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# OVERVIEW OF PRESENTATION

## Title:

“Moving beyond Schedules 4B and 5B of the Constitution through strategic litigation: The wide powers of municipalities in fostering environmental objectives as illustrated in recent cases”

## Part 1: Introduction

### □ Fundamental transformation of post apartheid local government

- Constitutional protection – entire Ch 7 of the Constitution
- Distinct sphere of government albeit interrelated and interdependent
- Municipalities have self-governing powers over a range of issues – “governors” and being “governed”
- Expanded developmental mandate:
  - ✓ provide services to communities in a *sustainable manner*
  - ✓ provide democratic and accountable government
  - ✓ promote socio-economic development
  - ✓ promote a safe and healthy environment,
  - ✓ encourage the involvement of communities in local governance

## Part 1: Introduction cont.

- ✓ participate in national and provincial development programmes and
- ✓ contribute to the realisation of *inter alia* s 24 constitutional environmental right
- **Other obligations imposed by the Constitution re s 24**
  - Municipalities must respect, protect, promote and fulfil the s 24 constitutional environmental right
  - Municipalities must adopt “legislative and other measures” to give effect to s 24 of the Constitution
  - Ss 4(2)(j) and 23(1)(c) of the *Systems Act* explicitly compels municipalities to contribute towards realising s 24 of the Constitution
  - **Therefore, municipalities are legally bound to realise aspects of s 24 of the Constitution that fall within their shared or exclusive areas of competence**

## Part 1: Introduction cont.

### □ Areas of environmental competence?????

- Schedules 4B and 5B of the Constitution gives an indication of the areas of environmental competence for municipalities
- However, the exact contours of their powers in promoting the objectives of s 24 of the Constitution are subject to ongoing definition by way of legislation and policies as well as through interpretation by courts

### □ Purpose of paper:

This paper critically reflects on the potential of strategic litigation in redefining and expanding the powers of municipalities in fostering the objectives of s 24 of the Constitution beyond the rigid walls of Sch 4B and 5B.

## Part 1: Introduction cont.

### □ Approach : 4 sub-themes

- Part 2: Original powers and functions of municipalities in environmental protection
- Part 3: Environmental powers and functions beyond Schedules: the case of biodiversity protection
- Part 4: The contribution of recent case law
- Part 5: Lessons and implications of recent case-law for strategic environmental litigation

## Part 2: Original powers and functions of LG in environmental protection

### ❑ A central feature of the previous system of LG was lack of self-governing powers

- Subjected to strict control by provincial and national governments
- By-laws passed by local authorities were subject to the approval of the Provincial Administrator
- local authorities reduced to decentralised executive agencies for relevant central government departments

### ❑ Self-governing powers of LG is now entrenched in the Constitution

- The powers and functions of LG have been confirmed and explained by especially the CC in several cases

## Part 2: Original powers cont.

- In *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC), the CC said at par 60:

The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which *the sphere of local government is interdependent, 'inviolable and possesses the constitutional latitude within which to define and express its unique character' subject to constraints permissible under our Constitution.* A municipality under our Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial and national legislation. *A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of the municipality is not always invalid only for the reason that no legislation authorises it. Its powers may derive from the Constitution or from legislation of a competent authority or from its own laws*

## Part 2: Original powers cont.

- Original powers of municipalities are set out in s 156 of the Constitution
- A municipality has executive and legislative authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution
- Original powers and functions of municipalities in the area of environmental protection **appears** limited to "brown issues" such as: **air and noise pollution; municipal health services; sanitation services; refuse removal, refuse dumps, and solid waste disposal; fire fighting; sewage disposal; and municipal planning**

## Part 2: Original powers cont.

- provincial and national governments have a limited supervisory authority with regard to the functional areas in Schs 4B and 5B
- the original powers and functions of municipalities cannot be removed or amended by national or provincial legislation except by an amendment of the Constitution itself
- Municipalities have **the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions** – s 156(5) of the Constitution
- The CC has indicated that s 156 and Schedules 4B and 5B are not the only source of local government's powers

## Part 3: Environmental powers beyond Schedules: the case of biodiversity protection

### □ Institutional subsidiarity: A new feature

#### ■ S 156(4) of the Constitution:

“The national and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 and Part A of Schedule 5 which necessarily relates to local government, if –

(a) that matter would most effectively be administered locally; and  
if

(b) the municipality has the capacity to administer.”

- From the above provision, it is clear that environmental functions contained in Schedule 4A and Schedule 5A to be assigned to local government

## Part 3: Environmental powers beyond Schedules cont.

### □ The Bill of Rights

- The Bill of Rights has a direct bearing on LG's environmental powers and duties
- measures adopted to give effect to s 24 should be directed towards preventing pollution and ecological degradation; promote conservation; and secure ecologically sustainable development etc
- The degree of responsibility of the three spheres of government in realising s 24 of the Constitution may differ, especially in accordance with their related powers and functions and access to resources

## Part 3: Environmental powers beyond Schedules cont.

- ❑ **Framework and sector-specific environmental legislation and policies**
  - The *National Environmental Management Act* (NEMA) 107 of 1998 outlines environmental duties for LG and provides a number of environmental law principles that should guide municipalities' interpretation, administration and implementation of environmental matters – s 2 of NEMA

## Part 3: Environmental powers beyond Schedules cont

### ❑ Sector-specific legislation and policies on biodiversity protection

- There are diverse laws and policies on this subject. The paper considered:
  - ✓ The *National Environmental Management: Biodiversity Act* (NEMBA) 10 of 2004
  - ✓ The *National Environmental Management: Protected Areas Act* (NEMPA) 57 of 2003
  - ✓ The *National Biodiversity Strategy and Action Plan* (2005) and
  - ✓ The *National Biodiversity Framework* (2009)

