaster management has come none too soon.

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*Acknowledgements to Dr Krisno Nimpuno, Executive Director, Office of Disaster Preparedness for Africa, University of the Witwatersrand, Johannesburg for comments.

However, the following questions arise in relation to the new Act: What is a 'disaster'? Does the Act provide for immediate relief when a 'disaster' has occurred? Does the plethora of institutions, procedures and plans as prescribed by the Act not create a bureaucracy too large to adequately, efficiently and immediately deal with any disaster? Will this Act be able to tackle all the issues around 'disasters'? To what extent does the Act envisage a system of policies, plans and programmes to address the consequences of a 'disaster'?

Kofi Annan (*Living with risk* (2002) Geneva ISDR 3) has stated that '… a lack of regulatory mechanisms both increase the risk and exacerbates the effects of disasters'. In the context of this discussion the question must be asked whether the converse is also true?

2 Three South African disaster scenarios

While the promulgation of legislation to deal with disaster management was being debated, our courts had to deal with the tangible effects of 'disaster' in one form or another and to various degrees, they illustrate the intersection of 'natural' hazards and human agency. Whether the events in these cases are 'disasters' or not will be answered later.

2.1 Government of the Republic of South Africa v Grootboom *2001 1 SA 46 (CC)*

This decision has been frequently and competently referred to by authors and will not be dealt with in detail here (see eg Van der Walt 'Living with new neighbours: landownership, land reform and the property clause' 2003 *SALJ* 816-840; Pienaar 'The housing crisis in South Africa: Will the plethora of policies and legislation have a positive impact?'2002 *SAPR/PL* 336-370; Huchzermeyer 'Housing rights in South Africa: Invasions, evictions, the media and the courts in the cases of Grootboom, Alexandra and Bredell' (2003) 14(1) *Urban Forum* 80-107 and reply by Hopkins 'Democracy, government, policy, and law in South Africa' 2003 *Urban Forum* 108-118).

It has also set the precedent for many decisions dealing with socio-economic rights (eg the decisions mentioned in 2.2 and 2.3; *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (P) Section 21 Inc* 2001 2 SA 1 (CC); *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 3 All SA 741; *Treatment Action Campaign v Minister of Health* 2002 6 BCLR 625 (W); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC); 2002 3 SA 265 (CC); *City of Cape Town v Persons Unlawfully Occupying Erf 1800, Capricorn: Vrygrond Development* 2003 8 BCLR 878 (C)).

In the *Grootboom* case the 'disaster' was the eviction of about 900 people (of whom 510 were children, 276 being younger than eight years), from the

Wallacedene settlement in Cape Town, which had been earmarked for low cost housing. One of the evicted people, Mrs Grootboom, approached the court on behalf of the group on the basis that the community's constitutional right to adequate housing and the children's right to shelter had been denied.

In the context of the Constitution the court stated that

> the state is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well directed policies and programmes implemented by the Executive (para 42).

The court concluded that as with legislative measures, the existence of a programme to cater for people in desperate need was only a starting point. What was required was the implementation of that programme by taking all reasonable steps necessary to initiate and sustain it. It found that the programmes adopted by the Cape Metro fell short of the constitutional requirements of section 26(3) in that no provision was made for relief to the categories of people in desperate need (para 69). To comply with the section required 'the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need' (para 96).

2.2 Minister of Public Works v Kyalami Ridge Environmental Association *2001 7 BCLR 652 (CC)*

The 'disaster' which gave rise to this decision was the flooding, during the summer of 2000, of the Jukskei river which ran through the Alexandra Township, to the north of Johannesburg. The floods led to the destruction of the homes of some 300 people living on the banks of the river below the flood line. Immediately after the flood, the victims were given shelter in churches and halls. The conditions under which the victims were living resulted in a meeting with certain authorities where it was agreed that there was an urgent need to make provision for the accommodation of the flood victims and to establish a transit camp for this purpose (paras 2-3). It was decided that the victims be accommodated on the grounds of the Leeuwkop prison.

