

**Local government accountability in South  
Africa: an environmental law reading**

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## **DEDICATION**

**This thesis is dedicated to my wife, Sharon Karsten and my children, Keagan and Kristen Karsten, whose myriad of sacrifices and unwavering emotional support allowed me to complete this thesis**

**&**

**Daniel Cornelius Johannes Hoffman, my lifelong mentor in both the law and local government, a friend and confidant whose impressions of ethics, honesty and professionalism will always accompany me in my journey as a person and a lawyer.**

I love the LORD, for he heard my voice; he heard my cry for mercy. Because he turned his ear to me, I will call on him as long as I live. The cords of death entangled me, the anguish of the grave came upon me; I was overcome by trouble and sorrow.

Psalm 116:1

Hallel Yahweh

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## **PUBLICATIONS**

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## **ABSTRACT**

The role of sub-national (local) government is increasingly essential in terms of sustainable development, especially from a global governance perspective. Cities across the world are organised to become sustainable development nuclei based on their increased ascendancy in regional and national governance structures. From a South African perspective, municipalities are also seen as increasingly significant in the pursuit of sustainability. Imperative hereto is section 24(b) of the *Constitution of the Republic of South Africa, 1996* (the Constitution) that guarantees environmentally sustainable development and accordingly places co-responsibility (in terms of section 7(2)) on local government to pursue sustainable development. Basic to the understanding of any responsibility, local government needs to be accountable to the said obligation imposed or in absence thereof to be answerable in terms of the consequences.

Accountability has been a longstanding constituent of governance which dates back to the dawn of democratic societies. The notion of accountability has, however, been extensively developed since the original meaning thereof. The present-day understanding thereof includes government's responsibility and answerability towards its citizens. Central to public accountability are also various sub-classes of accountability feeding into the primary meaning thereof. These modifications of accountability have improved the understanding of the initial concept, that is now central to different systems of democratic governance. Accountability accordingly also fits into the post-constitutional epoch of South Africa. Hence, specific reference is made thereto in the Constitution.

Further to the novelty of the research and accountability in the context of governance in South Africa, this research draws the necessary parallels between public accountability and (local) government accountability. The understanding of (local) government accountability is presented in accord with the interrelatedness of local government's relationship with other spheres of government and also the electorate. The understanding of (local) government accountability accordingly extends the existing research on how (local) government environmental obligations must be interpreted from an

intergovernmental and intra-governmental perspective, and towards the electorate perspective.

Local government framework and sectoral environmental statutory responsibilities are considered to delimit the statutory confines of (local) government accountability in the three dimensions. Pronouncements of local government's environmental duties are spread among a wide array of statutes, and ignorance of the existence of some of these may cause municipalities not to realise their obligations associated with (local) environmental accountability. This thesis therefore *inter alia* attempts to understand what (local) environmental accountability entails in the context of prevailing South African environmental law.

Constituent hereto consideration is also given to how these environmental responsibilities are assessed to ensure that municipalities are accountable in terms of identified accountability mechanisms. Finally, the notion of local (environmental) accountability in South Africa's local government sphere in practice is examined with reference to the example of the City of Johannesburg.

**Keywords:**

Public accountability, local government accountability, liability, accountability mechanisms, environmental law, South Africa, City of Johannesburg.

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APPLJ	African Public Procurement Law Journal
AG	Auditor-General
AGSA	Auditor-General South Africa
AJPA	African Journal of Public Affairs
AR	Annual Report
CAF	Comprehensive Accountability Framework
CCSF	Climate Change Strategic Framework
CJLG	Commonwealth Journal of Local Governance
CM	City Manager
CMA	Catchment Management Agency
CMP(s)	Coastal Management Plan(s)
CoGTA	Department of Co-operative Governance and Traditional Affairs
CoJ	City of Johannesburg
ELJ	European Law Journal
DPLG	Department of Provincial and Local Government
DPME	Department of Performance Monitoring and Evaluation in the Presidency
DEAT	Department of Environmental Affairs and Tourism
DMA	Disaster Management Act 57 of 2000
DORA	Division of Revenue Act 9 of 2021
DPSA	Department of Public Service and Administration

DWS	Department of Water and Sanitation
ED: EIS	Executive Director: Environment and Infrastructure Services
EIA	Environmental Impact Assessment
EISD	Environment and Infrastructure Services Department
ELM	Emfuleni Local Municipality
EMI(s)	Environmental Management Inspectorate(s)
EMT	Executive Management Team
ESI(s)	Environmental Sustainable Issue(s)
ESS	Environmental Sustainability Strategy
Fordham Urb LJ	Fordham Urban Law Journal
FRP(s)	Financial Recovery Plan(s)
GDARD	Gauteng Department of Agriculture and Rural Development
GDS	Growth Development Strategy
GHG	Greenhouse Gasses
GRAP	Generally Recognised Accounting Practice
HJRL	Hague Journal on the Rule of Law
IDP	Integrated Development Plan
IEC	Electoral Commission of South Africa
IFRA	Intergovernmental Fiscal Relations Act 97 of 1997
IGR	Intergovernmental Relations
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies

IoDSA	Institute of Directors South Africa
IOSR-JHSS	IOSR Journal of Humanities and Social Science
IRFA	Intergovernmental Relations Framework Act 13 of 2005
ISO	International Organisation for Standardisation
IUDF	Integrated Urban Development Framework
JCPZ	Johannesburg City Parks and Zoo
JCSS	Joburg City Safety Strategy
J L Econ & Org	Journal of Law, Economics, and Organization
J Dev Arr	The Journal of Developing Areas
JDA	Johannesburg Development Agency (SOC) Limited
JMOSS	Johannesburg Metropolitan Open Space Strategy
JMPD	Johannesburg Metropolitan Police Department
J Public Adm	Journal of Public Administration
JRA	Johannesburg Roads Agency
KPA(s)	Key Performance Area(s)
KPI(s)	Key Performance Indicator(s)
LEG	Local Environmental Governance
LGB	Local Government Bulletin
Minn L Rev	Minnesota Law Review
LoEB	Leader of Executive Business
MAYCO	Mayoral Committee
MCMP(s)	Municipal Coastal Management Plan(s)

MDMP	Municipal Disaster Management Plan
MEC	Member of the Executive Committee
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
MFPFA	Municipal Fiscal Powers and Functions Act 12 of 2007
MFRS	Municipal Financial Recovery Service
MMC	Member of the Mayoral Committee
MOE(s)	Municipal-Owned Entities
MPAC	Municipal Public Accounts Committee
MPRA	Local Government: Municipal Property Rates Act 6 of 2004
MPT(s)	Municipal Planning Tribunal(s)
MSCOA	Municipal Regulations on a Standard Chart of Accounts
NPC	National Planning Commission
NBRBSA	National Building Regulations and Building Standards Act 103 of 1977
NDP	National Development Plan
NEMA	National Environmental Management Act 107 of 1998
NEM: AQA	National Environmental Management: Air Quality Act 39 of 2004
NEM: BA	National Environmental Management: Biodiversity Act 10 of 2004
NEM: ICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008

NEM: PAA	National Environmental Management: Protected Areas Act 57 of 2003
NEM: WA	National Environmental Management: Waste Act 59 of 2008
NGO(s)	Non-governmental organisation(s)
NHA	National Health Act 61 of 2003
NWA	National Water Act 36 of 1998
OECD	Organisation for Economic Co-operation and Development
OPCA	Operation Clean Audit
PAAA	Public Audit Amendment Act 5 of 2018
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PER / PELJ	Potchefstroom Elektroniese Regsjoernaal / Potchefstroom Electronic Law Journal
PPPF Act	Preferential Procurement Policy Framework Act 5 of 2000
SACN	South African Cities Network
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
SANS	South African National Accreditation Services
SAPR/PL	Suider Afrikaanse Publiekreg / Southern African Public Law
SCM	Supply Chain Management
SCMP	Supply Chain Management Policy

SCOPA	Standing Committee on Public Accounts
SDBIP(s)	Service Delivery and Budget Implementation Plan(s)
SDF(s)	Spatial Development Framework(s)
SDG(s)	Sustainable Development Goal(s)
SJCH	Southern Journal for Contemporary History
SLA	State Liability Act 20 of 1957
SOC	State owned company
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
St Comp Int Dev	Studies in Comparative International Development
Stell LR	Stellenbosch Law Review
SSB / TRP / MDM	Stads- en Streeksbeplanning / Town and Regional Planning / Meralo ya Ditoropo ya Mabatowa
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TMR	Transformation, Modernisation Re-industrialisation Planning Strategy
ToR	Terms of Reference
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
VAB(s)	Valuation Appeal Board(s)

WSA

Water Services Act 108 of 1997

WWTW

Waste Water Treatment Works



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# CHAPTER 1

## INTRODUCTION

### *1.1 Contextual background*

Recent years have seen an amplified focus in the sustainable development discourse on the role of cities. The view is generally held that globally cities and localities must assist in the pursuit of sustainable development and the establishment and maintenance of sustainable communities.<sup>1</sup> It suffices to say that city governments everywhere are recognised more and more as important governance actors in the pursuit of sustainability. This is generally confirmed by several recent international developments including the 2030 Sustainable Development Goals (hereafter SDGs) adopted in 2015, the United Nations New Urban Agenda (2016) and the United Nations Habitat World Cities Report (2020). Goal 11 of the SDGs in particular states that cities must become more resilient, safe, inclusive and sustainable as part of the global quest for sustainable development. The United Nations (hereafter UN) Habitat World Cities Report 2020 reiterates this message.<sup>2</sup>

At the African regional level, the Vision 2063 document under Aspiration 1 confirms the goal of a prosperous Africa based on inclusive growth and sustainable development.<sup>3</sup> Vision 2063 determines that cities in Africa must contribute to the realisation of basic necessities of life such as water, sanitation and energy – amenities all of which are critical to the pursuit of urban sustainability.<sup>4</sup>

In the domestic context of South Africa, the National Development Plan Vision 2030 (hereafter NDP) states the importance of municipalities' role in sustainability, with cities being labelled as a strategic sector with an estimated 70 per cent of the population

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<sup>1</sup> Porras 2009 *Fordham Urb LJ*.

<sup>2</sup> UN *World Cities Report 2020* 2.

<sup>3</sup> African Union *Agenda 2063* 4.

<sup>4</sup> CoGTA *IUDF* 8.

expected to reside in them by 2030.<sup>5</sup> This rapid urbanisation underscores the importance of municipalities or local authorities as governance actors and of cities as spaces of habitation.<sup>6</sup> The 2016 Integrated Urban Development Framework determines that South African cities and towns need to be steered towards a sustainable growth model of compact, connected and coordinated cities and towns,<sup>7</sup> and further hereto, that one of four strategic goals is to harness urban dynamism for inclusive, sustainable economic growth and development.<sup>8</sup> The 2016 State of South Africa's Cities Report published by the South African Cities Network further indicates that the current unsustainable growth path in the country involves development which is resource-intensive in and around cities.<sup>9</sup> This in turn is causing the rapid depletion of resources combined with an unstainable energy mix, landfill sites running out of space, increased emissions and diminishing freshwater resources, to mention only a few such matters.<sup>10</sup>

The above must be read and interpreted against the fact that the *Constitution of the Republic of South Africa, 1996*<sup>11</sup> ushered in a new developmental local government model which differs in design and authority from the model of local government known prior to 1994. Chapter 7 of the Constitution suggests that local government has become a sphere of government with particular meaning in the domestic pursuit of ecologically sustainable (urban) development and justice for all.

It is not only at the international and national levels, however, that the matter of sustainable urban development is receiving attention. In South Africa's Gauteng Province, for example, one finds explicit commitment to the pursuit of sustainable and globally competitive cities.<sup>12</sup> This objective is sought to be achieved by means of an inclusive and

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<sup>5</sup> NPC *NDP 2030 22*.

<sup>6</sup> NPC *NDP 2030 22*.

<sup>7</sup> CoGTA *IUDF 8*.

<sup>8</sup> CoGTA *IUDF 8*.

<sup>9</sup> SACN *State of South African Cities Report 2016 10*.

<sup>10</sup> SACN *State of South African Cities Report 2016 10*.

<sup>11</sup> *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).

<sup>12</sup> Gauteng Provincial Government *Gauteng Vision 2055*.

spatially balanced approach to development in the province – an approach dedicated to addressing social issues like poverty and inequality through sustainable growth.<sup>13</sup>

The pursuit of sustainable cities and the optimisation of the role of cities in the global, national and sub-national pursuit of ecologically sustainable development are arguably dependent on sound local government institutions and good local governance. Good local governance being generally understood to require a mix of constituent ingredients,<sup>14</sup> one of which is "accountability" on the part of local authorities via the structures and functionaries of which it is comprised. In this context accountability is a loaded term, but in its most elementary form it may be described as answerability towards local communities.<sup>15</sup> Both administrative and political functionaries need to account to their local communities, and in the case of proportional representative councillors, to their political masters.

Accountability ties in with the normative governance roles and any explicit duties and functions of an organ of state.<sup>16</sup> In the South African context, many such public duties and functions in relation to sustainability are found in the country's body of environmental law. This is to be expected, given the constitutional environmental right's explicit call for ecologically sustainable development (section 24(b) of the Constitution) – to be read in combination with the constitutional principles on public administration and the duty of the entire government to fulfil all constitutional rights. Local government legislation is also vocal on the need for municipalities specifically to pursue sustainable development and to deliver ecologically sustainable services.<sup>17</sup> It is a commonly held opinion that this endeavour requires the balancing of the ecological, environmental and social interests which are imbedded in a well-functioning local governance framework.

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<sup>13</sup> Gauteng Provincial Government *Gauteng Vision 2055*.

<sup>14</sup> Ackerman 2004 *World Development* 448.

<sup>15</sup> Ackerman 2004 *World Development* 448.

<sup>16</sup> Ackerman 2004 *World Development* 448.

<sup>17</sup> See para 3.5.6 in Chapter 3.

The duties and functions of local government in relation to sustainable development are scattered across a range of local government and environmental laws and policies including the Constitution, the *National Environmental Management Act*,<sup>18</sup> and the *Local Government: Municipal Systems Act*.<sup>19</sup> The failure to deliver in terms of these duties and functions may amount to a failure of accountability on the part of municipalities i.e. municipal structures and functionaries. For this reason, it makes sense to explore and critically analyse the meaning and scope of the term "accountability". An in-depth exposition is required of: a) the meaning (in general) of the notion of accountability on the part of organs of state such as municipalities; b) an identification of the different structures and functionaries in the South African local government model that may be held accountable; and c) the level and nature of the accountability arising from the body of South African environmental laws applicable to all three categories of municipalities.

The accountability of local government in terms of environmental law depends *inter alia* on the relevant substantive and procedural provisions of this field of law – the Constitution, the NEMA and other environmental laws included. It is to be expected that such accountability will be informed not only by the duties arising from people's constitutional environmental rights and environmental law, but also from the public trusteeship doctrine which is embodied in several national environmental laws, including the NEMA, the *National Water Act*<sup>20</sup> and the *National Environmental Management: Biodiversity Act*.<sup>21</sup> The notion of custodianship (public trusteeship) *inter alia* envisions government's (including local government) taking responsibility for holding natural resources in public trust on behalf of all the people in South Africa.<sup>22</sup>

The duties and functions arising from environmental law and resting on the shoulders of government dictate the kinds of actions and decisions for which government stands

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<sup>18</sup> *National Environmental Management Act* 107 of 1998 (hereafter the NEMA).

<sup>19</sup> *Local Government: Municipal Systems Act* 32 of 2000 (hereafter the *Systems Act*).

<sup>20</sup> *National Water Act* 36 of 1998 (hereafter the NWA).

<sup>21</sup> *National Environmental Management: Biodiversity Act* 10 of 2004 (hereafter the NEM: BA).

<sup>22</sup> Freedman "Conservation, Sustainable Use of Natural Resources and the Notion of Public Trusteeship" 8-1.

accountable. Where, when and how to keep any government structure accountable will depend, however, on any generic and sector-specific instruments and mechanisms aimed at accountability that have been built into law. These instruments and mechanisms may be situated in environmental law or in the generics of constitutional and administrative law, for example. In the local government context, such instruments and mechanisms may also be provided for in framework local government law. A comprehensive and coherent assessment of the scope of accountability in terms of environmental law and of the different organs of state in the South African context is needed. As one part of such an inquiry, this study questions what (local) environmental accountability ought to entail in the context of South African environmental law and the apportionment of the state's environmental responsibility in terms of the Constitution. The study focuses specifically on such accountability of different local government structures.

### ***1.2 South Africa's developmental local government in a system of co-operative governance***

South African local government is today labelled as "developmental", which marks a move away from local government's being merely a service provider for local communities. The White Paper on Local Government of 1998<sup>23</sup> describes this notion, noting the central responsibility of municipalities to work together with local communities to find sustainable ways to meet and improve the quality of lives of their residents.<sup>24</sup> With the publication of the White Paper, local government was envisaged as becoming more institutionalised with the fulfilment of its constitutional mandates and developmental duties.<sup>25</sup> These developmental duties have four interrelated characteristics, which include the maximisation of social development and economic growth, integration and co-ordination, democratising development, and leading and learning.<sup>26</sup> It is accordingly clear that as

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<sup>23</sup> Department of Constitutional Development *White Paper on Local Government* (hereafter the White Paper).

<sup>24</sup> Section B of the White Paper 8.

<sup>25</sup> De Visser 2009 *CJLG* 9.

<sup>26</sup> De Visser 2009 *CJLG* 9.

early as in 1998 a particular role had been devised for local government as far as sustainable development is concerned.

According to De Visser, the developmental duties of local authorities are centred on the following: democracy, sustainable service delivery, social and economic development, environmental protection, community participation, poverty alleviation and intergovernmental co-operation.<sup>27</sup> Captured under developmental local government are the decentralisation of governance and the devolution of responsibility and accountability. In terms of the White Paper, the concept of accountability is descriptive of the "central responsibility" of municipalities together with their communities to create sustainable ways to address their needs and improve their quality of life.<sup>28</sup>

Accountability is further confirmed in the fact that the Constitution affords each of the three government spheres (national, provincial and local) with specific areas of competence. Section 41 of the Constitution confirms that the three spheres function separately, although they are interrelated with one another to allow for co-operative governance. Steytler states that this interdependence is indicative of the constitutional obligation of co-operative governance.<sup>29</sup> However, although local government forms part of a broader government structure, it is no longer regarded as a mere functionary of the provincial and national spheres. Local government is a semi-autonomous sphere, responsible for serving as developmental local government.<sup>30</sup>

### ***1.3 (Local) government accountability***

Good governance in the public sector and elsewhere does not spontaneously occur and is not based on the good faith of bureaucrats and politicians, but requires accountability, among other things.<sup>31</sup> The necessity of accountability is acknowledged by international studies such as the World Cities Report 2020, which confirms that accountability is one of

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<sup>27</sup> De Visser 2009 *CJLG* 9.

<sup>28</sup> Section B of the White Paper.

<sup>29</sup> Steytler "National, Provincial and Local Relations" 230.

<sup>30</sup> Du Plessis 2010 *Stell LR* 265.

<sup>31</sup> Ackerman 2004 *World Development* 448.

the elements of so-called new urban governance.<sup>32</sup> Similarly, regional instruments like the African Agenda 2063 (under Aspiration 4) seek to include accountability as an important requirement to be met by institutions on all levels of government.<sup>33</sup> Good governance has been defined as the manner in which office bearers in a municipality direct, control and regulate the municipality with reference to the principles of efficiency, transparency<sup>34</sup> and accountability.<sup>35</sup> Calls for improved accountability date to the Local Government Turnaround Strategy, where the root causes of dysfunctional municipalities are identified as weaknesses in responsiveness and accountability to communities.<sup>36</sup>

South Africa's Constitution is vocal about government accountability to the extent that section 195 includes the principles which oversee public administration in the country. All organs of state, including local government, must for example be development-oriented. The Constitution mandates the provision of services and public participation and, most relevant for our present purposes, calls on the public administration in all three spheres of government to be accountable.<sup>37</sup> Based on the well-developed developmental duties of local government and the justiciable environmental right in the Constitution, the question can be asked whether or to what extent non-compliance with environmental law triggers measures of accountability. The statutory duties of municipal administrations include the obligations to facilitate a culture of public service and accountability.<sup>38</sup> Accountability in this context has been discussed by various international and domestic authors. Some of the more prominent descriptions in the available literature are outlined below.

Ribot confirms the importance of the accountability of government by reflecting on the concept of democracy as being a sub-species of the wider concept of the "accountability of [the] state to society".<sup>39</sup> Authors depict accountability as the uber-concept of the

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<sup>32</sup> UN *World Cities Report 2020* 225.

