

***“THE ROLE AND DUTIES OF MUNICIPALITIES IN THE ENFORCEMENT OF
ENVIRONMENTAL LAW”***

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ABSTRACT

This paper investigates the municipalities' legal duties to enforce environment protection. The government has been criticised for years for failure to provide measures for environmental protection. The government is divided into local, provincial and national spheres. This paper will further investigate problem faced by the local government as compared to provincial and national sphere of government in the enforcement of environmental law. Environmental and international law instruments will be used to address the problem as well as the decision making processes of the local sphere in enforcing compliance. The Constitution Act 108 of 1996 will be the influential document in addressing challenges. The main focus also, will to suggest tools to be used to enforce environmental law and see compliance and obtain possible outcomes after compliance.

I. INTRODUCTION

The role of municipalities in relation to the protection of the environment has increased significantly in the decade with the promulgation of the Constitution,¹ as well as general environmental legislation, such as the National Environment Management Act (NEMA)² the National Environmental Air Pollution Act³ and some provincial legislation such as the Limpopo Environmental Management Act.⁴ This is because environmental legislation is often best administered at a local level, as opposed to being administered by Provincial and National government. Municipalities may not have had the training which will enable them to make sound environmental decisions. It is recognized that capacity-building within the municipal sphere is both desirable and necessary. Most municipalities in the country lack resources and suffer from too little upgrading and development. This may be lack of planning in the formulation of their Intergraded Development Plans that they make rather than outstretched practices in terms of planning. These are some of the issues in this discussion.

The Department of Environmental Affairs and Planning, responsible for the environment and planning has embarked upon capacity-building programmes, which seek to inform and educate the citizens of the country. Generally, these are capacity-building programmes within municipalities in relation to decision-making which impacts on the environment and the implementation of legislation which relates to the environment. In addition, the Department of Environmental Affairs and Planning wishes to clarify the relationship between planning legislation and environmental legislation.

It will be argued in this paper that capacity-building programmes for the municipalities relating to the environment are best to be administered at local level. There will be a need to consider the overview of the role of municipalities in our new constitutional dispensation which include the Constitutional provisions dealing with municipal executive power as well as municipal legislative power. Further, this paper will consider the role of municipalities in respect of environmental decision-making specifically how decisions

affecting the environment are made. The paper will also consider common law and the role of policy documents, including articles from legal journals.

⁵II. LEGAL TOOLS TO BE USED ON ENFORCEMENT OF ENVIRONMENTAL LAW

There are *municipality cases* which form an integral part of our law. They expounded the doctrine that municipalities are not liable for mere omissions on their part to construct, maintain or repair public facilities, especially roads and streets but have a positive duty to take care of the mechanisms and designs required for a healthy and not a harmful environment. The municipalities' failure to maintain the environment and infrastructure amounts to them not enforcing environmental law on their part and not protecting the environment. The question that comes to the fore is that; *is a municipality supposed to enforce the environmental law or do even the public⁶ have a role to play in enforcing environmental law?* This question falls to be answered in line with the case of *Debbie Investment CC v. City Council of Johannesburg*.⁷ According to the law laid down in this case, the approach now is that the same principles of common law of delict apply to municipalities as are applied to ordinary individuals. Thus to say that where there is any delict caused due to environmental management (or lack thereof), the municipalities have the same recourse under common law as in the situation when there is need to enforce environmental law, which is not fulfilled.

It is necessary for this paper to deal in some depth with the powers granted to municipalities when need arises to enforce the environmental law. This discussion will include some aspects relating to the enforcement of environmental law or for the protection of the principles of applicable environmental law. Some attention will be paid to the question of what the municipalities' responsibilities are, as mentioned above.

A municipality will be liable to anyone who institutes a claim against it for its omissions where there is a legal duty to take action to enforce the relevant and applicable environmental law provisions. However as is always the point of departure, when dealing with compliance issues, each case will have to be determined on its own merits. In this analysis, it is in the context of the legal duty on the environmental incident which

involves the legal principles as in the case when the *Debbie Investment company instituted* action against the *City of Johannesburg*. It is in view of these imperatives that the outcome will be firstly, to determine what the law expects of a compliant municipality and secondly what the municipality should do in order to achieve an acceptable level of compliance with environmental law. In considering the Plaintiff's action against the Defendant, the court found that although municipalities are no longer accorded blanket immunity from liability for omissions, there is also "*no blanket legal duty on the Defendant to maintain all roads and supporting walls in its jurisdictional area in a perfect condition.*"