What gave rise to the court decision was the action (or inaction) of officials involved in settling the flood victims, in terms of communicating with the residents in the area surrounding the prison. A residents' association was formed, which demanded the suspension of building operations on the prison grounds, on the basis that the establishment of the transit camp on the site involved an alteration in the use of the land and was being carried out in contravention of the Environment Conservation Act 73 of 1989 and the National Environmental Management Act 107 of 1998.

Counsel representing the Kyalami residents indicated that the legislative framework empowering the government to deal with the consequences of natural disasters included the Development Facilitation Act 67 of 1995, the

Less Formal Township Establishment Act 113 of 1991; the Civil Protection Act 67 of 1977 and the Gauteng Civil Defence Ordinance 20 of 1977. Since none of these statutes could be relied on in the circumstances, the court held that '…the legislative framework … was neither designed for nor appropriate to the provision of relief to the victims of the flood' (para 48).

It was this lack of any legislative framework (or programme for that matter) to accommodate the victims of the flood, which led to the court stating that

> this has been a most unfortunate case. When the proceedings commenced, the government contemplated that the flood victims would be accommodated on the prison farm temporarily and that they would be allocated permanent accommodation elsewhere within 6-12 months. Later it was said that the time would at most be 12-24 months. Nearly a year has passed since then. In the meantime the flood victims have been living in deplorable circumstances, and there is no word as to when permanent accommodation will become available. It is time that attention be paid to their needs. (para 111).

2.3 Modderklip Boerdery (Edms) Bpk v President van die RSA *2003 6 BCLR 638 (T)*

On a day in May 2000, fifty shacks, accommodating some 4000 squatters were erected on the farm Modder East in the Ekurhuleni municipality. Complaints of trespass were laid and meetings held with the police, but to no avail. By October 2000 the squatters had laid out about 4000 units which were occupied by about 18 000 people. During October an application to evict the squatters was instituted. In April 2001 the Witwatersrand Local Division of the High Court made an order that structures and shacks erected by squatters be demolished and removed by them from the land within two months, failing which the Sheriff was authorised to demolish and remove. The squatters remained in occupation after the expiry of the two months. When a warrant was issued which the Sheriff was requested to execute, the Sheriff replied on 21 June 2001 that an amount of R 1,8 million be deposited in a trust account before the warrant for the eviction could be executed because the assistance of private contractors would be needed. In the meantime the numbers of squatters continued to grow, reaching a number of 35, 000.

An application for a declaratory order was launched on 3 September 2001 against the President of the RSA, the Minister of Safety and Security, the Minister of Agriculture and Land Affairs, the National Commissioner of Police, the Sheriff, the Ekurhuleni Metropolitan Municipality and the squatters. The case was finally heard on 20 November 2002.

In the context of this discussion the court had to decide on the position of the government with regard to its duties in terms of sections 26(1), and (2) read with section 25 of the Constitution. The court found that the government's existing policy, actions and programmes failed with regard to their constitutional obligations – on the one hand section 25(1), in the sense that applicant's rights were infringed because of the refusal to evict the squatters and, on the other section

26(1) and (2) read with section 25(5), in the sense that reasonable legislative and other measures must be in place to realise the evictees' right of access to adequate housing (693A-F). The court also held that section 165(4) of the Constitution, which provides that 'organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts', had to be adhered to.

The conclusion reached from these court decisions is that government is obliged to put in place legislation, policy, actions and programmes to address the needs of people affected by a variety of 'disasters'. Against this background it must be determined whether the recently promulgated Act will be at least part panacea in dealing with disasters.

3 Events giving rise to the acceptance of the Act

In 1998 a *Green Paper on Disaster Management for South Africa* was published. It was followed, a year later, by a *White Paper on Disaster Management.*

The *White Paper* contains seven key policy proposals (para 1.3). These are

- the urgent integration of risk reduction strategies into development initiatives;
- the development of a strategy to reduce the vulnerability of South Africans – especially poor and disadvantaged communities – to disasters;
- the establishment of a National Disaster Management Centre;
- the introduction of a new disaster management funding system to ensure that risk reduction measures are taken, sufficient capacity to respond to disasters is built and that adequate post-disaster recovery is provided;
- the establishment of a framework to enable communities to be informed, alert and self reliant and capable of supporting and cooperating with government in disaster prevention and mitigation;
- the establishment of a framework for coordinating and strengthening the current fragmented training and community awareness initiatives;
- the introduction and implementation of legislation.