<sup>33</sup> African Union *Agenda 2063* 8.

<sup>34</sup> See Meijer "Transparency" 507 for more information on the origins of transparency in relation to accountability.

<sup>35</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action".

<sup>36</sup> CoGTA *Local Government Turnaround Strategy* 18.

<sup>37</sup> Section 195 of the Constitution.

<sup>38</sup> Section 6(2)(c) of the *Systems Act*.

<sup>39</sup> Ribot *African Decentralization* 29.



modern era or the twenty-first century.<sup>40</sup> Another consideration of accountability allows for the exercise of counter power to balance arbitrary action.<sup>41</sup> Brinkerhoff reflects on accountability by splitting the concept into two elements, namely "answerability" and "enforceability"<sup>42</sup> while Lonsdale states that accountability is reflective of the measure of responsibility associated with government.<sup>43</sup> Accountability is further regarded as the cornerstone of public administration to the extent that it underscores that those who hold public authority are responsible and answerable for their actions and inactions.<sup>44</sup>

The notion of local government accountability must be understood with reference to two types of government accountability.<sup>45</sup> The vertical application of accountability is representative of political accountability as provided for by way of elections, executive oversight and legislative oversight.<sup>46</sup> The horizontal application of accountability is to be understood as consisting of social accountability mechanisms created through civil society actions as well as independent oversight in the form of monitoring or advocacy.<sup>47</sup> The content of South African local government law appears at this point to trigger both types of accountability, considering the nature of the executive, legislative and administrative powers resting with elected municipal councils and municipal officials. Different authorities go even further by categorising "local accountability systems" into four different actors, differentiating among local residents, local governments, producers of local government services, and higher-level government.<sup>48</sup> Central to the position of these actors is the distinction between *ex ante* and *ex post* accountability. The notion of accountability allows differentiation between forward-looking (*ex ante*) accountability and retrospective (*ex post*) accountability.<sup>49</sup> Jelmin confirms the application of retrospective accountability as being representative of the purest form of accountability associated with the prospect of

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<sup>40</sup> Bovens, Schillemans and Goodin "Public Accountability" 1.

<sup>41</sup> Ribot *African Decentralization* 29.

<sup>42</sup> Ribot *African Decentralization* 29.

<sup>43</sup> Ribot *African Decentralization* 29.

<sup>44</sup> Kakumba and Fourie 2008 *J Public Adm* 122.

<sup>45</sup> Jelmin *Democratic Accountability in Service Delivery* 7.

<sup>46</sup> Jelmin *Democratic Accountability in Service Delivery* 7.

<sup>47</sup> Jelmin *Democratic Accountability in Service Delivery* 7.

<sup>48</sup> World Bank *Local Government Discretion* 6.

<sup>49</sup> Jelmin *Democratic Accountability in Service Delivery* 7.

accountability.<sup>50</sup> Price describes accountability as consisting of two interrelated dimensions, one of these being "to hold people accountable", which is reflective of democratic governance e.g. government's duty to account for its and others' decisions or actions (including inaction), and the other being "liability", meaning to hold government responsible for its actions, e.g. taking responsibility for wrongdoing.<sup>51</sup> Price further discusses various means of holding the state accountable for its actions (or failure to act), including through ensuring that there are political and legal consequences for government's actions.<sup>52</sup> Closely linked to the said consequences are political and legal mechanisms to hold municipalities accountable.<sup>53</sup> Political consequences could foresee a political functionary's being voted out of office, the application of various other sanctions, and/or the public declaration of wrong-doings.<sup>54</sup> Second, legal consequences could cause functionaries to account for their actions by means of judicial, quasi-judicial<sup>55</sup> and chapter 9 institutional proceedings.<sup>56</sup> It suffices to say that accountability on the part of government takes different forms and that the notion can be interpreted variously.

Relevant to this study are the critical links between the notions of accountability and "liability". Liability is not the same as accountability to the extent that the former is understood to be the penalty or consequence of the lack or absence of accountability. It follows that only once accountability is established can the transgressor be held answerable (liable) for its wrongdoing.<sup>57</sup> Tague explains answerability and the related impeachability thereof in the light of the transgressor's becoming inseparable from his act.<sup>58</sup> Tague concludes that while accountability and responsibility are fundamental

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<sup>50</sup> Jelmin *Democratic Accountability in Service Delivery* 7.

<sup>51</sup> Price "State Liability and Accountability" 315.

<sup>52</sup> Price "State Liability and Accountability" 317.

<sup>53</sup> Paragraph 2.5 in Chapter 2.

<sup>54</sup> Kamp *Concepts and Principles of Democratic Governance and Accountability* 25.

<sup>55</sup> Paragraph 4.3 in Chapter 4.

<sup>56</sup> Paragraph 4.4.6 in Chapter 4.

<sup>57</sup> Price "State Liability and Accountability" 315.

<sup>58</sup> Tague 2004 *Midwest Quarterly* 20.

concepts in society, the time is opportune to "add answerability".<sup>59</sup> Answerability could therefore in practice strengthen the notion of accountability in the context of governance.

Although for the purposes of this study the researcher considers liability to be separate from accountability, liability is an integral element in the establishment of local government's accountability. An exploration of the notion of liability will accordingly also form part of the process and methodology to determine local government's liability in this study.<sup>60</sup>

Authority confirms that different meanings are associated with the term liability, *inter alia* the Diceyan view that the rule of law dictates that public authorities should also be held liable for their actions or omissions, like any other bearer of rights, including under common law and the law of delict.<sup>61</sup> The idea of public authorities' being held liable is confirmed in European jurisdictions such as Germany and France, which have codified their legislation linked to state liability, allowing for specific rules and legislation governing state liability.<sup>62</sup> Jurisdictions for example England, however, prevented claims of delict against the state with the English doctrine of "Crown Immunity".<sup>63</sup> Pre-democratic South Africa, being a former British colony, in 1957 also adopted its own legislation indemnifying the state from liability,<sup>64</sup> with the *State Liability Act*.<sup>65</sup> Historically the South African government was considered supreme, and no liability could be apportioned to the state.

Noticeable in South Africa's post-constitutional era is the allowance of both public law and constitutional law remedies or measures to help ensure and facilitate state liability. This may very well be seen to form part of the transformative epoch brought about by the Constitution.

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<sup>59</sup> Tague 2004 *Midwest Quarterly* 20.

<sup>60</sup> Paragraph 2.3 in Chapter 2.

<sup>61</sup> Price "State Liability and Accountability" 317.

<sup>62</sup> Price "State Liability and Accountability" 317.

<sup>63</sup> Price "State Liability and Accountability" 317.

<sup>64</sup> Price "State Liability and Accountability" 317.

<sup>65</sup> *State Liability Act* 20 of 1957 (hereafter the SLA).

#### **1.4 Environmental law and governance in South Africa**

The adoption of the Constitution also saw the birth of the first constitutional environmental right in the country. Section 24 promises everyone an environment which is not harmful to human health or well-being as well as proper conservation of the environment for future generations, through reasonable legislative and other measures (section 24(b)). This right must be read with section 7(2) of the Constitution, which determines that all three spheres of government are obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.

Section 24 is at the basis of the NEMA. The objective of the Act is to provide a platform for the creation of a legal framework that allows for the proper administration and enforcement of environmental laws *inter alia* through co-operative environmental governance.<sup>66</sup> The NEMA envisages public sector accountability in relation to the environmental responsibilities and sustainability outcomes envisioned in the Act and in other sector-specific environmental laws.<sup>67</sup> Many of these outcomes go along with implicit and explicit duties and functions for municipalities,<sup>68</sup> which range from air quality and waste management responsibilities to biodiversity management and the integrated management of coastal areas.<sup>69</sup>

South African local government law also alludes to the environmental duties and functions of local government. The *Systems Act*, for example, determines that local government has the duty to provide services in a sustainable manner and further to promote a safe and healthy environment in line with section 24 of the Constitution.<sup>70</sup>

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<sup>66</sup> Preamble of NEMA.

<sup>67</sup> See para 3.3 in Chapter 3.

<sup>68</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance".

<sup>69</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance".

<sup>70</sup> The *Systems Act*.

### **1.5 Environmental law duties and functions of local government**

The scope of local government accountability necessitates understanding the key environmental law duties and functions of municipalities. Much work has already been done in this regard and it has been established that these duties and functions should be understood with reference to the dimensions of local environmental governance (hereafter LEG) identified by Nel, Du Plessis and Retief, for example.<sup>71</sup> Following their thinking, the accountability of local government speaks to three dimensions of LEG: local government's governing itself,<sup>72</sup> local government's governing the community<sup>73</sup> and local government's being governed by provincial and national authorities.<sup>74</sup> These dimensions cross various different environmental sectors such as waste management, air quality management and biodiversity management and relate to the overarching pursuit of (urban) sustainability. It can be accepted that the duties and functions of local government arising from environmental law have at their basis the section 24 environmental right, which is further detailed in framework and sector-specific environmental laws and regulations, as alluded to above.<sup>75</sup>

### **1.6 The accountable structures in local government**

In general terms, both the political and administrative arms of government stand to be accountable towards members of society. In the local government context this means that elected councillors as well as administrative officials may in principle be held accountable. How exactly the accountability will be allocated depends on the specific government system adopted by each municipality. Be that as it may, the operation of a municipal council is closely associated with the legislative function of the municipality,<sup>76</sup>

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<sup>71</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action".

<sup>72</sup> See para 2.5.6 in Chapter 2.

<sup>73</sup> See para 2.5.6 in Chapter 2.

<sup>74</sup> See para 2.5.5 in Chapter 2.

<sup>75</sup> See para 3.5 in Chapter 3.

<sup>76</sup> Section 19 of the *Local Government: Municipal Structures Act* 117 of 1998 (hereafter the *Structures Act*).

whereas the mayor or executive committee of the municipality is normally regarded as the functionary of the executive authority.

In this study the accountability of local government role players and functionaries such as the Council, the Speaker, members of the mayoral committees (hereafter MAYCOs), the Chief Whip, ward committees, section 79 and 80 committees, the Petitions Committee, the Ethics Committee, the Rules Committee and the Municipal Public Accounts Committee (hereafter MPAC) are specifically discussed in more detail.<sup>77</sup> The objective is to establish the nature of the accountability of the specific local government role players and functionaries and the mechanisms used (or available) to hold functionaries accountable. One of the aims is to determine where the accountability of officials stops and the accountability of council begins.

### ***1.7 Internal and external municipal accountability measures***

Lastly, the thesis envisages understanding the internal and external processes created to ensure accountability in municipalities, with proper consideration of the applicable systems and structures.<sup>78</sup> Therefore, internal and external accountability measures will be considered in terms of the processes and instruments created to allow for a proper assessment of internal non-compliances. These accountability mechanisms must be clearly defined by a municipal council.<sup>79</sup>

Accountability pertaining to municipal governance has been specifically emphasised during the past few years with the development of a plethora of processes to monitor internal governance, specifically.<sup>80</sup> Legislation that applies to internal governance processes and structures includes the *Local Government: Municipal Finance Management Act* (hereafter the MFMA),<sup>81</sup> the *Local Government: Municipal Structures Act* (hereafter

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<sup>77</sup> Sections 79 and 80 of the *Structures Act*.

<sup>78</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action".

<sup>79</sup> Section B, s 2.2.2 of the White Paper.

<sup>80</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance".

<sup>81</sup> *Local Government: Municipal Finance Management Act* 56 of 2003 (hereafter the MFMA).

the *Structures Act*)<sup>82</sup> and the *Systems Act*,<sup>83</sup> to mention only a few. The existing mechanisms to hold different local government structures accountable in terms of environmental law will be discussed in Chapter 4.<sup>84</sup>

## **2 Accountability in terms of environmental law: the City of Johannesburg-case**

The theoretical meaning and broad application of the notion of government accountability in terms of environmental law can best be contextualised with reference to an example. The City of Johannesburg (hereafter the City or CoJ) is a vast urban area in central South Africa with unique environmental and urban development challenges. It is located in the so-called Gauteng City Region,<sup>85</sup> which is indicative of the complexity of the geographical scope, spatial planning and mobility profile of this city. Based on the information on the City captured in the Integrated Urban Development Framework<sup>86</sup> and the 2016 State of South African Cities Report,<sup>87</sup> the CoJ seems to offer an ideal case to review and examine the potential scope of environmental accountability on the part of a municipality and those of its structures or positions with which such accountability may finally sit. An initial evaluation of the environmental duties and concomitant activities of the City assisted in determining who in this specific municipality takes responsibility for what and how environmental law responsibilities (and their execution) are actually being organised and structured.<sup>88</sup> As is explained in Chapter 4 of this study, the analysis of the City's relevant environmental policies, by-laws, organogram and integrated development plan (hereafter IDP) was pre-determined by the definition and meaning of accountability as relevant in the South African local government and environmental law context. Cognisant of the fact

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<sup>82</sup> The *Local Government: Municipal Structures Act* 117 of 1998.

<sup>83</sup> The *Local Government: Municipal Systems Act* 32 of 2000.

<sup>84</sup> See Chapter 4 below for a discussion on mechanisms in law for local environmental governance (LEG) accountability in local government.

<sup>85</sup> Geyer, Geyer and Geyer 2015 *SSB / TRP / MDM* 14: The term Gauteng City Region is commonly used in reference to the broader Gauteng city-region incorporating different metropolises in Gauteng, consisting of a continuous urban region surrounded by a wider peri-urban region stretching for a hundred and fifty kilometres.

<sup>86</sup> CoGTA *IUDF*.

<sup>87</sup> SACN *State of South African Cities Report 2016*.

<sup>88</sup> Chapter 5.

that the findings of this case study will probably not be replicable for another city, the aim was merely to conduct an appraisal of the manner in which local government accountability in terms of environmental law (framework and sector environmental law) could play out in South Africa's local government context.

### **3 Objectives of this study**

#### ***3.1 Primary objective***

To critically explore the nature and extent of the accountability of local government structures and functionaries in terms of South African environmental law.

#### ***3.2 Secondary objectives***

The secondary objectives of the study are to:

3.2.1 Offer a theoretical perspective on the meaning and role of (local) government accountability in democratic government systems;

3.2.2 Develop a theoretical perspective on the role of local government in environmental accountability, given the design and objectives of South African framework and sector-specific environmental law;

3.2.3 Critically analyse and discuss the mechanisms created by law to facilitate the accountability of different structures and functionaries in local government in relation to duties and functions;

3.2.4 Explore the complexity of the CoJ's internal structures and functionaries relevant to environmental accountability, with a view to understanding the complexities in context; and

3.2.5 Conclude and make recommendations on the optimisation of local government accountability in terms of South African environmental law.



## **4 Points of departure**

4.1 The Republic of South Africa is a constitutional state which affords everyone the right to an environment that is not harmful to his/her health or well-being;

4.2 Local government is co-responsible with the other two spheres for the realisation and protection of the constitutional environmental right;

4.3 In terms of the Constitution, the South African government must be accountable;

4.4 Local government in South Africa is developmental and enjoys relatively autonomous authority in a system of co-operative government; and

4.5 Local government governs and co-governs in terms of national, provincial and its own environmental laws while simultaneously being governed in terms of the same body of laws.

## **5 Hypothesis**

The structures and functionaries of developmental local government in South Africa are together and separately accountable for the development, implementation, enforcement of and adherence to environmental law. In the absence of this, adverse environmental impacts such as natural resource degradation and pollution may increase and cause irreparable inter-generational harm.

## **6 Outline of the study**

Chapter 2 of the study offers a theoretical perspective on the meaning and role of (local) government accountability in democratic government systems. Accountability is analysed in the context of government systems and the interrelationship of accountability and the functionality thereof in government systems.

Chapter 3 develops a theoretical perspective on the role of local government in environmental accountability, given the design and objectives of South African framework

and sector-specific environmental law. Understanding the environmental responsibilities of local government is significant in terms of any associated environmental obligations and accountability.

Chapter 4 critically analyses and discusses the mechanisms created by law to facilitate the accountability of different structures and functionaries in local government in relation to its duties and functions. These mechanisms are discussed in detail to understand how accountability and more specifically responsibility are enforced in South Africa.

Chapter 5 explores the complexity of the CoJ's internal structures and functionaries relevant for environmental accountability, with a view to understanding the complexities in context. Local government environmental accountability in the CoJ is appraised by means of the mechanisms configured in the previous chapter.

Chapter 6 concludes and make recommendations on the optimisation of local government accountability in terms of South African environmental law. The chapter makes a number of recommendations and summarises the possible future research to be undertaken in this field of study.

## **7 Research methodology**

The research was conducted by means of a desktop literature review evaluating and reviewing government documents as well as scholarly research publications, legislation, case law, internal municipal policies and municipal resolutions.

The first step was to investigate the theoretical perspectives on local government accountability by considering the definitions, meanings and descriptions associated with (local) government accountability in democratic government systems in general. The investigation was conducted by means of an overview and assessment of relevant international and domestic literature. The next step was an assessment of some of the theoretical perspectives on the role of local government in environmental governance in South Africa, which was made by considering the existing range of definitions, meanings

and descriptions in literature, and the legal framework itself. The researcher further perused and evaluated relevant legislation and case law (primary sources) depicting the different mechanisms in law designed to hold local government structures and functionaries accountable. Further to the NEMA and select sector environmental laws, the *Systems Act*, the *Structures Act* and all legislation relevant to establishing local government environmental accountability was utilised to identify and assess the nature and extent of environmental accountability. This part of the study also questioned the current determination of accountability of the various structures in local government (i.e. municipalities).

To concretise the general discussion and literature review, the researcher conducted a desk-based case study of the CoJ, focussing on relevant city policies, local environmental and planning frameworks and instruments as well as any accountability mechanisms utilised to address internal accountability in the City's structures. The CoJ was selected as the preferred subject of this case study because of the vast urban and geographical extent of the City. The City is representative of a modern city with its own unique challenges and features. The City's historical design and the size of the City vis-à-vis its environmental impact and footprint serve as opportune case-study material to understand local accountability from an environmental perspective. The final step was to consolidate and analyse the observations emanating from the different chapters of the study and to make recommendations to optimise local government accountability in terms of South African environmental law.

## CHAPTER 2

# MEANING AND ROLE OF (LOCAL) GOVERNMENT ACCOUNTABILITY IN DEMOCRATIC SYSTEMS

### *2.1 Introduction*

Based on the increasing amount of research being undertaken to establish the most accurate idea of "accountability", scholars in the field now regard accountability as the "uber-concept" of the twenty-first century.<sup>89</sup> Dubnick, for example, provides empirical evidence of the growing frequency of the use of the term "accountability", based on a million scanned volumes drawn from works published in English between 1800 and 2005.<sup>90</sup> While the term first appears in the plotted sample during the early 1800s, it remains a culturally innocuous term until the 1960s and 1970s, when a very sharp and increasing upturn in its usage surfaces, which continues well into the twenty-first century.<sup>91</sup>

"Accountability" is often described as a buzzword in the context of "modern governance".<sup>92</sup> In a democratic dispensation, accountability is generally regarded as being synonymous with the prevention of the abuse of power by the state through the implementation of checks and balances, for example.<sup>93</sup> Against this background, this chapter seeks to understand the theoretical and conceptual foundations of the notion of "accountability" in a developmental local government context. Accountability is widely held to be a critical ingredient of democratic governance, the reason for which opinion will become clearer as this chapter progresses.<sup>94</sup>

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<sup>89</sup> Bovens, Schillemans and Goodin "Public Accountability" 1.

<sup>90</sup> Dubnick "Accountability as a Cultural Keyword" 23.

<sup>91</sup> Bovens, Schillemans and Goodin "Public Accountability" 1.

<sup>92</sup> Bovens, Schillemans and Goodin "Public Accountability" 1.

<sup>93</sup> Cendón "Accountability and Public Administration" 22.

<sup>94</sup> OECD *Accountability and Democratic Governance* 23. Also see Warren "Accountability and Democracy" 39.

The Cambridge Dictionary defines accountability as "the fact of being responsible for what you do and able to give a satisfactory reason for, or the degree to which this happens".<sup>95</sup> The notion of accountability in this study extends beyond its ordinary dictionary meaning to the degree that it is framed with reference to public administration specifically.<sup>96</sup> For the purposes of public administration, emphasis is placed on aspects like openness<sup>97</sup> and transparency, and the understanding of the term is therefore not restricted to the normal dictionary meaning or the usual popular grasp of the term.<sup>98</sup>

In order to establish a working definition relevant to the focus of this study, it is necessary to review the different theoretical perspectives thereof. Accountability traits are explored *inter alia* to understand the characteristics as they relate to liability<sup>99</sup> and responsibility.<sup>100</sup> This chapter further unfolds around how the concept of accountability is perceived from a public administration perspective.