In *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust as Amicus Curiae)*⁸ and *Cape Town Municipality v Bakkerud*,⁹ found that in order to decide whether the Defendant was under a *legal duty* to maintain this road and retaining wall, it had to determine whether the legal convictions of the community demanded that the Defendant was subject to a legal duty to act¹⁰ and that the Defendant's failure to do so was negligent. The duty to act was the duty to provide for adequate storm water drainage on the road and to take adequate steps to prevent flooding after the Defendant became aware of the danger of the municipal wall. The problem hereby displayed in this project will however be given a solution. The general role of municipalities is however well defined in both the Constitution and the legislations. According to the Constitution all spheres of government are obliged to provide effective, transparent, accountable and consistent government in the Republic.¹¹ The municipalities in failing to comply will however in most cases involve a breach¹² of access to information¹³ contained in the Bill of rights. This point should however be discussed with the legal duty of the municipalities to comply or rather to enforce the environmental law.

The municipalities are required to govern the local affairs of its community in accordance with the Constitution and subject to the national and provincial legislations.¹⁴ To enforce compliance, the Municipal Structures Act¹⁵, was enacted to force compliance to municipalities in terms of the enforcement of environmental law. On the other hand the Municipal Systems Act¹⁶, establishes the enabling framework in

order for the municipalities to adequately discharge its constitutional and other obligations. Failure on the part of the municipalities to comply in their legal duty to enforce environmental law will however result in them breaching the requirements and frameworks set out in the Constitution and the stated legislations above.

What is to be indicated below is the legal duty of a municipality to enforce environmental law: *“Parents of two children who were badly burnt, allegedly by exposed municipal electrical cables, are suing the King Sabata Dalindyebo (KSD) Municipality for R9 million. The two children, seven-year-old Mbalentle Mgozozana and his cousin, 10-year-old Philela Tshuta, were apparently burnt at a funfair. Lindile Qina, an attorney acting on behalf of the parents of the two minors, said summons had been served on the municipality on July 14. Mbalentle’s parents, Zolile Mgozozana and Liziwe Mafestile, have filed the biggest lawsuit, for R7.4 million. The pair said yesterday they were “fed up” with the municipality’s apparent “lack of caring”. Their lawsuit included: Mbalentle was the most severely burnt of the two children and spent more than five months at the Nelson Mandela Academic Hospital. According to the summons, the boy suffered 100 percent burns on both legs, his stomach, arms, right humerus and both hands. As a result, he “cannot remain standing for an inordinate period, cannot run, walk fast, squat, kneel or bend his right leg”, read the summons in part. The summons also denounced the conduct of KSD employees for failing to cover the cables. “The conduct of the defendant’s employees was wrongful because they **breached the legal duty to ensure the safety of the minor**”.*¹⁷

This then indicates that the failure by the municipality in enforcing environmental law where necessary, may result in that municipality held accountable under the national legislations to have breached the legal duty it has on the enforcement of environmental law.

Section 4 of the Municipal Systems Act¹⁸ imposes a (legal) duty on municipalities to contribute towards building the capacity of local communities, to enable them to participate in the affairs of a municipality. According to this section, councillor and staff

have the active duty to foster community participation through developing a culture of municipal governance that complements formal representative government with a system of participatory governance. Such constitutional and legislative provisions leave no doubt as to the existence of extraordinary political commitment to notions of participatory governance.¹⁹ The courts had decided on how the municipalities can further be held accountable or rather hold individuals accountable for breach of the legal duty to enforce the environmental law.

III. ENFORCEMENT OF ENVIRONMENTAL LAW BY MUNICIPALITIES

The Constitution has three sources for municipal executive authority. Firstly, a municipality has executive authority in relation to the matters set out in Parts B of Schedules 4 and 5 of the Constitution, and any other law assigned to it.²⁰ Secondly, a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.²¹ The functions of a municipality are set out in the Constitution which must be read with the Municipal Systems Act and the Municipal Structures Act. In view of devolution of power being a fundamental feature of the Constitution, this right should be widely interpreted. Such an interpretation should be consistent with the obligation on the national and provincial spheres of government not to compromise a municipality's ability or right to exercise its powers or perform its functions.²² Local authorities now have more independence in decision-making and greater freedom to devise and carry out policy.

The Provincial and National governments are obliged to assign to local authorities the administration of any matter listed in Part A of Schedules 4 and 5.²³ These relate to local government's matters which are most effectively administered at local level of which municipalities there under have authority to administer such matters.²⁴ This would imply that municipalities either at local or district level will have only that power granted to it by the empowering legislation to deal with matters that fall within the jurisdiction of such municipalities. It is not clear which Organ of State ultimately decides whether a matter would be most effectively administered locally, particularly where there

is a difference of opinion. This would assist in determining which municipal obligation rather duties of enforcing environmental law. The Provincial or National government would actually assign powers and ultimate determination would probably lie at that level.

