

Municipal Courts and environmental justice in South African local government

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DEDICATION

Dedicated to the memory of my parents; my father MPriesta MOLAIWA, and my mother MOSIMA, who always believed in my capability to be successful in the academic field. Death defeated you and could not witness my success but your belief in me has made this journey possible. Kgotso!

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ABSTRACT

Environmental injustice is part and parcel of the fundamentals of international and domestic environmental law. In South Africa, section 2(4)(c) of the *National Environmental Management Act* 107 of 1998 (NEMA) establishes environmental justice (EJ) as part of the environmental management principles to direct decision-making. This is particularly relevant because of the country's legacy of continuing environmental injustices and inequalities, especially concerning natural-resource dependent services and benefits. The *Constitution of the Republic of South Africa*, 1996 further establishes a developmental local government (DLG) of which the objects are to ensure a safe and healthy environment, sustainable delivery of services, promotion of social and economic development as well as public participation in decision-making. These objects are complemented by section 24 environmental right in the Bill of Rights.

Municipal service delivery pertaining to water and sanitation, electricity, land matters and municipal health, should supplement, not compromise the state of local communities' environment and access should be equal. The absence of the latter may result in the form of environmental injustice as has been described by authors such as Bullard, McDonald and Schlosberg. In the event of service delivery-related environmental injustices, it is to be expected that communities must have remedial options available. One of which may be access to the judicial system.

Therefore, this study focuses on and explains the role that Municipal Courts specifically may play in fortifying the relationship between municipal service delivery and improved grass-root level environmental justice in South Africa. The underlying research question is whether such courts can be agents of (environmental) change where local communities are exposed to environmental harm as a consequence of the failure of municipal services or the environmentally harmful actions of other community members or local industries.

Keywords: Municipal Courts, magistrate's courts, the role of courts, access to justice, developmental local government, environmental justice

ABBREVIATIONS

ADR	Alternative Dispute Resolution
BCLR	Butterworths Constitutional Law Reports
CC	Constitutional Court
DLG	Developmental Local Government
DoJ & CD	Department of Justice and Constitutional Development
EJ	Environmental Justice
GG	Government Gazette
GN	Government Notice
IDP	Integrated Development Plan
JOL	Judgements Online
LULUs	Locally Undesirable Land Uses
MEC	Member of the Executive Council
NEMA	National Environmental Management Act
NEM: AQA	National Environmental Management: Air Quality Act
NEM: WA	National Environmental Management: Waste Act
NDPP	National Director of Public Prosecution
NPA	National Prosecuting Authority
PAJA	Promotion of Access to Administrative Justice Act
PELJ	Potchefstroom Electronic Law Journal

SADCLJ	Southern African Development Community Law Journal
SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPS	South African Police Service
SCA	Supreme Court of Appeal
UNDP	United Nations Development Programme
USA	United States of America
WCC	Western Cape High Court
WPLG	White Paper on Local Government

TABLE OF CONTENTS

DEDICATION.....	i
Acknowledgements	ii
ABSTRACT.....	iii
ABBREVIATIONS.....	iv
CHAPTER 1	1
Introduction.....	1
CHAPTER 2.....	8
Meaning and relevance of environmental justice in the South African municipal context.....	8
2.1 <i>Introduction</i>	8
2.2 <i>The notion of environmental justice</i>	8
2.2.1 <i>A brief historical account of the evolution of a social, political and legal concept</i>	
8	
2.2.2 <i>A contemporary definition of environmental justice</i>	11
2.2.3 <i>Distributive environmental justice</i>	12
2.2.4 <i>Procedural environmental justice</i>	13
2.2.5 <i>Environmental justice as recognition</i>	14
2.2.6 <i>Environmental justice as a principle of South African law</i>	15
2.3 <i>The relevance of environmental justice in the municipal context</i>	17
2.3.1 <i>The nexus between developmental local government, environmental justice and municipal service delivery</i>	18

2.4	<i>Chapter summary</i>	19
CHAPTER 3		20
Meaning and relevance of the right to access to justice in the South African municipal context		20
3.1	<i>Introduction</i>	20
3.2	<i>The need for access to justice in local communities</i>	20
3.3	<i>A right to access to justice in international and African regional law</i>	21
3.4	<i>The right to access to justice in South Africa</i>	24
3.4.1	<i>Constitution</i>	24
3.4.2	<i>National Environmental Management Act 107 of 1998</i>	26
3.4.3	<i>Promotion of Administrative Justice Act 3 of 2000</i>	28
3.4.4	<i>Jurisprudence on the right to access to justice</i>	28
3.5	<i>Chapter summary</i>	29
CHAPTER 4		31
Municipal Courts as part of the South African judicial system		31
4.1	<i>Introduction</i>	31
4.2	<i>The design of the South African judicial system</i>	31
4.3	<i>Magistrate's Courts</i>	32
4.4	<i>"Municipal Courts" as specialist magistrate's courts</i>	35
4.4.1	<i>The nature of municipal courts</i>	35
4.4.2	<i>Establishment of Municipal Courts and appointment of judicial officers</i>	38

4.5	<i>Municipal Courts for improved access to the justice system in cases of environmental injustice</i>	41
4.6	<i>Chapter summary</i>	45
CHAPTER 5		46
Conclusion		46
5.1	<i>Background</i>	46
5.2	<i>Main findings and recommendations</i>	49
5.3	<i>Concluding remarks</i>	51
BIBLIOGRAPHY		52

CHAPTER 1

Introduction

Environmental justice (henceforth EJ) is an evolving notion that recognises the fair distribution of environmental hazards in communities. The notion of EJ was initially used to explore and demonstrate reasons why communities and individuals experience issues of unevenly distributed environmental harm, racism, and natural resource-related injustice.¹ As such, EJ fits the broader discourse of social justice, i.e. justice, in the distribution of opportunities and privileges.² It challenges and questions institutional conditions and social norms.³ The idea of EJ is explicitly to ensure that everyone enjoys human rights, equal opportunities, and services that include participation in decision-making and access to social institutions and judicial recourse in the event of environmental harm.⁴

There is growing scholarly literature suggesting that there is no universally agreed definition of EJ.⁵ This contention has been documented by scholars like Schlosberg, Agyeman, Evans, and others.⁶ The consensus is that a universally applicable definition of EJ is problematic and challenging because of disparities in respect of origin, race, culture and historical developments of different regions, countries and communities. Schlosberg argues that in addition to equity in the use of natural resources, EJ encompasses the rules of distributive and procedural justice with a focus on equal and fair processes in the distribution of environmental benefits to people.⁷ McDonald, in a similar vein, holds that the objectives of EJ relate to the relationship between people

¹ Schlosberg 2013 *Journal of Environmental Politics* 39.

² White *Environmental harm: An eco-justice perspective* 3. The reason why EJ and social justice are inextricably linked is because both demand access to a healthy and safe environment for present and future generations. Furthermore, the key elements of social justice include, for example, human dignity and respect, economic egalitarianism and social equality. Also see Schlosberg *Defining Environmental Justice* 41 and Steady "A Brief History and Overview" 17-18.

³ Schlosberg *Defining Environmental Justice* 41.

⁴ White *Environmental harm: An eco-justice perspective* 43-44. Also see paragraph 2.2 below.

⁵ Chapter 2 gives a comprehensive exposition of the notion of EJ.

⁶ Agyeman and Evans 2004 *Geographical Journal* 156. Agyeman, Bullard and Evan 2002 *Space and Polity Journal* 82 as well as Schlosberg 2013 *Journal of Environmental Politics* 39.

⁷ Schlosberg 2013 *Journal of Environmental Politics* 39.

and the environment.⁸ EJ thus serves to incorporate environmental concerns into the intellectual and institutional framework of matters such as human (environmental) rights and accountability in environmental decision-making.⁹ As indicated earlier, EJ cannot be separated, however, from the elements of (what is required for) social justice.¹⁰ This is because social justice and EJ are inseparably linked concepts that affirm that people should be treated fairly in the distribution of environmental benefits as well as to avail judicial recourse should EJ be at risk, for example.¹¹

South African environmental law recognises EJ as part of its constitutionally entrenched environmental right. Section 24 of the *Constitution of the Republic of South Africa, 1996* (henceforth the *Constitution*) provides that "everyone has the right to an environment that is not harmful to their health or well-being." Given the anthropocentric¹² nature of this right, it may be assumed that section 24 is among other things aimed at EJ for all.¹³ Further, the *National Environmental Management Act* 107 of 1998 (henceforth NEMA) explicitly provides for the "principle" of EJ. Section 2 of NEMA determines that "environmental management must place people and their needs at the forefront of its concern and serve their cultural and social interests equitably." Section 2(4)(c) of the Act even more explicitly states that "EJ must be pursued to avoid the unfair distribution of adverse environmental impacts to any person or vulnerable or disadvantaged people" in particular. The principle of EJ as contemplated in NEMA imposes duties on the state, commensurate with the constitutional environmental duties of government.¹⁴ These duties range from protecting, promoting, respecting and fulfilling all of the rights in the Bill of Rights to

⁸ McDonald *Environmental Justice in South Africa* 4.

⁹ McDonald *Environmental Justice in South Africa* 3.

¹⁰ White *Environmental harm: An eco-justice perspective* 3.

¹¹ Schlosberg *Defining Environmental Justice* 41 and White *Environmental harm: An eco-justice perspective* 43-44. Also see paragraph 2.2 below.

¹² The notion "Anthropocene" in the geo-ecological context denotes a period when people significantly dominate the environment by modifying or degrading it. Kotzé 2014 *Journal of Energy and Natural Resources Law* 127-128. Also see White *Crimes against Nature: Environmental criminology and ecological justice* 17.

¹³ *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* 2019 1 SA 491 (GP) para 11.11. *Baleni and others v Minister of Mineral Resources* 2019 1 SA 358 (GP) paras 83-84. *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* (Fuel Retailers) 2007 10 BCLR 1059 (CC) paras 4, 44 and 45.

¹⁴ Section 7(2) of the *Constitution* determines that the "state must protect, promote, respect and fulfil the rights in the Bill of Rights" (inclusive of the section 24 environmental right).

the progressive realisation of the constitutional environmental right. What this means is that all three spheres of government must cooperatively execute all of these duties.

Following on the above, EJ as a principle of South African environmental law also speaks to local government, which is comprised of 257 municipalities.¹⁵ Several scholars have to date analysed the general environmental duties of municipalities in the country.¹⁶ Overall, municipalities are jointly responsible with the other spheres of government for the realisation of people's environmental rights and the realisation of the environmentally relevant legal entitlements of communities.¹⁷ According to section 152(1)(d) of the *Constitution*, municipalities are constitutionally mandated to promote a safe and healthy environment for residents, of which a key element is law enforcement through courts and agencies. The Court in *Le Sueur v eThekweni Municipality* (the Le Sueur case),¹⁸ for example, submitted that it would be implausible to exclude municipalities from legislating concerning environmental matters at the local level.¹⁹

Given municipalities' constitutional and legislative mandate to promote a healthy and safe environment, it is expected that municipalities will help enhance EJ as described earlier by granting access to sufficient municipal services, among other methods. Municipal services typically include the provision of water, sanitation, electricity and the control of health and noise pollution.²⁰

The reality in South Africa is that ongoing social injustice(s)²¹ have over time also resulted in environmental despoliation and degradation, increasing levels of poverty

¹⁵ The term "local government" will be used interchangeably with the term "municipalities" throughout the study. It includes metropolitan, district and local municipalities. Reading sections 155(1)(c) of the *Constitution* with section 1 of the *Local Government: Municipal Systems Act* 32 of 2000 (Municipal Systems Act). Also see the total number of municipalities in South Africa at the Municipal Demarcation Board: <http://www.demarcation.org.za/site/faq/>.

¹⁶ De Visser 2009 *Commonwealth Journal of Local Governance* 20-21. De Visser and Christmas 2009 *Commonwealth Journal of Local Governance* 111-118, Du Plessis 2010 *Stellenbosch Law Review* 267-268 and Fuo 2015 *Commonwealth Journal of Local Governance* 20-26, among others.

¹⁷ Du Plessis 2017 *Journal of Law, Democracy and Development* 244.

¹⁸ 2014 JOL 31891 (KZP).

¹⁹ *Le Sueur v eThekweni Municipality* paras 19-20 and 40.

²⁰ Section 1 of the Municipal Systems Act defines a "municipal service" as a service that a municipality may provide in terms of the *Constitution* for the benefit of the local community, whereas a "basic municipal service" is a service necessary to ensuring an acceptable and reasonable quality of life, in that if it is not provided the failure would risk public health or the safety of the environment.

²¹ These injustices include, among others, poverty, unemployment, and pollution.

and the unequal distribution of necessary natural resources.²² Recent statistics suggest that the majority of poor people in South Africa's rural and urban areas are still without the proper delivery of services such as water services.²³ Many communities are directly or indirectly exposed to indoor or outdoor pollution, poor urban planning and the impact of climate change, among other things, on an ongoing basis.²⁴ Given the relationship between human health and well-being and the environmental dependency of proper services, it may be argued that where municipal service delivery fails and threatens the human condition, EJ is threatened.

Any injustice arising from non-compliance with EJ should, in principle, be able to be judicially challenged. The *Constitution* provides that everyone can approach the courts or any impartial fora when their rights enshrined in the Bill of Rights are infringed or when communities are faced with injustices.²⁵ In an environmental context, this finds further support in NEMA that determines explicitly that any person may institute legal proceedings in respect of any breach of a legal provision in the Act in the interest of the environment.²⁶ To successfully encourage environmental protection in the interest of the public and the environment, NEMA further provides that anyone who institutes proceedings in a court of law will be exempted from paying litigation costs²⁷ where the court finds that the person acted in the interest of the public and in the interest

²² Llewellyn 2018 *Journal of Contemporary African Studies* 23-24. Beall, Crankshaw and Parnell 2000 *Journal of Southern African Studies* 833-834.

²³ Statistics South Africa - General Household Survey 2017 2-6 <http://www.statssa.gov.za/publications/P0318/P03182017.pdf>. Statistics South Africa - Living Conditions Survey 2014/2015 <http://www.statssa.gov.za/publications/P0310/P03102014.pdf>.