## Part 3: Environmental powers beyond Schedules cont

### ❖ *National Biodiversity Framework (NBF) of 2009*

- One of the priority actions identified in the NBF is to establish a national programme that builds the capacity of municipalities to include biodiversity opportunities and constraints in their planning and operations
- The NBF equally acknowledges the potential role of local government in biodiversity management in several paragraphs:

*Although conservation is not a function of the local sphere of government in terms of the Constitution, municipalities are obliged to provide a safe environment for all residents and to contribute towards sustainable development. In terms of these obligations, municipalities must take biodiversity considerations into account in their planning, decision-making and other functions. See *National Biodiversity Framework (2009) 52**

## Part 3: Environmental powers beyond Schedules cont

### ❖ NEMBA

- NEMBA provides a direct role for municipalities in biodiversity conservation:
- A municipality that desires to contribute towards biodiversity management must submit to the Minister for approval a draft management plan for: a listed or unlisted ecosystem which warrant special conservation attention; listed or unlisted indigenous species which warrant special conservation attention; or a migratory species to give effect to the country's obligations in terms of binding international agreements
- The Minister may approve the draft biodiversity management plan, after establishing that the municipality is willing and capable of its implementation

## Part 3: Environmental powers beyond Schedules cont

- A biodiversity management plan must take into consideration a municipality's IDP
- Generally, municipalities "must take into account the need for the protection of listed ecosystems" when preparing their IDPs
- All organs of state in all spheres of government (including municipalities) "must prepare an invasive species monitoring, control and eradication plan for land under their control"
- The invasive species monitoring, control and eradication plans of municipalities "must be part of their integrated development plans

### ❖ NEMPAA

- Unlike NEMBA, a reading of the NEMPAA suggests that there is no direct role for municipalities in the management of protected areas except where there is an assignment

## Part 4: The contribution of recent case law

- *Le Sueur Case + Blue Moonlight Properties 39 (Pty) Ltd*

### □ Facts of *Le Sueur*

- Challenge of a resolution adopted by the Ethekekwini Metropolitan Municipality in December 2010 to introduce the Durban Metropolitan Open Space System (D-MOSS)
- D-MOSS is a project that incorporates areas of high biodiversity value.
- D-MOSS was introduced to contribute towards biodiversity conservation by *inter alia* meeting provincial and national biodiversity targets
- It included some areas of privately owned land

## Part 4: The contribution of recent case law Cont

- The Applicants, owners of property affected by the D-MOSS resolutions approached the court requesting that the decision to introduce D-MOSS should be declared unconstitutional and illegal and accordingly set aside
- They argued *inter alia* that respondent lacked constitutional and legislative powers to legislate on environmental issues – especially those relating to conservation and biodiversity protection

### ❑ Decision and reasoning of the court

- Justice Gyanda held that the reasoning adopted by the applicants was unduly narrow and incorrect for three main reasons:
- ✓ As an organ of state, each municipality is obliged to comply with the obligations imposed on the state by section 7(2) of the Constitution re s 24

## Part 4: The contribution of recent case law Cont

- ✓ municipalities have historically exercised within their jurisdictions legislative and executive responsibility over environmental issues such as conservation under the banner of "municipal planning",
- ✓ National and provincial legislation assigned the respondent legislative and executive authority over environmental issues
  - The court held that the functional areas of constitutional competence as set out in Schedules 4 and 5 of the Constitution are not the only provisions dealing with governmental responsibilities and duties
  - The environment is an area of competence shared by all spheres of government

## Part 4: The contribution of recent case law Cont

- D-MOSS Amendments did not in any way transgress or intrude upon the exclusive purview of the national and provincial government
- D-MOSS amendments was not unconstitutional and invalid on the basis contended for the by applicants
- *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) BCLR 150 (CC)*
- Relevance to current discussion????
- Similar arguments but within context of right to housing – Sch 4A

## Part 4: The contribution of recent case law Cont

- The methodology used by Justice Gyanda in *Le Sueur* resonates with that of the CC in *Blue Moonlight Properties 39*
- Schedules 4B and 5B of the Constitution are non-exhaustive of local government's executive and law-making powers and functions
- There is nothing which prevents municipalities that have the necessary resources to self-fund environmental projects that typically fall within the legislative area of competence of national and provincial government - in so far as such projects seek to further the objectives of s 24 of the Constitution and do not conflict with national and provincial legislation/policies

# Part 5: Lessons and implications for strategic environmental litigation

## □ Lessons

- The environmental powers and functions of municipalities cannot be defined exclusively with reference to the Schedules in the Constitution
- Any analysis of local government's environmental powers and duties cannot be exhaustive without a consideration of the implications of ss 7(2) and 24 of the Constitution
- When exercising original and assigned powers and functions, a municipality can adopt by-laws to protect against improper invasion any environmental matters listed in Schedules 4A and 5A of the Constitution
- municipal planning is inextricably linked to environmental issues and could be used to foster environmental objectives

## Part 5: Lessons and implications for strategic environmental litigation cont.

### ❑ Implications for strategic litigation

- *Le Sueur* and *Blue Moonlight Properties* show that strategic litigation can be used to "broaden" the environmental functions and powers of LG beyond Schedules 4B and 5B of the Constitution
- The above can be achieved through:
  - ✓ an expansive interpretation of existing functions in Schedules 4B and 5B or
  - ✓ through interpretations of LG's responsibilities vis-a-vis s 24 of the Constitution

**Thanks for your attention**