There is a potential for direct conflict between the definition of municipal power in relation to the functions outlined in Part B to Schedules 4 and 5 of the Constitution, and the broad powers granted to local government under the Structures Act, Systems Act and provincial legislation, such as the Municipal Ordinance.²⁵ One such example, from an environmental point of view, would be the power of “supply, distribution, use and protection of water under the control or management of the council, whether within or outside its municipal area, with power to differentiate in regard to water used for different purposes”. In this regard, in terms of Schedule 4B of the Constitution, municipalities are competent only to administer water services insofar as they relate to potable water supply systems and domestic wastewater and sewage disposal systems.

Unusually, the legislative competence of a municipality depends on its executive powers. It seems that this is an indication that the Constitution envisages municipalities to be involved primarily in the delivery of services within the scheme of co-operative government and, accordingly, the legislative competence of municipalities must be restrictively interpreted.²⁶ This means that unless the Constitution or other legislation clearly gives a municipality the power to make bylaws relating to a particular matter, they must be presumed not to have that power. In other words, notwithstanding that at first glance local authorities appear to have broad powers to make laws, it is generally believed that these powers should be interpreted narrowly. The principal duty of a municipality is to govern the affairs of that municipality in accordance with the Constitution and relevant legislation. The most common are the Structures Act and the Systems Act. The environmental right²⁷ contained in the Bill of Rights imposes another important duty on municipalities.

If a municipality took a decision, or failed to take a decision, which resulted in degradation of the environment, anyone could approach a court alleging a violation by that municipality of the environmental right. A municipality, in turn, would be able to allege a violation of the environmental right where another State entity failed to perform a duty or function, which resulted in harm to the environment. The right is also applicable between individuals, and thus may be enforced by State or non-State parties against private parties who are failing to act consistently with its provisions.²⁸

It is important to recognize that the environmental right is not absolute, but may be restricted in accordance with the limitations clause in the Constitution.²⁹ A right may be limited under the limitations clause, only by a law of general application, and only to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.³⁰ Courts considering whether a limitation of a right is reasonable and justifiable will apply a balancing test, in terms of which the right is weighed up against the limitation, to reach their conclusion. Environmental decision-makers must take account of the provisions of the constitutional rights and associated legislation in the undertaking of their activities.

A municipality making a decision about the provision of water or environmental resource to a particular community must be aware of the size of the population. Reliance on the constitutional right to sufficient water or any resource may require that measures be taken by the municipality to supply them with water or the resource. Under the locus standi clause, a wide range of people, including classes of people and people acting in the public interest may enforce constitutional rights, including the environmental right. The rights of access to information and to just administrative action are given effect to in legislations Promotion of Administrative Justice Act³¹ and Promotion of Access to Information Act³² respectively. These will guide in checking the actions, powers and functions of the municipalities.

IV. ADMINISTRATIVE JUSTICE AND THE ENVIRONMENT

Administrative law governs the relationships between public bodies and between public and private bodies. So many activities which affect the environment require authorization from a public body. Environmental conflicts usually arise from the exercise of administrative decision-making powers. Administrative law principles are of particular relevance to environmental law. When making decisions in respect of the environment, the State must exercise their powers in accordance with the constitutional right to just administrative action and the Act promulgated under it. The constitutional right to just administrative action guarantees everybody the right to administrative action that is “lawful, reasonable and procedurally fair”.³³ It also guarantees the right to be provided with written reasons for administrative action that has adversely affected rights.³⁴ Persons affected by administrative action, for instance, a decision of a municipality to rezone land, may therefore attempt to rely upon the right where they believe that the action was taken other than in accordance with fair procedure, or unreasonably or unlawfully. If they could also show that the decision adversely affected their rights, they would be entitled to obtain written reasons for the decision.

Linked to the notion of administrative justice is the right of access to information. Without access to information, a person may be unable to determine whether or not his or her right to just administrative action has been infringed. The Constitutional right of access to information, Promotion of Access to Information promulgated under it, and National Environmental Management Act, create rights of access for public and private bodies to certain public and private information, including environmental information. Authorities making decisions regarding the environment, including municipalities, must be aware that interested persons may rely upon these statutory provisions to request access to information in respect of the decisions. The authorities are obliged to comply with the statutory provisions. Everyone has the right of access to all information held by the State, and any information held by non-State parties which is required for the exercise or protection of rights. This right prevails over statutory provisions that unreasonably limit disclosure of information.