²⁴ Statistics South Africa - General Household Survey 2017 2-6 <http://www.statssa.gov.za/publications/P0318/P03182017.pdf>. Statistics South Africa - Living Conditions Survey 2014/2015 <http://www.statssa.gov.za/publications/P0310/P03102014.pdf>. Feris *The conceptualisation of environmental justice within the context of the South African Constitution* 4 and 170. Kidd *Environmental law* 301. Also, see Glazewski "Environmental justice and the new South African democratic legal order" 5. The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data <http://www.statssa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf>.

²⁵ Reading sections 34 and 38 of the *Constitution* together.

²⁶ Section 32(1) of NEMA. Kotzé and Du Plessis 2010 *Journal of Court Innovation* 163-164. Also, by virtue of section 33 of NEMA, any interested party may institute private prosecution in the interest of protecting the environment. See *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* Case Number: 82/2017 ZAGPPHC 86 (1 April 2019) paras 91, 105 and 130.

²⁷ An inclusive reading of sections 32(1) and 32(2) of NEMA. *Biowatch Trust v Register, Genetic Resources* 2009 6 SA 232 (CC) paras 16, 17 and 60. Also see Humby 2010 *Journal of Environmental Law* 132-133.

of protecting the environment.²⁸ Courts and communities are thus statutorily enabled to address and remedy EJ as it manifests, among other things, through non-compliance with environmental law duties and functions.

In South Africa as elsewhere, judicial authority vests in the courts.²⁹ The courts are considered independent and are subject only to the *Constitution*.³⁰ Access to courts is a fundamental right entrenched in the *Constitution* and helps to facilitate everyone's access to and protection of other rights contained in the Bill of Rights, including the environmentally relevant rights.

The question under consideration is whether the South African judicial system is designed to adequately facilitate access to courts for local communities where EJ and environmental rights are threatened due to, for example, poor municipal performance. In other words, can the judicial system be an agent of environmental change? This inquiry is especially essential where local communities are exposed to environmental harm following failing municipal service delivery. The study argues that in these circumstances, a possible judicial institution that might be particularly useful would be the so-called Municipal Courts.

Municipal Courts are generally described as a division of the courts that focus only on local matters.³¹ Municipal Courts have exclusive jurisdiction in terms of by-law violations dealing with matters of nuisance such as street-trading, municipal planning, outdoor advertising, public open spaces, water services and waste dumping.³² These

²⁸ An inclusive reading of sections 32(1) and 32(2) of NEMA. *Blowatch Trust v Register, Genetic Resources* 2009 6 SA 232 (CC) paras 16, 17 and 60. This provision makes access to courts easier for an ordinary citizen who may not be able to afford the costs of litigation.

²⁹ Section 165(1) of the *Constitution*.

³⁰ Section 165(1) and (2) of the *Constitution*.

³¹ City of Tshwane 2015 <http://www.tshwane.gov.za/sites/Departments/Corporate-and-Shared-Services/LegalServices/MunicipalCourts/Pages/Municipal-Courts.aspx>. Municipal Courts are functions of the DoJ & CD. In the United States of America for example, the use of the term "municipal" in combination with courts refers to a lower court of record which has both civil and criminal jurisdiction of misdemeanour offences such as domestic violence, speeding tickets, evictions, parking violations and damages on default judgements. See United States of American Government: <https://www.usa.gov/state-courts>. Tempe Municipal Court: <https://www.tempe.gov/government/city-court>. Also see Ames 1933 *California Law Review* 121.

³² City of Tshwane 2015 <http://www.tshwane.gov.za/sites/Departments/Corporate-and-Shared-Services/LegalServices/MunicipalCourts/Pages/Municipal-Courts.aspx>. City of Johannesburg By-Laws Manual (2019) 4. The word "municipal" in the local government context is most frequently understood to refer to a municipality as an entity having the right of self-government. See section

courts also serve as a delegation from the Department of Justice and Constitutional Development (DoJ & CD) and the National Prosecuting Authority (NPA) to conduct prosecutions in respect of a failure to comply with a provision of other legislation that is administered by the municipality as well as traffic violations.³³

The research question underpinning this study is how Municipal Courts can contribute to EJ in South Africa. The objective is to explore how a judicial institution situated in the local sphere of government (i.e. Municipal Courts) could help address specific manifestations of environmental injustice as they continue to exist in the local government sphere. The subsidiary objective is to identify some of the common threats to EJ and factors hampering access to justice in environmentally relevant cases involving municipalities or local community actors.

The methodology adopted in this study comprises a literature review and an analysis of existing law. The research concerns primary and secondary sources of law and environmental governance theory, particularly constitutional and local government law, as well as the acts and regulations applicable to the justice system of the country. The study also considers the theory on the origin and rationale behind the notion of EJ. The primary sources for the literature review include legislation, case law, government policies, municipal by-laws, and strategies. The secondary sources comprise of journal articles, textbooks, and general and specialised reports.

Chapter 2 of this study explores the meaning and relevance of EJ in the South African municipal context. This chapter sketches the historical background and theoretical account of the emergence of the notion of EJ in jurisdictions not confined to South Africa. Chapter 3 discusses the meaning and relevance of the right to access to justice in the South African municipal context from the perspective of judicial recourse for

1 of the *Municipal Systems Act*. Municipal Courts function in terms of the *Magistrate's Courts Act* 32 of 1944.

³³ Section 112(b) and (c) of the *Municipal Systems Act* read with section 22(8)(b) of the *National Prosecuting Authority Act* 32 of 1998 together. City of Tshwane 2015 <http://www.tshwane.gov.za/sites/Departments/Corporate-and-Shared-Services/LegalServices/MunicipalCourts/Pages/Municipal-Courts.aspx>. By agreement between each municipality, the DoJ & CD and NPA, a Municipal Court may conduct and institute criminal proceedings in respect of a contravention of, for example, the *National Building Regulations and Standards Act* 103 of 1977 and the *Spatial Planning and Land Use Management Act* 16 of 2013.

environmental injustices. Chapter 4 critically looks at the role and place of Municipal Courts in the South African judicial system with a specific focus on what these courts could contribute to EJ in the cities of the country. The last chapter concludes the study and charts a future research and action agenda for Municipal Courts and the role they could potentially play in EJ at the local level.

This study does not intend to explore the functioning of a specific Municipal Court or courts. Instead, it sets out to consider how a local court (as a type of judicial institution) devoted to municipal matters could potentially assist in resolving and addressing matters of environmental injustice as they occur in local communities across South Africa.

CHAPTER 2

Meaning and relevance of environmental justice in the South African municipal context

2.1 *Introduction*

As alluded to in Chapter 1, environmental injustice arises in the absence of equal access to natural or cultural resources, or in the event of the uneven spread of environmental harm.³⁴ To the extent that municipal services such as water, sanitation, refuse collection and electricity are natural resource-related services, it is possible to reason that their inadequate provision may under certain conditions give rise to different levels or forms of environmental injustice.

One of the premises of this study is the reciprocal connection between environmental injustice and poor essential municipal services. In the build-up to establishing and evaluating this inter-relationship, this chapter provides a brief historical background of EJ and its theoretical underpinnings. Also, this chapter aims to provide a definition of EJ that is suitable for the South African context.

2.2 *The notion of environmental justice*

2.2.1 *A brief historical account of the evolution of a social, political and legal concept*

EJ has many definitions and articulations that differ from society to society and from one context to the next.³⁵ For Newton, the notion of EJ invokes special inclusivity and connection between the present and future generations by protecting their environmental interests and equalising the impact of resource depletion.³⁶ According to McDonald, EJ denotes and concerns itself with environmental injustices inherent in the relationship between people and the environment.³⁷

³⁴ Schlosberg and Collins 2014 *Journal of Wiley Interdisciplinary Reviews* 360-361.

³⁵ Gellers 2019 *Researchgate* 278-279.

³⁶ Newton *Environmental Justice* 3-5.

³⁷ McDonald *Environmental Justice in South Africa* 4.

The notion evolved from a social movement to a notion (and principle) of environmental law which concerns environmental equity³⁸ and the distribution of environmental harms.³⁹ EJ originally emerged in the United States of America (USA) as part of the understanding of "environmental racism"⁴⁰ that targeted the communities of colour.⁴¹ These communities experienced a range of environmental risks and the zoning of locally undesirable land uses (LULUs) such as polluting refineries, incinerators and landfills.⁴² At the time, these communities were not meaningfully involved in the decision-making concerning the development, implementation and enforcement of environmental laws, policies and regulations.⁴³

By the late 1980s and 1990s, several EJ movements had sprung up, such as the Anti-Toxic, Citizen-Movement, and People of Colour Environmental Movement, to protest against manifestations of environmental injustices at neighbourhood levels in the USA.⁴⁴ These movements sought to extend civil rights as well as legal remedies that addressed inequalities in instances where communities of colour suffered injustices as a result of racial discrimination.⁴⁵ Today the concept of EJ fits the scope of civil and

³⁸ Newton *Environmental Justice* 3-5. Environmental equity is understood to denote the circumstances in which environmental harms and benefits are equal and comparable to all in a society, as opposed to environmental inequity, which denotes the environmental harms or threats that are disproportionately distributed to or located in poor communities.

³⁹ Aygeman and Evans 2004 *Geographical Journal* 155-156.

⁴⁰ For Schlosberg, environmental racism refers to the exclusion of a certain culture or tribe in the enforcement of environmental laws, environmental decision-making and the location of LULUs. Schlosberg *Defining environmental justice* 48-49. For Bullard in his emphasis on institutional racism, it is the "value system that supports and allows racism in environmental matters." Bullard has also previously expressed the view that "whether by conscious design or institutional design" poor communities (mainly blacks) are also vulnerable and still are faced with environmental injustices as a result of racial exclusion. Bullard 1993 *Yale Journal of International Law* 319-320. Environmental Justice/Environmental Racism: <http://www.ejnet.org/ej/index.html>.

⁴¹ Steady "Linking Environmental Justice and Human Rights" 1-2. Brulle and Pellow 2006 *Journal of Annual Review of Public Health* 110-111. Newton *Environmental Justice* 3. The concept of "communities of colour" in the context of EJ refers to people who are not in the category of white people, who are also poor and marginalised, for example, Indians, Asian Americans, black African and African-American and Native Americans.

⁴² Stacy "Environmental justice and transformative law in South Africa and cross-jurisdictional notes about Australia, the United States and Canada" 36. Schlosberg 2013 *Journal of Environmental Politics* 38. Kidd *Environmental Law* 293. The United States Environmental Protection Agency 2017: <https://www.epa.gov/environmentaljustice/environmental-justice-timeline>. Newton *Environmental Justice* 6.

⁴³ Gellers 2019 *Researchgate* 278-279.

⁴⁴ Brulle and Pellow 2006 *Journal of Annual Review of Public Health* 110-111.

⁴⁵ The United States Environmental Protection Agency 2017
<https://www.epa.gov/environmentaljustice/environmental-justice-timeline>. The Civil Rights

political rights under the environmental law framework as an *Executive Order*.⁴⁶ The mission of the *Order* is to enlist and remedy environmental risks, effects, programmes, policies and activities that otherwise disproportionately targeted minority people and low-income populations.⁴⁷ Similarly, the USA Environmental Protection Agency (EPA) was mandated to formulate strategies that would address and challenge issues of environmental injustice.⁴⁸

The USA was undoubtedly not the only part of the world affected by environmental injustice. In the South African context, the idea of EJ emerged in the pre-constitutional era and is still today a priority for national development.⁴⁹ As in America, racism also played a sensitive role in South Africa due to its oppressive apartheid laws. During the apartheid period, the majority of black people were subjected to racial segregation and deprived of the rights to participate in environmental decision-making, among other things.⁵⁰ Apartheid and cultural and political differences created and shaped several state policies and legal realities that have impacted on how EJ is understood.⁵¹ It has also been suggested that before 1994, environmental concerns were mostly white elitist concerns, which characterisation changed when South Africa transitioned to a democratic government in 1994.⁵²

After 1994 the South African government formalised EJ as part of the legal framework to protect, respect, promote and fulfil everyone's environmental rights.⁵³ The inclusion of a substantive environmental right in the *Constitution* (section 24) was a strategy of

Movement arose as a result of individuals' seeking to address issues of environmental inequalities and environmental protection in their communities.

⁴⁶ Executive Order No. 12898 *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* 59 Federal Regulation 7629 of 1994 - issued by President William J. Clinton in 1994.

⁴⁷ See Preamble to the Executive Order No. 12898. Also see Kidd *Environmental Law* 296.

⁴⁸ The preamble to the Executive Order No. 12898. Also see Kidd *Environmental Law* 296.

⁴⁹ Toxopeus *The promotion of environmental justice through the lens of civil-based environmental governance in South Africa* 6. Stacy "Environmental justice and transformative law in South Africa and cross-jurisdictional notes about Australia, the United States and Canada" 36.

⁵⁰ Debanne and Keil 2004 *Journal of Space and Polity* 212.

⁵¹ Debanne and Keil 2004 *Journal of Space and Polity* 212. Llewellyn 2013 *Journal of South African Review of Sociology* 3-4.

⁵² Glazewski 1991 *Acta Juridica* 2.

⁵³ Sections 7(2) and 24 of the *Constitution* read together. McDonald 2002 *International Journal of African Historical Studies* 2.

the new government to guarantee a healthy environment free from harm⁵⁴ for the people of South Africa.⁵⁵ EJ is also inherent in other constitutional rights such as the rights to equality,⁵⁶ human dignity,⁵⁷ life,⁵⁸ property⁵⁹ and access to housing,⁶⁰ food and sufficient water.⁶¹ EJ is further enabled by several constitutionally enshrined procedural rights including access to information,⁶² administrative justice⁶³ and the courts.⁶⁴

2.2.2 *A contemporary definition of environmental justice*

While the initial discourse on EJ primarily focussed on the diversity and place-specificity of the USA, this study adopts a broader definition of the notion to expand its influence and application. In an unequal society such as South Africa, environmental benefits and resources such as water and clean air, for example, are (still) not distributed equally to everyone.⁶⁵ The ideology of domination and hegemony continues to shape and influence the distribution paradigm of these resources, especially in poor and marginalised communities.⁶⁶

This suggests that a more inclusive definition would translate into an understanding of EJ that focusses on the total living environment of both the present and future generations; one that is free from racial discrimination and excessive, unfairly distributed externalities on the environment.⁶⁷ A more inclusive understanding of EJ arguably recognises the synergies between the living environment and environmental

⁵⁴ For example, water and air pollution, the lack of resources, environmental degradation and despoliation, and urban sprawl.