Accountability is analysed to understand the interrelationship of accountability and the functionality thereof in government systems. The enquiry progresses to the notion of accountability in democratic government systems; e.g. what does it mean and entail - to understand its relevance and importance for sound democratic and environmentally responsible governance as well as for those local government functionaries and actors involved.

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<sup>95</sup> Definition of "accountability" in the Cambridge Dictionary (McIntosh *et al Cambridge Advanced Learner's Dictionary*).

<sup>96</sup> Definition of "accountability" as a noun from Hornby *et al Oxford Advanced Learner's Dictionary*: "the fact of being responsible for your decisions or actions and expected to explain them when you are asked".

<sup>97</sup> See the Founding Provisions of the South African Constitution; s 1(d) of the Constitution whereby South Africa as democratic state is founded on "universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

<sup>98</sup> Bovens, Schillemans and Goodin "Public Accountability" 7.

<sup>99</sup> See para 2.3 in Chapter 2.

<sup>100</sup> See para 2.2 in Chapter 2.

This chapter is based on a literature review, as explained in Chapter 1. The research is not confined to legal authority but also includes reference materials from disciplines such as public management and public administration.

## ***2.2 Accountability defined***

Accountability is often associated with the monitoring of the overarching use of power and the establishment of sufficient institutional constraints associated with the exercise of power.<sup>101</sup> The adjective "accountable" derives from the Old French verb *aconter*, meaning to count, and from the Latin verb *computare*, meaning to calculate.<sup>102</sup> Schedler calls "accountability" a fashionable term, which sounds appealing with reference to its use, but further states that it is considered and remains an evasive term with fuzzy boundaries, and its internal structure is seen as confusing.<sup>103</sup> Accountability is understood differently in diverse contexts. Yang expresses the concern that unless the term in its basic form is understood, it will be difficult to properly determine its real meaning.<sup>104</sup> Not understanding the actual concept often causes accountability and responsibility to be regarded as being interchangeable. An example hereof is that political discourse in recent times has given a distinct colour to the understanding of accountability.<sup>105</sup> Accountability is therefore frequently incorrectly thought to be a universal remedy with reference to any divergent behaviour in a general context. When uncertainty prevails as to how a problem needs to be approached, the solution will more often than not require accountability from the wrongdoer, without much understanding of what the term may signify in academic parlance.<sup>106</sup>

The academic description of accountability, on the other hand, is more specific, and incorporates particular elements. Gardner holds that accountability has a relational aspect

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<sup>101</sup> Molander, Grimen and Eriksen 2012 *Journal of Applied Philosophy* 220.

<sup>102</sup> Dubnick "Accountability as a Cultural Keyword" 27.

<sup>103</sup> Schedler "Conceptualizing Accountability" 13.

<sup>104</sup> Yang "Emergent Accountability and Structuration Theory" 269.

<sup>105</sup> Gardner "Mark of Responsibility" 237.

<sup>106</sup> Dubnick "Accountability as a Cultural Keyword" 25.

that the notion of responsibility lacks.<sup>107</sup> It is submitted with reference to accountability that it is not sufficient to merely justify or condone one's actions; the responsible party must justify himself or herself with the necessary explanation, and it is required that the attribution of the said conduct to the particular person must be justified; thus being the person that one "holds to account".<sup>108</sup> Molander, Grimen and Eriksen describe the characteristics of accountability as being threefold: people may be accountable to one another; an agent with discretionary powers is accountable to the principal who entrusted him or her to carry out his or her responsibilities; and lastly there is the process of being called to account.<sup>109</sup>

However, the term accountability also relates to terms such as oversight, monitoring, auditing, control, exposure and punishment.<sup>110</sup> Schedler, Diamond and Plattner explain the nature of two primary elements of accountability: answerability and enforcement.<sup>111</sup> These two aspects go together; the accounting party provides oversight in relation to the actions of the accountable party, and the accountable party will have to account to the accounting party for his or her conduct. An example of this might be when angry citizens demand accountability in the form of getting someone's head on a block.<sup>112</sup> Mansbridge, however, warns that punishment in isolation must not be seen as identical to accountability. Enforcement or punishment is therefore not synonymous with accountability, but is a mere element thereof. The subsequent enforcement of accountability can give rise to consequences through the imposition of sanctions by the accounting party in observance of misconduct by the accountable party.<sup>113</sup> As against the view of Mansbridge, authors such as Schedler, Diamond and Plattner contend that depending on the actors and functional types of accountability, certain considerations of

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<sup>107</sup> Gardner "Mark of Responsibility" 237.

<sup>108</sup> Gardner "Mark of Responsibility" 237.

<sup>109</sup> Molander, Grimen and Eriksen 2012 *Journal of Applied Philosophy* 220.

<sup>110</sup> Schedler, Diamond and Plattner *Self-restraining State* 4.

<sup>111</sup> Schedler, Diamond and Plattner *Self-restraining State* 4.

<sup>112</sup> Mansbridge "Contingency Theory of Accountability" 55.

<sup>113</sup> Schedler, Diamond and Plattner *Self-restraining State* 4. Also see Mansbridge "Contingency Theory of Accountability" for a detailed discussion on sanction-based accountability.

accountability will extend to only one of the elements.<sup>114</sup> An example is where only responsibility applies in the context of accountability and it is not mandatory that both elements coincide to allow for there to be accountability.<sup>115</sup> "Answerability" is also often considered to be a synonym for accountability.<sup>116</sup> Molander, Grimen and Eriksen describe the common usage of accountability as being to be summoned to account for one's actions.<sup>117</sup>

Accountability translates into an obligation not only to be answerable, based on the nature of the responsibility, but also to justify the way the responsibility was discharged.<sup>118</sup> Molander, Grimen and Eriksen hold that without accountability there is no control over the activities of others in so-called discretionary spaces, when duties are not executed in a manner which is publicly justifiable.<sup>119</sup> They anticipate that accountability may be present in any discretionary space which requires the execution of duties in a manner which is considered publicly justifiable.<sup>120</sup> Schedler further contends that without the "publicity principle" of accountability, it would be regarded as private, which would serve no purpose.<sup>121</sup> Not all forms of accountability are dependent on the public justification of one's actions.<sup>122</sup> This explains why accountability needs to be understood from both a public sector and a private sector perspective, based on the difference between the two perspectives (their not being the same).

Some authors, for example Mashaw for instance, differentiate between accountability regimes, in that generic and institutional qualities adapt to the different regimes associated therewith.<sup>123</sup> However, for the purposes of this chapter private accountability

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<sup>114</sup> Schedler, Diamond and Plattner *Self-restraining State* 4.

<sup>115</sup> Schedler, Diamond and Plattner *Self-restraining State* 4.

<sup>116</sup> Dubnick *Situating Accountability* 6. Also see Molander, Grimen and Eriksen 2012 *Journal of Applied Philosophy* 220.

<sup>117</sup> Molander, Grimen and Eriksen 2012 *Journal of Applied Philosophy* 220.

<sup>118</sup> Molander, Grimen and Eriksen 2012 *Journal of Applied Philosophy* 220.

<sup>119</sup> Molander, Grimen and Eriksen 2012 *Journal of Applied Philosophy* 221. Also see Staszewski 2009 *Minn L Rev* 1287.

<sup>120</sup> Molander, Grimen and Eriksen 2012 *Journal of Applied Philosophy* 214.

<sup>121</sup> Schedler "Conceptualizing Accountability" 21.

<sup>122</sup> Bovens, Schillemans and Goodin "Public Accountability" 7.

<sup>123</sup> Mashaw "Accountability and Institutional Design" 121.



will be differentiated from public accountability for the purposes of analysing accountability in the domain of local government in democratic government systems.

### *2.2.1 Private sector accountability*

Accountability in the private sector refers to how private entities exercise responsibility and accordingly account for their actions. Mashaw indicates that the non-governmental and private spheres share comparable structures of accountability.<sup>124</sup> Accountability in the private domain shares the three dimensions of "who", to "whom" and "what".<sup>125</sup> This is not necessarily so with public accountability. Mulgan explains that private companies normally concentrate on accountability in relation to financial outcomes.<sup>126</sup> It follows that private accountability instruments such as "profitability" are key.<sup>127</sup> Braithwaite approves of this view in that private accountability is more often restricted in its application and normally only exercised by corporate actors.<sup>128</sup> For example, specific to market accountability,<sup>129</sup> institutions (markets) conforming to private sector accountability include product markets, capital markets and labour markets. With regard to product market accountability, actors will normally include producers (who) are accountable to customers (to whom) for the product's specific quality, its features and the price associated therewith.<sup>130</sup>

In financial markets, similarly, accountability is required from the necessary fund managers, making them accountable to entities issuing equity capital.<sup>131</sup> Other examples include labour markets, which are reflective of a reciprocal accountability relationship

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<sup>124</sup> Mashaw "Accountability and Institutional Design" 122.

<sup>125</sup> Hayne and Salterio "Accounting and Auditing" 427. Also see Mashaw "Accountability and Institutional Design" 122.

<sup>126</sup> Mulgan 2000 *Australian Journal of Public Administration* 95. Also see Hayne and Salterio "Accounting and Auditing" 428.

<sup>127</sup> Mulgan 2000 *Australian Journal of Public Administration* 95.

<sup>128</sup> Braithwaite "Accountability and Responsibility Through Restorative Justice" 33. Also see Bovens, Schillemans and Goodin "Public Accountability", whereby private accountability is limited in that it is not subjected to the same public scrutiny as with the configuration of public accountability.

<sup>129</sup> Accountability as conceived in non-governmental and private sectors *inter alia* including product and capital markets - Mashaw "Accountability and Institutional Design" 122.

<sup>130</sup> Mashaw "Accountability and Institutional Design" 122.

<sup>131</sup> Mashaw "Accountability and Institutional Design" 122.

between employers and workers, which could include working conditions, benefits, pay and the quality of the human capital provided in the market.<sup>132</sup> Notwithstanding the same, market accountability cannot be described as a comprehensive, self-regulating system of accountability. As previously mentioned, market actors continue to operate in a sector regulated by "systems of behaviour control", which ultimately makes private parties accountable to the state, notwithstanding the deemed self-regulating corporate environment.<sup>133</sup> Unlike public accountability, market accountability does not have precisely regulated confines and primarily depends on clients' choices<sup>134</sup> and satisfaction as its measure.

Mulgan believes that accountability in the public sector is more stringent than in the private sector<sup>135</sup> in that public institutions utilise processes which are regulated in the determination of decisions and policies. Mulgan explains that private sector accountability lacks the degree of scrutiny found in public sector institutions.<sup>136</sup> Although outwardly trivial in relation to the understanding of local government, private sector accountability does influence the sphere of local government accountability, for example in the adoption of principles associated with corporate governance,<sup>137</sup> or supply chain management practices,<sup>138</sup> or in the outsourcing of specific functions under service delivery agreements and public private partnerships. While the private sector is different in the way accountability is structured from a public sector perspective, the importance of private sector accountability for the purposes of this study lies in the increasing convergence of private and public sector accountability. Examples hereof are seen in the adoption of private sector management practices,<sup>139</sup> like references to corporate management practices and the outsourcing of contracts.<sup>140</sup> Further reference to the importance of the

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<sup>132</sup> Mashaw "Accountability and Institutional Design" 122.

<sup>133</sup> Mashaw "Accountability and Institutional Design" 123.

<sup>134</sup> Barton 2006 *Accounting, Auditing and Accountability Journal* 259.

<sup>135</sup> Mulgan 2000 *Australian Journal of Public Administration* 94.

<sup>136</sup> Mulgan 2000 *Australian Journal of Public Administration* 94.

<sup>137</sup> IODSA *King IV* - Part 6.2 Supplement for Municipalities 80.

<sup>138</sup> See para 4.3 in Chapter 4.

<sup>139</sup> Mulgan 2000 *Australian Journal of Public Administration* 95.

<sup>140</sup> IODSA *King IV* - Part 6.2 Supplement for Municipalities 80; Barton 2006 *Accounting, Auditing and Accountability Journal* 256; Mulgan 1997 *Australian Journal of Public Administration* 106.

understanding of accountability in the private sector relates to the proliferation of public / private partnerships in the public sector, as when government collaborates with external corporate entities which assume financial, technical and operational risk to jointly partake in government service delivery and infrastructure projects.<sup>141</sup>

### *2.2.2 Public sector accountability*

Accountability in the public sector has been described as "a social relationship in which an actor has an obligation to explain and to justify his or her conduct to some significant other".<sup>142</sup> In brief, public sector accountability refers to matters of public interest, which include matters related to the exercise of public power, conduct associated with public institutions, and accounting for the spending of public funding.<sup>143</sup> Public accountability is also said to be utilised as a social, political and administrative governance mechanism.<sup>144</sup>

Public sector accountability is often described with reference to those who need to be accountable, the role that accountability plays in (public) governance, and the objectives of accountability. There are numerous definitions of public accountability in the literature.<sup>145</sup> Schedler states, for example: "in framing a government ... the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself".<sup>146</sup> Public accountability speaks to the answerability of the state to citizens to advance transparency in governance (public decision-making, planning, budgeting etc.).<sup>147</sup> Bovens describes accountability as conveying a sense of transparency and trustworthiness.<sup>148</sup> Schedler describes the public nature of accountability, addressing three aspects of it: information, reasoning and punishment.<sup>149</sup> Without transparency, accountability would not permit for the publicity of what would otherwise be the exercise

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<sup>141</sup> National Treasury *PPP Manual* 6.

<sup>142</sup> Bovens, Goodin and Shillemans *Oxford Handbook of Public Accountability* 184.

<sup>143</sup> Bovens, Schillemans and Goodin "Public Accountability" 1.

<sup>144</sup> Bovens, Schillemans and Goodin "Public Accountability" 8.

<sup>145</sup> Christie 2018 *Public Integrity* 80.

<sup>146</sup> Schedler "Conceptualizing Accountability" 13.

<sup>147</sup> Schedler "Conceptualizing Accountability" 20.

<sup>148</sup> Bovens 2007 *ELJ* 448.

<sup>149</sup> Schedler "Conceptualizing Accountability" 21.

of opaque power. In itself, though, transparency does not translate into accountability.<sup>150</sup> Schedler reasons that if the exercise of power had always been transparent there would not be a need to demand accountability.<sup>151</sup>

Two of the prevalent classifications of public sector accountability in the literature useful to the present discussion are the following: accountability as a virtue, and accountability as a mechanism.<sup>152</sup> Accountability as a virtue is associated with the desired outcome or quality of governance in government organisations, whereas accountability as a mechanism is an institutional arrangement which regulates conduct between different institutional actors and related forums.<sup>153</sup> Sklar and O'Donnell see accountability as a public mechanism which provides oversight to check abuses of power by agencies and branches of government.<sup>154</sup> These authors also describe the inter-branch (intergovernmental) accountability checks between the elements of the tripartite division of power into the executive, the judiciary and the legislator as being the *locus classicus* with reference to accountability.<sup>155</sup> Romzek and Dubnick elaborate on public accountability as involving the features by which public organisations and their officials manage the expectations generated by and associated with the public domain.<sup>156</sup>

From this one can glean that in general, accountability actors are represented by the state, which stands accountable to related forums, which include citizens, voters, public organisations and courts.<sup>157</sup> Public accountability therefore not only involves those whom we seek to hold accountable, but also requires citizens to act as agents of accountability. A second aspect of accountability is therefore the forums "to whom an account must be rendered"<sup>158</sup> that monitor the actors of accountability.<sup>159</sup> Schedler describes the

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<sup>150</sup> Bovens 2007 *ELJ* 453.

<sup>151</sup> Schedler "Conceptualizing Accountability" 21.

<sup>152</sup> Bovens, Schillemans and Goodin "Public Accountability" 7.

<sup>153</sup> Bovens, Schillemans and Goodin "Public Accountability" 8.

<sup>154</sup> Schedler, Diamond and Plattner *Self-restraining State* 3.

<sup>155</sup> Schedler, Diamond and Plattner *Self-restraining State* 3.

<sup>156</sup> Romzek and Dubnick 1987 *Public Administration Review* 228.

<sup>157</sup> Bovens, Schillemans and Goodin "Public Accountability" 9.

<sup>158</sup> Bovens, Schillemans and Goodin "Public Accountability" 10.

<sup>159</sup> Schedler "Conceptualizing Accountability" 21. Also see Bovens, Schillemans and Goodin "Public Accountability" 9 for a detailed description of both accountable actors and accountability forums.

authorities to whom one must account as so-called vampires in reverse: institutions of accountability can function only if "they act in the daylight of the public sphere" and "they crumble and die as soon as they enter the shadows of privacy and secrecy".<sup>160</sup>

Examples of accountability actors in the public sector include politicians, administrators and citizens, and the accountability relationships include political and managerial relationships.<sup>161</sup> Public sector accountability is also represented by the mode of interface between the accountability actors and other accountability forums,<sup>162</sup> and how public authority is exercised.

The public accountability interface can be distinguished in relation to vertical and horizontal accountability. Vertical accountability refers to mandatory accountability whereby the forum wields power over the actor.<sup>163</sup> Horizontal accountability refers to accounting across institutions; hence power and answerability are shared.<sup>164</sup> Vertical accountability bears a close association with democratic elections, where the electorate has oversight over the political accomplishments of the executive,<sup>165</sup> whereas horizontal accountability relates to accounting to internal or external forums of accountability. Cendón confirms that public accountability includes the accountability of those who hold public office to external bodies for what they have done or failed to do in relation to the public office held.<sup>166</sup>

Jabra and Dwivedi separate the elements of administrative, legal, political, professional, and moral accountability.<sup>167</sup> Mashaw describes the framework of accountability in three different regimes which are reflective of state governance, private markets and social

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<sup>160</sup> Schedler "Conceptualizing Accountability" 21.

<sup>161</sup> Almquist *et al* 2013 *Critical Perspectives on Accounting* 480. Also see Bovens, Schillemans and Goodin "Public Accountability" 10 for detailed discussion in relation to the accountable actor.

<sup>162</sup> Bovens, Schillemans and Goodin "Public Accountability" 9 for a detailed description of both accountable actors and accountability forums.

<sup>163</sup> Bovens, Schillemans and Goodin "Public Accountability" 12. Also see Uhr "Accountable Civil Servants" 235.

<sup>164</sup> Uhr "Accountable Civil Servants" 235.

<sup>165</sup> Papadopoulos "Accountability and Multi-level Governance" 274.

<sup>166</sup> Cendón "Accountability and Public Administration" 25.

<sup>167</sup> Jabra and Dwivedi *Public Service Accountability*.

networks.<sup>168</sup> Although the state governance framework is limited in its approach, in which only three different accountability mechanisms are referenced, namely social, political and administrative accountability,<sup>169</sup> the subclasses thereof make provision for the distinctive nature of every type of accountability.<sup>170</sup>

There are four different types of public sector accountability, namely political accountability, administrative accountability, professional accountability and democratic accountability. Romzek and Dubnick expand on this typology, finding the terms comparable with bureaucratic accountability, legal accountability, professional accountability and political accountability.<sup>171</sup> Cendón accepts Romzek's four elements model, but expresses the opinion that the ambit of public accountability must include democratic accountability.<sup>172</sup> Conversely, and importantly for the current study, the discussion of public accountability must therefore include the additional element of democracy to fully relate to the local government context.

The established elements of public accountability can be applied from a local governance perspective. It follows that the same characteristics of public accountability are also evident in the local government domain and need to be analysed if we are to understand accountability from a local governance perspective. The four different types of public sector accountability are discussed in turn below.

a) Political accountability

Political accountability is a feature of public sector accountability. Briefly, it refers to both vertical and horizontal relationships between accountability actors and forums. Weale describes political accountability in the following way: "the first element of accountability is that those who hold the reins of political power in a society have to give an account –

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<sup>168</sup> Mashaw 2005 *Issues in Legal Scholarship* 19.

<sup>169</sup> See para 2.2.2 in Chapter 2.

<sup>170</sup> Mashaw "Accountability and Institutional Design" 128. These categories of accountability will be discussed in detail under paras a, b, c and d of subheading 2.2.2.

<sup>171</sup> Romzek and Dubnick 1987 *Public Administration Review* 228.

