

CONSTITUTIONAL INCOMPETENCY OF LOCAL GOVERNMENT: THE CASE OF NORTH WEST PROVINCE MUNICIPALITIES

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INTRODUCTION



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AHC Minister for Co-operative Governance Sicelo Shiceka blames WHITE RATEPAYERS for the AHC's poor municipal services - which are causing countrywide, very violent protests in 2009 and 2010



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INTRODUCTION



CHALLENGES FACED BY MUNICIPALITIES

- **MALADMINISTRATION AND CORRUPTION**
- **LACK OF SUPERVISION/ACCOUNTABILITY/MONITORING**
- **ABUSE OF POWER/AUTONOMY: sec 40 & 41 of the 1996 Constitution**
- **INAPPLICABILITY OF SECTION 139 of the Constitution**
- **INEFFECTIVE LEGISLATION/ LACK OF EFFECTIVE LEGISLATION**
- **INEFFECTIVE TOOLS: IDP, EMP**
- **INABILITY & UNWILLINGNESS TO DELIVER BASIC SERVICES**

CHALLENGES

- **‘My reflection primarily centered on the challenges of maladministration and corruption and the impact of these on the constitutional promise of a prosperous South Africa.**
- **Can we legitimately continue to blame the lack of or poor progress on some of the fronts, particularly the elimination of poverty and under-development, on apartheid?**
- **My experience has convinced me that maladministration and corruption are responsible for many unfulfilled aspects of the South African dream.’ Adv Thuli Madonsela**

What does the law say?

Constitution: 1996

Sec 152: The objects of local government are:

- (b) To ensure the provision of services to communities in a sustainable manner**
- (d) To promote a safe and healthy environment**
- (e) To encourage the involvement of communities and community organizations in the matters of local government.**

Sec 156(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer

Part B of Sch 4 & 5:

- Air pollution**
- Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems**

The law.....

- Cemeteries, funeral parlours and crematoria
- Control of public nuisances
- Facilities for the accommodation, care and burial of animals
- Noise pollution
- Refuse removal, refuse dumps and solid waste disposal

Sec 24: Environmental Right

Sec 8: The BOR applies to all organs of state.

The law....

- **NEMA, 1998**
- **Sec 2: The principles in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment:**
- **Pollution and degradation of the environment are avoided, or where they cannot be altogether avoided, are minimised and remedied;**
- **That waste is avoided, or where it cannot be altogether avoided, minimised and reused or recycled where possible and otherwise disposed of in a responsible manner**
- **Environmental management must be integrated**
- **Environmental justice must be pursued: adverse impacts shall not be discriminatory**
- **Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being**
- **Duty of care, polluter-pays, public trust...**

The law....

- **NEMA, 1998**
- **Sec 28(1)** Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring.
- **(2)** The persons on whom subsec (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land.
- **(3)** The measures in subsec (1) include measures to
 - (i)** contain or prevent the movement of pollutants or the causant of degradation;
 - (ii)** eliminate any source of the pollution or degradation; or
 - (iii)** remedy the effects of the pollution or degradation.
- **(4)** The Director-General may direct any person who fails to take measures in (i) to commence taking specific reasonable measures before a given date or complete them before a specified reasonable date.
- **(7)** Should a person fail to comply, or inadequately comply with a directive, the Director-General or provincial head of department may remedy the situation.

The law....

- **NEMA, 1998**

Sec 28(8) The Director-General or provincial head of department may recover all costs incurred from;

(a) any person who is or was responsible for, or who directly or indirectly contributed to the pollution or degradation or the potential pollution

(b) the owner of the land at the time when the pollution or the degradation occurred, or that owner's successor in title.

(c) the person in control of the land or any person who has a right to use that land

(d) any person who negligently failed to prevent the activity or the process being performed or undertaken or the situation from coming about, provided that such a person failed to take the measures required of him or her under subsec (1).

The law....

- NEMA, 1998
- Sec 32: Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any **provision of this Act**, including a **principle** contained in Chapter 1, or **any other statutory provision** concerned with the protection of the environment or the use of natural resources
- (e) in the interest of protecting the environment.

- **NEM: Waste Act 59 of 2008:**

Sec 2: Objects of the Act: to give effect to sec 24 of the Constitution, 1996.

Sec 9(1): Each municipality in the Republic **must** exercise its executive authority to deliver waste management services, including waste removal, waste storage and waste disposal services.

The law.....

Sec 23(2): Every municipality must, subject to the Act, and as far as is reasonably possible. Provide containers or receptacles for the collection of recyclable waste that are accessible to the public.

Sec 27 provides that an owner of privately owned land to which the general public has access, must ensure that the litter is disposed of before it becomes a nuisance, a ground for a complaint or causes a negative impact on the environment.

- **National Water Act 36 of 1998**

sec 19(1) An owner of land, a person in control of land or a person who occupies or uses the land on which:

(a) any activity or process it or was performed or undertaken; or

(b) any other situation exist, which causes or is likely to cause pollution of a **water resource**, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

NEM: Protected Areas Act

NEM: Biodiversity Act

The law...

- **Sec 32 of the NEMA: *Locus Standi* in environmental matters**

NEMA aims to provide wider access to courts in those instances where communities or groups of people would like to bring an environmental matter to court. (Ferris L Environmental Compliance: 150)

- ***Merebank Environmental Action Committee v Executive Member of KZN Council for Agric and Environmental Affairs: unreported case 2691/0 (D)***
- ***All the Best Trading & Others v SN Nayagar Property Development and Construction CC 2005(3) SA 396 T***
- ***Director Mineral Development, Gauteng Region v Save the Vaal Environment and Others 1999 (2) SA 709 SCA***
- ***Minister of Water Affairs & Forestry v Stilfontein Gold Mining Company Ltd & Others***

Case law....

SIBU(Sannieshof Inwoners Belastingbetalers Unie)

They decided to no longer pay municipal rates and taxes, instead, it was their intention to deposit the monies they would have paid into a separate account. Their motivation for the decision was simple: while residents had continued to pay their rates and taxes , the local municipality (Tswaing) did not respond appropriately by delivering adequate municipal services.

In 2009, there was a growing consensus that municipal governance is the weakest tier of government.

Willem Landman Beeld Newspaper Commentator:

The lesson of Sannieshof is that complaints and an attitude of standing with the hands on the hips lead you nowhere. Conditions in many towns have deteriorated to the extent that taxpayers are forced to take up the cudgels themselves.

Wayforward/suggested intervention strategies

- **Interdict**
- **Delictual claims**
- **Public protector**
- **Statutory remedies**
- **Sec 38: Constitution**
- **Sec 139: Constitution**
- **Sec 238: Constitution**
- **Sec 32: NEMA**
- **Sec 28: NEMA**
- **Sec 31L: NEMA**
- **SIBU: local government within local government**
- **MARAAPO**



CONCLUSION

- **Stop politicising corruption and take responsibility for it. Corruption thrives because it tends to be posed as a disease that only affects politicians. The reality is that most maladministration and corruption in government takes place at the lower operational levels without the involvement of politicians.**
- **Learn from the Chris Hani municipality: no infighting, no parallel structures, but perpetual constructive thinking by all in the district**
- **Municipalities need to be accountable to the Provincial legislature. Because municipalities receive support and funding from the provincial fiscus, isn't it time that Provincial legislatures establish mechanisms for oversight over municipalities?**

Power to turn
tide lies in our
collective
hands



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