⁵⁵ Reading sections 7(2) and 24 of the *Constitution* together.

⁵⁶ Section 9.

⁵⁷ Section 10.

⁵⁸ Section 11.

⁵⁹ Section 25.

⁶⁰ Section 26.

⁶¹ Toxopeus and Kotzé 2017 *Law, Environment and Development Journal* 52.

⁶² Section 32.

⁶³ Section 33.

⁶⁴ Section 34. Also see Chapter 3 below.

⁶⁵ World Bank 2019: <https://www.worldbank.org/en/country/southafrica/overview>. The World Bank states that South Africa remains one of the countries in the world that is unequal in the distribution of opportunities such as employment and economic opportunities.

⁶⁶ World Bank 2019: <https://www.worldbank.org/en/country/southafrica/overview>. See Steady "Linking Environmental Justice and Human Rights" 6.

⁶⁷ Scott and Oelofse 2004 *Journal of Environmental Planning and Management* 449.

policy, legislation and government action as they manifest in the provision of public services and public decision-making, for example.⁶⁸

Arguably, a broader understanding of EJ draws on the understanding of “justice” as being premised on three theoretical dimensions, namely, justice as distribution, justice as a procedure, and justice as recognition. Together these three dimensions help to frame the conditions and circumstances under which it would be possible to identify environmental injustice and argue for judicial action in a context such as that of South Africa.

2.2.3 *Distributive environmental justice*

Distributive justice refers to the fair distribution of resources, goods, duties and responsibilities throughout society.⁶⁹ Munalula notes that distributive justice is a principle that guides the just distribution of benefits, services and burdens.⁷⁰ According to Schlosberg, an individual cannot access distributive justice without duly having justice in the procedures of distribution for producing equitable distribution.⁷¹ It follows that in the environmental context, distributive EJ refers to the fair distribution of environmental burdens or the negative effects of environmentally harmful facilities (LULUs).⁷²

The relevance of the above to a broader understanding of EJ is that distributive EJ focusses on the process of distributing environmental goods and resources fairly (green spaces, clean water, air and green transport infrastructure). In the local context, this would mean that everyone in society gets a fair share of services that the municipality

⁶⁸ Scott and Oelofse 2004 *Journal of Environmental Planning and Management* 449. Debanne and Kreil 2004 *Journal of Space and Polity* 211.

⁶⁹ Legal Dictionary (date unknown): <https://legaldictionary.net/distributive-justice/>. Maiese 2013 Distributive justice: <https://www.beyondintractability.org/essay/distributive-justice>. This dimension of justice can manifest in several ways, one of which pertains to utilitarianism, with an emphasis on the fair treatment of all people and the promotion of the greatest happiness for the majority of people via the equal distribution of goods and opportunities. See Johnson, Pete and du Plessis *Jurisprudence: A South African perspective* 180. Also see Munalula 2014 *SADCLJ* 88 and Schlosberg *Defining Environmental Justice* 11-13.

⁷⁰ Munalula 2014 *SADCLJ* 87. Munalula frames his argument on the basis of the idea that benefits, services and burdens must be shared across the demographic spectra equally and with moral propriety to reflect proportionate equity. Also see White *Crimes against Nature: Environmental criminology and ecological justice* 170.

⁷¹ Schlosberg *Defining Environmental Justice* 56.

⁷² Clough 2018 *Current Opinion in Environmental Science & Health* 14.

must provide in terms of the *Constitution* or legislation.⁷³ For example, the state must provide at least a "minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month,"⁷⁴ the "minimum standard for basic sanitation (which includes a safe, reliable, clean and environmentally sound toilet)"⁷⁵ and a fixed 50 kWh of electricity per household per month."⁷⁶

2.2.4 Procedural environmental justice

Procedural justice is part of the EJ discourse⁷⁷ and denotes the right to equal concern and respect in political and civil decision-making processes about environmental goods and opportunities (e.g. jobs and sustainable development).⁷⁸ The term denotes the idea of fairness in the procedures that resolve disputes and that see to the distribution of resources.⁷⁹ It is a core feature of EJ in conflicts and decisions relating to natural resources. The relationship between distributive justice and the judicial pursuit of EJ provides opportunities for society to access courts and exercise its rights to be heard, and to be given information and reasons for any decision.⁸⁰

In the context of municipal service delivery, distributive EJ would mean that the provision of services to the community is procedurally fair. The provision of basic municipal services must duly consider the overall needs and values of the community openly and transparently.⁸¹ One procedure provided for in South Africa to recognise

⁷³ According to Rawls' theory of social justice and social goods, communities often compete for basic rights, freedoms, wealth and power, including resources such as housing, health care and education, in which context the principle of distributive justice should be a determining factor in order for equity to prevail. See Johnson, Pete and Du Plessis *Jurisprudence: A South African perspective* 183 and 194. Nozick, another theorist, also highlights the fact that distributive justice serves as a principle to guide members of the community in how to acquire and transfer benefits and resources. Also see Maiese 2013 Distributive justice: <https://www.beyondintractability.org/essay/distributive-justice>.

⁷⁴ Regulation 3 of GN R509 in GG 22355 of 8 June 2001.

⁷⁵ Regulation 2 of GN R509 in GG 22355 of 8 June 2001.

⁷⁶ The *National Indigent Policy* (2006) at 21-23. Geduld *An environmental justice perspective on the role of local government in realising the right to sanitation* 48.

⁷⁷ Maiese 2013 Procedural Justice: <https://www.beyondintractability.org/essay/procedural-justice>.

⁷⁸ Rechtschaffen and Gauna *Environmental justice: Law, policy and regulation* 9. Maiese 2013 Procedural Justice: <https://www.beyondintractability.org/essay/procedural-justice>.

⁷⁹ Rechtschaffen and Gauna *Environmental justice: Law, policy and regulation* 9. Maiese 2013 Procedural Justice: <https://www.beyondintractability.org/essay/procedural-justice>.

⁸⁰ Preston "The effectiveness of the law in providing access to environmental justice: an introduction" 34.

⁸¹ Reading section 73(2) of the Municipal Systems Act with section 195 of the *Constitution*.

the overall needs and values of a local community is related to the development and adoption of an Integrated Development Plan (IDP).⁸² The IDP process requires consultation of and the participation of the local community in order to reflect the council's vision for the long term concerning critical development and the distribution of basic amenities such as water, sanitation and refuse collection, among other things.⁸³

2.2.5 *Environmental justice as recognition*

Justice as recognition emphasises who is given respect by whom, and who is and who is not valued in the decision-making process, e.g. concerning the distribution of natural resources or access to environmentally dependent services.⁸⁴ This dimension of justice also concerns how non-recognition negatively affects the opportunities available to vulnerable and disadvantaged groups in society.⁸⁵ In the environmental context, justice as recognition denotes the recognition of all interested and affected parties and stakeholders in environmental management.⁸⁶

In South Africa this typically suggests that municipalities may not design laws, policies or strategies that unfairly discriminate against people directly or indirectly due to gender, age, culture, race, pregnancy, sexual orientation or colour in regard to the provision of basic municipal services such as water and sanitation, health-care, food and waste removal.⁸⁷ This means that for laws, policies and strategies to contribute to EJ, vulnerable and marginalised people in poor and low-income communities must be able to get access to services that the municipality must provide in terms of the *Constitution* and legislation.

⁸² Chapter 5 of the Municipal Systems Act.

⁸³ Section 26 of the Municipal Systems Act.

⁸⁴ Preston "The effectiveness of the law in proving access to environmental justice: an introduction" 39.

⁸⁵ Gellers 2019 *Researchgate* 282.

⁸⁶ Schlosberg *Defining Environmental Justice* 25.

⁸⁷ Reading sections 9(3), 152(1) and 153(a) of the *Constitution*.

2.2.6 *Environmental justice as a principle of South African law*

The *White Paper on Environmental Management Policy for South Africa* (1998) includes EJ as one of the principles informing sector-specific environmental legislation and reiterates the sentiments of section 24 of the *Constitution*.⁸⁸ Even in the early days after the adoption of a new approach to environmental management in South Africa, the White Paper thus provided that the state is under a duty to integrate environmental considerations with social, political and economic justice and development in addressing the needs and rights of all communities, sectors and individuals.⁸⁹

As indicated earlier,⁹⁰ NEMA currently is South Africa's environmental framework legislation and sets out an array of overarching and fundamental principles which are to underpin all actions of all organs of state that may affect the environment significantly, including the exercise of the state's responsibilities envisaged in section 7(2) of the *Constitution*.⁹¹ Section 2 of NEMA provides that: "environmental management must place people and their needs at the forefront of its concern, to serve their physical, psychological, developmental, cultural and social interests equally."⁹² NEMA further determines that integrated environmental management has a prominent role in advancing the environmental interests of all people equitably.⁹³ NEMA is thus devoted to environmental protection and the balancing of socio-economic rights such as land (property), housing, water, food and health – for everyone. Considering the objects of EJ, the balancing of socio-economic rights and interests with the natural environment or resource base should always guide measures for environmental protection.⁹⁴

EJ is expressly provided in NEMA as follows:

⁸⁸ *White Paper on Environmental Management Policy for South Africa* (1998) para 3 on environmental principles.

⁸⁹ *White Paper on Environmental Management Policy for South Africa* (1998) para 3 on environmental principles.

⁹⁰ See Chapter 1.

⁹¹ Section 2(1) of NEMA.

⁹² Section 2(2) of NEMA. Kidd *Environmental Law* 302.

⁹³ Section 23(2) of NEMA. Feris 2010 *PELJ* 76.

⁹⁴ *Fuel Retailers* case para 61.

Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.⁹⁵

EJ is also implied in the following principle:

Equal access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access to it by categories of persons disadvantaged by unfair discrimination.⁹⁶

In the absence of a clear definition of what EJ entails from a South African environmental management perspective, the above principles give some sense of what EJ is supposed to mean. Significant emphasis is placed on the meaningful involvement of all people in environmental governance and complementary civil-based instruments, particularly public participation. Similarly, public participation constitutes a crucial civil-based instrument for ensuring that state decisions do not impact adversely on the environment and people.⁹⁷ In a similar vein, mechanisms such as public participation and notice-and-comment procedures serve as veritable environmental governance tools in consideration of the environmental concerns of local communities, whenever an environmental injustice is triggered.⁹⁸

Sector-specific environmental laws are also devoted to the principle of EJ as envisaged by NEMA. For example, the *National Environmental Management: Air Quality Act* 39 of 2004 (NEM: AQA) determines that “the burden of health impacts associated with polluted ambient air falls most heavily on the poor” and acknowledges that the “minimisation of pollution is the key to ensuring that air quality is improved” for everyone on the environment.⁹⁹ The fact that NEM: AQA recognises the rights of the poor concerning the environment directly feeds into the aims of EJ. In a similar vein, the *National Environment Management: Waste Act* 59 of 2008 (NEM: WA) acknowledges the fact that while failures in waste management may have significant

⁹⁵ Section 2(4)(c) of NEMA.

⁹⁶ Section 2(4)(d) of NEMA.

⁹⁷ Draai and Taylor 2009 *Journal of Public Administration* 113. Du Plessis 2008 *PELJ* 22. See also, King and Redell 2015 *PELJ* 948.

⁹⁸ See sections 3 and 4 of the *Promotion of Access to Administrative Justice Act* 3 of 2000.

⁹⁹ The Preamble to the Act.

negative impacts on the environment, the minimisation of pollution and waste (recycling, reusing and reducing) may be conducive to the environment.¹⁰⁰ The minimisation of waste may be one of the keys to realising and ensuring that the environment is protected equally for everyone.

Against the background of the above, the next section links EJ and the provision of municipal services in South Africa. The point of departure is that a right to basic municipal services¹⁰¹ and the anthropocentric nature¹⁰² of section 24 of the *Constitution* could be meaningfully linked to EJ discourse in the South African context.

2.3 The relevance of environmental justice in the municipal context

This section is premised on the view that the absence of basic municipal services such as water and sanitation and waste removal can impact on communities' experience of EJ. Municipalities are mandated to provide services in local communities – several of which are dependent on the availability or protection of natural resources and ecosystems.¹⁰³ Municipal services contribute to the quality of people's lives and well-being.¹⁰⁴ This section explains how municipalities in South Africa are expected to provide services and to fulfil their developmental mandate as entrenched in the notion of "developmental local government".¹⁰⁵ The rationale is that municipal services are inextricably tied to developmental local government.¹⁰⁶

¹⁰⁰ The Preamble to the Act.

¹⁰¹ Sections 1 and 5(1)(g) of the Municipal Systems Act read together.

¹⁰² Kotzé 2014 *Journal of Energy and Natural Resources Law* 256. White *Crimes against Nature: Environmental criminology and ecological justice* 17. Also see paragraph 1.1 above.

¹⁰³ Section 73 of the Municipal Systems Act.

¹⁰⁴ Municipal Systems Act. Also see Van der Waldt "Municipal service delivery and the environment" 310.

¹⁰⁵ Post 1994, municipalities went through constitutional transformation. Furthermore, the object and duties of municipalities were translated into the concept "developmental local government" to refer to municipalities that are committed to work with communities in the future to find sustainable ways to improve their quality of their lives. See sections 152 and 153 of the *Constitution*. De Visser 2009 *Commonwealth Journal of Local Governance* 9-10 and Du Plessis and Fuo 2017 *Commonwealth Journal of Local Governance* 2. Also see paragraph 2.4 below.

¹⁰⁶ See sections 152(1)(b) and (d) read with section 153(1) of the *Constitution*.

2.3.1 *The nexus between developmental local government, environmental justice and municipal service delivery*

The *Constitution* obliges municipalities to strive within their capacity to provide services in a sustainable manner, promote socio-economic development and a safe and healthy environment for local communities.¹⁰⁷ According to the Municipal Systems Act, each municipality exercises its executive and legislative authority towards promoting and undertaking development in communities.¹⁰⁸ Development in this instance denotes, for instance, the improvement of the quality of life of everyone, but especially the poor and disadvantaged, and safeguarding the living standards of future generations.¹⁰⁹ The Municipal Systems Act inadvertently emphasises that development must benefit everyone in society concerning their social, economic, environmental, institutional and infrastructural interests, for example.¹¹⁰

Although “developmental local government” (DLG) has a particular meaning which does not refer directly to EJ, it is of direct relevance to EJ if one considers its emphasis on fairness, inclusivity and equality. The notion DLG, as contained in the WPLG, has a significant impact on the daily lives of South Africans.¹¹¹ It defines the notion as the commitment of municipalities “to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.”¹¹² Arguably, DLG also unintentionally emphasises the relationship between the pursuit of EJ and the realisation of several socio-economic rights such as access to health-care, food, water and housing.