Access to Information Act gives effect to the Constitutional right of access to information, and lays down detailed procedures in respect of the access to records of public and private bodies. Only in certain circumstances, laid down in PAIA,³⁵ may access to information be refused if that information would lead to some form of damaging these rights. Decision-makers who take decisions in respect of the environment should take particular note of the following aspects of PAIA which are relevant to environmental law. Municipalities, as “public bodies” under PAIA, must be aware particularly of the provisions of PAIA relevant to the right and manner of access to records of public bodies.³⁶ Information officers of public bodies³⁷ are charged with ensuring compliance with the provisions of PAIA, and are assisted by deputy information officers, to be designated for that purpose.³⁸ Persons who make requests for information (“requesters”) are entitled to records of public bodies where they comply with the procedural requirements of PAIA and there is no ground under PAIA for refusing the request. Public bodies are obliged to assist requesters to obtain information in accordance with the procedure laid down in PAIA.

Various duties are imposed upon public bodies under PAIA, including publishing a manual containing detailed information about the body and the information held by it. NEMA provides that every person is entitled to access to information held by the State and organs of state which relates to the implementation of NEMA and any other law affecting the environment, and to the state of the environment and actual or future threats to it, including emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous wastes and substances (“environmental information”).³⁹ Requests for environmental information may be refused only on the grounds stipulated in section 31(1)(c) of NEMA, which include that the request is manifestly unreasonable or formulated too generally; that commercially confidential information must be protected; or that the granting of the request would endanger or further endanger the protection of the environment. Organs of state themselves are entitled to access environmental information where that information is necessary to enable the organ of state to carry out its duties under NEMA. It can also be any other law concerned with the protection of the environment or the use of natural

resources. From an environmental law perspective, the Constitution is significant in that it identifies which tier of government (national, provincial or local) is competent to make and enforce environmental laws on particular subjects. It elevates certain environmental considerations to the status of a fundamental human right by including an environmental right in the Bill of Rights. Further, it facilitates the bringing of legal actions to protect the environment by increasing access to information concerning the environment, and allowing greater access to courts, including by providing for the bringing of class actions. These entrench the right to lawful, reasonable and procedurally fair administrative action. The Constitution is the supreme law of South Africa, to which all law and conduct is subject. Laws or conduct inconsistent with the values are invalid.

Environmental decision-making is therefore required to be consistent with its values and principles. These must provide the backdrop to all laws passed and conduct undertaken in South Africa, by all public and private parties. When conducting any activity, including decision-making, all spheres of government, at national, provincial and local level, and all organs of state, are required to observe and adhere to the constitutional principles of co-operative governance, discussed in more detail above. The corollary of this second right is a duty on municipalities, among others, to protect the environment through such reasonable legislative and other measures. Legislative measures would include measures imposed in terms of national or provincial legislation, or by-laws. The term “other measures” would include policies, plans, and guideline and so on. The right applies between State and citizen, and therefore any person can enforce the right against an organ of state, such as a municipality, where it feels (and can show) that the State entity is violating the right, or is failing to protect it.

If a municipality took a decision, or failed to take a decision, which resulted in degradation of the environment, anyone could approach a court alleging a violation by that municipality of the environmental right. A municipality, in turn, would be able to allege a violation of the environmental right where another State entity failed to perform a duty or function, which resulted in harm to the environment.

V. THE DECISION-TAKING AND CONFLICT OF MANAGEMENT UNDER THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT

Obligation is placed on Municipal Councils to sort out any difference or disagreement that may arise concerning the exercise of any of their functions. This obligation that may significantly affect the environment may force the reconsideration of the desirability of conciliation before making a decision.

If the decision taken above is considered appropriate, the matter will then be referred to conciliation. The procedure laid in the National Environmental Management Act must also be attended to. When there is a difference or dispute regarding the protection of environment, the other alternative is to refer such difference or dispute to Arbitration. It is always or rather an expected duty of the Minister to appoint or assign relevant officials to various types of conflict handling with regard to the protection of the environment. Thus to say, a difference or disagreement regarding the protection of the environment or an environmental right may be referred to arbitration in terms of the Arbitration Act, 1965.”

V I. THE LEVEL OF EFFICENCY IN THE LOCAL SPHERE OF GOVERNMENT

In South Africa, the process of fiscal decentralization has yet to produce the expected results. Specifically, in the recent years, South Africa has been experiencing growing dissatisfaction with service delivery at the local level. In fact, local municipalities in South Africa have hitherto been plagued by significant service delivery and backlog challenges, poor financial management, corruption, and poor capacity due to lack of skills. This situation has resulted in a great number of local municipalities in financial distress and a loss of confidence and trust in local governments. The problems and challenges faced by local municipalities in South Africa are so crucial and alarming that questions have been raised concerning their capability to efficiently deliver on expected outcomes on a sustainable basis. Furthermore, and perhaps most alarmingly, the necessity to envisage a reverse tendency toward centralization has been proposed as a possible panacea. With this background in mind, the objective will be two-fold: to

identify the most efficient local municipalities in South Africa in terms of providing the best possible public local services at the lowest possible cost and to investigate the empirical determinants of local spending efficiency in order to draw policy conclusions about efficiency and effectiveness in local service delivery in South Africa.