<sup>172</sup> Cendón "Accountability and Public Administration" 25.

explain and justify their use of that power in terms that are in principle acceptable to the members of society or their representatives".<sup>173</sup> Political accountability differs from the other features of public sector accountability in the sense that it provides for a principal-agent relationship.<sup>174</sup> The citizenry has delegated its powers and provides a mandate to its elected representatives to execute specific objectives, and they must account to those from whom their power stems – the citizenry.<sup>175</sup>

The main role-players are the elected representatives of society and the electorate. The constituents of this relationship include the general public, elected officials, agency heads, the clientele, specific interest groups and, lastly, future generations.<sup>176</sup> As against political accountability, non-electoral accountability regimes include examples where senior bureaucratic officials hold political offices and positions of political power without accountability, and are appointed or removed for political reasons.<sup>177</sup>

Unfortunately, political accountability in isolation is generally weakly observed, because this dimension of accountability is dependent on the vigour of the electorate in controlling disproportionate political power. Romzek and Dubnick describe the element of "responsiveness" which typifies political accountability systems.<sup>178</sup> It is suggested that without the related responsiveness in political accountability systems, political actors will represent their own interests and cater to their own likes and dislikes and not those of the masses. Mashaw confirms that elected officials are accountable to the electorate in regard to their choice of policies and their application of those policies.<sup>179</sup> Therefore, political accountability also applies in the selection of candidates, the removal of non-accountable officials, and realignment to achieve accountability through governance coalitions. It can be argued that political accountability is similarly restrained by

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<sup>173</sup> Weale 2011 *Government and Opposition* 64. Also see Bovens, Schillemans and Goodin "Public Accountability" 13 for a comprehensive description of the principal-agent theory discussed.

<sup>174</sup> Adserá, Boix and Payne 2003 *J L Econ & Org* 447.

<sup>175</sup> Adserá, Boix and Payne 2003 *J L Econ & Org* 447.

<sup>176</sup> Romzek and Dubnick 1987 *Public Administration Review* 229.

<sup>177</sup> Mashaw "Accountability and Institutional Design" 121.

<sup>178</sup> Romzek and Dubnick 1987 *Public Administration Review* 229.

<sup>179</sup> Mashaw "Accountability and Institutional Design" 120.

confidentiality of coalition agreements or a lack of transparency (to the electorate), for example. Severe electoral weaknesses can also undermine horizontal oversight institutions, but can be strengthened by a strong institutional presence such as a well-developed governance system.<sup>180</sup>

The horizontal dimension refers to oversight by relevant legislatures, autonomous agencies, commissions of enquiry and the Auditor-General (hereafter the AG). These examples suggest the association of different spheres of government with specific accountability mechanisms and institutions.<sup>181</sup> It is noted, however, that the horizontal dimension is most often linked to the constitutional and democratic system in which political actors function. Therefore, political accountability, whether it be vertical or horizontal, is normally entrenched in constitutional or governance mandates.<sup>182</sup> Horizontal oversight includes the exercise of extraordinary powers granted in terms of constitutional values and principles, such as the powers granted to chapter 9 institutions as provided in the Constitution. Hence, the creation of the institution of horizontal accountability and the accountability powers reserved thereto exist in terms of the Constitution.

Political accountability is consequently regarded as the primary basis for open and representative government, which is to be found in aspects like open meeting procedures, freedom of information statutes, access to information and transparency provisions in law.<sup>183</sup> However, in the context of this study, it is evident that political accountability in isolation is too weak to accomplish accountability in democratic governance systems.

#### b) Administrative accountability

The relevant second type of public sector accountability is "administrative accountability". Broadly speaking, administrative accountability refers to the bureaucratic implementation of political decisions (in local government or otherwise).<sup>184</sup> To further explain this

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<sup>180</sup> Fox "Civil Society and Political Accountability" 19.

<sup>181</sup> Cendón "Accountability and Public Administration" 34.

<sup>182</sup> Cendón "Accountability and Public Administration" 29.

<sup>183</sup> Romzek and Dubnick 1987 *Public Administration Review* 229.

<sup>184</sup> Mansfeldová "Political and Administrative Accountability" 22.



statement, this type of accountability links the conduct of the administrator or any related administrative function to the associated accountability requirements of the supervisor or the authority thereof.<sup>185</sup> Administrative accountability is therefore the answerability of an administrative authority to its administrative superiors.<sup>186</sup> An example of this in the South African context would be so-called section 56 senior managers accounting to the municipal manager.<sup>187</sup>

Administrative accountability can also be defined as "bureaucratic accountability", which resembles a relationship of supervisory control.<sup>188</sup> Romzek and Dubnick confirm the presence of two essential elements, the first resembling "an organised and legitimate relationship between a superior and a subordinate in which the need to follow 'orders' is unquestioned".<sup>189</sup> Second being a "close supervision or a surrogate system of standard operating procedures or clearly stated rules and regulations".<sup>190</sup>

The main characteristics associated with the classical form of administrative accountability are first the full subjection of public administration to a wide ambit of administrative checks and balances, including constitutional, legal and administrative rules and procedures, and second, the need to adhere to administrative instructions in relation to administrative hierarchical ladders in organisations.<sup>191</sup> Proper differentiation of the dimensions of accountability also distinguishes between the vertical and horizontal axes and the realisation of the vertical axis of accountability through mechanisms of internal control and supervision facilitated by officials that are hierarchically superior.<sup>192</sup>

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<sup>185</sup> Paat, Sailan and Jasruddin 2018 *IOSR-JHSS* 40.

<sup>186</sup> Myeni and Mvuyana 2015 *J Public Adm* 792. Also see Wang 2002 *American Review of Public Administration* 351.

<sup>187</sup> Section 56 of the *Systems Act*.

<sup>188</sup> Romzek and Dubnick 1987 *Public Administration Review* 228.

<sup>189</sup> Romzek and Dubnick 1987 *Public Administration Review* 228.

<sup>190</sup> Romzek and Dubnick 1987 *Public Administration Review* 228.

<sup>191</sup> Cendón "Accountability and Public Administration" 38.

<sup>192</sup> Cendón "Accountability and Public Administration" 38.

The vertical axis of the accountability<sup>193</sup> of an administrative official is linked to his/her superior administrative and political officers.<sup>194</sup> Like the vertical axis of administrative accountability, where administrators account to supervisory authorities internally, the horizontal axis of administrative accountability<sup>195</sup> is important as it permits external oversight by interest groups, affected third parties and citizens.<sup>196</sup> The characteristics of the vertical and the horizontal axes of accountability are therefore distinct in relation to the primary concept of administrative accountability. As indicated, the horizontal axis is distinct in that it represents the formal legal procedure and criteria which regulate the relationship between the citizen<sup>197</sup> and the public administrator, and secondly between the public administrator and the external organs of control and supervision.<sup>198</sup> Mechkova, Lührmann and Lindberg further distinguish the horizontal axis with reference to the diagonal dimension of administrative accountability to include civil society and the media, but this aspect will be discussed below in terms of the horizontal axis.<sup>199</sup>

It is important that the horizontal axis of administrative accountability should create a nexus between public administration and citizens that causes public administrators to account for the services they have rendered. The horizontal axis is therefore important not only in that it relates to accounting for services rendered, but also because it relates to accounting for decisions taken. The horizontal axis also extends to external bodies which give oversight and supervision in relation to the administrative accountability function as oversight functionaries, such as auditors and ombudsmen.<sup>200</sup> The array of administrative accountability functionaries is echoed in the parallel disciplines of

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<sup>193</sup> The understanding of vertical accountability coincides with administrative instructions in relation to administrative hierarchical ladders within organisations.

<sup>194</sup> Cendón "Accountability and Public Administration" 34.

<sup>195</sup> The understanding of horizontal accountability is illustrated in administrative checks and balances including constitutional, legal and administrative rules and procedures.

<sup>196</sup> Bovens, Schillemans and Goodin "Public Accountability" 11.

<sup>197</sup> Mechkova, Lührmann and Lindberg 2019 *St Comp Int Dev* 40.

<sup>198</sup> Cendón "Accountability and Public Administration" 35.

<sup>199</sup> Mechkova, Lührmann and Lindberg 2019 *St Comp Int Dev* 40.

<sup>200</sup> Cendón "Accountability and Public Administration" 34.

administrative accountability, namely accountability for finances, accountability for fairness and accountability for performance.<sup>201</sup>

Notwithstanding the diverse interpretations and typologies of administrative accountability, it is suggested that administrative accountability in its classical form is judicial (legal) in nature.<sup>202</sup> Hence, most of the administrative accountability functionalities are guided by their statutory obligations as represented in the prevailing law in different jurisdictions.<sup>203</sup> It follows that the strength of administrative accountability depends on compliance monitoring and enforcement. The constitutional and legislative obligations of the administration are typically the departure point, and determine the ambit of their duties and administrative responsibilities.<sup>204</sup> Examples include the general and specific duties and obligations linked to the position held, obedience and loyalty, impartiality, integrity, discretion, the proper apportioning of public resources, the duty towards the citizens, the duty towards one's superiors, colleagues and subordinates, and finally the duty to abide by the Constitution and the relevant statutes.<sup>205</sup> Progressive legislation is normally linked to constitutional objectives, one of which might be to advance administrative justice by means of a regulated procedure to be followed in justifying an administrative decision, or to provide access to information.<sup>206</sup>

Administrative accountability relationships often resemble the accountability interface between citizens and the relevant administrative authority. Related aspects which underpin the accountability relationship depends on the specific administrative act that must be performed by the administrator, the administrative accountability required by law, the associated rights per legislation, and the administrative rights and expectations arising from it. The administrative accountability relationship therefore simulates that of administrative law in that the public authority must be accountable to the citizen, for

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<sup>201</sup> Poulsen 2009 *Public Administration* 119.

<sup>202</sup> Cendón "Accountability and Public Administration" 34.

<sup>203</sup> Cendón "Accountability and Public Administration" 34.

<sup>204</sup> Section 195(1) of the Constitution.

<sup>205</sup> Cendón "Accountability and Public Administration" 25.

<sup>206</sup> *Promotion of Access to Information Act* 2 of 2000 (hereafter the PAIA) and *Promotion of Administrative Justice Act* 3 of 2000 (hereafter the PAJA).

example in terms of access to information and the right to be given reasons for an administrative decision taken.

Although parallels exist with other forms of accountability such as democratic accountability,<sup>207</sup> it is suggested that administrative accountability on the horizontal axis is specific to the attainment of individual rights such as access to information and the right to reasons for administrative actions. Democratic accountability, in contrast, is attentive to the wellbeing of citizens or a social group in general, and the process thereof is not as formal or unyielding.<sup>208</sup> Dormer and Ward underline the importance of the horizontal axis, based on the growing contribution of accountability towards social partners, activists and the community.<sup>209</sup> Given the increasingly fragmented mechanisms for the provision of public services, which include contributions and partnerships with the community, the horizontal axis is becoming more and more important.<sup>210</sup>

The horizontal axis of administrative accountability distinguishes between public administration and external organs of control and supervision. Thus, in the aforesaid relationship the public administrator will account for his/her administrative actions to actors like external organs of control, although this relationship is generally observed through constitutional provisions which not many countries prescribe to equivalent levels of accountability.<sup>211</sup> Examples of external organs often include forums<sup>212</sup> like independent commissions, parliamentary commissions, ombudsmen, etc.

Dormer and Ward describe these horizontal external processes as two-stage processes with no hierarchal link between them, in which the power to sanction is related to third

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<sup>207</sup> See para 2.2.2 in Chapter 2.

<sup>208</sup> Cendón "Accountability and Public Administration" 35.

<sup>209</sup> Dormer and Ward 2018  
<https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/7002/paper.pdf> 13.

<sup>210</sup> Dormer and Ward 2018  
<https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/7002/paper.pdf> 13.

<sup>211</sup> Cendón "Accountability and Public Administration" 35.

<sup>212</sup> Bovens, Schillemans and Goodin "Public Accountability" 9 for a detailed description of both accountable actors and accountability forums.

parties.<sup>213</sup> Notwithstanding the external and objective power of such external organs to administer administrative accountability, they are generally weak. This weakness stems from the nature of their authority, which allows the external organ only to make recommendations and public denunciations pertaining to the findings of a commission.<sup>214</sup> Further concerns with regard to the lack of enforcement are raised, noting that the effect of recommendations often also depends on the prestige and acceptance of the institution making the recommendations.<sup>215</sup>

Therefore, better enforcement, which also needs to be developed through instruments of law, must regulate both the internal administrative procedure and the external control mechanisms, which need to be effective to induce measured consequence management<sup>216</sup> or enforcement associated with aspects of non-compliance. External control mechanisms<sup>217</sup> are often representative of legal and administrative accountability features; for example, review and investigative functions.<sup>218</sup> It is submitted that matters relating to administrative accountability ultimately end up being reviewed by competent high courts to provide oversight of the actions.<sup>219</sup>

However, impartiality and neutrality cannot be separated in the execution of the horizontal dimension of administrative accountability. For example, the public administration cannot differentiate between citizens on the basis of criteria of partisan ideology or philosophy.

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<sup>213</sup> Dormer and Ward 2018  
<https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/7002/paper.pdf> 13.

<sup>214</sup> Cendón "Accountability and Public Administration" 36.

<sup>215</sup> Cendón "Accountability and Public Administration" 37.

<sup>216</sup> Consequence management is described as the steps taken by officials to efficiently and effectively cause the implementation of legislative measures, policies or procedures to address transgressions of public servants in the employment of state entities including provincial departments, provincial entities and institutions. – KwaZulu-Natal *Framework on Consequence Management* 3. Also, consequence management, together with preventative controls, demonstrates that wrongdoing is not exempted and that there is accountability – CoJ *Oversight Report on the 2019/20 Annual Report*.

<sup>217</sup> Posner and Shahan "Audit Institutions" 498: where the expectations are determined by outside actors in a position to impose legal sanctions.

<sup>218</sup> Dormer and Ward 2018  
<https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/7002/paper.pdf> 15.

<sup>219</sup> Cendón "Accountability and Public Administration" 37.

The characteristic of neutrality in the proper facilitation of administrative services stands central to the horizontal dimension of administrative accountability.<sup>220</sup>

Further characteristics of horizontal administrative accountability are evident in the application of accountability through external forums and bodies such as quasi-judicial forums and courts.<sup>221</sup> Examples include the evaluation of public administration in oversight of compliance pertaining to administrative procedures and conduct, and the correct utilisation of public resources.<sup>222</sup> Finally, there is the aspect of enforcement, which imposes the establishment of consequence management established through legislation.<sup>223</sup> Examples hereof include enforcement through adequate sanctions such as enforcement of compliant behaviour, the revision of administrative acts by officials, or positive enforcement through the provision of a reward (an incentive) to the administrator involved.

The vertical dimension of administrative accountability is ensured through specific internal mechanisms of control which could *inter alia* relate to inspectorates and audits, which ensure strict adherence to administrative procedure and the correct utilisation of public resources.<sup>224</sup> Procedures related to financial expenditure are often used in creating methods of controlling expenditure *ex ante*.<sup>225</sup> Likewise, the two pillars of public accountability mentioned previously, enforcement or the consequences of the realisation of accountability, are provided in the form of *post ante* action.<sup>226</sup> Enforcement in the vertical dimension can be applied through the provisions of consequence management,<sup>227</sup>

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<sup>220</sup> Cendón "Accountability and Public Administration" 37. Also see Waldrauch *Institutionalizing Horizontal Accountability* 13, summarising Fontana's contribution titled "The Failures of Human Agency: Accountability in Historical Perspective".

<sup>221</sup> Mechkova, Lührmann and Lindberg 2019 *St Comp Int Dev* 43. Also see Cendón "Accountability and Public Administration" 38.

<sup>222</sup> Cendón "Accountability and Public Administration" 38.

<sup>223</sup> Cendón "Accountability and Public Administration" 38.

<sup>224</sup> Cendón "Accountability and Public Administration" 35.

<sup>225</sup> Cendón "Accountability and Public Administration" 35.

<sup>226</sup> Cendón "Accountability and Public Administration" 35.

<sup>227</sup> Consequence management is described as the steps taken by officials to efficiently and effectively cause the implementation of legislative measures, policies or procedures to address transgressions of public servants in the employment of state entities including provincial departments, provincial entities and institutions. – KwaZulu-Natal *Framework on Consequence Management* 3. Also, consequence

which could lead to disciplinary action, or by means of positive engagement allowing for corrective action for specific non-compliance which could be acknowledged by management.<sup>228</sup> For example, non-compliance is normally regulated through hierarchical relationships between subordinates and principles to cause answerability and consequence management thereof.<sup>229</sup> Alternatively Mansbridge gives examples of trust-based accountability as affecting behavioural changes by means of positive recognition.<sup>230</sup>

The vertical dimension of administrative accountability can be seen in local governance relationships which stimulate internal accountability in local governance structures. Unlike the horizontal axis, the vertical axis in local governance relationships does not always observe the normal interpretation of neutrality and impartiality in the performance of their duties by public officials. Often officials are required to execute administrative instructions in observance of political programmes directed by political actors elected to office, such as a chief of staff in the office of an executive. If neutrality is applied in this sense, the presumption that all government officials are non-partisan *qua* their positions would inhibit performance of instructions in elected offices. Neutrality in elected offices will impede with the execution of political instructions directed by elected officials. Then again, the refusal to execute political directives could infringe on the duties of loyalty and obedience, which also bind an official.<sup>231</sup> Neutrality in the execution of political programmes therefore paradoxically requires loyalty to the government currently in office, and is considered partisan.<sup>232</sup>

Based on the aforesaid discussion of both the horizontal and the vertical axes of administrative accountability, it is concluded that whereas bureaucratic (administrative)

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management, together with preventative controls, demonstrates that wrongdoing is not exempted and that there is accountability – CoJ *Oversight Report on the 2019/20 Annual Report*.

<sup>228</sup> Mansbridge "Contingency Theory of Accountability" 55.

<sup>229</sup> Bovens, Schillemans and Goodin "Public Accountability" 6.

<sup>230</sup> Mansbridge "Contingency Theory of Accountability" 58.

<sup>231</sup> Rourke 1992 *Public Administration Review* 541. Also see Cendón "Accountability and Public Administration" 37.

<sup>232</sup> Cendón "Accountability and Public Administration" 37.

accountability more often depends on external controls, professional accountability enhances internal norms and standards.<sup>233</sup>

c) Professional accountability

The third type of accountability formulated by Romzek and Dubnik could be associated primarily with the professional practice of specific professions.<sup>234</sup> It has been suggested that professional accountability had its origins in relation to the limitations of bureaucratic accountability.<sup>235</sup> It is evident that although professional accountability centres on professional practice, an increased prevalence of professional accountability is found in the domain of public administration. The increased number of professionals in public administration has been attributed to the increased technical specialisation and complexity of public administration tasks.<sup>236</sup> May confirms that the reliance on professional accountability is a departure from strictly bureaucratic regulatory controls to reliance on the exercise of professional judgment.<sup>237</sup> The shift to professionalising oversight in the South African public administration sector could be enhanced with the increased role played by professionals in local government.<sup>238</sup> Professionals in local government will *inter alia* include accounting, legal and engineering professionals in observance of the importance associated with accountability.<sup>239</sup> Examples of professional accountability in public administration include the work of the AG, the Office of the State Attorney, the State Advocate's Office and of National Treasury, which contribute to accountability in financial, budgetary and procurement processes, amongst others. The importance of professional accountability in the public sector resonates from the fact that although officials in the public sector are predominantly regulated by means of the provisions of public administration accountability, the professional in the public administrative space is

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<sup>233</sup> May 2007 *Regulation and Governance* 12.

<sup>234</sup> Romzek and Dubnick 1987 *Public Administration Review* 229.

<sup>235</sup> May 2007 *Regulation and Governance* 12.

<sup>236</sup> Cendón "Accountability and Public Administration" 38.

<sup>237</sup> May 2007 *Regulation and Governance* 12.

<sup>238</sup> Kroukamp and Cloete 2018 *Acta Academica* 61.

<sup>239</sup> GN R1391 in GG 44031 of 24 December 2020 (Determination of the Sub-frameworks that Comprise the National Qualifications Framework) 42.



also subjected to the professionals' own professional regulatory body, such as the Engineering Council of South Africa in the case of municipal engineers, legal practice councils for lawyers and accounting regulatory boards for the accounting profession.<sup>240</sup>

The exercise of professional accountability arguably results in greater accountability than otherwise, as the norms, standards, rules and ethics of the profession are observed and applied in the public administration domain, in addition to the rules and regulations of public administration accountability.<sup>241</sup> The combination of both professional accountability and public administration accountability is progressive in nature, as the observance of professional ethics augments the basis of accountability to strengthen the answerability of public administrators.