Steytler and De Visser argue that DLG should not occur at the expense of the environment and people.¹¹³ DLG is about more than municipal service delivery, but the latter is a crucial part thereof. The WPLG provides that municipal service delivery must

¹⁰⁷ Reading sections 152(1), 152 and 153(a) of the *Constitution* together.

¹⁰⁸ Reading sections 11(3)(b) and 4(2)(g) of the Municipal Systems Act.

¹⁰⁹ Section 1 of the Municipal Systems Act. Steytler and De Visser *Local Government Law of South Africa* Chapter 1 (available on LexisNexis database).

¹¹⁰ Reading sections 1 (definitions of the terms “development” and “local community”) and 5(1)(g) of the Municipal Systems Act together.

¹¹¹ Section B of the WPLG.

¹¹² Section B of the WPLG. Steytler and De Visser *Local Government Law of South Africa* Chapter 2 (available on LexisNexis database).

¹¹³ Steytler and De Visser *Local Government Law of South Africa* Chapter 1 (available on LexisNexis database).

be accessible to all without discrimination and be affordable in the sense that those who cannot afford to pay for the services must get at least a minimum level of provision.¹¹⁴ Furthermore, the WPLG provides that for services to reflect the purpose of improving the daily lives of society, they must be of good quality, safe and sustainable.¹¹⁵

The idea of universal affordability addresses issues of social inequality broadly by reason that EJ protects the rights of poor and low-income communities. For this reason, a legitimate aim and function of municipalities to promote development in the lives of the people in the communities they serve directly translates into the affirmation of EJ.

2.4 Chapter summary

This chapter has provided a brief historical background of EJ and its theoretical underpinnings. It has also aimed to provide a definition of EJ that is suitable to the South African context. Drawing on this definition, the chapter has further deliberated the connection between municipal service delivery or the lack thereof, and the pursuit of EJ at the local level in South Africa.

It was argued that the gist of DLG in South Africa suggests that people should have equal access to services, several of which are natural resource-dependent. The failure to adequately (reasonably) provide such services to all affects DLG and amounts to a breach of the law. It threatens EJ, if one considers its three dimensions.

The next chapter discusses the relevance of access to justice generally and in the environmental context with the objective of narrowing the discussion of EJ down to the place and role of courts in promoting and protecting EJ.

¹¹⁴ Section F of WPLG. Also see Section 73(2) of the Municipal Systems Act. Also see Van der Waldt "Municipal service delivery and the environment" 322.

¹¹⁵ Section F of WPLG.

CHAPTER 3

Meaning and relevance of the right to access to justice in the South African municipal context

3.1 Introduction

This chapter seeks to explore the relevance of access to justice in the South African municipal context for the pursuit of EJ.¹¹⁶ The chapter critically reviews the international and domestic literature on the nexus between access to courts and the judicial enforcement of rules and principles aimed at the redress or prevention of environmental injustices.¹¹⁷ The right to access to justice as enshrined in the South African *Constitution* and legislation receive attention in showing how it is in principle (and by law) possible for people to seek judicial recourse in matters of environmental injustice.¹¹⁸ The chapter concludes by highlighting the importance of local community access to justice in matters of environmental injustice as related to municipal service delivery, specifically.¹¹⁹

3.2 The need for access to justice in local communities

According to Dugard, having access to justice responds to the individual's or society's right to be heard when seeking legal redress.¹²⁰ She highlights difficulties that defeat the purpose of accessing justice, especially socio-economic hardships such as gross inequalities, legal costs and geographical disparities.¹²¹ A lack of financial assistance, legal empowerment, or sometimes the necessary information on how the judicial system works contribute to failures of the system.¹²² In these circumstances people need assistance, be it of a financial kind or concerning education, in order to be able

¹¹⁶ Paragraph 2.

¹¹⁷ Paragraph 3.2.

¹¹⁸ Paragraph 3.3.

¹¹⁹ Paragraph 4.

¹²⁰ Dugard 2008 *SAJHR* 216. Also see Flynn *Access to justice and the UN Convention of the Rights of Persons with Disabilities* 11-12.

¹²¹ Dugard 2008 *SAJHR* 216.

¹²² Adebawale 2004 *Journal of the Capacity Global* 14-15. Dugard 2008 *SAJHR* 216.

to benefit from the judicial system, especially when instituting legal proceedings concerning a matter of service delivery or EJ in particular.

Access to justice allows communities that are environmentally, socially, economically, politically or otherwise marginalised to improve their livelihoods.¹²³ Access to justice promotes peoples' capabilities, security and personal choices, while at the same time taking advantage of the law to prevent and address injustices.¹²⁴ For this reason, enabling access to justice grants local communities the power to address or seek remedies in instances where harm occurs, or where service delivery is not sufficient.¹²⁵ Access to justice and legal empowerment also make it possible to realise one's rights, such as the right to water, food, sanitation, property, housing, education, and a healthy environment.¹²⁶

There are several instruments internationally and in African regional law recognising and acknowledging the importance of the right to access justice and the ways of doing so.

3.3 A right to access to justice in international and African regional law

Access to justice is a human right and a customary norm internationally.¹²⁷ Many countries recognise the concept of access to justice in various forms, including in the form of supplying legal aid, physical access to legal structures, and the legal right to obtain legal redress.¹²⁸ The historical debate on access to justice suggests that the concept and its theoretical development include more than the ordinary government approach to justice, which only provides direct and physical access to judicial

¹²³ Ameermia *Mail and Guardian* 2.

¹²⁴ Ameermia *Mail and Guardian* 2.

¹²⁵ Van De Meene and Van Rooij *Access to Justice and Legal Empowerment* 6. Kibugi "Enhanced access to environmental justice in Kenya" 158. UNDP 2005 "Programming for Justice: For All" 5.

¹²⁶ Van De Meene and Van Rooij *Access to Justice and Legal Empowerment* 6. Mrema and Häntschel 2015 *Journal of Asian Biotechnology and Development Review* 19.

¹²⁷ Robinson 2012 *Journal of Pace Environmental Law Review* 366. Van De Meene and Van Rooij *Access to Justice and Legal Empowerment* 9. United Nations Development Programme "Programming for Justice: For All" 3.

¹²⁸ Yuthayotin *Access to Justice in Transnational B2C E-Commerce* 40.

structures (courts).¹²⁹ Legal scholars such as Morrow¹³⁰ and Kibugi,¹³¹ among others, suggest that people's access to justice refers to their being able to use a legal system to arrange their lives and resolve disputes effectively. Their emphasis is on the assumption that at some point in life, everyone will face legal problems such as theft, contractual issues, evictions and environmental pollution and degradation that will need legal redress.¹³²

According to the United Nations Development Programme (UNDP), access to justice involves more than physical access and denotes the "ability of all people to seek and obtain remedies through formal and informal institutions of judges, and in conformity with human rights standards."¹³³ The UNDP widely accepts that people need effective judicial mechanisms to protect their legitimate interests and to enforce the rule of law.¹³⁴ These mechanisms must be accessible to the public as a whole and to the extent that they accommodate every individual, especially the poor and marginalised groups.¹³⁵

The World Bank avers that access to justice is essential to eradicating poverty and promoting shared prosperity;¹³⁶ that access to justice is necessary to resolve disputes effectively by applying legal principles and recognising the rights of the poor people in the justice system.¹³⁷ Being poor is in this context equated with the inability to access justice or judicial institutions because it is often difficult to enforce and protect

¹²⁹ Yuthayotin *Access to Justice in Transnational B2C E-Commerce* 41. Also see Dugard 2008 *SAJHR* 216 and Flynn *Access to justice and the UN Convention of the Rights of Persons with Disabilities* 11-12.

¹³⁰ Morrow "The courts and public participation in environmental decision-making" 147-148.

¹³¹ Kibugi "Enhanced access to environmental justice in Kenya" 158. UNDP 2005 "Programming for Justice: For All" 5.

¹³² Morrow "The courts and public participation in environmental decision-making" 148. Kibugi "Enhanced access to environmental justice in Kenya" 158.

¹³³ UNDP 2013 "Rule of law and access to justice" 3. Kibugi "Enhanced access to environmental justice in Kenya" 158. UNDP 2005 "Programming for Justice: For All" 5. Wrbka, Van Uytsel and Siems "Access to justice and collective actions 'Florence' and beyond" 2-3.

¹³⁴ UNDP *Programme* "Programming for Justice: For All" 3. Also see Van De Meene and Van Rooij *Access to Justice and Legal Empowerment* 9. Yuthayotin *Access to Justice in Transnational B2C E-Commerce* 46.

¹³⁵ Van De Meene and Van Rooij *Access to Justice and Legal Empowerment* 9. *United Nations Development Programme* "Programming for Justice: For All" 3.

¹³⁶ The World Bank 2019: <http://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety>.

¹³⁷ The World Bank 2019: <http://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety>. Also see UNDP 2005 "Programming for Justice: For All" 4.

rights in a formal judicial institution due to factors such the cost of litigation, a lack of adequate information, and financial incapacity.¹³⁸

The *Universal Declaration of Human Rights* (1948) also recognises access to justice as a necessary right to realise other human rights. Articles 7 and 8 respectively provide that everyone is equal before the law and has a right to an effective remedy by a court of law when fundamental rights such as the right to life, dignity and privacy are violated. These articles emphasise that the state may not discriminate against anyone who seeks legal redress in courts, or when that person's fundamental expectations are violated or not fulfilled.¹³⁹ Similarly, Principle 10 of the *Rio Declaration on Environment and Development* (1992) says that states are required to provide adequate access to judicial and administrative proceedings to facilitate the public's ability to seek redress, accountability and transparency in decision-making.¹⁴⁰ Legal institutions must be directed to ensure fair access to justice and sound environmental governance by allowing public participation and making environmental information available, for example.¹⁴¹

Furthermore, *Sustainable Development Goal 16* (2016) (SDG)¹⁴² advances access to justice by calling on states and societies to "provide access for all and build effective, accountable and inclusive institutions at all levels" by 2030.¹⁴³ The aims and targets of SDG 16 are to promote the rule of law at the international and national levels by ensuring the maintenance of access to justice for all.¹⁴⁴ According to SDG 16, states

¹³⁸ The World Bank 2019: <http://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety> Van De Meene and Van Rooij *Access to Justice and Legal Empowerment* 9. Also see Du Plessis 2011 *SAJHR* 283-284.

¹³⁹ Articles 7 and 8 of the *Universal Declaration of Human Rights*. Also see article 8 of the *American Convention of Human Rights* (1969), article 6 of the *European Convention on Human Rights* (1953) and article 7(1) of the *African Charter on Human and People's Rights* (1986).

¹⁴⁰ Robinson 2012 *Journal of Pace Environmental Law Review* 365-366.

¹⁴¹ Mrema and Häntschel 2015 *Journal of Asian Biotechnology and Development Review* 18. Also article 9 of the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998), which provides legal remedies in circumstances where a party/parties are aggrieved by any decision taken concerning the environment, as a way of broadening avenues for legal remedies and access to justice.

¹⁴² SDG 16 aims to promote peaceful and inclusive societies for sustainable development, to provide access to justice for all, and to build effective, accountable and inclusive institutions at all levels.

¹⁴³ United Nation Sustainable Development Goals: <https://www.un.org/sustainabledevelopment/peace-justice/>.

¹⁴⁴ Target 16.3 of the SDG 16.

must establish and introduce institutions that are effective, accountable and inclusive, such as courts and tribunals, as a way of providing access to justice and promoting the rule of law.¹⁴⁵ These institutions must be judicially useful in the sense that they must grant sound judgements; they must be accountable in that they must uphold the law and perform their stipulated duties and responsibilities; and they must be inclusive of all, regardless of their material possessions, ethnicity or race.¹⁴⁶

The *African Charter on Human and Peoples Rights* (1986) recognises the right to access to justice by including the following provisions: the rights to participate freely in government decision-making,¹⁴⁷ to access to public services¹⁴⁸ and information,¹⁴⁹ and to be heard in a court of law,¹⁵⁰ including the right to asylum in another country when being persecuted.¹⁵¹ The African Charter includes these rights, arguably, as a way to broaden access to justice.

The next section describes the opportunities that people have to participate in environmental decision-making and to engage in the enforcement and protection of the environment in the South African context. Attention is paid to the procedures and other avenues through which to access or judicially leverage EJ in the South African context specifically.

3.4 The right to access to justice in South Africa

3.4.1 Constitution

The *Constitution* enunciates a right to access to justice (courts) to enable anyone to enforce the rights in the Bill of Rights.¹⁵² Section 34 of the *Constitution* provides that:

¹⁴⁵ Target 16.3 of the SDG 16.

¹⁴⁶ Target 16.3 of the SDG 16.

¹⁴⁷ Article 13(1).

¹⁴⁸ Article 13(2) and (3).

¹⁴⁹ Article 9.

¹⁵⁰ Article 7.

¹⁵¹ Article 12.

¹⁵² Section 34 of the *Constitution*.

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The right to access to justice provides that everyone may approach courts or other independent and impartial forums when his or her human rights (life, dignity, privacy, among others) are violated or where legal claims are concerned.¹⁵³ What this means is that courts and tribunals or forums have the power to make determinations and offer appropriate redress about such infringements or claims.¹⁵⁴ Frequently, the right to access to courts operates in parallel with the right to legal representation for individuals or interested groups who cannot afford legal services.¹⁵⁵

According to Currie and De Waal, any individual who is involved in a dispute has three distinct rights, as guaranteed in section 34 of the *Constitution*, should such an individual resort to this provision.¹⁵⁶ They posit that firstly the right to access to justice as provided in the *Constitution* creates a right to access to courts.¹⁵⁷ Secondly they argue that tribunals or forums involved in resolving disputes other than courts (judicial structures) should be independent and impartial when resolving disputes.¹⁵⁸ Thirdly, they require that those disputes be resolved in a fair and public hearing in order to embrace the guarantees of a fair trial or proceedings.¹⁵⁹ The primary purpose of this right is to protect the interests of individuals should disputes arise to which legal rules are applicable. Insisting on the use of section 34 of the *Constitution* gives effect to the principle of good order or the rule of law, which prohibits self-help in matters that would require judicial intervention.¹⁶⁰

¹⁵³ Currie and De Waal *The Bill of Rights Handbook* 711-715.