One of the *White Paper's* most significant conclusions was that South African legislation did not deal adequately with disaster management, a major shortcoming being that legislation focused on dealing with a disaster after it had occurred and largely ignored prevention and risk reduction. Moreover, the legislative framework 'is extremely confusing because of the many levels at which decisions can be taken. There is no clear delineation of authority and no appropriate process or criteria for disaster declarations' (para 5.1).

Up until the present (the new Act is not yet in operation), there are only two national statutes in place which deal with some form of disaster management: The Civil Protection Act 67 of 1977 empowers the Minister for Provincial Affairs and Constitutional Development to declare a 'state of disaster' but it does not indicate which actions other ministries should take. The Fund Raising Act 107 of 1978 provides for the declaration of a disaster in order to provide relief to victims.

Along the lines proposed in the *White Paper* the Disaster Management Act 57 of 2002 was enacted at the end of 2002.

4 Legislative competence

As the point of departure in determining the responsibilities of the different spheres of government with regard to disaster management the Constitution contains some relevant provisions. Part A of Schedule 4 lists disaster management as a functional area of concurrent legislative competence, meaning that both national and provincial government are competent to pass legislation on disaster management. Section 41(1)(b) provides that all spheres of government and all organs of state are required to 'secure the well-being of the people of the Republic'. Section 24 provides that 'everyone has the right to an environment that is not harmful to their health or well-being …'. In a similar context section 152(1)(d) requires local government to promote a safe and healthy environment.

5 Disaster Management Act 57 of 2002

This Act provides for 'an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post disaster recovery; the establishment of national, provincial and municipal disaster management centres; disaster volunteers …' (long title).

5.1 Definition of 'disaster'

The Act provides that a 'disaster'

> means a progressive or sudden, widespread or localised, natural or human caused occurrence which –
> (a) causes or threatens to cause –
> (i) death, injury or disease
> (ii) damage to property, infrastructure or the environment; or
> (iii) disruption of the life of a community; and
> (b) is of such a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.

This definition is very wide and can include any of the incidents mentioned in the introduction. However there is a limiting factor, namely that the disaster must be so great, that in order to cope with its effects, those affected by it must require resources other than their own.

5.2 What occurrences can be classified as 'disasters'?

The Disaster Management Programme of the United Nations Centre for Human Settlements (UNCHS) and the Disaster and Emergency Reference Center (DERC) defines a disaster as a 'calamity beyond the coping capacity of the effected (*sic*) population, triggered by natural or technological hazards or by human action.'

(Nimpuno (ed) *Disaster management glossary* (1998) 34). The editor of the glossary adds that disasters can traumatise populations, perhaps across generations, and have long-lasting negative effects on development. 'Disaster reduction is therefore gaining recognition as an important aspect of development planning' (Nimpuno 2).

The International Strategy for Disaster Reduction (ISDR) Secretariat has a similar definition of disasters, but maintains that 'a disaster is a function of the risk process. It results from the combination of hazards, conditions of vulnerability, and insufficient capacity or measures to reduce the potential negative consequences of risk' (Nimpuno 25).

It can be argued that the literature considers disasters to include fires, floods, erosion, refugees, cyclones, droughts, pollution, landslides, earthquakes, resettlement, volcano eruptions, and industrial disasters (Nimpuno 130).

The South African Act does not list such phenomena, and reflects the UNCHS/DERC definition of disaster in terms of people's ability to cope with such a situation (see 5.1 above).

Having determined what constitutes a 'disaster', the most crucial aspect that follows is how to manage these disasters.

5.3 Disaster management

'Disaster management' is defined in the Act as

> a continuous and integrated multi-sectoral, multi disciplinary process of planning and implementation of measures aimed at –
> (a) preventing or reducing the risk of disasters;
> (b) mitigating the severity or consequences of disasters;
> (c) emergency preparedness;
> (d) a rapid and effective response to disasters;
> (e) post-disaster recovery and rehabilitation.

5.4 Structure for disaster management

The Act sets out a complex structure for disaster management. This structure involves all spheres of government.