It is posited that due to its associated regulatory answerability to professional associations, professional accountability cannot fit into the general framework of administrative accountability, because the professional performance of practitioners is not subjected to the principles of public administration only.<sup>242</sup> Based on the above, it is contended that professional accountability is not evaluated by an administrative supervisor only, but the criteria of assessment are established from both a technical-professional perspective and a procedural-administrative perspective.<sup>243</sup> Probable shortfalls of professional accountability can manifest, however, through the "lack of proper professional norms and abuse of professional responsibilities".<sup>244</sup> Professional accountability in the public sector therefore leads directly to better accountability to the citizenry; for example, where auditors and legal professionals are ethically bound by the conduct required by their respective professions. Their conduct is therefore monitored

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<sup>240</sup> May 2007 *Regulation and Governance* 12: Standards of conduct for police, fire and other professions along with codes of practice for industry groups are examples of mechanisms for enhancing professional accountability. Professionals are therefore subjected not only to public administration scrutiny in public service, but also to scrutiny by their own professional bodies.

<sup>241</sup> Romzek and Dubnick 1987 *Public Administration Review* 229.

<sup>242</sup> Cendón "Accountability and Public Administration" 40.

<sup>243</sup> Cendón "Accountability and Public Administration" 41.

<sup>244</sup> May 2007 *Regulation and Governance* 12.

both in terms of a professional perspective and administrative processes, which amounts to a dual net of accountability.

As an example of this dual application of assessment, the subject's conduct will first be assessed by the members of the specific profession from a professional perspective. Secondly, the subject's conduct will be assessed by the ordinary organs of control facilitating the assessment from the public administration perspective. Schedler refers to other external forums regulating professional accountability in the form of ethics commissions and disciplinary courts, for example.<sup>245</sup> These forums adjudicating on accountability also serve as an indication that accountability pertains not only to the management of expectations but also focusses on answerability.

The realisation of professional accountability is found in the adherence of professional officials to the standards and ethics associated with their professions, as explained previously. The contribution to the improvement of accountability relates to the relative autonomy of professionals in exercising functions based on their professional knowledge. Professional accountability is therefore realised through the technical and professional nature of a profession. Further positive characteristics include mandatory compliance with the principles and technical requirements of the profession, and lastly professional bodies holding their own professionals accountable in terms of consequence management in a specific profession.<sup>246</sup>

#### d) Democratic accountability

Olsen explains that democratic ideals are based on the "search for understanding" as a foundation for an "enlightened government".<sup>247</sup> Although this is a legitimate notion, it does not prescribe to so-called "terms of association".<sup>248</sup> Therefore, democratic accountability requires the existence of independent nation states that differentiate

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<sup>245</sup> Schedler "Conceptualizing Accountability" 23.

<sup>246</sup> Cendón "Accountability and Public Administration" 42.

<sup>247</sup> Olsen 2013 *West European Politics* 455.

<sup>248</sup> Olsen 2017 *European Political Science Review* 523.

between principles and agents, where the principles provide control and compliance instruments in relation to the agents, to achieve accountability.<sup>249</sup> It follows that the form of accountability which most closely resembles public accountability is democratic accountability. This category of accountability is described as democratic in nature as it is regulated by the citizens or constituents of society.<sup>250</sup> Warren explains that because a people can never be considered a single entity, nor can the concept of the *loci* of rule be considered a unitary concept, a democracy represents a system of accountabilities.<sup>251</sup> Hence representatives are accountable to the people they represent, the officials are accountable for the public trust they hold, and even the people are accountable to themselves for past and future decisions.<sup>252</sup>

Democratic accountability is representation-based. The actors and forums maintain a symbiotic relationship.<sup>253</sup> It is suggested that democratic accountability presumes that there is a relationship between public administrations and the broader community or society as a whole. Olsen emphasises that in democracies agents are information-rich and their principals are information-poor; hence the importance of accountability.<sup>254</sup> The active role that is played by the citizens in terms of oversight to ensure proper accountability is important in terms of the relationship.<sup>255</sup> A progressive society will therefore provide oversight in order to obtain the highest degree of accountability of public administration. Hanberger explains that "accountability" finds its origin in the Latin word "computare",<sup>256</sup> where "com" means "together" and "putare" means to "count or consider". The origin is therefore suggestive of the community's public responsibility as a collective and replicates

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<sup>249</sup> Olsen 2013 *West European Politics* 453.

<sup>250</sup> Cendón "Accountability and Public Administration" 42.

<sup>251</sup> Warren "Accountability and Democracy" 39.

<sup>252</sup> Warren "Accountability and Democracy" 39.

<sup>253</sup> Bovens, Schillemans and Goodin "Public Accountability" 9 for a detailed description of both accountable actors and accountability forums.

<sup>254</sup> Olsen 2013 *West European Politics* 455.

<sup>255</sup> Cendón "Accountability and Public Administration" 42.

<sup>256</sup> Hanberger 2008 *Scandinavian Political Studies* 3.

the people's oversight conducted in terms of the public powers exercised in a democracy.<sup>257</sup>

Cendón describes the emergence of democratic accountability as being due to the increasing development of administrative action in relation to a broad variety of aspects in the broader civic community.<sup>258</sup> It is contended that the increasing bureaucratic action in turn stimulates more active participation by the citizenry. Hence, democratic accountability maintains dual or collective responsibility in that the agents are responsible for adequate performance and the principals for holding the agents to account for their decisions.<sup>259</sup> Hanberger refers with approval to Behn's concept of democratic accountability<sup>260</sup> as a broad compact of mutual, collective responsibility.<sup>261</sup>

In theory, actors and forums<sup>262</sup> alike account for successes and failures in democratic accountability. It is submitted that public participation processes have dual benefits for actors and forums. The administration uses public participation to maximise the support for its decisions and galvanise the moral and social acceptance of such decisions.<sup>263</sup> Second, on the part of the citizenry, public administration takes into consideration society's needs and those of collective groups in society. Therefore, the ensuing association or synergy between the actors and forums creates a relationship of accountability.<sup>264</sup> The relationship between the actors and forums consequently also creates obligations in terms of discursive democracy, in which citizens as accountability holders contribute to public policy through participatory mechanisms (-for example voting) and hence are jointly responsible for both the successes and the failures of government.<sup>265</sup> The classification of democratic accountability, however, needs to be distinguished from

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<sup>257</sup> Hanberger 2008 *Scandinavian Political Studies* 3.

<sup>258</sup> Cendón "Accountability and Public Administration" 42.

<sup>259</sup> Hanberger 2008 *Scandinavian Political Studies* 5.

<sup>260</sup> Behn *Rethinking Democratic Accountability*.

<sup>261</sup> Hanberger 2008 *Scandinavian Political Studies* 5.

<sup>262</sup> See Bovens, Schillemans and Goodin "Public Accountability" 9 for a detailed description of both accountable actors and accountability forums.

<sup>263</sup> Cendón "Accountability and Public Administration" 42.

<sup>264</sup> Cendón "Accountability and Public Administration" 42. Also see Bovens, Schillemans and Goodin "Public Accountability" 9 for a detailed description of both accountable actors and accountability forums.

<sup>265</sup> Hanberger 2008 *Scandinavian Political Studies* 3.

the accountability associated with democratic governance systems, which will be unpacked in the ensuing sections of this chapter. It follows that democratic governance accountability extends further than the mere confines of democratic accountability as discussed above. It is submitted that democratic accountability is also different from other types of accountability in its methods of evaluation and instruments of assessment, which include public consultation and enquiries pertaining to allegations made by the citizenry.<sup>266</sup>

Cendón holds that the main objective of democratic accountability is to satisfy the wishes of society.<sup>267</sup> Therefore, democratic accountability is progressive in nature and seeks to achieve accountability in observance of citizens' needs. Democratic accountability extends beyond the mere prerequisites of administrative accountability,<sup>268</sup> which in their purest form measure accountability by means of applied administrative oversight to assess the execution of administrative processes. Christie contends that in order to improve the model of accountability to be found in current public administration literature, two elements need be added to achieve a purported Comprehensive Accountability Framework (hereafter CAF) for public administration.<sup>269</sup> The additional elements are social and moral / ethical accountability. Christie would accordingly supplement the Cendón framework elements with the inclusion of social and moral / ethical considerations.<sup>270</sup> Notwithstanding the elements of accountability envisaged by Cendón,<sup>271</sup> for the purposes of the application of accountability, Christie argues for the consideration of these additional elements.<sup>272</sup>

Social accountability as described by Christie might seem to be a sub-category of democratic accountability. Unlike other types of accountability associated with public administration, social accountability extends to outward accountability.<sup>273</sup> In this context,

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<sup>266</sup> Cendón "Accountability and Public Administration" 42.

<sup>267</sup> Cendón "Accountability and Public Administration" 42.

<sup>268</sup> See para 2.2.2 in Chapter 2.

<sup>269</sup> Christie 2018 *Public Integrity* 82.

<sup>270</sup> Christie 2018 *Public Integrity* 82.

<sup>271</sup> See para 2.2.2 in Chapter 2.

<sup>272</sup> Christie 2018 *Public Integrity* 82.

<sup>273</sup> Christie 2018 *Public Integrity* 84.

actors need to account to external forums or stakeholders like non-governmental organisations (hereafter NGOs), interest groups and clients. Social accountability is commonly referred to as the demand side of good governance, as it allows the citizenry to hold elected leaders accountable through active participation.<sup>274</sup> Jelmin explains that the increase in the number of civil actors in the public domain inadvertently caused an increase in social accountability and civic vigilance by means of civil society in the form of independent monitoring, formal monitoring by government watchdogs, and advocacy by NGOs, an example being Makassar, Indonesia.<sup>275</sup> As explained previously, without transparency, accountability do not permit for publicity and would be considered as the exercise of opaque power.<sup>276</sup> These organisations, which call on institutions to account in the context of social accountability, are described as stakeholders or actors with affected interests.<sup>277</sup>

The importance of social accountability is asserted by three main arguments, including the need for improved governance, increased development effectiveness, and empowerment.<sup>278</sup> Malena, Forster and Singh describe social accountability as a vertical dimension to allow for the proper accountability of government officials by permitting citizens to participate in civic engagements to attain accountability.<sup>279</sup> Social accountability by external parties is primarily gained through legal rights enforced against the conduct of organisations.<sup>280</sup> Examples of legal rights include rights configured under law (legislation) and the Constitution.

The need for social accountability is argued by commentators who describe the other vertical mechanisms of accountability like elections as weak. Elections are described as weak and blunt instruments ill-suited to achieving accountability between elections.<sup>281</sup>

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<sup>274</sup> Malena, Forster and Singh *Social Accountability* 1.

<sup>275</sup> Jelmin *Democratic Accountability in Service Delivery* 13.

<sup>276</sup> See para 2.2.2 in Chapter 2.

<sup>277</sup> Moore "Accountability, Legitimacy, and the Court of Public Opinion" 636.

<sup>278</sup> Malena, Forster and Singh *Social Accountability* 6.

<sup>279</sup> Malena, Forster and Singh *Social Accountability* 3.

<sup>280</sup> Moore "Accountability, Legitimacy, and the Court of Public Opinion" 634.

<sup>281</sup> Malena, Forster and Singh *Social Accountability* 5.

Malena, Forster and Singh describe the emergence of social accountability as a remedy to move past older social accountability mechanisms, which include merely protesting against the actions of political leaders and bureaucrats.<sup>282</sup> Protests in any event often lack legitimacy, given the frequently frivolous reasons for the protests and the claims made in relation thereto.<sup>283</sup> Examples of participatory mechanisms include participatory public policy making, participatory budgeting and public expenditure tracking,<sup>284</sup> which contribute to bringing about effective positive change because they are more organised, constructive and systematic.<sup>285</sup>

Social accountability is regarded as a counter for civil unrest and social upheaval. Social accountability requires specific factors to be present if it is to prevail. The first factor relates to reliance on the type of democratic governance system. It is apparent that social accountability and more specifically democratic governance are important constituents of the proper establishment of accountability in democratic government systems. Other factors include the availability of access to information, the existence of responsible media, the capacity of civil society, the capacity of the state, the existence of a state-civil society synergy, and institutionalisation.<sup>286</sup>

Moral accountability as the second sub-category of democratic accountability has responsiveness as its primary value. Its objective is answerability to key external stakeholders.<sup>287</sup> Moral accountability is a critical component of democracy and allows the democratic state to survive and thrive.<sup>288</sup> Confirmation of the importance of moral accountability is found in the inference that citizens trust public officers when the administration functions for the public good.

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<sup>282</sup> Malena, Forster and Singh *Social Accountability* 5.

<sup>283</sup> Moore "Accountability, Legitimacy, and the Court of Public Opinion" 641 for a detailed discussion pertaining Social Accountability versus Social Legitimacy.

<sup>284</sup> Malena, Forster and Singh *Social Accountability* 3.

<sup>285</sup> Malena, Forster and Singh *Social Accountability* 5.

<sup>286</sup> Malena, Forster and Singh *Social Accountability* 12.

<sup>287</sup> Christie 2018 *Public Integrity* 87.

<sup>288</sup> Dmochowski, Jurczuk and Szczepankowski 2003  
<https://www.scribd.com/document/260629418/Ethics-in-Public-Administration-Eng>.

Although the objective of moral accountability is to promote ethical behaviour among administrators, its prominence also suggests that there is a quantum of skepticism about the trustworthiness of the state.<sup>289</sup> Hence, the responsibility for oversight lies with the citizenry, civil society and the media. This function of the media is generally referred to as watchdog journalism.<sup>290</sup> Moral accountability is described as conduct that reflects accepted societal rules of behaviour, which in terms of the responsiveness to these ethical values is supervised by external role-players such as the media or civil society.<sup>291</sup> The absence of moral accountability is commonly accompanied with liability in the form of related sanctions or the disclosure of the details of the administrator involved, and may be followed by the dismissal or resignation of the administrator.<sup>292</sup>

### ***2.3 Relationship between public sector accountability and liability***

In theory, the concept of liability requires the actor bestowed with obligations of answerability to be confronted with the direct consequences of his/her performance.<sup>293</sup> The associated liability can also be described as the consequences related to specific answerability in relation to a purported type of accountability. Braithwaite states that if specific responsibility is attached to an obligation, specific liability in relation to the fulfilment of the responsibility is required.<sup>294</sup> Also known as sanction-based accountability,<sup>295</sup> liability focusses on the punishment of the implicated actor.<sup>296</sup> Consequently, if the actor does not fulfill his/her responsibility or facilitate the accountability, the actor will be liable for the consequential blame.<sup>297</sup>

In his understanding of accountability Schedler describes it as being a two-dimensional concept, the first part of which creates the supposition that specific actors in the public

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<sup>289</sup> Norris "Watchdog Journalism" 525.

<sup>290</sup> Norris "Watchdog Journalism" 525.

<sup>291</sup> Christie 2018 *Public Integrity* 82.

<sup>292</sup> Christie 2018 *Public Integrity* 82.

<sup>293</sup> Christie 2018 *Public Integrity* 85.

<sup>294</sup> Braithwaite "Accountability and Responsibility Through Restorative Justice" 44.

<sup>295</sup> Mansbridge "Contingency Theory of Accountability" 56 for detailed discussion on the balancing of sanction-based accountability to prevent distrust.

<sup>296</sup> Mansbridge "Contingency Theory of Accountability" 56.

<sup>297</sup> Braithwaite "Accountability and Responsibility Through Restorative Justice" 44.



service are given specific responsibilities which create answerability in relation to the performance of the responsibilities associated therewith.<sup>298</sup> Having determined "who" is accountable for "what" and to "whom", accountability finally accounts for the consequences after the first enquiry of answerability has been established. Bovens, Jacobs and Schillemans describe the two-phase approach as the information phase in which information is obtained in relation to the actor involved, after which the consequence phase ensues, in which the accountability forum confirms its verdict in relation to the actor and applies the sanctions associated with the action to the actor.<sup>299</sup> For the purposes of public sector accountability, not only does liability extend into the sub-elements of what is perceived to be the current understanding of accountability, but it provides for a valuable nexus in the chain of accountability.<sup>300</sup> Moreover, answerability enhances accountability and consequently allows for the enforcement of irregular behaviour.

According to Schedler, answerability goes hand in hand with the consequences that follow good and bad performance or conduct.<sup>301</sup> Schedler states that "answerability implies the idea that accounting actors do not just 'call into question' but also 'eventually punish' improper behaviour".<sup>302</sup>

Accordingly, accountable persons not only have to account for what they have done and why, but they have to bear the consequences of it, including negative sanctions.<sup>303</sup> In his analysis of the dimensions of accountability Koppell identifies five concepts which in his view underpin the nature of accountability.<sup>304</sup> One of the five inherent concepts supports the imposition of liability.<sup>305</sup> It follows that liability is the consequence of non-compliance with an actor's responsibility to perform in a certain way. For the purposes of

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<sup>298</sup> Schedler "Conceptualizing Accountability" 15.

<sup>299</sup> Bovens, Jacobs and Schillemans 2016 *Policy and Politics*.

<sup>300</sup> See para 2.5.8 in Chapter 2.

<sup>301</sup> Schedler "Conceptualizing Accountability" 15.

<sup>302</sup> Schedler "Conceptualizing Accountability" 15.

<sup>303</sup> Schedler "Conceptualizing Accountability" 15.

<sup>304</sup> Christie 2018 *Public Integrity* 85.

<sup>305</sup> Christie 2018 *Public Integrity* 85.

understanding accountability in the context of this study, liability as a consequence of the failure to be responsible is understood as sanction-based liability.

In his research into the associated types of accountability, Cendón attaches formal consequences or liability to accountability, as the one follows the other.<sup>306</sup> The CAF situates liability under the concept of accountability which establishes answerability and consequential liability which provides related consequences based on the said liability.<sup>307</sup> For the purposes of public administration, the relationship between accountability and liability can therefore not be regarded as inconsequential, as specific types of accountability are rendered meaningless in the absence of liability.

Accountability without liability, or exposing misdeeds without imposing consequences, is described by Schedler as "weak and toothless" and is evidence of a "diminished form of accountability".<sup>308</sup> Schedler goes on to describe accountability without liability as window dressing instead of exercising real restraints of power.<sup>309</sup> An example of accountability without liability is where democratic accountability requires liability in terms of both social and moral accountability, which demands a response by the external actors (including citizens),<sup>310</sup> the absence of which will negate the effect of the democratic accountability and the transparency related to it.<sup>311</sup>

It follows that in the absence of punishment for abuses of power as depicted for instance under political accountability, the rule of law would be compromised. Liability will be further discussed under the reading of accountability for democratic government systems, in which the consequences of the absence of liability in functional democratic government systems will be discussed.<sup>312</sup> Gardner emphasises the importance of consequential responsibility which is derived from basic responsibility.<sup>313</sup> Gardner argues that

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<sup>306</sup> Cendón "Accountability and Public Administration" 26.

<sup>307</sup> Schedler "Conceptualizing Accountability" 16.

<sup>308</sup> Schedler "Conceptualizing Accountability" 16.

<sup>309</sup> Schedler "Conceptualizing Accountability" 16.

<sup>310</sup> Warren "Accountability and Democracy" 47.

<sup>311</sup> See para 2.2 in Chapter 2.

<sup>312</sup> See para 2.4 in Chapter 2.

<sup>313</sup> Gardner "Mark of Responsibility" 234.

consequential responsibility is merely one of the outcomes of accountability, as it is derived from basic responsibility.<sup>314</sup> This underlines the importance of basic accountability, as it allows individuals to properly account for themselves through accepting the consequences of their actions, because the consequences are included as part of the responsibility to account. Responsibility has therefore been described as a two-way street. Gardner describes modes of consequential responsibility as the "liability to be punished" and a "duty to atone".<sup>315</sup> Liability is therefore inherent in the prospect or purported threat of punishment. It is under the aforementioned proposition that all wrongdoers will be punished.<sup>316</sup> Gardner states that if people are basically responsible, then they have an interest in being punished; the acceptance of punishment confirms that one has a basic sense of responsibility.<sup>317</sup> Punishment as a consequence of their actions may be unwelcome to some, who will endeavour to avoid it. This signifies their lack of a sense of basic responsibility.<sup>318</sup>

In attempting to define the term accountability, consideration needs be afforded to how accountability can be conceived of in a democratic governance framework. The types and dimensions of accountability analysed so far will assist to develop a description of accountability suitable for the purposes of this study. Based on the interpretations of various scholars, an inclusive definition of public accountability should cover both axes, the actors and the reactors. Therefore, for the purposes of the present study, accountability can be defined as follows: "Accountability speaks to the relationship between public (government) actors in the three spheres and three branches of government as far as it concerns their obligations and answerability towards each other as well as towards the citizenry (society). Absent answerability triggers liability."