¹⁵⁴ South African Human Rights Commission: <https://www.sahrc.org.za/home/21/files/Access%20to%20Justice%20Pamphlet.pdf>.

¹⁵⁵ Reading sections 34 and 35(2)(b) of the Constitution together. Sarkin 2002 *South African Journal on Human Rights* 630. Notably, this chapter does not equate justice with the claims of a fair trial envisaged in section 35(5) of the *Constitution*. Dugard 2008 *SAJHR* 218.

¹⁵⁶ Currie and De Waal *The Bill of Rights Handbook* 711.

¹⁵⁷ Section 34 of the *Constitution*. Currie and De Waal *The Bill of Rights Handbook* 711. Also see Budlender 2004 *SALJ* 341-343.

¹⁵⁸ Currie and De Waal *The Bill of Rights Handbook* 711.

¹⁵⁹ Currie and De Waal *The Bill of Rights Handbook* 711.

¹⁶⁰ Waal *The Bill of Rights Handbook* 711.

Although the right to access to justice guarantees direct and indirect access to courts or administrative structures,¹⁶¹ courts have not interpreted this right as granting immediate legal standing.¹⁶² Prospective litigants still need to adhere to the rules of legal standing.¹⁶³ The right to access to justice is entirely justified when a prospective litigant has sufficient interest in the subject matter concerned.¹⁶⁴ For this reason, section 38 of the *Constitution* broadly determines that in order to have access to justice (courts) or tribunals and to be able to institute judicial proceedings, litigants must have a sufficient interest in these proceedings to enforce their rights successfully.¹⁶⁵

3.4.2 *National Environmental Management Act 107 of 1998*

Section 32(1) of NEMA expressly provides that any person or group of persons may help protect the environment or natural resources by seeking appropriate relief of any breach or statutory provision in the Act. Within this purview, NEMA broadens access to justice by providing for appropriate relief and exempting indigenous litigants who instituted legal proceedings in the interest of protecting the environment from the payment of costs.¹⁶⁶ From an EJ point of view, the provisions of NEMA give recognition of access to justice in the broader context of protecting the environment.

3.4.2.1 Other potential mechanisms for access to justice in NEMA

Access to justice is not confined to direct access to administrative structures or courts. Alternative dispute resolution (ADR) mechanisms could also prove to be beneficial to

¹⁶¹ See 2.3.2 above.

¹⁶² *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions: Zuma v National Director of Public Prosecution* 2009 (3) BCLR 309 (CC) para 62. Rautenbach "Introduction to the Bill of Rights" (LexisNexis Online Database).

¹⁶³ Rautenbach "Introduction to the Bill of Rights" (LexisNexis Online Database). See *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions: Zuma v National Director of Public Prosecution* para 47.

¹⁶⁴ Morrow "The courts and public participation in environmental decision-making" 148 and Kibugi "Enhanced access to environmental justice in Kenya" 162.

¹⁶⁵ This section provides that any person has the requisite legal standing to enforce the rights in the Bill of Rights if that person (a) is acting in his or her own interest; (b) is acting on behalf of another person who cannot act in his or her own name; (c) is as a member of, or in the interest of, a group or class of persons; (d) is acting in the public interest; and (e) an association acting in the interest of its members.

¹⁶⁶ Sections 32(1) and (2) of NEMA.

people involved in environmental or EJ-related disputes. This is because ADR mechanisms are often more cost-effective, flexible and confidential, and its use might encourage poor and vulnerable people to pursue EJ.¹⁶⁷

Section 34 of the *Constitution* directly grants everyone the right to have any dispute resolved using another independent and impartial tribunal or forum. The use of ADR mechanisms obviates the barriers of financial constraints or delay in prosecution.¹⁶⁸ This is because ADR is understood to be mechanisms that resolve disputes outside courts. Its forms include mediation,¹⁶⁹ arbitration,¹⁷⁰ conciliation¹⁷¹ and facilitation.¹⁷² Authors such as Pretorius¹⁷³ and Bendeman¹⁷⁴ point to the fact that ADR methods bring justice to more people, especially the poor, at a lower cost and a greater speed. Several ADR options could apply to environmental disputes in ensuring effective dispute-resolution, such as arbitration, conciliation and investigation.¹⁷⁵ NEMA makes provision for parties to refer a dispute or a difference concerning the protection of the environment to arbitration proceedings as a way of obtaining access to justice through alternative means.¹⁷⁶

¹⁶⁷ Brand "The nature of the arbitration process" 100. The characteristics of litigation include formality (the procedure is determined by the Constitution or legislation), the outcome is enforceable, which sometimes destroys ongoing relationships between parties, and the law of precedent is strictly applied.

¹⁶⁸ Pretorius "Introduction and Overview" 1-2.

¹⁶⁹ Pretorius "Introduction and Overview" 4. Albertyn "Specialized arbitration and mediation" 114. Wiese *Alternative Dispute Resolution in South Africa* 1-5. Mediation refers to a voluntary process which involves a third person (mediator) who is impartial and neutral and assists the parties to resolve their dispute. Mediation is voluntary both in its initiation and in its continuation.

¹⁷⁰ Reading sections 1 and 3 of the *Arbitration Act* 42 of 1965 together. De Jong 2014 *PELJ* 2358. Arbitration is understood to be a "private" process whereby parties voluntarily opt to settle their dispute outside of court. Arbitration is also a form of adjudication. Pretorius "Introduction and Overview" 5. Wiese *Alternative Dispute Resolution in South Africa* 7.

¹⁷¹ Conciliation is more or less the same as mediation. The difference is that the conciliator makes a formal recommendation to the parties for settlement of the dispute in addition to being a mediator. See Pretorius "Introduction and Overview" 4.

¹⁷² Facilitation denotes the process where a facilitator assists two parties or more to resolve a dispute in some form of meeting. Pretorius *South African Human Rights and Labour Law Yearbook* 264. Pretorius "Introduction and Overview" 4.

¹⁷³ Pretorius "Introduction and Overview" 2.

¹⁷⁴ Bendeman 2007 *African Journal of Conflict Resolution* 139.

¹⁷⁵ Lyster "Environmental dispute resolution" 146.

¹⁷⁶ Section 19(1) of NEMA. A dispute should be referred to arbitration in terms of the *Arbitration Act* 42 of 1965.

3.4.3 Promotion of Administrative Justice Act 3 of 2000

PAJA finds application to the right to have a dispute resolved fairly in public in the sense that it allows for the judicial review of administrative action as an alternative route to resolving disputes after the exhaustion of internal remedies.¹⁷⁷ Section 6 of PAJA provides that any person may institute judicial proceedings for the review of an administrative action if the administrator¹⁷⁸ who took it (for example, a local government official) was not authorised to do so or was biased in that the action was taken in bad faith or arbitrarily or was otherwise unlawful (unconstitutional).¹⁷⁹

For this reason, the judicial review procedure in terms of PAJA provides a means of realising other rights in the *Constitution*, especially the right to resolve any dispute before a court of law or tribunal.¹⁸⁰ The provision to allow judicial review in section 6(1) of PAJA suggests that when an administrative action in relation to “making, suspending, revoking or refusing to make an order or determination”¹⁸¹ perhaps pertaining to water, electricity or land-use licences and permits, an aggrieved party may approach any competent, impartial court or tribunal for the review of the decision.

3.4.4 Jurisprudence on the right to access to justice

Courts have interpreted the right to access to justice (courts) inclusively to enhance access for the poor and low-income communities and to curb the recourse to self-help. According to the court in *Concorde Plastics (Pty) Ltd v NUMSA*,¹⁸² access to justice is the initial requirement for the stability of an orderly community, to ensure that prospective litigants have legal mechanisms that are capable of resolving disputes among them.¹⁸³ The emphasis in access to justice is on the fact that access to courts

¹⁷⁷ Section 7(2) of PAJA provides that it is pre-condition to institute a judicial review when all internal remedies have been exhausted.

¹⁷⁸ Section 1 of PAJA defines an administrator as a person making or failing to take a decision, be it an organ of state in terms of section 239 of the *Constitution* or a natural or juristic person.

¹⁷⁹ Sections 6(2) and (3) of PAJA.

¹⁸⁰ Section 34 of the Constitution read with section 7(1) of PAJA. Hoexter "Just Administrative Action" 649.

¹⁸¹ Section 1 of PAJA.

¹⁸² *Concorde Plastics (Pty) Ltd v NUMSA* 1997 11 BCLR 1624 (LAC).

¹⁸³ *Concorde Plastics (Pty) Ltd v NUMSA* paras 1644F-1645A. Also see *Lesapo v North West Agricultural Bank* paras 16-17. De Vos *et al. South African Constitutional Law in Context* 632.

ensures that society is at peace and regulated in terms of law and that the institutionalised mechanisms used are fair and are heard in public.

The ruling in *Nedbank v Thobejane*¹⁸⁴ is an example of the courts recognising the right to access to justice as enshrined in section 34 of the *Constitution*. The central question, in this case, was whether financial institutions must consider the cost implications and the principles concerning access to justice when instituting legal proceedings in the lower or superior courts.¹⁸⁵ The Court held that financial institutions are obliged to take into consideration the rights and the status of poor and low-income communities when choosing a court to resolve disputes.¹⁸⁶ According to the court's reasoning, the right to access to justice aims to give society a meaningful opportunity to institute and efficiently defend any legal action in a court of law.¹⁸⁷

Section 34 of the *Constitution* also places positive duties on the state to remove any restriction, regulation, social and economic hurdles which may prevent the possibility of access to justice.¹⁸⁸ This judgement illustrates the fact that without cognisance of the development of the right to access to justice in the pursuit of effective redress when harm occurs, the ideal of equal access for all will remain worthless in the current South African legal dispensation.¹⁸⁹ Where legal and valid opportunities to seek redress are lacking for whatever reason, this could amount to and exacerbate pre-existing injustices such as environmental injustices.

3.5 Chapter summary

A right to enforce breaches of environmental law is essential in promoting access to EJ – in the local and other contexts. This chapter has reviewed international and domestic literature on the link between access to courts and the judicial enforcement of rules and principles aimed at the prevention of environmental injustice and the promotion of EJ. A conclusion that could be drawn from this chapter is that in regard to access to justice concerning EJ, the state must take into consideration,

¹⁸⁴ 2018 4 SA 694 (GP).

¹⁸⁵ *Nedbank v Thobejane* para 4.

¹⁸⁶ *Nedbank v Thobejane* para 96.

¹⁸⁷ *Nedbank v Thobejane* para 79.

¹⁸⁸ *Nedbank v Thobejane* para 79.

¹⁸⁹ *Nedbank v Thobejane* para 52.

commensurate with its duties stipulated in section 7(2) of the *Constitution*, that access to justice requires that people are able to claim and seek remedies in the judicial system when environmental harm occurs. What this means is that access to EJ through courts, and other forums enable residents who are adversely affected by environmental injustices to participate in and have claims adjudicated in a fair and open manner as envisaged by section 34 of the *Constitution*.

The question remains as to why it is still problematic for people (individuals and groups such as communities) to prosecute non-compliance with environmental law in South Africa. Why is access to courts in cases of environmental injustice easier said than done? The next chapter builds further on this question in the context of local government specifically by considering the elevation of some judicial institutions (Municipal Courts) in terms of their potential for access to justice and EJ in combination.

CHAPTER 4

Municipal Courts as part of the South African judicial system

4.1 Introduction

The South African judicial system comprises of various courts, ranging from the highest to the lowest.¹⁹⁰ These courts adjudicate and are responsible for both severe and less severe cases. For this reason, this chapter begins with a summary of the design of the South African judicial system with specific reference to the powers and functions of the courts in terms of the *Constitution*.¹⁹¹ The chapter commences by exploring the powers and functions of magistrate's courts generally. This exercise provides the basis for examining Municipal Courts as "specialist district magistrate's courts"¹⁹² within the South African judicial system. Subsequently, the chapter questions and systematically unpacks the potential role of Municipal Courts in combatting environmental injustice in the local government sphere.¹⁹³

4.2 The design of the South African judicial system

As earlier indicated, the *Constitution* provides that the South African judicial system is vested in courts which are independent and derive their authority directly from the *Constitution*.¹⁹⁴ These courts are involved in hearing legal disputes and resolving legal claims. In this sense, courts have a potential role in contributing to the protection, vindication and advancement of any right in the *Constitution*.¹⁹⁵ The courts are also expected to "promote the values that underlie an open and democratic society based

¹⁹⁰ Barnard-Naudé "Adjudication, Interpretation and Dispute Resolution" 193-194.

¹⁹¹ Paragraph 4.2.

¹⁹² Paragraph 4.3.

¹⁹³ Paragraph 4.4.

¹⁹⁴ Sections 165(1) and (2) of the *Constitution*. Soyapi *The role of the judiciary in advancing the right to a healthy environment: Eastern and Southern African perspectives* 8 and 76. Bekink *Principles of South African Constitutional Law* 484.

¹⁹⁵ Soyapi *The role of the judiciary in advancing the right to a healthy environment: Eastern and Southern African perspectives* 8-9. Bekink *Principles of South African Constitutional Law* 469.

on human dignity, equality and freedom" when advancing and protecting the rights of everyone.¹⁹⁶

Since 1996 South Africa's judicial system has consisted of one Constitutional Court (CC),¹⁹⁷ one Supreme Court of Appeal (SCA)¹⁹⁸ and a range of High Courts.¹⁹⁹ In addition to these courts, the *Constitution* determines that all other courts, except the CC, SCA and the High Courts, are considered lower courts.²⁰⁰ According to section 170 of the *Constitution*, a lower court is a magistrate's court. The powers and functions of magistrate's courts with specific reference to advancing rights are relevant to this study, as discussed in the next section.

4.3 Magistrate's Courts

Magistrate's courts are considered lower courts because they deal with less severe criminal and civil matters.²⁰¹ Their powers and functions derive from the *Constitution* and legislation, particularly the *Magistrate's Courts Act*. To further understand the functioning of magistrate's courts, a distinction between the district and regional magistrate's courts must be grasped, especially when determining the jurisdictional limitations of magistrate's courts.²⁰² They consist of two types, namely, the district

¹⁹⁶ Section 39(1)(a) of the *Constitution*.