5.4.1 Intergovernmental Committee on Disaster Management

As an overarching institution the Act introduces an Intergovernmental Committee on Disaster Management. This committee consists of cabinet members, MECs of each province involved in disaster management (selected by the Premier), and members of municipal councils selected by the South African Local Government Association. This committee must give effect to the principles of cooperative governance as set out in chapter 3 of the Constitution, is accountable to, and must report to cabinet on the coordination of disaster management in all spheres of government, and must advise and make recommendations to cabinet on issues relating to disaster management as well as the national framework (s 4(3)).

5.4.2 National disaster management

The Act prescribes a whole range of institutions and structures within the national sphere of government. These include the following:

(a) National Disaster Management Centre. This Centre is established (s 8) with the objective of promoting an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities (s 9). The powers and duties of the National Centre are mainly advisory, monitoring, research, information gathering, consultation, education, and training. One of the most important functions of the centre will be its role as a repository of, and conduit for, information concerning disasters and disaster management. For this purpose it must collect, process and analyse information and develop an electronic database containing information on disasters (s 17(1)).

(b) National Disaster Management Advisory Forum. The responsible Minister establishes the national forum which is headed by the head of the Centre (s 5(2)), and consists of senior representatives of each department represented on the Intergovernmental Committee (s 5(1)(b)), senior representatives of provincial departments represented on the Intergovernmental Committee (s 5(1)(c)), municipal officials selected by SALGA (s 5(1)(d)), representatives of other role players which may include, *inter alia*, organised business, organised labour, traditional leaders, organised agriculture, medical organisations, higher education institutions and experts (s 5(1)(e)).This forum is the body in which national, provincial and local government and other role players coordinate their actions and consult one another (s 5(3)).

(c) National Disaster Management Framework. The responsible Minister must prescribe a National Disaster Management Framework (s 6), which must provide a coherent, transparent and inclusive policy on disaster management for the Republic as a whole (s 7(1)). This framework must 'reflect a proportionate emphasis on disasters of different kinds, severity and magnitude that may occur in southern Africa, place emphasis on measures that reduce the vulnerability of disaster-prone areas, communities and households' and, *inter alia*, guide the development and implementation of disaster management, establish prevention and mitigation as the core principles of disaster management, facilitate cooperation in southern Africa, and the involvement of all relevant groupings, capacity building, give effect to cooperative governance, promote research and provide key performance indicators (s 7(2)).

(d) National Disaster Management Plans. Each national organ of state indicated in the national framework must prepare a plan setting out the way in which the concept and principles of disaster management are to

be applied, its role, responsibilities and capacity to fulfil that role, and particulars of strategies. It must also coordinate its plan with those of other organs of state (s 25(1)).

5.4.3 Provincial disaster management

The Act prescribes similar institutions in the provinces as in the national sphere. These institutions have similar responsibilities, duties and powers, but in a provincial context. These institutions exercise their powers and perform their duties within all the components of the national disaster management system (above 5.4.2). Each province must introduce the following:

(a) a provincial disaster management centre (ss 29-31)
(b) a provincial disaster management framework which must ensure an integrated and uniform approach to disaster management in the province (s 28(1))
(c) a provincial disaster management advisory forum (s 37) and
(d) disaster management plans (ss 38-39).

5.4.4 Municipal disaster management

In the same context as provinces, the Act prescribes similar institutions for the municipalities as in the national and provincial sphere. These institutions have similar responsibilities, duties and powers, but in a municipal context. These institutions exercise their powers and perform their duties within all the components of the national and provincial disaster management system (above 5.4.3). Each metropolitan and district municipality, and in the case of disaster management plans, local municipalities, must establish the following:

(a) a municipal disaster management centre (ss 43-45)
(b) a municipal disaster management framework (s 42)
(c) a municipal disaster management advisory forum (s 51) and
(d) municipal disaster management plans (ss 52-53).

5.5 Procedure in the case of disasters

Provision is made for the declaration of a national disaster (s 27), a provincial state of disaster (s 41) and a local state of disaster (s 55) as well as the responsibilities of the relevant spheres of government in the event of a disaster (ss 26(1), 40(1), 54(1)).