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<sup>314</sup> Gardner "Mark of Responsibility" 234.

<sup>315</sup> Gardner "Mark of Responsibility" 234.

<sup>316</sup> Gardner "Mark of Responsibility" 234.

<sup>317</sup> Gardner "Mark of Responsibility" 235.

<sup>318</sup> Gardner "Mark of Responsibility" 235.

## **2.4 Accountability in democratic government systems**

### *2.4.1 Democratic government systems*

Democracies are also systems of accountabilities.<sup>319</sup> It follows that democratic governance systems can be used to govern and account to voters. Democratic governance is normally associated with equality, political freedom and the rule of law.<sup>320</sup> Democracy in its most elementary form refers to the "rule of the people" or rather "rule by the masses", which in theory should be representative of the will of the people.<sup>321</sup>

Hindess draws our attention to an additional element of Aristotle's understanding of government, which has to do with the idea of the "telos" or the purpose of governance.<sup>322</sup> The "telos" refers to the formation of the notion of a "proper purpose", which is that governance takes place for the "good of the governed".<sup>323</sup> This was the beginning of the idea that the truest form of government embraces the aspect of a common interest. Democratic governance is therefore not merely the actions of an elected government molded by the will of the people, but should coincide with accountable governance. An accountable government is understood to be synonymous with democratic governance and *vice versa*.<sup>324</sup> The inclusion of the notion of a common interest in relation to democracy therefore suggests that both accountability and democracy are representative of responsibility and responsiveness,<sup>325</sup> although Dubnick advances the opinion that the relationship between democracy and accountability is not precise.<sup>326</sup>

Modern representative governance focusses on the wellbeing of the citizenry and the preservation of civil freedoms rather than on the interests of the rulers.<sup>327</sup> This is also

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<sup>319</sup> Warren "Accountability and Democracy" 39.

<sup>320</sup> Bekink *Principles of South African Constitutional Law* 78. Also see Dubnick "Accountability as a Cultural Keyword" 32.

<sup>321</sup> Hindess 2002 *Australian Journal of Public Administration* 35.

<sup>322</sup> Hindess 2002 *Australian Journal of Public Administration* 31.

<sup>323</sup> Hindess 2002 *Australian Journal of Public Administration* 31.

<sup>324</sup> Dubnick "Accountability as a Cultural Keyword" 32.

<sup>325</sup> Dubnick "Accountability as a Cultural Keyword" 32.

<sup>326</sup> Dubnick "Accountability as a Cultural Keyword" 32.

<sup>327</sup> Hindess 2002 *Australian Journal of Public Administration* 36.

reflected in the Social Contract Theory, in which Rousseau expands on the differentiation between the concerns of the state and those of the people.<sup>328</sup> Dubnick suggests that accountability in the context of democracy fuses with the qualities of democracy.<sup>329</sup> Accountability as a concept is therefore like a chameleon. Given its rich origins, it changes colour from place to place and from time to time.<sup>330</sup>

Governance of the state is not restricted to the work of government, which accordingly causes accountability to incorporate all the relevant actors, both internal and external.<sup>331</sup> It is therefore contended that modern democracy reflects not only the actors as agents and the citizenry as principals, but also the advanced administrative systems and different professional structures incorporated in government. Consequently, the meaning of government needs be interpreted as regulating the conduct not only of the broad population but also of the various actors engaged in governance, *inter alia* public and private organisations, elected representatives and politicians.<sup>332</sup>

It follows that to understand the nature of the accountability associated with the concept of democratic governance systems one must first understand the two forms of democracy, namely direct and representative democracy.<sup>333</sup> Direct democracy merely allows for a system of popular self-governance, which does not have any intermediary phases of government. Actors in a direct democratic state govern themselves. Hence, those who vote policy into law have no accountability for the execution and consequences thereof.<sup>334</sup> Direct governance is generally an impractical system, as direct democracy by its very nature is limited to small numbers of citizens who subsequently account to themselves.

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<sup>328</sup> Hindess 2002 *Australian Journal of Public Administration* 37.

<sup>329</sup> Dubnick "Accountability as a Cultural Keyword" 32.

<sup>330</sup> Dubnick "Accountability as a Cultural Keyword" 32.

<sup>331</sup> Hindess 2002 *Australian Journal of Public Administration* 35.

<sup>332</sup> Hindess 2002 *Australian Journal of Public Administration* 35.

<sup>333</sup> See Bellini 2019 *Philosophy and Public Issues* 92-101 for a detailed discussion of direct democracy and representative democracy.

<sup>334</sup> Warren "Accountability and Democracy" 46.

The need for transparency and accountability is notably absent in this type of democracy, as it is self-regulatory.<sup>335</sup>

In representative democracy, on the other hand, the actors are elected by the citizenry and provided with a mandate to take political decisions, take administrative decisions, enact legislation, and drive bureaucratic and political programmes to improve the lives of the citizenry. Consequently, to safeguard the integrity of the concept of representative democracy the need arises to formulate accountable interphases in the governance structure so that those who govern account to the citizenry. Accountability is hence central to representative democracy.<sup>336</sup>

Elected officials in democracies are held accountable under the notion of the probability of not being re-elected if their conduct is not conducive to proper and good governance.<sup>337</sup> Schedler, Diamond and Plattner rightfully concede that contemporary accountability as envisaged through social accountability is "too weak to guarantee a decent government" or to ensure a proper governance system.<sup>338</sup> They further state that although it is necessary to the observance of accountability, social accountability is also too weak to keep state power in check, defend civil rights, lead to bureaucratic accountability, require answerability, or result in enforcement in situations of public exploitation.<sup>339</sup>

Therefore, an understanding of the concept of democracy needs to focus on specific principles including accountability, the control of the abuse of power, transparency, the separation of powers and the rule of law, amongst other checks and balances.<sup>340</sup> Applied in the context of democratic governance, accountability must ensure answerability in terms of the principles of democracy, thereby preventing the abuse of power, causing appropriate transparency, the proper separation of powers, the protection of human

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<sup>335</sup> Warren "Accountability and Democracy" 46.

<sup>336</sup> Aucoin and Jarvis *Modernizing Government Accountability* 7.

<sup>337</sup> Kamp *Concepts and Principles of Democratic Governance and Accountability* 25.

<sup>338</sup> Schedler, Diamond and Plattner *Self-restraining State* 2.

<sup>339</sup> Schedler, Diamond and Plattner *Self-restraining State* 2.

<sup>340</sup> Ribot *African Decentralization* 72.

rights, and the observation of the rule of law. All of these are contained in their abstract form in the notion of democracy, but they need to be accounted for.

#### *2.4.2 The role of accountability in the functioning of democratic government systems*

Man is the custodian of democracy, but it is submitted that no man is infallible. Thus, the Latin maxim bears reference: *Quis custodiet ipsos custodientes*<sup>341</sup> - to whom will the custodians account, or who will oversee the custodians.<sup>342</sup> Schedler, Diamond and Plattner eloquently summarise the importance of accountability in a democratic government system:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls of government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place obligate it to control itself. A dependence on the people is, no doubt, the primary control on the government: but experience has taught mankind the necessity of auxiliary precautions.<sup>343</sup>

The current state of at least some democracies (e.g. unrestrained political conduct and government decay in Venezuela)<sup>344</sup> highlights the relevance of the above. Schedler provides advice on the probability of domesticating the state<sup>345</sup> or subjecting state actors to institutional accountability, the improbability of which is confirmed in that accountability is not in the self-interest of the dominant actors.<sup>346</sup> Accountability therefore serves as both the carrot offered and the stick wielded to ensure that democratic governance actually reflects the will of the *dēmos*.<sup>347</sup>

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<sup>341</sup> Harris 2012 *Policing* 240: The dictum of Roman poet Juvenal, Satire VI lines 347-348, is normally translated as "Who will guard the guards themselves?" and is applied to the contemporary debate about who is best placed to resolve complaints against police officers.

<sup>342</sup> Peters *Politics of Bureaucracy* 306.

<sup>343</sup> Schedler, Diamond and Plattner *Self-restraining State* 3.

<sup>344</sup> Daly 2019 *HJRL* 12.

<sup>345</sup> Schedler "Restraining the State" 346.

<sup>346</sup> Schedler "Restraining the State" 346.

<sup>347</sup> Peters *Politics of Bureaucracy* 306.

The "stick" refers to the legal and political means of imposing proper conduct and punishing non-compliance.<sup>348</sup> The "carrot" bears reference to the development of moral persuasion to entice public servants to be accountable.<sup>349</sup> Therefore, the development of accountability will proceed in the face of institutional change to continuously mold democratic governance and restore service in the interest of the "good of the governed". It follows that accountability is central in democratic government systems.

More in-depth research is needed to understand the present role of accountability in democratic government systems and to determine the part that improved accountability could play in a democratic government system.<sup>350</sup> Schedler, Diamond and Plattner suggest that the increased investigation of "working systems to restrain the overreaching of political power" could create better accountability and help prevent the total collapse of "low-quality democracies".<sup>351</sup>

As accountability should be present in democratic governance, the role of accountability in the performance of democratic systems must be analysed. In other words, what does accountability look like and how does it function as a component of democratic government systems? It is envisaged that just as the separation of powers protects constitutional democracy, so political, administrative and judicial accountability function to safeguard the principles of democratic governance.

The role of accountability in democratic governance systems is important, given the infrequency of the activation of democratic accountability systems such as elections. Akech describes democracy in Africa as narrow and minimalist.<sup>352</sup> It is perceived to be primarily associated with the ballot box.<sup>353</sup> Warren confirms that democratic accountability mechanisms should not primarily relate to elections, but include rights to petition,

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<sup>348</sup> Peters *Politics of Bureaucracy* 306.

<sup>349</sup> Peters *Politics of Bureaucracy* 306.

<sup>350</sup> Schedler, Diamond and Plattner *Self-restraining State* 2.

<sup>351</sup> Schedler, Diamond and Plattner *Self-restraining State* 2.

<sup>352</sup> Akech 2013 *Ind J Global Legal Studies* 342.

<sup>353</sup> Akech 2013 *Ind J Global Legal Studies* 342.



standing to sue, associations and activist organisations.<sup>354</sup> As elections happen only periodically, Akech also asserts that democracy needs to be practised as a daily event rather than only at elections.<sup>355</sup> The periodic nature of elections suggests that they are not an adequate mechanism for ensuring that governments effectively practice democratic principles once they have been elected. The accountability that results from the practice of electing a government therefore needs to be separated from the accountability associated with the principles of democratic governance. Accountability in democratic governance systems relates to the right of the actors to participate through the proper processes of democratic governance. They need to be able to participate in governance on a frequent basis.<sup>356</sup> It follows that accountability in democratic governance systems enhances accountability between elections and helps facilitate the accountable behaviour of accountability actors.

Accountability in democratic governance systems is described as requiring those who exercise public authority to be scrutinised and evaluated by superior officials or public institutions.<sup>357</sup> The interest in systems of accountability grew from a continuing interest in processes of democratisation and further commitments from the state to be more responsive to its citizens.<sup>358</sup> Domestic accountability also describes the relationship between the state and its citizens.<sup>359</sup> The Organisation for Economic Co-operation and Development (hereafter OECD) defines accountability, more specifically domestic accountability, in terms of three main concepts: transparency, answerability and enforceability.<sup>360</sup> It follows that the same principles capture the design of accountability in democratic governance systems.

Democratic governance systems in their purest form can bring about stable and collective governance in a community, in which accountability institutions are needed in order to

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<sup>354</sup> Warren "Accountability and Democracy" 47.

<sup>355</sup> Akech 2013 *Ind J Global Legal Studies* 342.

<sup>356</sup> Akech 2013 *Ind J Global Legal Studies* 343.

<sup>357</sup> Aucoin and Jarvis *Modernizing Government Accountability* 8.

<sup>358</sup> OECD *Accountability and Democratic Governance* 23.

<sup>359</sup> OECD *Accountability and Democratic Governance* 23.

<sup>360</sup> OECD *Accountability and Democratic Governance* 23.

balance the overreach of power. Such institutions oversee decision-makers through checks and balances that include the judiciary and the public service and related professions which are the custodians of accountability and transparency (government auditors and oversight committees).<sup>361</sup> These institutions demand the observance of answerability. They are not designed to articulate accountability in the interest of populist rule but are mandated to demand answerability in the interest of the citizenry.<sup>362</sup>

It follows that democratic governance systems without strong and balanced institutional accountability have the potential to over-stimulate democratic accountability, more specifically on the horizontal plane, which could relate to the development of a resilient, irrepressible civil society. This could cause an increase in the number of protests and civil incidents of disorder, or the complete despoliation of political and bureaucratic accountability. Examples hereof are given by Berman in the context of Germany, where the prevalence of weak, disjointed political parties was the core element resulting in the dissolution of the Weimar Republic and the rise of the Nazi Party.<sup>363</sup> Therefore, strong civil societies can destabilise democratic governance in the void created by poor governance interventions.<sup>364</sup> A degree of equilibrium is required by democratic institutions associated with democratic governance structures to balance the axes of accountability.

Whilst democratic governments regulate conduct through enacting legislation and issuing authoritative instructions, the conduct of accountability actors is also regulated through governance systems which are not restricted to the executive, legislature and judiciary. It follows that administrative decentralisation also contributes to accountability as a democratic governance system. Decentralisation as a democratic governance system has two principal components: participation and accountability.<sup>365</sup> In relation to quasi-federal countries or unitary states, administrative decentralisation as a democratic governance system is often practised to allow for improvement pertaining to the horizontal axes of

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<sup>361</sup> Warren "Accountability and Democracy" 41.

<sup>362</sup> Hindess 2002 *Australian Journal of Public Administration* 39.

<sup>363</sup> Oh 2012 *Asian Survey* 543.

<sup>364</sup> Oh 2012 *Asian Survey* 543.

<sup>365</sup> World Bank *Administrative Decentralization* 9.

accountability.<sup>366</sup> Associated with the concept of administrative decentralisation, the three major forms of administrative decentralisation relate to the devolution of power, the delegation of power, and de-concentration.<sup>367</sup> The role of accountability in these subcategories of democratic governance systems will be further discussed below.

De-concentration is considered the weakest form of decentralization, does not amount to the transfer of authority or responsibility, and will consequently not be discussed in relation to accountability.<sup>368</sup> Delegation, on the other hand, is considered a more extensive form of decentralisation, in which some responsibilities of central government are transferred to semi-autonomous organisations.<sup>369</sup> Thus, governments may delegate responsibility for the administration of some public functions or enterprises to other spheres of government such as housing authorities or development corporations.<sup>370</sup>

The last form of accountability in relation to decentralisation is the devolution of powers. This concept emphasises the rationale that government is more accountable to those being governed if the governance is physically closer to those being governed.<sup>371</sup> It follows that the devolution of its powers should contribute towards making government better accountable in relation to the execution of governance responsibilities.<sup>372</sup>

The devolution of powers is justified in that the closer the decision-making is to the citizenry, the more attentive the government will be and the better the communication will be within the constituency.<sup>373</sup> Devolution in democratic government systems is important for the purposes of accountability. Decentralisation improves accountability and transparency.<sup>374</sup> It follows that decentralisation generates responsibilities and

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<sup>366</sup> World Bank *Administrative Decentralization* 9.

<sup>367</sup> World Bank *Administrative Decentralization* 9.

<sup>368</sup> Ozmen 2014 *European Scientific Journal* 418.

<sup>369</sup> World Bank *Administrative Decentralization* 1.

<sup>370</sup> World Bank *Administrative Decentralization* 1.

<sup>371</sup> Isufaj 2014 *Procedia* 460.

<sup>372</sup> Isufaj 2014 *Procedia* 460.

<sup>373</sup> Ruben "Myth of Non-Bureaucratic Accountability" 54.

<sup>374</sup> Isufaj 2014 *Procedia* 460.

consequently answerability in terms of the responsibilities provided to the other spheres of government.

As already alluded to, democracy as the sole vehicle of accountability cannot balance the probable overreaching of political and administrative powers. The OECD describes the field of accountability as a growing body of information,<sup>375</sup> of which accountability in relation to democratic governance systems remains critical to the functional concepts of answerability: responsiveness and enforceability.<sup>376</sup> Based on the aforesaid, the importance of being able to moderate the overreaching powers of democratic governance actors is amplified. Those powers need to be balanced with the important role of accountability in democratic governance systems. The discussion so far has focussed on public accountability in governments and accountability as part of democratic governance with a view to understanding the functioning of accountability in the context of democratic governance systems. For the present purposes it is necessary to probe the meaning of accountability on sub-national levels of government in order to understand the scope and features of local government accountability from this perspective. The next section focusses specifically on accountability in the local government (municipal) sphere.

### ***2.5 Scope and features of (local) government accountability***

The question arises whether the general understanding of accountability as discussed so far finds different application in the local government context. The relevant literature suggests that accountability in local government is not a separate concept. However, accountability at the local level must be understood against the duty of municipalities to provide services.<sup>377</sup> This is a distinct role of municipalities which definitely has an impact on who is accountable to whom and for what at the local level. Although the aforesaid is true, adequate service delivery does not necessarily directly equate to accountability in local government. The extent of service delivery only mirrors the physical outcomes of

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<sup>375</sup> OECD *Accountability and Democratic Governance* 23.

<sup>376</sup> OECD *Accountability and Democratic Governance* 23.

<sup>377</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 1.

accountability and is therefore not the actual measure or yardstick of accountability. Local government accountability, like accountability in democratic governance systems more broadly, depends on the separation of powers, the rule of law, and the existence of proper checks and balances.<sup>378</sup>

The separation of powers contributes to the balance of power in governance. Balancing the powers in relation to national and local governmental actors protects the locals from overreaching their powers, for example.<sup>379</sup> A mechanism associated with the balancing of powers is polycentricity, in terms of which regional powers are created by generating different centres of semi-autonomous power or "multiple loci of power", which are combined with higher levels of government that prevent institutional actors from exceeding their powers.<sup>380</sup> Applying the notion of polycentricity, accountability is therefore critical in the local government space, where functional powers and services need to be executed.

It follows that accountability in local government is further developed by readings in observance of the principle of subsidiarity, which is aimed at the decentralisation of power, a notion derived from Catholic social philosophy.<sup>381</sup> Drew and Grant describe subsidiarity with reference to decentralised government as governance which is best fitted to respond to the needs of the citizenry due to its close proximity.<sup>382</sup> Further, decentralisation is expected to lead to governance which observes the common good and the state's duty to guard over it.<sup>383</sup> Accountability is therefore enhanced by the principle of subsidiarity due to local government's close proximity to where actual powers and services are executed. Hereto accountability in municipalities is correspondingly executed across the municipal spectrum, features of accountability are however dissimilar in terms of the different categories of municipalities in South Africa.

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<sup>378</sup> See para 2.4 in Chapter 2.

<sup>379</sup> Ribot *African Decentralization* 72.

<sup>380</sup> Ribot *African Decentralization* 72.

<sup>381</sup> Drew and Grant 2017 *Publius* 522.

<sup>382</sup> Drew and Grant 2017 *Publius* 522.

<sup>383</sup> Drew and Grant 2017 *Publius* 522.

### 2.5.1 Accountability in different categories of municipalities in the South African context

The following section is devoted to identifying the differences in the nature of accountability as it is to be found in the different categories and types of municipalities in South Africa. Section 195 of the Constitution sets out the basic values and principles governing public administration. Central thereto is the statement that public administration needs to be accountable.<sup>384</sup> It is further emphasised that the principles also apply to the administration of every sphere of government, which includes local government.<sup>385</sup> But the different categories of municipalities are burdened with dissimilar powers and functions, and the nature of accountability in each of the different categories needs to be established. This notion is confirmed in that the instruments of responsibility of the political structures, the political office bearers and the municipal managers, must be appropriate to the category and type of the municipality. Therefore, the responsibilities and consequently the accountability of structures and types of municipalities differs.<sup>386</sup>

Category A municipalities are metropolitan municipalities. To further clarify the term, "metropolitan" municipalities are defined in the *Structures Act* as municipalities that have exclusive executive and legislative authority in their areas of jurisdiction. They are also described in section 155(1) of the Constitution as Category A municipalities.<sup>387</sup> Metropolitan municipalities in South Africa include Buffalo City, Ekurhuleni Metropolitan Municipality, City of eThekweni, City of Johannesburg, City of Tshwane, the City of Cape Town, the Nelson Mandela Metropolitan Municipality, and the Mangaung Metropolitan Municipality. Explicit to these cities would be their metropolitan characteristics, which would include "large urban settlements with high population densities, complex and diversified economies" with integrated economic activities spread across a large geographical area.<sup>388</sup> Further to the powers and functions derived from the Constitution, the accountability of metropolitan municipalities extends to both executive and legislative

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<sup>384</sup> Section 195(1)(f) of the Constitution.