¹⁹⁷ The CC is the supreme court adjudicating constitutional matters and derives its authority, legitimacy and functioning directly from the *Constitution*. The functions and powers of the CC include, the validation and confirmation of any Act of Parliament or a provincial Act decided by the SCA or High Court and the resolution of disputes between spheres of government and organs of state, among others. For a discussion on the CC see Sections 167(3) and (7) of the *Constitution*. The Constitutional Court 2019: <https://www.concourt.org.za/index.php/about-us/role>. Dugard 2006 *SAJHR* 261. Peté *et al Civil Procedure* 62. De Vos *et al South African Constitutional Law in Context* 213-217. Bekink *Principles of South African Constitutional Law* 495.

¹⁹⁸ The SCA is the second uppermost court in all appeal matters. For full discussion on the powers and functioning of the SCA see Section 168(1) of the *Constitution*. Also see Kotzé and Du Plessis 2010 *Journal of Court Innovation* 161. <http://www.justice.gov.za/sca/aboutsca.htm> and Peté *et al. Civil Procedure* 62. Bekink *Principles of South African Constitutional Law* 505-506.

¹⁹⁹ The High Court of South Africa may resolve any constitutional matter except for a matter in which the Constitutional Court has jurisdiction, or any matter that the Act of Parliament does not assign to another court. For a comprehensive discussion on the powers and functioning of the High Courts see section 169(1) of the *Constitution*. <https://www.gov.za/about-government/judicial-system>. Kotzé and Du Plessis 2010 *Journal of Court Innovation* 161. Bekink *Principles of South African Constitutional Law* 506-508.

²⁰⁰ Section 170 of the *Constitution*.

²⁰¹ South African Judiciary 2019: <https://www.judiciary.org.za/index.php/about-us/16-magistrates-courts>. Paterson *Principles of Civil Procedure in the Magistrates' Courts* 11-12.

²⁰² There are certain matters in which a district magistrate's court cannot assume jurisdiction, as with the regional magistrate's courts. These include civil matters concerning interpreting a will, the status of a person's mental capacity, decrees of perpetual silence, and orders of specific

and regional magistrate's courts.²⁰³ According to section 2(1) of the *Magistrate's Courts Act*, the Minister of Justice and Constitutional Development (the Minister) is obliged to establish and define the area of jurisdiction of all the regional magistrate's courts and to establish the magistrate's district courts to hear both civil and criminal cases to another district.²⁰⁴

Regional magistrate's courts²⁰⁵ have jurisdiction²⁰⁶ to deal mainly with severe criminal and civil matters including, for example, murder, rape, armed robbery and serious assault, except for treason.²⁰⁷ A regional magistrate's court has a penal jurisdiction that is limited to 15 years' imprisonment or in some instances a maximum fine²⁰⁸ or correctional supervision.²⁰⁹ On the other hand, district magistrate's courts²¹⁰ deal with lesser criminal and civil matters other than offences in which a regional magistrate's courts may have jurisdiction, such as damage to property, shoplifting, drinking and driving, and possession and dealing with drugs.²¹¹ The district magistrate's courts can impose a maximum fine of R200 000²¹² and imprisonment to a maximum of three years.²¹³

performance without an alternative of damages. Despite these jurisdictional limitations in civil matters, district magistrate's courts may grant orders for attachment, interdicts and *mandamenten van spolie*. See section 46 of the *Magistrate's Courts Act*. Theophilopoulos, Van Heerden and Boraine *Fundamental Principles of Civil Procedure* 85 for a comprehensive discussion on the jurisdictional limits of district magistrate's courts.

²⁰³ Section 1 of the *Magistrate's Courts Act* provides that a court means a district or regional magistrate's court. Also see section 1 of the *Jurisdiction of Regional Courts Amendment Act* 31 of 2008. South African Judiciary 2019: <https://www.judiciary.org.za/index.php/about-us/16-magistrates-courts>.

²⁰⁴ Wallis "Magistrate's Courts – The Introduction" (LexisNexis Online Database).

²⁰⁵ Peté *et al Civil Procedure* 60. These courts are seated in metropolitan municipalities in most cases, examples being Port Elizabeth, Bloemfontein, Johannesburg, eThekweni and Cape Town.

²⁰⁶ Jurisdiction in this regard refers to the power or the competence of magistrate's courts to hear and determine an issue or issues between parties brought before it. The jurisdiction of every court is determined immediately after the proceedings are instituted. See Peté *et al Civil Procedure* 60.

²⁰⁷ Section 89(1) and (2) of the *Magistrate's Courts Act*. The South African Judiciary 2019: <https://www.judiciary.org.za/index.php/about-us/16-magistrates-courts>.

²⁰⁸ A penal fine amounts to R400 000, but the Minister of Justice and Constitutional Development may determine a maximum fine, depending on the circumstances, of up to R600 000, which is determined by in the GN 216 in GG 37377 of 27 March 2014. A monetary penal judgement in civil cases higher than R400 000 will be determined in the High Court. See Theophilopoulos, Van Heerden and Boraine *Fundamental Principles of Civil Procedure* 83.

²⁰⁹ Section 92(1) of the *Magistrate's Court Act*.

²¹⁰ These courts are seated in towns, cities and villages. Peté *et al Civil Procedure* 60.

²¹¹ Section 89(1) and (2) of the *Magistrate's Courts Act*.

²¹² GN 217 in GG 37477 of 27 March 2014.

²¹³ Section 92(1) of the *Magistrate's Courts Act*.

Furthermore, the Minister may establish a court for any district or regional division as a new specialist court²¹⁴ to have jurisdiction on matters determined by him or her. Examples include consumer courts,²¹⁵ traditional courts,²¹⁶ equality courts,²¹⁷ small claims courts,²¹⁸ maintenance courts²¹⁹ and child justice courts.²²⁰ These courts aim to make sure that cases go to the correct court, which has specialist powers and function to make effective judgements. It follows that the Minister must appoint judicial officers and other court officials in the magistrate's courts (including specialist magistrate's courts) to offer well-run court services.²²¹

The powers and functioning of both the regional and the district magistrate's court suggest that where matters of EJ are imminent and require redress, whether civil or criminal, these courts may assume jurisdiction to protect the rights of society and impose maximum fines or sentence offenders to a period not exceeding 15 years' imprisonment.²²² The above further suggests that the Minister may establish more

²¹⁴ Although these courts (specialist courts) bear the same name "courts", they do not fall within the scope of Chapter 8 of the *Constitution*, because they are creatures of statute and likely have the same status as ordinary district magistrate's courts. However, these courts play an essential role in resolving legal claims and giving valid judgements, albeit subject to appeal and review by a court of higher status. See Section 169(1) of the *Constitution*. <https://www.gov.za/about-government/judicial-system>. Kotzé and Du Plessis 2010 *Journal of Court Innovation* 161. Peté *et al. Civil Procedure* 61 for a comprehensive discussion on the nature of specialist magistrate's courts.

²¹⁵ Established in terms of the *Consumer Protection Act* 68 of 2008 and Labour Courts and Labour Appeals in terms of *Labour Relations Act* 66 of 1995.

²¹⁶ These courts are found mostly in rural areas and have jurisdiction in less serious matters including, livestock theft and land issues. For De Vos *et al South African Constitutional Law in Context* 247, traditional courts administer justice on the basis of customary law and the authority granted by apartheid-era laws, including, for example, the *Black Administration Act* 38 of 1927. Recently, Traditional Courts have functioned in terms of the *Traditional Courts Bill* 15 of 2008. The most prominent traditional courts are found in the Western Cape, namely in Cape Town, Gugulethu and Mitchell's Plain. South African Judiciary 2019: <https://www.judiciary.org.za/index.php/about-us/16-magistrates-courts>.

²¹⁷ Equality courts are established in terms of section 9 of the *Constitution*, the *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4 of 2000. These courts deal mainly with matters of hate speech or harassment and discrimination.

²¹⁸ Small claims courts are established in terms of the *Small Claims Court Act* 61 of 1984. According to section 12 of the *Small Claims Court Act*, these courts have jurisdiction in the district in which they were established.

²¹⁹ Established in terms of section 3 of the *Maintenance Act* 99 of 1998 for matters pertaining to the maintenance of children and spouses.

²²⁰ Established in terms of section 2 of the *Child Justice Act* 75 of 2008 to ensure that child justice matters are managed in a rights-based manner.

²²¹ Reading sections 8 and 9(1)(a) of the *Magistrate's Courts Act* together.

²²² These courts may further grant an order of an interdict to prevent the occurrence of any environmental injustice activity where necessary.

specialist magistrate's courts to deal with matters in specific areas of law including but not limited to Municipal Courts which specialise in municipal matters specifically.

4.4 "Municipal Courts" as specialist magistrate's courts

4.4.1 The nature of municipal courts

The potential role of Municipal Courts is significant in the judicial system, but the challenge is that the role has not yet been clearly defined. Generally, "Municipal Court" is understood to refer to a division of a magistrate's court that has powers and functions in the handling of municipal matters only.²²³ Municipal Courts are described as specialist "district magistrate's courts dealing with municipal matters" and as separate lower courts.²²⁴ This court, however, remains a district magistrate's court that operates in terms of the *Constitution*²²⁵ and legislation.²²⁶ What this means is that a Municipal Court is not autonomous or a separate lower court but has a delegated authority under legislation from the DoJ & CD and the NPA to conduct prosecutions.²²⁷

According to section 22(8)(b) of the *National Prosecuting Authority Act*,²²⁸ the National Director of Public Prosecutions (NDPP) may authorise any local authority to conduct prosecutions in respect of statutory offences as well as municipal by-laws. However, arguably, municipalities derive their authority to conduct prosecutions from the Municipal Systems Act. Section 112 of the Municipal Systems Act determines that an authorised municipal staff member has powers to institute criminal proceedings in matters relating to infringement of any municipal by-law, policy and regulation. These provisions empower municipalities to establish and introduce Municipal Courts as a way to rationalise court jurisdictions, particularly the prosecution of municipal by-laws

²²³ City of Tshwane 2018 <http://www.tshwane.gov.za/sites/Business/Bylaws/Pages/Promulgated-By-Laws.aspx>.

²²⁴ City of Tshwane 2018 <http://www.tshwane.gov.za/sites/Business/Bylaws/Pages/Promulgated-By-Laws.aspx>

²²⁵ Section 170 and 171 of the *Constitution* read together.

²²⁶ Municipal Courts functions in terms of *Magistrates' Courts Act*, *Criminal Procedure Act*, *National Prosecuting Authority Act* and the *Municipal Systems Act*.

²²⁷ The DoJ & CD 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²²⁸ 32 of 1998.

and traffic offences, as well as service delivery in the new democratic dispensation.²²⁹ The aim of rationalising Municipal Courts arguably was to enhance access to justice in local communities, streamline the prosecutorial process concerning municipal matters, and consolidate cooperative governance between the DoJ & CD and the NPA.²³⁰

In recent years many municipalities have shown a great interest in establishing and introducing Municipal Courts in their jurisdictions. Municipalities like the City of Cape Town,²³¹ Ekurhuleni,²³² eThekweni,²³³ Johannesburg²³⁴ and Tshwane²³⁵ have introduced Municipal Courts as a way of providing services such as information on traffic fines and municipal by-laws, or general inquiries about the payment of outstanding traffic fines and municipal accounts.²³⁶ Emfuleni,²³⁷ George²³⁸ and Mossel

²²⁹ In a break with the past, local government went through an initial process of transformation in the post-constitutional era. Chapter 7 of the *Constitution* is dedicated to local government. Now municipalities have a wide range of powers and functions to effectively administer the executive functions outlined in section 156(1) of the Constitution. See *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 36. Also see *City of Cape Town v Robertson* 2005 2 SA 232 (CC) para 60, Sections A and B of the WPLG and Bekink *Principles of South African Local Government Law* 23-26. Du Plessis 2010 *Stellenbosch Law Review* 268 and Fuo 2015 *Commonwealth Journal of Local Governance* 18-21.

²³⁰ According to section 2(1) of the *Magistrate's Courts Act*, the Minister may establish a district magistrate's court to prosecute matters such as shoplifting, damage to property, and drinking and driving, the purpose being to enhance access to justice services at courts that are located closer to where people live. South African Government 2014: <https://www.gov.za/minister-launch-rationalisation-courts-part-access-justice>.

²³¹ City of Cape Town 2019: <https://www.capetown.gov.za/Family%20and%20home/See-all-city-facilities/Our-service-facilities/Municipal%20courts>. Also see City of Cape Town Media Release Statement "Municipal Courts play critical role locally (2018). The City of Cape Town manages 11 Municipal Courts.

²³² There are four rationalised magisterial districts in Ekurhuleni namely; Ekurhuleni Central (Palm Ridge and Germiston), Ekurhuleni East (Springs and Nigel), Ekurhuleni North (Kempton Park, Boksburg and Tembisa) and Ekurhuleni South East (Benoni, Brakpan, Daveyton and Tsakane).

²³³ eThekweni Municipality 2011: http://www.durban.gov.za/City_Government/Administration/city_manager/LegalServices/Pages/Municipal-Courts.aspx. There is only one Municipal Court in eThekweni municipality.

²³⁴ There are four magisterial Municipal Courts in the City of Johannesburg, namely, Johannesburg Central, North (Randburg, Midrand and Alexandra) West (Roodeport) and in Emfuleni (Vereening district).

²³⁵ City of Tshwane 2015: <http://www.tshwane.gov.za/sites/residents/Services/MunicipalityCourts/Pages/Municipal-Court-Listing.aspx>. There are three main courts (Pretoria Central, Centurion and Wonderboom) and five satellite courts (Mamelodi, Garankuwa, Soshanguwe, Temba and Atteridgeville).

²³⁶ Buffalo City municipality is also set to establish a Municipal Court. Gowa Dispatch Live 2017: <https://www.dispatchlive.co.za/news/2017-05-23-r4m-municipal-court-on-cards/>.

²³⁷ Emfuleni Local Municipality: <https://www.emfuleni.gov.za/index.php/municipal-courts-99254.html>.