An assessment on the spending efficiency of 231 local municipalities in South Africa for 2007 has been made using the nonparametric Data Envelopment Analysis (DEA) and the parametric Stochastic Frontier Analysis (SFA) techniques. In relation to the DEA technique, efficiency scores are subsequently explained in a second stage regression model with potential explanatory factors such as income, education, job vacancy using a Tobit regression model. The results show that on average, B1(local) and B3(district) municipalities could have theoretically achieved the same level of basic services with about 16% and 80% fewer resources respectively. The difference between the most efficient and the least efficient municipalities being quite substantial, the results also show that B3 municipalities could have theoretically achieved the same level of basic services with about 62% fewer operating expenditures. Furthermore, fiscal autonomy and the number and skill levels of the top management of a municipality's administration were found to influence the productive efficiency of municipalities in South Africa.⁴⁰ These, however leads to improper management level, lack proper skills and ultimately lack of resources to implement the environmental management protection measures, and therefore leading to disregard of Section 153(a) of the Constitution.⁴¹

VII. THE RELATIONSHIP OF COMMUNITIES TO THE ENVIRONMENT

There must be an existing relationship between Municipalities and the communities in as far as the environment and its resources are concerned. There must be a strong link on the environment in as far as the need of the communities can be balanced on the environment. Municipalities must work hand in glove with the communities to sustain the compliance with environmental laws. Therefore, the involvement of communities when enforcing environmental law will be vital even when there is a need for further compliance with the readily available environmental laws.⁴²

The Nagoya Protocol is has its objectives on the fair and equitable sharing of the benefits arising from the utilization of genetic resources to communities. This includes the appropriate access to genetic resources and by appropriate transfer of relevant technologies. This also takes into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

The protocol stresses that each party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities. This will be in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.⁴³ Parties shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.⁴⁴ So, further involvement of the communities in managing these resourced areas will be more beneficial and help Municipalities achieve their environmental obligations.

VIX. THE DUTY OF CARE AND REMEDIES OF ENVIRONMENTAL DAMAGE UNDER NEMA

The National Environmental Management Act introduces a general duty to take reasonable measures to prevent environmental degradation. People against whom the duty is imposed and who fail to adhere to relevant channels and procedures have to be directed to the Director-General or the Head of the provincial department who are/is responsible for the environment. In failing to do so, the relevant authorities may take the measures and recover the costs from the persons who failed to discharge their (legal) duties of care. However Section 28 does not give the Municipalities power to enforce the (legal) duty of care. The Act provides for assigning or delegating of ministerial

powers, functions and duties including the functions and duties of the municipalities. The Municipalities are expected to be very much aware of the fact that certain powers under the Act currently not relevant to them must or may be assigned or delegated in the future. This is because some of the powers designated under Section 28 of the National environmental Management Act do not fall entirely within the Municipal parameters where they will need enforcement. Below is just how certain municipal powers may be assigned or delegated to other organs of state.

VX. COMPLIANCE WITH THE ENFORCEMENT OF ENVIRONMENTAL LAW

In order to see compliance with the enforcement of the environmental law, there are number of noteworthy aspects to be addressed. **Firstly**, default by the local authority in enforcing environmental law. The administrator of a province, in terms of Environmental Conservation Act (the Act)⁴⁵, has the authority to direct a local authority which has failed to perform a function assigned to it in terms of the Act to perform.⁴⁶ This performance will be in line with the provisions of the Act. To direct a local authority is nothing else but to see compliance with the enforcement of environmental law. Failure to perform as directed, will result in the expenditure or costs been recovered from the official or the authority so directed to perform.⁴⁷ It is common cause that the said Administrator may also perform the assigned function on behalf of the authority. At the same time, the administrator may recover the said expenses and costs as if the said authority failed to perform as directed.⁴⁸