<sup>385</sup> Section 195(2)(a) of the Constitution.

<sup>386</sup> Section 53(3) of the *Structures Act*.

<sup>387</sup> Section 1 Definitions of the *Structures Act*.

<sup>388</sup> The White Paper 106.

responsibility in their local areas with the necessary oversight by the National Government and the relevant Provincial Government.<sup>389</sup>

Hence, metropolitan municipalities account to other spheres of government in terms of their decentralised powers.<sup>390</sup> Further, they account to the communities they govern by virtue of their responsibility to provide democratic and accountable government,<sup>391</sup> and furthermore through the objectives of sections 152 and 195 of the Constitution they account to themselves internally, as the achievement of the objectives of "accountable governance" are measured through performance management.<sup>392</sup> Bekink emphasises the importance of putting special measures in place to structure and oversee the performance of internal municipal procedures and functions.<sup>393</sup>

Unlike Category A municipalities, which have well-conceived and properly articulated governance structures, Category B (local) municipalities are inherently weak in terms of their design features which influence their powers performed.<sup>394</sup> It follows that based on the limited extent of the powers of Category B municipalities, the accountability measures of this category of municipalities are also restricted or limited based on their structural design.<sup>395</sup> Category B municipalities are further differentiated and limited in terms of their accountability as they share executive and legislative authority with Category C (district) municipalities. Category B municipalities can therefore only account for the powers allocated to them based on the applicable division of powers and functions divided between themselves and the relevant district municipalities, in terms of the executive and legislative authority in the jurisdictional control of the district boundaries. Individual municipalities can therefore be deemed accountable for the manner of the exercise of their powers, functions and duties only to the extent that the Constitution permits.<sup>396</sup>

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<sup>389</sup> Section 155(7) of the Constitution.

<sup>390</sup> Section 155(7) of the Constitution.

<sup>391</sup> Section 152(1)(a) of the Constitution.

<sup>392</sup> Section 160(1)(a) of the Constitution.

<sup>393</sup> Bekink *Principles of South African Constitutional Law* 465.

<sup>394</sup> Section 2 of the *Structures Act*.

<sup>395</sup> See para 2.5.2 in Chapter 2.

<sup>396</sup> *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 60.

Consequently, although accountability can be described as imprecisely entrenched in the dimensional fragments of Category B municipalities, the "being governed" dimension of the decentralised accountability for the exercise of their specific powers and functions is also apportioned between the Category B and Category C municipalities. In terms of the aforesaid features, the degree of accountability is therefore varied, based on the division of accountability in accordance with the apportionment of the powers and functions. It follows that unlike Category A municipalities, which have urban characteristics, some local and district municipalities are more rural or medium-density municipalities, and are more limited in terms of the resources and skills available to them to provide accountable governance to local communities.<sup>397</sup> Examples pertaining the distribution of resources can be seen in the way that the national fiscus funds (equitable share transactions) municipalities based on the category of municipality.

Further differentiation in the accountability features of municipalities can be found in their accountability to "governing others", noting the inherent structural differences between Category B and Category C municipalities. The structure of Category C municipalities is severely restricted in regard to democratic accountability, social accountability and political accountability. Examples of accountability deficits include the omission of design features such as ward committees, ward councillors and other accountability features, making answerability more difficult and further removing governance from the people. Another relevant feature of district municipalities is that they are strategically organised as quasi centralised governments to facilitate standard planning and development in their regions.<sup>398</sup> From a layered authority perspective, this means that district municipalities are merely regional overseers of district development plans, whereas the actual responsibility and authority to effect planning and development rests with its local municipalities. The accountability dilemma is further complicated by the structural design inadequacies of Category C municipalities. In contrast with Category B municipalities, Category C municipalities do not consist of wards, a fact that gives rise to difficulty with

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<sup>397</sup> National Treasury *2011 Local Government Budgets and Expenditure Review* 112.

<sup>398</sup> The White Paper 123.



the "governing others" accountability dimension. Siddle and Koelble also voice concerns in relation to the local institutional capacity of the poorly managed, incapacitated Category B and Category C municipalities.<sup>399</sup> Unlike metropolitan municipalities, local and district municipalities often struggle to attract and retain skilled and qualified personnel,<sup>400</sup> and this has the potential to compromise accountability in the internal governance dimension. Notwithstanding the aforesaid, the author contends that the differentiation of accountability is influenced not only by the structural determination of municipalities, but also by the associated type of municipalities.

### *2.5.2 Differentiation of accountability in different types of municipalities*

Bekink confirms that local governance systems are important for more effective and efficient decision making.<sup>401</sup> Equally, the types of municipalities can also be critical in contributing to efficient and effective decision-making. In terms of the Constitution, provincial legislation facilitates the different types of municipalities to be established in each province.<sup>402</sup> The number of councillors,<sup>403</sup> the status of the councillors (full-time or part-time)<sup>404</sup> and the extent of their responsibilities are determined by the Member of the Executive Committee (hereafter MEC) of the relevant provincial government.<sup>405</sup> However, when considering executive and legislative authority in the local government sphere, the related powers and functions are vested in the municipal council.<sup>406</sup> In terms of the accountability in different types of municipalities, all municipalities must have municipal

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<sup>399</sup> Siddle and Koelble *Failure of Decentralisation in South African Local Government* 86.

<sup>400</sup> National Treasury *2011 Local Government Budgets and Expenditure Review* 112.

<sup>401</sup> Bekink *Principles of South African Constitutional Law* 450.

<sup>402</sup> Section 155(5) of the Constitution.

<sup>403</sup> Section 20 of the *Structures Act*: This is relevant to the "being governed" dimension. The number of councillors should be determined by the MEC in such a manner as to achieve the responsiveness and accountability of councillors.

<sup>404</sup> The annual Determination of Upper Limits of Salaries, Allowances and Benefits of Different Members of Municipal Councils in terms of the *Remuneration of Public Office Bearers Act* 20 of 1998 provides more detail in relation to part-time and full-time councillors.

<sup>405</sup> Section 18 of the *Structures Act*.

<sup>406</sup> Bekink *Principles of South African Constitutional Law* 459.

councils<sup>407</sup> which administer their powers and functions in relation to the different types of governance utilised.

Accountability in terms of the different governance systems is configured as an aspect of executive and participatory systems.<sup>408</sup> Bekink explains that municipalities must exercise their executive authority and therefore need at least to adopt an executive structure (e.g. an executive mayor or an executive committee or an executive plenary system) in which a participatory system (sub-councils and ward committees) can be established, in addition to at least one of the types of the executive system.<sup>409</sup> These types of governance systems further deepen democratic accountability and social accountability in the performance of their powers and functions.<sup>410</sup> The accountability systems available to metropolitan municipalities extend to sub-councils and ward committees as well.

Based on the differentiation of the different types of municipalities, only Category A municipalities may establish sub-structures (sub-councils)<sup>411</sup> in their metropolitan structures, and only Category A and Category B municipalities may establish ward committees in their municipal governance structures.<sup>412</sup> Metropolitan governments with ward committees are deemed to exercise the complete range of legislative, executive and administrative powers.<sup>413</sup> It follows, further to the structural diversity of the different types of municipalities, the type of the municipality in theory extends the range of accountability in the context of the different governance models.<sup>414</sup> The accountability of the different models and of the different executive actors can also be discussed in relation to the executive mayor, the executive committee and the plenary executive council.

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<sup>407</sup> Section 18 of the *Structures Act*.

<sup>408</sup> See para 4.2 in Chapter 4.

<sup>409</sup> Bekink *Principles of South African Constitutional Law* 459. The information discussed in terms of the different executive systems is reflective of the law prior to the promulgation of the *Local Government: Municipal Structures Amendment Act* 3 of 2021 (hereafter *Structures Amendment Act*), of which any amendments thereto have not been considered in terms of this analysis.

<sup>410</sup> Section 18(3) of the *Structures Act*.

<sup>411</sup> Section 8 of the *Structures Act*.

<sup>412</sup> Sections 8 and 9 of the *Structures Act*.

<sup>413</sup> The White Paper 117.

<sup>414</sup> See para 4.2 in Chapter 4.

Based on the executive powers of the different types of governance, accountability will follow the executive actor in terms of the designated type of governance. Although the mayor ordinarily features in the executive ambit of municipal structures, the accountability of the mayor will be founded on the features of the executive mayoral system, the executive committee system and the plenary executive system. Based on the aforesaid interchangeability of both democratic and political accountability,<sup>415</sup> it is suggested that both types of accountability exist under all three of these systems.

With reference to the executive committee system, accountability applies to the entire committee.<sup>416</sup> Although the chairperson of the executive committee is the mayor, the full executive committee reports to the council on its decisions and accounts for all decisions taken by the committee.<sup>417</sup> One member is therefore appointed mayor and presides over the meetings of the executive committee. Irrespective of the appointment of a mayor in the executive system, the mayor carries no executive powers as an individual.<sup>418</sup> In the context of an executive committee the mayor is primarily a ceremonial functionary who presides over meetings of the executive committee. Confirmation of the non-executive purpose of the mayor under the executive committee system is found in the fact that the presence of the mayor is not necessary for the purposes of the executive committee's being quorate, the quorum being based on the number of members present.<sup>419</sup> The executive committee reflects the proportional political representation in council and is therefore representative of the various political actors elected to the council.<sup>420</sup> This underlines the aspect of political accountability, whereby a political party will elect representatives to execute its mandate in the council and will either be rewarded or sanctioned by its voters in terms of their performance. It is not only the majority of the members that is accountable for the use of the executive powers but the total

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<sup>415</sup> See para 2.2.2(a) – *Political Accountability*. Also see para 2.2.2(d) – *Democratic Accountability*.

<sup>416</sup> Section 44(1)(a) of the *Structures Act*.

<sup>417</sup> Section 44(4) of the *Structures Act*.

<sup>418</sup> Siddle and Koelble *Failure of Decentralisation in South African Local Government* 100.

<sup>419</sup> Section 52(1) of the *Structures Act*.

<sup>420</sup> Section 43(2) of the *Structures Act*.

representation or the collective of all the political parties represented in the executive committee.

Clear differentiation of accountability is to be found in the executive mayoral system, where the autonomy of the executive powers centres on the position of the executive mayor. Although the appointment of the MAYCO is a statutory prerequisite for this type of municipality, it is palpable in the legislation that the MAYCO, in which the members are allocated specific portfolios, serves at the mayor's will. They are accountable to the executive mayor and report directly to the executive authority on matters pertaining to their portfolios.<sup>421</sup> The MAYCOs' term of office is also linked to the executive mayor's term of office, a fact which serves as further confirmation that the members of the MAYCO are accountable to the executive mayor.<sup>422</sup>

Meetings of the MAYCO are chaired by the executive mayor, but in contrast to the way in which the executive committee functions, the MAYCO does not have quorum requirements, as its decisions are based on the executive powers of the executive mayor.<sup>423</sup> The MAYCO only advises the executive mayor on matters relating to the executive powers. MAYCO members are not constituent to a lawful decision of the executive mayor. Notwithstanding the aforesaid, the executive mayor will not simply disregard the advice of appointed members, because the members of the MAYCO will more often than not have technical insight into their designated appointed portfolios. Consequent on the nature of this committee, accountability centres on the executive mayor.

The executive mayor will execute decisions on the basis of reports to the MAYCO and dispose of the same where the necessary executive power has been delegated to the position. In the absence of the necessary authority to consider a matter, the executive mayor will report the same to council with the necessary recommendations, and the

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<sup>421</sup> Siddle and Koelble *Failure of Decentralisation in South African Local Government* 100.

<sup>422</sup> Section 60(5) of the *Structures Act*.

<sup>423</sup> Section 60 of the *Structures Act*.

council must dispose of the matter in terms of its own powers.<sup>424</sup> Hereto, political accountability is restricted to the position of the executive mayor, and subsequently by political analogy to the majority of the council. As against the situation in the executive committee, the representation of political parties in council does not have to be reflected in the composition of the MAYCO. Democratic accountability is thus limited to council structures and excluded from the executive authority.<sup>425</sup>

The limiting of democratic accountability where minority parties are not included in the composition of the MAYCO causes supplementary checks and balances to be executed more effectively, however, which permits minority representation to seek accountability from the majority through the use of mechanisms such as oversight committees, and to hold the executive responsible in defiance of executive power. An example of this would be where the MPAC,<sup>426</sup> being representative of the composition of the elected representatives in the council, seeks the attendance of the executive mayor to account for probable reckless conduct. Accountability is improved where political representation in the executive is detached from political representation in council. Unbiased accountability or oversight can prevail in the face of the executive powers. This issue will be discussed under the internal accountability mechanisms,<sup>427</sup> when the organisation scrutinises itself. Accountability in relation to the executive mayoral system is of grave importance, given the immense power wielded in municipalities which, as against the position in the executive system, is not subject to the consent of the collective. Consequently, the executive mayoral system can severely hamper or improve efficient and effective political accountability.<sup>428</sup> However, in both the executive committee and the mayoral systems, the mayor serves as the accountability link between the administration and the council.

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<sup>424</sup> Section 56(1) of the *Structures Act*.

<sup>425</sup> *Democratic Alliance v Masondo* 2003 2 SA 413 (CC).

<sup>426</sup> See para 4.2.2.7 in Chapter 4.

<sup>427</sup> See para 4.2 in Chapter 4.

<sup>428</sup> Siddle and Koelble *Failure of Decentralisation in South African Local Government* 100.

Lastly, the plenary executive system<sup>429</sup> is self-governing and self-regulatory by nature and limited in its potential to create participatory democracy. Under the above discussed executive systems, the Speaker acts as the so-called guardian of integrity. Thus, the Speaker does not form part of the executive and is not accountable to the executive.<sup>430</sup> Parallel to the previous types of executive governance discussed above, the plenary executive system accounts only to itself, which reduces both the executive and the legislative powers of the municipal council. Although participatory democracy mechanisms such as ward committees can be supplemented in terms of the systems available, the democratic and political accountability of the plenary executive system is condensed into one solitary executive and legislative body, namely the council. With the absence of any perceptible separation of powers, the plenary sessions are chaired by the mayor, which clearly impedes any probable separation of the legislative and executive arms of the municipality.<sup>431</sup> The combining of the executive and legislative arms narrows accountability and prevents proper checks and balances from taking place. In this context, democratic and political accountability in terms of the plenary executive systems is therefore voided. As is customary in municipal structures, the role of the Speaker is to protect the oversight that council practices over the executive powers. This supposed oversight ordinarily relates to the practice of scrutinising the proceedings of the executive in terms of their moral and social accountability, and requiring community participation. This could involve statutory participatory systems such as ward committees,<sup>432</sup> and ethical and participatory initiatives being co-ordinated by the speaker's office. Notwithstanding the different kinds of accountability that prevail in the different categories and types of municipalities, accountability can also be exercised from an environmental perspective,<sup>433</sup>

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<sup>429</sup> See para 4.2 in Chapter 4.

<sup>430</sup> SALGA *Guideline Document* 17.

<sup>431</sup> By its own admission, s 36(5) of the *Structures Act* confirms the consolidation of the executive and legislative powers.

<sup>432</sup> Van Der Waldt *Municipal Management* 85.

<sup>433</sup> See para 3.6.1 in Chapter 3.

and the mechanisms utilised to ensure accountability will be discussed in the following chapters.<sup>434</sup>

### *2.5.3 Accountability interphasing to advance (local) government accountability*

Based on the differences associated with the local governmental structures and systems, the interphase between the different types<sup>435</sup> of accountability will differ.<sup>436</sup> Similar to the generic understanding of public accountability, local government accountability can work either upwards or downwards.<sup>437</sup> Nonetheless, due to the closeness of the local government sphere to the citizenry and its consequently being considered the coalface of service delivery, the ambit of accountability in local governance is extensive.<sup>438</sup> It follows that the strength of accountability for the provision of direct service delivery relates to a proper oversight of performance and a clear understanding of the officials' responsibilities.<sup>439</sup> It is submitted that the responsibilities are also supplemented by a horizontal (administrative) dimension, consisting of different types of accountability.<sup>440</sup> Further, similar to accountable government, it also consists of three elements: answerability, responsiveness and enforcement.<sup>441</sup>

Blair suggests that democratic decentralisation has become increasingly important for the purposes of democratisation.<sup>442</sup> He ventures further to refer to democratic decentralisation as being synonymous with the notion of democratic local governance.<sup>443</sup> It is submitted that popular participation and accountability in local governance will cause better responsiveness to citizens' needs, which in turn will cause effective service delivery.<sup>444</sup> Therefore, while local government accountability reflects elements of public

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<sup>434</sup> Chapter 4.

<sup>435</sup> See para 2.2.2 in Chapter 2.

<sup>436</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 4.

<sup>437</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 4.

<sup>438</sup> Du Plessis and Alberts 2014 *SAPR/PL*.

<sup>439</sup> Romzek "Accountable Public Service" 310.

<sup>440</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 5. Also see para 2.2.2(b) in Chapter 2.

<sup>441</sup> Chirwa and Nijzink *Accountable Government in Africa* 5.

<sup>442</sup> Blair 2000 *World Development* 21.

<sup>443</sup> Blair 2000 *World Development* 21.

<sup>444</sup> Blair 2000 *World Development* 21.

accountability and democratic accountability, like accountability in democratic governance systems,<sup>445</sup> it differs from local government accountability based on the supplementary element of decentralisation accountability. It follows that decentralisation accountability in the context of local government becomes important to understand how municipalities interphase and account to other spheres in terms of decentralised responsibilities.

Despite the fact that local government accountability functions in the same governance or institutional framework as that described for public accountability, it interacts with a different set of actors. The actors in this context include other spheres of government, such as the provincial and national governments, as there is an overlap of powers and functions between the various spheres of government.<sup>446</sup> Carlisle and Gruby argue that polycentric governance systems improve accountability due to the practical impossibility of "capturing" multiple centres of government as against "capturing" a single centre of government.<sup>447</sup> Local government accountability interphasing further expands on the accountability outcomes that polycentric governance provides. Local government accountability causes municipalities to account internally, failure to perform responsibilities causes intergovernmental (reactionary) accountability (polycentric governance), and in the absence of intergovernmental accountability local government accountability causes remedial intervention by the electorate (the delegator of public power) to ensure answerability. Strong internal accountability prevents accountability burdens (pressure) on the electorate. It is suggested that the "basic prerogatives of governance" more often facilitate accountability where actors do not exercise overreaching powers of governance.<sup>448</sup> It follows that local government accountability therefore not only extends accountability in terms of intra and intergovernmental interphasing, but includes direct external interphasing with the electorate.

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<sup>445</sup> See para 2.4 in Chapter 2.

<sup>446</sup> See para 1.2 in Chapter 1.

<sup>447</sup> Carlisle and Gruby 2017 *Policy Studies Journal* 14.

<sup>448</sup> Carlisle and Gruby 2017 *Policy Studies Journal* 14.



As local government structures interphase with multiple actors on these different levels of governance, the local decision-making structure of municipalities is configured in multi-layered centres of power and accountability. Although designed from a LEG perspective, the Nel and Du Plessis Model for Local Government Action serves as an example of a multi-layered institution of power and accountability.<sup>449</sup> It deals with three governance dimensions in local government institutions, namely being governed (where the institution accounts to provincial and national government); governing (thus governing others – the citizenry) and governing itself (governing internally).<sup>450</sup>

Although Nel and Du Plessis developed this model in the context of LEG, the same dimensions can arguably be used as a basis for developing a model that explains the application of public accountability in the local government context of South Africa. The rationale for applying the same dimensions in terms of local accountability is that the accountability outcomes, as discussed earlier,<sup>451</sup> fit the multi-layered centres of power in a municipality. The diverse types of accountabilities<sup>452</sup> are arranged in the dimensions to meet the democratic governance outcomes and the local accountability outcomes as schematically illustrated. The local government accountability model provides a practical illustration of how accountability interphases with the different dimensions. The figure below depicts the local government accountability model proposed in this study.

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<sup>449</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-3.

<sup>450</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-3.

<sup>451</sup> See para 2.5 in Chapter 2.

<sup>452</sup> See para 2.2 in Chapter 2.