²³⁸ George Local Municipality 2017: <http://www.george.gov.za/executive-mayor-george-officially-opens-george-municipal-court>. George Herald 2015:

Bay²³⁹ local municipalities have also introduced Municipal Courts to provide a modern well-run court service and to sustain public confidence in the criminal justice system.²⁴⁰

The role and function of the Municipal Courts are meaningful in the prosecution of by-law offences and the imposition of the sanctions provided for in these by-laws, for example. Municipal Courts have jurisdiction in matters of municipal by-law violations dealing with matters of a nuisance, waste dumping, public amenities, cemeteries, air quality management, events management, outdoor advertising and informal trading, as well as traffic rules.²⁴¹ However, section 112 of the *Municipal Systems Act* determines that a Municipal Court may have jurisdiction to prosecute violations and non-compliance with any legislation that is administered by a municipality, for example, the *National Building Regulations and Building Standards Act* 103 of 1977. Under this provision, a prosecutor in the Municipal Court or an authorised municipal staff member may effectively and successfully prosecute any offender who fails to comply with any provision or regulation in the Act.

Municipal Courts also have jurisdiction in matters connected with the particular provisions enshrined in the CPA.²⁴² For example, where a Municipal Court intends to prosecute an accused for non-compliance with or the infringement of a by-law, it may issue a summons in order to successfully secure the attendance of the accused.²⁴³ The issued summons must contain the complete charge and information specifying

<https://www.georgeherald.com/News/Article/General/municipal-court-for-george-approved-20170711>.

²³⁹ Mossel Bay Advertiser 2012: <https://www.mosselbayadvertiser.com/news/News/General/20674/Green-light-for-municipal-court>.

²⁴⁰ Emfuleni Local Municipality: <https://www.emfuleni.gov.za/index.php/municipal-courts-99254.html>.

²⁴¹ Emfuleni Local Municipality: <https://www.emfuleni.gov.za/index.php/municipal-courts-99254.html>.

City of Tshwane 2015: <http://www.tshwane.gov.za/sites/residents/Services/MunicipalityCourts/Pages/Municipal-Court-Listing.aspx>. Also see City of Johannesburg By-Laws Manual (2019) 4. However, by virtue of the commencement of Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (AARTO), many municipalities elect not to establish Municipal Courts for traffic law violations. This is because AARTO aims to facilitate the adjudication of road traffic infringements and to support the prosecution of offences in terms of the national and provincial laws relating to road traffic. See AARTO 2019: <http://www.aarto.gov.za/>.

²⁴² By reason of the fact that a Municipal Court is a district magistrate's court and is operational in terms of the CPA and the *Magistrate's Courts Act*.

²⁴³ Section 54 of the CPA. However, an accused may elect to admit guilt and pay a fine in terms of section 57 of the CPA.

the place, date and time for the appearance in the Municipal Court.²⁴⁴ Consequently, if the accused fails to appear, a Municipal Court may issue a warrant of arrest to secure his or her attendance. For this reason, a Municipal Court may impose a fine not exceeding R300 or sentence the accused to imprisonment for a period not exceeding three months if there are compelling and aggravated circumstances.²⁴⁵

4.4.2 Establishment of Municipal Courts and appointment of judicial officers

Every municipality requires collaboration with the DoJ & CD and NDPP to establish a Municipal Court successfully.²⁴⁶ This collaboration initially requires a municipality to provide a detailed motivation for establishing a Municipal Court, as an additional and specialist magistrate's court in the judicial system.²⁴⁷ When a municipality intends to establish a Municipal Court, the municipal manager²⁴⁸ must firstly consult with the DoJ & CD, the NDPP and the area court manager regarding the need for a Municipal Court.²⁴⁹ During this process, the municipal manager must submit a proposed comprehensive business plan together with a detailed prior establishment investigative report which outlines the mission and vision of a Municipal Court.²⁵⁰ In addition, costs associated with the establishment, functioning and challenges encountered, alternative plans, as well as the budget of the municipality must be included in the report.²⁵¹ The reason for a business plan presentation in the initial phase is to

²⁴⁴ Section 54(1) of the CPA. In a similar manner, a Municipal Court may issue a written notice to the accused in terms of section 56(1) of the CPA.

²⁴⁵ Section 55(2) of the CPA. Compelling and aggravating circumstances include failure to appear without a proper reason.

²⁴⁶ Dullah Omar Institute 2003: <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/volume-5-issue-4-september-2003/vol-5-no-4-2003-establishing-a-municipal-court-case-study-stellenbosch.pdf>. The DoJ & CD 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²⁴⁷ Dullah Omar Institute 2003: <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/volume-5-issue-4-september-2003/vol-5-no-4-2003-establishing-a-municipal-court-case-study-stellenbosch.pdf>. The DoJ & CD 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²⁴⁸ Section 82 of the *Municipal Structures Act* defines a municipal manager as the head of municipal administration as well as the accounting officer for the municipality.

²⁴⁹ The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²⁵⁰ The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²⁵¹ The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

scrutinise whether the proposed plan is linked to an approved municipal budget and the municipality's IDP.²⁵²

The municipal manager and the relevant municipal legal department must provide a description of the advantages and disadvantages of the non-establishment of a Municipal Court to the DoJ & CD and the NPA.²⁵³ The aims of the establishment must reflect what a Municipal Court as an additional district magistrate's court would seek to achieve.²⁵⁴ In most instances, the aims of establishing a Municipal Court should be, for example, to primarily ensure the implementation and enforcement of all municipal by-laws in conjunction with effective prosecution should infringements arise as a matter of non-compliance.²⁵⁵ Moreover, a Municipal Court must seek to impose appropriate fines or penalties and sentences in cases of imprisonment, provide access to fair and speedy justice services for all, and ease the existing magistrate's courts rolls.²⁵⁶

Thirdly, a municipality must consider the following factors in an attempt to establish a Municipal Court, including the number of all municipal-related cases requiring prosecution, several court days allocated to these cases in an ordinary magistrate's court, and statistics and data showing the cases reported and the success rates.²⁵⁷ By so doing, a municipality will successfully allocate sufficient time to prosecute specific offences and to trace all outstanding cases on the roll in order to avoid double

²⁵² Section 1 of the *Local Government: Municipal Finance Management Act 56 of 2003* (MFMA). The approved budget refers to an annual budget that is adopted and approved in terms of section 16 of the MFMA. The recent report issued by Auditor-General seems to indicate that municipalities have run out of funds. This could hamper the establishment of Municipal Courts, which is a risk to realising EJ. Auditor-General of South Africa 2019: <https://www.agsa.co.za/Reporting/MFMAReports/2017-2018MFMA.aspx>.

²⁵³ The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²⁵⁴ The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²⁵⁵ Dullah Omar Institute 2003: <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/volume-5-issue-4-september-2003/vol-5-no-4-2003-establishing-a-municipal-court-case-study-stellenbosch.pdf>.

²⁵⁶ This must be authorised in terms of section 92(1) of the *Magistrate's Courts Act*. The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html. George Municipality 2017: <http://www.george.gov.za/executive-mayor-george-officially-opens-george-municipal-court>.

²⁵⁷ The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

jeopardy.²⁵⁸ A municipality should also consider cases withdrawn and the reasons that precipitated the withdrawal, warrants of arrest issued (including outstanding warrants, cases allowed after the execution of warrants per day) and the potential growth about the warrant accumulation of arrest cases.²⁵⁹

After consideration of all these factors, the parties (DoJ & CD, NDPP and the municipal council) involved in the establishment should decide whether the establishment of a Municipal Court as an additional magistrate's court is possible and feasible.²⁶⁰ In cases when it is found feasible to establish a Municipal Court, a resolution between the parties should outline the responsibilities of each.²⁶¹ The resolution should stipulate who is responsible for issues like court infrastructure, administration, expenses and the provision of other logistical facilities.²⁶² Necessarily, a full resolution should elaborate who is primarily responsible for staff remuneration and the nomination of magistrates, prosecutors, registrars and clerks.²⁶³

²⁵⁸ Cox *IOL News* 2005: <https://www.iol.co.za/news/south-africa/joburg-municipal-court-fails-to-take-up-slack-251108>. Double jeopardy refers to a procedural defence that prevents an accused person from being prosecuted again on the same offence. Merriam-Webster 2019: <https://www.merriam-webster.com/dictionary/double%20jeopardy>.

²⁵⁹ One of the challenges is that warrants of arrest issued in a Municipal Court are sometimes issued in duplicate or withdrawn due to defective notices, wrong addresses or court dates and the incomplete or non-existing identity numbers of accused persons. Although the City of Johannesburg issued a total of 464 warrants of arrest in 2018. It can be argued that progress has been delayed due to reasons associated with defective personal information, among other issues. City of Johannesburg Statement "Municipal Courts and operation #BuyaMthetho ensuring rule of law is applied in Joburg (2018). Also see Cox *IOL News* 2005: <https://www.iol.co.za/news/south-africa/joburg-municipal-court-fails-to-take-up-slack-251108>.

²⁶⁰ Dullah Omar Institute 2003: <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/volume-5-issue-4-september-2003/vol-5-no-4-2003-establishing-a-municipal-court-case-study-stellenbosch.pdf>.

²⁶¹ However, this is not a reality in many municipalities. For example, if it appears that the budget is inadequate or that there is little likelihood of success in prosecuting by-law offences, a Municipal Court cannot be established. The parties collectively decide on this by balancing all possibilities. Dullah Omar Institute 2003: <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/volume-5-issue-4-september-2003/vol-5-no-4-2003-establishing-a-municipal-court-case-study-stellenbosch.pdf>.

²⁶² The Department of Justice & Constitutional Development 2016: http://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

²⁶³ George Municipality 2017: <http://www.george.gov.za/executive-mayor-george-officially-opens-george-municipal-court>.

The Minister may nominate and appoint a magistrate,²⁶⁴ the prosecutor²⁶⁵ as well as other court officials²⁶⁶ in the Municipal Court, but this duty may be delegated to the chief or senior magistrate in the proximity of the court, where necessary.²⁶⁷ It is noteworthy to state that a magistrate in a Municipal Court (including all court officials, arguably) must take a solemn oath before commencing duties that he or she will be “faithful to the Republic of South Africa, to uphold and protect the *Constitution* and the Bill of Rights as well as to administer justice without fear, favour or prejudice.”²⁶⁸ This is partly to ensure that magistrates and prosecutors in Municipal Courts deal successfully with the conflict of interest between the demands arising from their appointment and the demands of the municipality.

Although municipalities help to fund the establishment and running of Municipal Courts, the authorities (the magistrate, the prosecutors and the municipal court clerks) have complete independence and as such report directly to the DoJ & CD. Alternatively, they may be under the auspices of the NPA. This means that a magistrate or prosecutor does not stand accountable to the municipality but the Minister or senior magistrate in the district.

4.5 Municipal Courts for improved access to the justice system in cases of environmental injustice

As explained earlier,²⁶⁹ South African local communities are legally entitled to EJ, and they also have legal standing and the right to access to judicial recourse in the event of environmental harm. The question that remains to be answered is how Municipal Courts *per se* can enhance EJ at the local level, where municipalities fail to deliver services or to address pollution in a fair and equal manner. In order to arrive at a finding on this matter, it is essential first of all to outline the requirements for a Municipal Court be able to function in the local “environmental” space.

²⁶⁴ Sections 9(1)(a) and 9(1)(aA) read together.

²⁶⁵ However, the prosecutors are appointed by the NDPP in terms of section 16 of the NPA Act.

²⁶⁶ Sections 13, 13A and 14 of the *Magistrate's Courts Act*. This includes court registrars, clerks and messengers.

²⁶⁷ Sections 9(1)(a) and 9(1)(aA) read together. It is noteworthy that a Municipal Court functions in terms of authority delegated by the DoJ & CD in terms of the *Magistrate's Courts Act*.

²⁶⁸ Section 9(2)(a) of the *Magistrate's Courts Act*.

²⁶⁹ Chapter 3 above.

Firstly, in an endeavour to achieve EJ in local communities, municipalities (together with the national and provincial spheres) have a legal duty to *protect* the environment and the health and well-being of the community.²⁷⁰ The *Constitution* also explicitly provides that municipalities must *promote* a safe and healthy environment for the community.²⁷¹ A key to protecting and promoting a safe and healthy environment for the community is arguably the application of and enforcement of relevant municipal by-laws.²⁷² This is because many municipal by-laws regulate activities that are concomitant with working and residing in an environment that is free from health risks, which is one of the critical pillars of EJ. For this reason, municipalities could fulfil their constitutional environmental duties as well as strengthen the EJ principle in South African local communities through establishing a visible judicial institution (a municipal court) that is dedicated to the handling and prosecution of non-compliance with (environmentally relevant and service delivery-related) by-laws.

Secondly, Municipal Courts are designed to adequately facilitate access to justice (being the courts closest to the community) in instances where (environmental) rights and (service delivery) entitlements are threatened or where harm has occurred as a result of the infringement. This means that where EJ and environmental rights, in particular, are at risk or infringed, a local community member or a group of such people may approach a Municipal Court to resolve the dispute as an indirect way of accessing and enforcing EJ.²⁷³ It follows that Municipal Courts, with their specialist powers to prosecute non-compliance with by-laws or other relevant legislation²⁷⁴ as

²⁷⁰ Sections 7(2) and 40(1) of the *Constitution* read together. See Du Plessis "Local government and the pursuit of urban sustainability" 267.

²⁷¹ Section 152(1)(d) of the *Constitution*. Du Plessis "Local government and the pursuit of urban sustainability" 267.

²⁷² Dullah Omar Institute 2003: <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/volume-5-issue-4-september-2003/vol-5-no-4-2003-establishing-a-municipal-court-case-study-stellenbosch.pdf>.

²⁷³ See section 34 of the *Constitution*. Access to justice is a critical pillar of EJ, especially when environmental injustice occurs. Kotzé and Du Plessis 2010 *Journal of Court Innovation* 162. Budlender 2004 *SALJ* 339-341. Nealer 2005 *Journal of Public Administration* 470. Friedman 2010 *Fordham Urban Law Journal* 3. Also see article 9 of *Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters* (1998).

²⁷⁴ See section 112 of the *Municipal Systems Act*.

well as traffic violations, may broaden access to justice and effectively provide relief to the existing magistrate's courts rolls.²⁷⁵

Thirdly, Municipal Courts as courts of the first instance in the prosecution of non-compliance with environmental by-laws, for example,²⁷⁶ are well-placed to prioritise these cases and dedicate resources to achieving successful prosecutions. Municipal Courts could achieve the successful prosecution of these by-laws by ensuring that qualified, experienced and dedicated judicial officers, court administrators and law enforcement personnel have the required knowledge of both the environmental and local government laws in order to contribute to EJ.²⁷⁷ These courts could also ensure that all transgressors appear in court, and could expedite the turn-around time in cases that involve EJ. In a similar vein, the decisions of these courts could also serve as a deterrence to those who might engage in acts that do not comply with environmental by-laws.²⁷⁸

The next step is to determine (in the event of Municipal Courts being established and having environmental authority) how such courts should go about remedial judicial action.