6 Integrated Development Planning

Disaster management is clearly part of development planning. The Local Government: Municipal Systems Act 32 of 2000 provides that the IDP of a municipality must include the municipal council's vision for the long term development of the municipality, the council's development priorities and objectives, spatial development frameworks and applicable disaster management plan (s 26).

The Disaster Management Act 57 of 2002 reinforces these provisions where it provides that a disaster management plan must form an integral part of the municipality's integrated development plan (s 53(1)).

Similarly a draft Land Use Management Bill 2001 (*GG* 22473 dated 2001-07-20) takes further the provision in the Local Government: Municipal Systems Act 32 of 2000 that municipalities must draw up spatial development frameworks. There is a difference in the way in which disaster management plans and spatial development frameworks are viewed. Spatial development frameworks are the sole responsibility of municipalities while disaster management straddles national, provincial and municipal spheres.

In terms of spatial development frameworks, the cooperation and alignment falls within *one* sphere, whilst with disaster management *all three* spheres of government are involved. It is difficult to envisage how a municipal disaster management plan will have to form an integral part of the municipality's integrated development plan (s 53(1)) whilst at the same time having to comply with both the national and the provincial disaster management plans (see further 7 below).

7 Test for cooperative governance

The Constitution sets out principles of cooperative governance in chapter 3.

Cooperative governance is also stressed in the Act (see eg s 4(3)(a), s 7(2)(l), s 25(1)(b)), s 30(1)(b)). If one examines the provisions which set out how this cooperation is to take place disaster management will indeed be a test for those constitutional directives.

The Disaster Management Act stresses that provincial disaster management frameworks must be consistent with the provisions of the Act and the national disaster management framework (s 28(2)). The municipal disaster management framework of every municipality must be consistent with the Act, the national disaster management framework and the relevant provincial disaster management framework (s 42(3)).

Similarly, the Act provides that the implementation of the disaster management plan of provincial organs of state and of municipalities will have to be coordinated and aligned with those of 'other organs of state and institutional role players' (s 38(1)(b)).

Disaster management centres and advisory forums will exist in national, provincial and municipal spheres. The provincial centres must 'assist the National Centre …' (s 32(1)) while the municipal centres will have to 'assist the National Centre and the relevant provincial disaster management centre…' (s 46(1)). Municipal centres will have to 'liaise and coordinate their activities with the National Centre and the relevant provincial disaster management centre' (s 44(4)).

Disaster management is relevant not only in South Africa, but southern Africa too, particularly with the spectre of cross border refugees and natural phenomena (especially droughts and floods in our subregion), which do not respect political boundaries. The national disaster management framework must 'reflect a

proportionate emphasis on disasters of different kinds, severity and magnitude that may occur in southern Africa … and facilitate cooperation in southern Africa' (s 7(2)). The national framework must also facilitate South Africa's cooperation in international disaster management as well as regional cooperation in southern Africa (s7(2)(c)). The National Centre may act in an advisory capacity to other governments and institutions in southern Africa (s 15(1)(d)).

8 Conclusion

As has been shown, the Act defines 'disaster' in very broad terms and rightly sees disaster management as being part of a 'multi-sectoral, multi-disciplinary process of planning and implementation'. All the incidents mentioned in the introduction can, therefore, be included in the definition and will have to be kept in mind when drawing up the frameworks and plans and when apportioning responsibilities in the various committees, forums and centres.

The Act proposes a complex structure for disaster management in South Africa. All spheres of government are expected to form part of that structure. Despite the fact that all of the disasters mentioned in the introduction can easily assume massive proportions and cut across local, provincial and even national boundaries, logically speaking most disasters will be 'municipal disasters' – from the scenarios sketched above it is obvious that most disasters will take place within the areas of jurisdiction of a single municipality or perhaps two municipalities.

Municipalities are at the coalface of governance in South Africa and in many respects municipalities carry the heaviest burden. In the context of integrated development planning, municipalities have the biggest responsibility. Yet, many municipalities are capacity burdened and many are financially crippled. To now place the additional burden of disaster management on municipalities without providing for capacity or funding is to make that burden too heavy. Is this not perhaps a ready recipe for disaster?

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