If a person performs and still perform an activity which is detrimental or damaging to the environment, such person may be ceased from continuing with such an activity.⁴⁹ This will advance to the protection of the environment and have sustainable progress. This is merely for the Municipalities to see compliance when environmental law is being enforced. These will also assist the municipalities in realizing their environmental report. With regard to such a report, the local government must work at the coalface of development. In order to have the effective state of the environment, the municipalities should first realize what goal they need to achieve and how. **Secondly**, in order to see

compliance, municipalities and the stake holders need to be persuaded of the importance of long-term vision and of integrating their planning and management across people, economy and the Environment.⁵⁰ In that regard the level of governance closest to the people and local authorities must play a role in educating, mobilizing and responding to the public to promote sustainable development. These will also assist in achieving what will be termed environmental sustainability. This will mean that the provision of a service that aims to ensure that risks of environmental harm and risks to human health and safety are minimized to the extent reasonably possible. Under the circumstances also, the potential benefits in these areas are maximized to a similar extent, while legislation intended to protect the environment and human health and safety is complied with. In that way our municipalities will also have a way when enforcing the environmental law.

Municipalities are in a unique position when it comes to ensuring compliance with state and federal environmental regulations. Most municipalities must have the financial resources to hire a full time environmental manager. Responsibility for environmental compliance must be typically given to the town manager and is delegated to individuals such as municipal wastewater treatment plant operators and road department managers. Despite good intentions, these individuals often lack the time or expertise required to identify and keep current with changing regulatory requirements with which they must comply. However, this doesn't lessen a municipality's liability or obligation when it comes to environmental compliance. Municipalities are still subject to inspections by state and federal regulators and are subject to enforcement actions, including fines, if violations are found.

Municipalities must have authority to regulate environmental matters within their boundaries. Each province has enacted so-called “enabling laws” setting out the powers municipalities may exercise. If a municipality enacts a by-law that goes beyond the power enumerated in the enabling law, the by-law is invalid. The legal term for a by-law that goes too far is *ultra vires* (Latin for “beyond authority”). As a general rule, a by-law is *ultra vires* the enabling law when its effects go beyond the boundaries of the

municipality's own territory and intrude on matters in other municipalities. Municipalities must have to make it a point that when enforcing the environmental law, all necessary precautions are given greater care. This will even be relevant in the exercise of environmental protection and sustainability.

VXI. OUTCOMES

There is a need for complete authorization to be issued in terms of which the municipalities lack the powers to monitor and enforce environmental law. Once the authorization, by provincial authority, has been issued, a municipality must monitor the activity to ensure compliance with the conditions of the authorization.⁵¹ The municipalities must also ascertain what their powers of enforcement are in terms of the law. These powers must apply to the decisions they take. The municipalities should also ensure that the appropriate enforcement measures are put in place. Municipalities must assume far greater responsibility with regard to the implementation and enforcement of environmental laws in the country. This responsibility will be devolved or assigned as such in the municipalities where there is need for demonstration of capabilities and expertise in such responsibilities. The municipalities should take necessary steps to ensure that there are resources adequate to maintain compliance.

The above simply entail that the resources that the municipalities must put in place is the human and financial resources. This is to implement by-laws and use them as a big tool to ensure compliance and healthy environment. Just like the Kyoto protocol, there should be serious commitment and measures taken against environmental degradation or damage. This in itself will have preserve and protect our environment that will be free and healthy for everyone living on it.⁵² The municipalities should as a result, enforce harsh environmental penalties to most of the offenders. This in itself will help reduce environmental shame and destroy and lead to safe and healthy environment.

Effective enforcement by our municipalities will be a key to ensuring that the ambitious goals of our environmental statutes are realized. This enforcement will refer to the set of actions that the government can take to promote compliance with environmental law. If

our municipalities cannot ensure that they reduce the current non-compliance with environmental laws, it will remain disturbingly high. Experts believe that as many as twenty to forty percent of firms regulated by federal environmental statutes regularly violate the law. Tens of millions of citizens live in areas out of compliance with the health based standards of the **Clean Air Act**,⁵³ and close to half of the water bodies in the country fail to meet water quality standards set by the Clean **Water Act**.⁵⁴ In communities where there is burdened multiple sources of pollution, non-compliance has particularly resulted in serious health consequences for affected residents. As in virtually every other area of government regulation, Municipal environmental enforcement traditionally has been based on the theory of deterrence. This theory assumes that: “persons and businesses act rationally to maximize profits, and will comply with the law where the costs of non-compliance outweigh the benefits of non-compliance.” The job of Municipalities is to make both penalties and the probability of detection high enough that it becomes irrational and unprofitable for regulated firms to violate the law.

For further protection and compliance with the enforcement of environmental law, the case of *Director: Mineral Development, Gauteng Region v. Save the Vaal Environment*⁵⁵ had indicated on how the environment can be protected and the environmental law enforcement guaranteed. This case indicated what will call public participation in terms of the protection of the environment. It indicated also high compliance on the enforcement of environmental law by the stake holders. In the above case, the appellant is a voluntary association of more than twenty persons, with which has its object to assist its members to maintain the environment and protect the environmental law enforcement and integrity.