Firstly, a Municipal Court²⁷⁹ has to protect the rights in the *Constitution* by upholding the law and resolving disputes impartially.²⁸⁰ This duty reflects the ruling in the Fuel

²⁷⁵ Municipal matters are often unnecessarily withdrawn from the court rolls due to administrative deficiencies, poor law enforcement, or a lack of departmental integration and partnerships with other stakeholders such as the South African Police Service (SAPS), AARTO and traffic departments. Furthermore, there is a gap between adherence and enforcement which creates backlogs both in the judicial system and in municipalities, as well as delays in the prosecution of contraventions of by-laws. See paragraph 5.2 below for full a discussion.

²⁷⁶ Environmental by-laws typically deal with air pollution and noise control, street-trading, waste management, water services, outdoor advertising and public health, among other matters.

²⁷⁷ For more details see paragraph 5.2 below.

²⁷⁸ Ngqakamba *News24* 2018: <https://www.news24.com/SouthAfrica/News/tavern-owner-sentenced-to-2-years-in-jail-for-noise-pollution-in-neighbourhood-20180810>. Tshwane Municipal Court, sitting in the Soshanguwe Magistrate's Court, sentenced a tavern owner who contravened Gauteng noise control regulation after being served notices of contravention several times. See regulations 2 and 9 of the *Gauteng Noise Control Regulation* in GN 75 in GG 5479 of 20 August 1999.

²⁷⁹ McLoed-Kilmurray "Lowering Barriers to Judicial Enforcement: Civil Procedure and Environmental Ethics" 289. Generally, courts are the most powerful institutions involved in the enforcement of laws; this in comparison with other institutions such as non-governmental organisations and environmental practitioners.

²⁸⁰ Sections 39 and 165 of the *Constitution* read together. Kotzé and Du Plessis 2010 *Journal of Court Innovation* 159-160. Qumbu *The Role of Courts in Promoting Water Security in South Africa* 42.

Retailers case that courts have a potential role to play in protecting and promoting the rights in the Bill of Rights, particularly in section 24, within the purview of sustainable development.²⁸¹

For this reason, the specialist powers and functioning of Municipal Courts are critical in the pursuit of EJ as well as of environmental protection and sustainability.²⁸² This is because these courts must uphold the law in practice, interpret the law to resolve disputes impartially and contribute to law-making by coming to sound and useful judgements that could strengthen EJ in local communities.²⁸³

Secondly, in the municipal context and service delivery, Municipal Courts would through exercising their adjudicative (specialist) powers, and functions generally protect and promote rights concerning the distribution of services as well as ensure that municipalities respect and fulfil these rights.²⁸⁴ Through their specialist powers and functions in promoting a healthy environment, Municipal Courts can contribute to the broader advancement and protection of EJ in local South African communities.

In general, Municipal Courts have a role to play in the local pursuit of EJ by specifically allowing a municipality and its residents to conduct their affairs in one locality (one building). This is because most Municipal Courts offer more than just the prosecution of non-compliance with by-laws. The accessibility of the court also leads, for example, to the provision of information on both by-laws and traffic fines, customer care, responses to inquiries relating to outstanding individual fines, the development of public trust and confidence, and the perception that the court is independent and accountable.²⁸⁵

²⁸¹ Fuel Retailers para 44-45.

²⁸² Soyapi *The Role of the Judiciary in Advancing the Right to a Healthy Environment* 76-77.

²⁸³ Kotzé and Du Plessis 2010 *Journal of Court Innovation* 159-160. Also see Qumbu *The Role of Courts in Promoting Water Security in South Africa* 42.

²⁸⁴ See section 7(2) of the *Constitution*. Soyapi *The Role of the Judiciary in Advancing the Right to a Healthy Environment* 102.

²⁸⁵ City of Tshwane 2015: <http://www.tshwane.gov.za/sites/Departments/Corporate%20and%20Shared%20Services/Legal%20Services/MunicipalCourts/Pages/Municipal-Courts.aspx>. City of Cape Town 2019: <https://www.capetown.gov.za/Family%20and%20home/See-all-city-facilities/Our-service-facilities/Municipal%20courts>.

4.6 Chapter summary

This chapter has unpacked the potential role of Municipal Courts in addressing environmental injustice in local South African communities. It was found that Municipal Courts could improve EJ in the local sphere by advancing the fair and reliable prosecution of non-compliance with environmental by-laws, for example. The achievement of fair and reliable prosecutions would, however, require Municipal Courts to dedicate time and resources to that end, and the DoJ would have to appoint more dedicated magistrates and prosecutors (and other staff members) in order to increase the number of court days and improve the practice of law enforcement.

In a nutshell, Municipal Courts could assist in addressing environmental injustice in local communities by employing dedicated magistrates and prosecutors to deal with environmental and local government law matters (service delivery). Municipal matters (especially those concerning by-laws and offences) are sufficiently technically complex to arguably require specialised expertise to achieve successful prosecutions.

CHAPTER 5

Conclusion

5.1 *Background*

This study aimed to explore the role that Municipal Courts may play in fortifying the relationship between municipal service delivery and improved grass-root level EJ in South Africa. The main objective was to explore whether these courts can be agents of (environmental) change where local communities are exposed to environmental harm as a consequence of a lack of municipal services or the environmentally harmful actions of other community members or local industries.

Chapter 2 of this study explored the meaning and relevance of EJ in the local South African context. The chapter sketched the historical background and theoretical accounts of the emergence of the notion of EJ. The aim of the chapter was to offer a discussion of the linkages between environmental injustice and poor essential municipal service delivery.²⁸⁶ In demonstrating this connection, the chapter discovered that the features of EJ (distribution, procedural and recognition) play a critical role in determining the linkages between service delivery and EJ by reason that the provision and distribution of these services may impact on the environment and the lives and well-being of local communities.²⁸⁷

Therefore, the chapter argued that municipal service delivery (for example, water and sanitation, electricity and health) should support the realisation of the right of everyone to an environment that is not harmful to health and well-being and not compromise the quality of local communities' environment. Concerning a comprehensive, more inclusive definition of EJ in South Africa, the chapter discovered that broadening the scope of EJ does not mean that the concern of sustainable development is not considered. This is because the broadened scope of EJ could

²⁸⁶ Paragraph 2.2.3-2.2.5 above.

²⁸⁷ Paragraph 2.3 above.

incorporate environmental concerns into the intellectual and institutional framework of human rights, ecological systems and democratic accountability.

The aim of Chapter 3 was to discuss the meaning and relevance of the right to access to justice in the local South African context from the perspective of the broader role of the courts in the pursuit of EJ. This chapter observed the nexus between access to courts and the judicial enforcement of rules and principles aimed at addressing environmental injustices at the local level. The conclusion reached was that enabling access to justice will grant people the power to address or seek remedies in instances where environmental harm occurs.²⁸⁸ For this reason, the chapter discovered that without due cognisance of the development of the notion of access to justice in the pursuit of EJ, the ideal of equal access to justice for all would remain worthless in South African communities. This is because it is impossible to access EJ if the legal system does not offer sufficient opportunities for redress and legal empowerment when relevant fundamental rights are infringed or not fulfilled.

The conclusions that this chapter drew were that when approaching access to justice concerning EJ, the state should take the following into account: that access to justice requires people to claim and seek remedies in the judicial system as well as to adapt to a particular context that protects legitimate interests.²⁸⁹ What this means is that access to EJ through courts enable residents who are adversely affected by environmental injustices to participate in the adjudication (in a fair and reliable manner) of their claims.

Chapter 4 explored the potential role of Municipal Courts in combatting environmental injustice in local communities. From the outset, this chapter generally explored the powers and functions of magistrate's courts by reason that Municipal Courts are in fact specialist district magistrate's courts dealing with the handling and prosecution of municipal by-laws and any other legislation that is administered by the municipality. Although Municipal Courts do not have inherent jurisdiction concerning the development of common law or declarations on the validity or invalidity of any law,

²⁸⁸ Paragraph 3.5 above.

²⁸⁹ Paragraph 3.5 above.

these courts could ensure that municipal cases (e.g. non-compliance with by-laws) are prosecuted efficiently and timely.²⁹⁰

The conclusion drawn from Chapter 4 is that Municipal Courts should be willing and able to challenge any injustice resulting from non-compliance with environmental by-laws or law aimed at EJ. With their specialist powers and functions, it is expected that they could be agents of environmental change where local communities are exposed to environmental harm or injustice and where the absence of service delivery threatens EJ.²⁹¹ The chapter revealed that they could improve EJ by advancing the fair and reliable prosecution of non-compliance with environmental by-laws in these communities.²⁹² Achieving fair and reliable prosecutions would require Municipal Courts to dedicate time and resources to the function, more dedicated magistrates and prosecutors (and other staff members) would need to be appointed, the number of court days would have to be increased, and the standard of law enforcement would have to be improved.

Advancing the fair and reliable prosecution of non-compliance with environmental by-laws is feasible because, firstly, the DoJ & CD have rationalised Municipal Courts to enhance access to justice in local communities and have withdrawn municipal matters from the jurisdiction of other courts.²⁹³ This finds support in the fact that access to courts closest to where harm occurs is one of the critical pillars of EJ.²⁹⁴ Secondly, the nature and jurisdiction of Municipal Courts allow the prosecution of non-compliance with any by-law, including environmental by-laws.²⁹⁵ This study argues that prosecuting non-compliance with by-laws in general or environmental by-laws serves as a deterrent and displays Municipal Courts as institutions demonstrably able to advance the fair and reliable prosecution of by-laws in the pursuit of EJ in South Africa.

Bearing in mind the backlogs in the court rolls, the deficiencies that are associated with a lack of quality, the inadequate qualifications and experience of presiding officers

²⁹⁰ Paragraph 4.3 above.

²⁹¹ Paragraphs 4.4.1 and 4.5 above.

²⁹² Paragraphs 4.4.1 and 4.6 above.

²⁹³ Paragraph 4.4.1 above.

²⁹⁴ Paragraph 3.2 above.

²⁹⁵ Paragraph 4.4.1 above.

and court officials in environmental and local government law in the justice system, Municipal Courts could, thirdly, contribute to EJ in South Africa by employing suitable candidates in advancing municipal matters to achieve successful prosecutions.²⁹⁶ Also, fourthly, Municipal Courts could remedy the inefficiencies that the current justice system has overlooked over the years concerning municipal matters by prioritising these matters and dedicating time and resources to them.

Finally, Municipal Courts could improve the status of EJ and service delivery in local South African communities by prosecuting municipalities for their failure to deliver and to provide and distribute municipal services in a fair and equal manner, as required.²⁹⁷ What this means is that well-established and efficient Municipal Courts would be able to help residents with service delivery and that residents could use these courts to report environmental harm. Based on this assertion, the main findings appear below.

5.2 Main findings and recommendations

In addition to the findings per chapter as outlined above, some of the overarching findings and recommendations of this study are the following:

- Well-established and well-run of the Municipal Courts that mainly deals with municipal matters (e.g. prosecution of by-law violations) can assist in addressing the existing and upcoming environmental injustice in local communities.²⁹⁸ This suggests that municipalities must consider establishing more Municipal Courts in order to broaden access to justice and advance the fair and reliable prosecutions of the by-law (e.g. environmentally by-laws) offences in society.²⁹⁹ Further, based on this finding, the introduction and establishment of these courts must include an independent investigative unit that will ensure the performance of proper investigations which could lead to effective prosecutions. Accordingly, this calls for a collective agreement between the DoJ & CD, the NPA and municipalities to train prosecutors and law

²⁹⁶ Paragraphs 4.4.1 and 4.4.2 above.

²⁹⁷ Paragraph 4.5 above.

²⁹⁸ See paragraphs 4.4.1, 4.4.2 and 4.5 above.

²⁹⁹ See paragraph 3.2 above.

enforcement agencies in matters of environmental and local government law;³⁰⁰

- The streamlining of the prosecutorial process and the enactment of the Municipal Courts Act could improve the status, powers and functions of Municipal Courts concerning access to EJ;³⁰¹
- The production of a prosecutorial manual on by-laws (including environmental by-laws) and traffic offences in Municipal Courts across the country could address enforcement issues;³⁰²
- The coming into operation of AARTO may defeat the aim of the integration of the different internal departments in municipalities and the rationalisation of courts, as well as the establishment of more Municipal Courts. In this instance, a collaboration between municipalities and AARTO in the adjudication of road traffic infringements and access to justice could help improve the status of EJ in local communities.³⁰³ Furthermore, a partnership with other municipalities and stakeholders (SAPS) would enhance cooperative governance in the operation of Municipal Courts for the improved prosecutorial process;
- Advanced prosecutorial and municipal court administration training courses (that includes local and environmental law knowledge) for magistrates, prosecutors and court clerks could help in addressing administrative challenges and remedy backlogs in the justice system;³⁰⁴
- Municipalities need to take advantage of the modernisation and digitalisation of Municipal Courts in order to move away from inefficient methods, reduce costs, and improve the status of access to EJ in local communities;³⁰⁵ and
- There must be an evaluation of Municipal Courts every year to track the developments and statistics concerning warrants of arrest issued and outstanding cases concerning environmental by-laws in order to address EJ issues.

³⁰⁰ Paragraph 4.4 above.

³⁰¹ Paragraph 4.4 above.

³⁰² Paragraph 4.4 and 4.5 above.

³⁰³ Paragraph 4.4.1 above.

³⁰⁴ Paragraph 4.5.

³⁰⁵ Paragraph 4.4.1 above.

5.3 *Concluding remarks*

EJ and its pursuit are complicated and not easy to box in terms of who is responsible for exactly what and when. This study has aimed to argue that environmental injustices often surface in local areas where municipal services fail, concerning their sustainability and equal provision. Environmental injustices can and should be addressed by legislatures, executives and courts. The focus of this study was, however, on the potential impact that Municipal Courts may have in the municipal areas of South Africa as far as pertains to service-delivery-related environmental injustices. The findings and recommendations suggest that further research may be necessary, but for now it is established that Municipal Courts can be very valuable and that as a judicial institution, they must be embraced and actively motivated for at national and local levels.

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