To realize greater compliance, the case indicated that, the coming together of all the environmental rights as fundamental and justiciable human rights will help change ideological climate and our legal and administrative approach to the environmental concerns. The municipalities' task is simple in their legal duties on environment. Their task is to implement policies that will circumvent the whole idea of environmental

degradation and educate the societies about the importance and the protection of the environment. Not all societies are containing educated residents, but the little the municipalities can provide, as a platform of environmental awareness the greater the environment will sustain. Municipalities must encourage public participation. They must also promote the idea of environmental awareness campaigns in areas of public domains and enjoyment, like schools and shopping centers.

X. COMPLIANCE WITH (WASTE) MANAGEMENT LAW

Compliance with environmental laws governing waste management is an essential aspect of corporate environmental compliance which must be construed to the level required of our municipalities. Provincial laws must assist municipalities to govern the classification of wastes for disposal and recycling purposes, and determine approval and documentation requirements for those engaged in waste transportation, waste disposal, and recycling operations. Certain classes of waste generators may have approval or registration requirements, as well as waste classification and reporting requirements. Waste generators may be subject to requirements to progressively reduce the waste they generate. Our municipalities must make policies or by-laws⁵⁶ which will regulate the use of unlicensed waste facilities or operators which may lead to penalties and waste removal requirements. As well, the disposal of waste on one's own site without an approval must result in penalties and waste removal orders.

XII. CONCLUSION

Municipalities' legal duties on the enforcement of environmental law need policy directions. It is however a considerable fact that municipalities should also involve the public rather the communities in their plan to make environmental policies. These policies must meet the required standards and those suggested by community members. There should be more environmental campaigns in the country to help stimulate these development and management responsibilities on the municipalities.

It is however a loose question on the part of the municipalities with regards to their direct mandate in terms of the degradation and harm to the environment. South Africa has so many laws (environmental) which one can talk and enforce on or about. It is however, again, the common fact that our municipalities are ignorant of the environmental laws in existence within their surroundings or jurisdiction. It is then monitored at that level that there is high environment damages that there where before if these laws could have been enforced or recognized. Most of our societies are uneducated about the ways in which the land rather the environment can be protected, and that leaves much to be desired because they are the frontiers of the environmental benefit.

Municipalities must also make decision about the provision of environmental resources to communities and must be aware of populations that fall under them. There must be an attempt by communities to rely on their constitutional right to sufficient water or any environmental resource. This may require that measures be taken by municipalities to supply them with water or the resource. The locus standi principle must be evoked, under which the municipalities must enforce what is called Municipal cases. Under the locus standi clause, there will be wide range of people. These people include the classes of people and people acting in the public interest who may enforce constitutional rights, including the environmental right. The constitutional obligation to protect the environment by municipalities must be met, which means there will be nothing to hamper compliance when environmental law is enforced. The involvement of public, thus public participation in the policy making process (of the Municipalities) can assist in the development and protection of environmental law. There will be nothing to defeat compliance when environmental laws are enforced by the municipalities. There must be public participation in most of the environmental policy decisions by the municipalities. There are many and various factors that must be considered relevant when environmental law is enforced. These must be the concerns and the needs that arise during the process of enforcement of environmental law.

In order to give effect to compliance with environmental law, municipalities should further acknowledge the application and use of available resources in order to give effect to the protection of the environment. This will be achieved by means of the general application of the stated legislations consistent with the local government capacity-building programmes that are in place for effective control and implementation towards the environment and the law. To further show compliance, the municipalities need largely to rely on the whole National Environmental Management Act 107 of 1998 and other legislation, including necessary regulations. Lack of compliance and enforcement of environmental law at most cases lead to environmental degradation, harm to health and other related impacts such as road infrastructure, land as well as court disputes in relation to the impairment of the right to environment. The municipalities should follow their own drafted guidelines and the empowering legislations to develop good working Intergraded Development Plans.

There must be the system of checks and balances in the local and provincial spheres to help regulate the enforcement of environmental laws. Provincial laws must assist municipalities to govern the classification of wastes for disposal and recycling purposes, and determine approval and documentation requirements for those engaged in waste transportation, waste disposal, and recycling operations. Municipalities must make policies or by-laws which will regulate the use of unlicensed waste facilities or operators which may lead to penalties and waste removal requirements. As well, the disposal of waste on one's own site without an approval may result in penalties and waste removal orders. If that can be met we will have no doubt about the way in which our municipalities regulate and enforce environmental laws.

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108	1996	THE CONSTITUTION ACT
39	2004	NATIONAL ENVIRONMENTAL AIR POLLUTION ACT
7	2003	LIMPOPO ENVIRONMNETAL MANAGEMENT ACT
117	1998	MUNICIPAL STRUCTURES ACT

107	1998	NATIONAL ENVIRONMENTAL MANAGEMENT ACT
32	2000	MUNICIPAL SYSTEMS ACT
20	1974	MUNICIPAL ORDINANCES ACT
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¹ Act 108 of 1996, hereafter referred as Constitution

² Section 17 of the National Environmental Management Act, Hereafter referred to as NEMA

³ Act 39 of 2004

⁴ Act 7 of 2003

⁵

⁶ **Ratepayers and Residents Action Association Inc. v. Auckland City Council 1986 1 NZLR 746, 750 (CA):** any court exercising a discretion in the interests of justice in a particular case must have regard to any public interest consideration which the litigation serves

⁷ ZASCA 25; [2006] SCA 29 (RSA)

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¹⁰ Section 152(1)(a)

¹¹ Section 41(1) of the Constitution

¹² Section 33 of the Constitution

¹³ Section 32 of the Constitution

¹⁴ Section 151(3) of the Constitution

¹⁵ Municipal Structures Act

¹⁶ Municipal Systems Act 32 of 2000 hereafter referred to as the Municipal System Act.

¹⁷ Parents sue KSD Municipality for R9m: an article: 2010/08/03

¹⁸ Act 32 of 2000, hereinafter referred to as , Municipal Systems Act

¹⁹ “Assessing the effectiveness of community based involvement”- **Janine Hicks**, Director, Centre for Public Participation

²⁰ Section 156(1)- Those matters which relate to the environment include, among others, municipal health services; municipal public works (but only where this is necessary for a municipality to administer the functions specifically assigned to it); storm-water management in built up areas; water and sanitation services (limited to potable water supply systems and domestic waste-water and sewage disposal systems); cleansing; solid waste disposal; air pollution; control of public nuisances; building regulations; jetties, piers and harbours (excluding the regulation of international and national shipping and related matters) and beaches.

²¹ Section 151(4) of the Constitution

²² Section 156(5) of the Constitution

²³ Which include disaster management, environment, nature conservation (excluding marine resources and national parks), and pollution control and soil conservation

²⁴ Section 156(4) - The provisions of section 10 of the Municipal Systems Act would also have to be complied with.

²⁵ 20 of 1974

²⁶ Currie and De Waal -The New Constitutional and Administrative Law (Volume One) (2001: 1st edition).

²⁷ Section 24 of the Constitution

²⁸ Section 8(2) of the Constitution

²⁹ Section 36 of the Constitution

³⁰ Section 36(1) of the Constitution

³¹ 3 of 2000, hereafter referred as PAJA

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³³ Section 33(1) of the Constitution

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³⁵ Part 2, Chapter 4 and Part 3, Chapter 4

³⁶ Contained in Part 2 of PAIA

³⁷ Section 17 of PAIA

³⁸ *ibid*

³⁹ Section 31(1) (a) This section remains in force notwithstanding that section 31(1) states that it remains in force only until the promulgation of PAIA, by virtue of the provisions of section 6 of PAIA.

⁴⁰Nara F. Monkam: University of Pretoria: working document

⁴¹ municipality must- *(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community*

⁴² Nagoya Protocol on Access and Benefit-sharing of 2010
5 Nagoya Protocol on Access and Benefit-sharing of 2010

⁴³ Fair and equitable benefit: Article 2 of the Nagoya Protocol on Access and Benefit-sharing

⁴⁴ Fair and equitable benefit: Article 5 of the Nagoya Protocol on Access and Benefit-sharing

⁴⁵ Environmental Conservation Act 73 of 1989 hereafter referred to as the Conservation Act.

⁴⁶ Section 33 (1) of the Conservation Act

⁴⁷ Section 31(2) of the Conservation Act

⁴⁸ Section 31(3) of the Conservation Act

⁴⁹ Section 31 A (1) of the Conservation Act

⁵⁰ Dr. Rudi Pretorius: State of Environmental Reporting: Guidelines for Municipalities

⁵¹ Section 24(1) of the Constitution

⁵² Section 41 of the Constitution (co-operative governance).

⁵³ Act of 1956 :The International name or law for the Reduction of air pollution

⁵⁴ Act of 1977: The International name or law for Reduction of water or surface pollution

⁵⁵ 1999(2) SA 709 (SCA)

⁵⁶ In terms of section 156 of the Constitution