**Figure 1** Local government accountability model



It is suggested that every dimension of accountability as depicted by Figure 1 above comprises of different types of accountability<sup>453</sup> and that the dimensional approach to accountability can be used to establish which types of accountability exist in every dimension to meet the democratic governance outcomes.<sup>454</sup> The local government accountability model uses the three dimensions (the being governed dimension, where the institution accounts to provincial and national government; the governing others dimension, where the institution governs the citizenry; and the governing itself dimensions, where the institution governs itself internally)<sup>455</sup> as selected from the Nel and Du Plessis Model for Local Government Action to capture the three dimensions of local government accountability. It follows that the theory and literature on accountability as discussed in this chapter<sup>456</sup> will directly inform the different types of accountability applicable in the different dimensions of the local government accountability model. Based on the three dimensions of accountability, namely intergovernmental accountability, intra-

<sup>453</sup> See para 2.2.2 in Chapter 2.

<sup>454</sup> See para 2.2.2 in Chapter 2.

<sup>455</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-3.

<sup>456</sup> Chapter 2.

governmental accountability and accountability towards the electorate, the accountability dimensions can be used to understand the parameters of local government accountability.

#### *2.5.4 The parameters of local government accountability*

The accountability associated with local government is not one-dimensional and is not unlimited in its application. The different types of accountability are limited in observance of the three dimensions of being governed (intergovernmental accountability), governing (being accountable to local electorates), and governing (intra-municipal accountability). Consequently, it is contended that being part of a semi-unitary state with three spheres of government and operating in a constitutional democracy which exhibits some of the traits of federal government, local government in South Africa needs to observe certain limitations in terms of the multi-level or multi-layered approach to government.<sup>457</sup> Hereto, accountability is configured in a semi-federal government system where the Constitution divides authority and duties among the three spheres of government as well as among the three branches – the legislature, the executive and the judiciary.<sup>458</sup>

Correspondingly, accountability in a multi-level local government setting will be reflective of the same multi-dimensional phases.<sup>459</sup> Local government accountability will include public accountability traits which consist of bureaucratic accountability, legal accountability, professional accountability and political accountability. With reference to democratic governance, the multi-dimensional approach of local government will include democratic accountability (inclusive of social accountability) and moral accountability, anticipating the probable democratic governance framework.<sup>460</sup> Lastly, in alignment of the decentralised nature of the multiphase democratic governance system in South Africa, local government accountability includes an adapted type of accountability called decentralised accountability. This type of accountability acknowledges the importance of

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<sup>457</sup> See para 2.5.3 in Chapter 2.

<sup>458</sup> The detailed setting of co-operative governance and its relatedness to accountability will, however, be further unpacked in Chapter 3 and Chapter 4 below.

<sup>459</sup> See para 2.5 in Chapter 2.

<sup>460</sup> See para 2.2.2(d) in Chapter 2.

decentralisation in modern democratic governance. Decentralised accountability allows for adequate inter-phasing between the different spheres of government and provides for the balancing thereof in the context of the three spheres of government. It is therefore contended that decentralised accountability as applied in the semi-federal state of South Africa, read together with the actors, powers and accountability framework of Agrawal and Ribot,<sup>461</sup> allows for the adoption of a multi-sphere accountability framework to conceptualise the extent of local government accountability. In addition to the accountability dimensions, accountability extends into practical mechanisms and structures of accountability.<sup>462</sup> The multidimensional contexts of local government accountability are illustrated in Figure 2.

**Figure 2** Local Government Accountability.



The types of accountability configured in the three dimensions of local government, namely intergovernmental accountability, intra-governmental accountability and

<sup>461</sup> Agrawal and Ribot 1999 *J Dev Arr* 473.

<sup>462</sup> See para 4.2 in Chapter 4.

accountability to the electorate (as per the proposed local government accountability model) will now be considered.

### *2.5.5 Intergovernmental accountability*

The first proposed dimension of local government accountability is to be found in the context of the "governed - being ruled".<sup>463</sup> In South Africa's semi-federal system of government, local government accounts to both the national and the provincial spheres in terms of the original duties assigned to other spheres of government.<sup>464</sup> Based on its limited accountability to the national and provincial spheres of government, specific types of accountability will inform the accountability relationship between local government and the other spheres. These are legal accountability<sup>465</sup> and decentralised accountability (which consists of devolution accountability and deconcentrated accountability). Legal accountability from a "governed"<sup>466</sup> perspective in relation to local government accountability derives from the legal relationship between central government and local government, where central government includes both the national and the provincial spheres of government and regulates the conduct of local government.<sup>467</sup> Local government will therefore account to national and provincial structures in terms of the performance of specific duties such as pollution control management, cleansing services, noise pollution management, licensing services and housing. It follows that local government must comply with legislation as configured by central government in local government's discretionary space. Examples of this include municipalities accounting for their use of their equitable share funding, the Municipal Infrastructure Grant Funding, or seed funding received in terms of the *Division of Revenue Act*<sup>468</sup> for expenditure and the safeguarding of funding received from National Treasury. The primary source of local government's accountability to the national and provincial regulatory ambit is the

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<sup>463</sup> See para 2.5.3 in Chapter 2.

<sup>464</sup> See para 2.5.7 in Chapter 2.

<sup>465</sup> See para 2.4.2 in Chapter 2.

<sup>466</sup> See para 2.5.3 in Chapter 2.

<sup>467</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-3.

<sup>468</sup> *Division of Revenue Act* 9 of 2021 (hereafter DORA).

Constitution.<sup>469</sup> The more federal actors in multi-level governance relationships are emancipated from their principles, the more accountability dilemmas will be resolved,<sup>470</sup> and better accountability is obtained in the horizontal dimension thereof. Beyond the legal accountability which characterises the horizontal "being ruled"<sup>471</sup> relationship, another valuable link to accountability, as already mentioned, is decentralized accountability.

The emphasis on decentralisation as a way of helping to secure the accountability of local government is critical. It relates to the link between accountability and good local governance.<sup>472</sup> Additional benefits stemming from the decentralisation of powers to local government are better accountability, more stable governance and greater efficiency.<sup>473</sup> It is suggested that decentralisation is widespread in both developing and developed countries, and that the motivation for decentralisation is the desire for responsiveness and accountability.<sup>474</sup> It is suggested that when properly placed in the said discretionary space, accountability can be measured based on the decentralised powers provided to the local actors.<sup>475</sup> In this context, accountability facilitates responsibility and necessitates answerability to the delegator of the said powers and functions. Thus, the actors in the intergovernmental dimension will account to the original actors or delegators thereof. Rubin confirms that in the said dimension, central government identifies the decentralised objective whereby the specific criteria attached thereto would define the success or failure thereof.<sup>476</sup> From a practical perspective the said decentralised actor would become answerable thereto and, on a failure to achieve the objective the punitive measures would become enforceable and the delinquent actor would consequently face the necessary sanctions. Rubin describes the said transfer of authority as more reflective of managerial decentralisation than related to federalism.<sup>477</sup> Blair warns against the incomplete transfer

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<sup>469</sup> See para 1.2 in Chapter 1.

<sup>470</sup> Papadopoulos "Accountability and Multi-Level Governance" 281.

<sup>471</sup> See para 2.5.3 in Chapter 2.

<sup>472</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* vii.

<sup>473</sup> Isufaj 2014 *Procedia* 460.

<sup>474</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 1

<sup>475</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 8.

<sup>476</sup> Ruben "Myth of Non-Bureaucratic Accountability" 55.

<sup>477</sup> Ruben "Myth of Non-Bureaucratic Accountability" 55.

of authority, however, which relates to inadequate accountability.<sup>478</sup> A scenario from Bolivia is described, where the authority was devolved on the local authority but the central government continued to determine salaries, postings and tenures.<sup>479</sup> The mayor could therefore regulate the duties of the municipal staff but could not discipline them in the event of non-compliance. It follows that authority is necessary if local accountability is to be formally pursued, and it needs to be established if the authority to pursue accountability exists in the system of South African local government.

To actively pursue accountability in the context of intergovernmental relations (hereafter IGR), the World Bank recommends that a suite of laws be developed to define the discretionary space to maintain intergovernmental relationships.<sup>480</sup> The "governed - being ruled" dimension<sup>481</sup> is well founded in local government financial administration in South Africa, where there are multiple statutes regulating the financial processes, financial conduct and financial decisions in the local government domain.<sup>482</sup> Based on the concept of subsidiarity, accountability is also improved where power is exercised by the structure or governmental institution closest or best positioned to facilitate the function. Decentralisation can similarly compromise accountability if not properly exercised between intergovernmental actors. If the responsibility and the necessary powers thereto are not properly devolved from central government, this could result in there being multiple centres for one functional area of responsibility, for example. This could make local government accountability futile.<sup>483</sup>

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<sup>478</sup> Blair 2000 *World Development* 27.

<sup>479</sup> Blair 2000 *World Development* 27.

<sup>480</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 8.

<sup>481</sup> See para 2.5.3 in Chapter 2.

<sup>482</sup> See para 4.4.3 in Chapter 4 with reference to the National Treasury as intergovernmental accountability structures for a detailed discussion of the "being ruled" dimension, with specific reference to regulatory financial processes.

<sup>483</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 20.

### 2.5.6 Being accountable to local electorates

The second dimension of "governing - ruling others"<sup>484</sup> is reflective of the democratic relationship between elected or executive actors and the citizenry in the local government dimension. Various types of accountabilities are related to this.<sup>485</sup> These include political accountability, democratic accountability, social accountability, moral accountability, legal accountability and the associated subsidiarity accountability.<sup>486</sup>

#### 2.5.6.1 Political accountability

In democratic systems, municipalities are accountable to local communities or the people that they govern. This is true for a municipality in its totality and for the local council comprising of elected politicians.<sup>487</sup> Opposition parties are often catalysts to enforce accountability, but on the other hand the majority party may have "strong incentives to evade accountability".<sup>488</sup> It follows that accountability in the political arena cannot solely be dependent on opposition politics to demand adequate responsibility from the governing executives. Yilmaz, Beris and Serrano-Berthet say that it is important for political actors to properly understand the factors related to accountability.<sup>489</sup> Enhanced political accountability requires elected representatives to provide oversight of the executive officials, thus emphasising the implementation of policy and directives.<sup>490</sup> For example, local councils should be held to account for the implementation of local laws and policies, but the actual measurement of political accountability is adapted to include reference to a "supply side" and a "demand side".<sup>491</sup> Yilmaz, Beris and Serrano-Berthet refer to demand side political accountability mechanisms as including petitions, referendums and the

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<sup>484</sup> See para 2.5.3 in Chapter 2.

<sup>485</sup> See para 2.2.2 in Chapter 2.

<sup>486</sup> See para 2.2 in Chapter 2 for a discussion of the different types of accountability and the characteristics thereof and the fit thereof in the being accountable to the electorate dimension.

<sup>487</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11.

<sup>488</sup> Blair 2000 *World Development* 28.

<sup>489</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 6.

<sup>490</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11. Also see Posner and Shanahan "Audit Institutions" 499, where political accountability is described as bureaucrats being expected to be responsive to policies and programme goals as determined by political representatives.

<sup>491</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11.



recalling of elected political officials.<sup>492</sup> They believe that all citizens should partake in public hearings on policy issues and not involve themselves only during periodic elections.<sup>493</sup> On the supply side of political accountability, it is important to note that elections are more often considered to be the primary mechanism of democratic accountability; but other approaches could involve the provision of representation for marginalised groups, improving the electoral system and the related conduct, and insisting on transparent election procedures.<sup>494</sup>

Notwithstanding the sanction of the removal of elected officials by means of recalling them to achieve political accountability in local institutions, caution is needed, as the said accountability mechanism could be exploited to gain political advantage through the recalling of senior elected representatives.<sup>495</sup> Other accountability mechanisms include service delivery and budget performance indicators, which can be used as dual accountability mechanisms which supply political accountability in monitoring the performance of political functionaries in the first dimension, and assist the executive to observe bureaucratic accountability in relation to the performance of the administration in the "governance-ruling internally" dimension.<sup>496</sup>

#### 2.5.6.2 Social accountability

Notwithstanding the political accountability context of the second dimension ("governance - ruling others"),<sup>497</sup> additional forms of accountability are also associated with the same dimension. One of these types of accountability is "social accountability". Malena, Forster and Singh define social accountability as "building accountability that relies on civic

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<sup>492</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11.

<sup>493</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11. See para 2.2.2(d) in Chapter 2 for a detailed discussion of public participatory measures.

<sup>494</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11.

<sup>495</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11.

<sup>496</sup> See para 2.2.2 in Chapter 2 for a reference to accountability in the public sector, and para 4.2.4 in Chapter 4 in terms of performance management as an internal mechanism for accountability.

<sup>497</sup> See para 2.5.3 in Chapter 2.

engagement, i.e., in which it is ordinary citizens and/or civil society organisations who participate directly or indirectly in exacting accountability".<sup>498</sup>

Social accountability is associated with providing a voice to the poor and the marginalised through their participation in the form of different social forums, social groups, community groups and NGOs.<sup>499</sup> As defined under public accountability, it is evident that social accountability relates to societal action or the pursuance of a specific mandate. Civil society could also be classified as being a watchdog over the state.<sup>500</sup> Oversight mechanisms hereof include "legislation empowering citizenry; demanding accountability", "specific bodies and processes for citizen oversight" and "citizen oversight through community operations".<sup>501</sup>

Illustrations of legislation to empower the citizenry would include legal mechanisms which are used to ask for explanations and justifications from local government or to further achieve responsive outcomes, for example public hearings and public petitions.<sup>502</sup> In South Africa, the mechanisms to provide social accountability include local petition committees and various statutory oversight committees enquiring about an array of different issues, including finances, and having oversight over public accounts.<sup>503</sup> In the example of Bolivia, the processes of civil redress for the citizenry allow for specific grievance processes against elected officials, which involve the use of "vigilance committees" as accountability mechanisms.<sup>504</sup> If convinced that a council has erred, they can enforce action.<sup>505</sup>

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<sup>498</sup> Malena, Forster and Singh *Social Accountability* 3.

<sup>499</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 11.

<sup>500</sup> Blair 2000 *World Development* 28.

<sup>501</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 14. See para 4.3 in Chapter 4 for a detailed discussion of accountability towards the local electorate.

<sup>502</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 14.

<sup>503</sup> See para 4.3 in Chapter 4 for a detailed discussion of oversight committees and the related committees in relation to internal mandatory structures and mechanisms for accountability in municipalities.

<sup>504</sup> Blair 2000 *World Development* 30.

<sup>505</sup> Blair 2000 *World Development* 30.

Another aspect of social accountability is citizenry oversight, which functions similar to citizen engagement in the governance environment.<sup>506</sup> Participatory processes allowing for the participation of the citizenry are important accountability mechanisms which are more often mandated by statutory instruments. Similar social accountability instruments that ensure participation in statutory processes range from budgetary processes to spatial planning and integrated development planning.<sup>507</sup> Blair confirms that several countries rely on public meetings to supplement the civic or participatory process in local government.<sup>508</sup>

Yilmaz, Beris and Serrano-Berthet indicate that the participation of the electorate in budgetary processes also allows citizen oversight thereof.<sup>509</sup> Part of social accountability includes ethical/moral accountability and is critical for external actors. This implies the existence of a moral or ethical responsibility on the actors to facilitate their duties as public representatives in an accountable manner.<sup>510</sup> Local elected actors are held responsible based on their acceptance of a code of conduct that regulates ethical behaviour in the execution of their duties. Failure to comply allows the enforcement of sanctions commensurate with the seriousness of the transgression.<sup>511</sup>

### 2.5.6.3 Legal accountability

Legal accountability provides for the observance of the principle of the rule of law, where actors in the local government setting comply with their regulatory obligations.<sup>512</sup> The actors stand accountable in terms of legally established laws, statutes and rules.<sup>513</sup> Such

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<sup>506</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 14.

<sup>507</sup> See para 2.2.2 (d) in Chapter 2.

<sup>508</sup> Blair 2000 *World Development* 30.

<sup>509</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 14.

<sup>510</sup> Christie 2018 *Public Integrity* 82.

<sup>511</sup> Christie 2018 *Public Integrity* 82.

<sup>512</sup> Christie 2018 *Public Integrity* 82.

<sup>513</sup> Actors include the Executive Mayor (executive powers of municipalities), Council (legislative powers of Council), its committees, the accounting officer, officials who exercise responsibility externally (administrative powers of municipalities) and municipal courts (judicial powers of municipalities).

accountability is adjudicated by courts and quasi-judicial forums.<sup>514</sup> Local government has a suite of powers, as prescribed in statutes and regulations, to "rule others".<sup>515</sup>

Statutes and regulations create specific jurisdiction and the ambit of jurisdiction in the local government domain.<sup>516</sup> This includes the authority to promulgate legislation in the form of by-laws and to enforce these.<sup>517</sup> Councils approve penalties implemented by municipal courts in the jurisdiction of the local authority, for example.<sup>518</sup>

Municipal courts in South Africa are created by statute and subsequent Council resolution to specialise in local law enforcement.<sup>519</sup> Thus, they specialise in local governance fields of expertise, including land use, building control, health violations, public safety, economic development and the regulation of outdoor advertising in a specific jurisdiction. This mechanism allows for the cost-effective and proficient prosecution of local governance matters.<sup>520</sup> Molaiwa confirms the extended potential of this mechanism to make environmental justice more accessible to the electorate.<sup>521</sup> Municipal courts are not equally accessible to all communities; however, the mechanism has potential to extensively enhance accountability.

Administrative institutional actors that account to the citizenry for decisions taken are responsible in terms of legal accountability.<sup>522</sup> It does so in terms of statute that allows for administrative justice and purported remedies which envisage external court processes to allow for the review of administrative decisions.<sup>523</sup> It needs to be mentioned that the related internal processes of review need to be exhausted prior to approaching external

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<sup>514</sup> Christie 2018 *Public Integrity* 82.

<sup>515</sup> See para 2.5.3 in Chapter 2.

<sup>516</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 16.

<sup>517</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 16.

<sup>518</sup> See para 4.3 in Chapter 4.

<sup>519</sup> See para 4.3 in Chapter 4.

<sup>520</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 16. Also see Molaiwa 2021 *PER / PELJ* 27.

<sup>521</sup> See Molaiwa 2021 *PER / PELJ* 27.

<sup>522</sup> See para 4.3 in Chapter 4 for a detailed discussion of the administrative and legal mechanisms in relation to accountability/enforceability measures and mechanisms at the disposal of local communities.

<sup>523</sup> See para 4.3 in Chapter 4 for a detailed discussion of the administrative and legal mechanisms in relation to accountability/enforceability measures and mechanisms at the disposal of local communities.

mechanisms to enforce the administrative rights in question.<sup>524</sup> The multiple personality nature of local government (as advanced by Du Plessis) also manifests with council as the custodian of local accountability through its statutory powers and functions, to rule others and delegate specific functions to other administrative and executive actors to ensure proper accountability.<sup>525</sup> Thus, council is not only positioned as a legislative body but also performs functions associated with its legal, administrative and governance role.

The exercise of these many powers by municipalities can yet give rise to shortcomings in terms of legal accountability, with the centre of power being the council. Based on the extent of the responsibilities to be exercised by the council, it is administratively and logistically impossible to discharge these responsibilities exclusively. This difficulty is mitigated by the provision making it possible for councils to delegate their powers.<sup>526</sup> Consequently, Council extends responsibility to both the political and the administrative officials it appoints in terms of the power to delegate. Peters, however, observing the increasing number of administrative rulings issued and decisions taken under the auspices of delegated powers, warns against the overuse of the practice.<sup>527</sup> The risk is mitigated, however, in that the delegates, whether political or administrative officials, are obliged to report back on their exercise of the delegated powers.<sup>528</sup> Decisions taken by delegates in terms of the powers delegated to them can also be appealed in terms of the accountability mechanisms provided to the community in the electoral dimension.<sup>529</sup>

### *2.5.7 Intra-municipal accountability*

The third dimension of accountability to be discussed is the "governance - ruling internally" dimension.<sup>530</sup> Yilmaz, Beris and Serrano-Berthet describe the basic understanding of "governance - ruling internally", which focusses on the dimension of

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<sup>524</sup> See para 4 in Chapter 4.

<sup>525</sup> See para 2.5 in Chapter 2.

<sup>526</sup> See para 4.2.1 in Chapter 4.

<sup>527</sup> Peters *Politics of Bureaucracy* 315.

<sup>528</sup> See para 4.2.1 in Chapter 4.

<sup>529</sup> See para 4.3.6 in Chapter 4.

<sup>530</sup> See para 2.5.3 in Chapter 2.

actors functioning internally, and therefore accounting to themselves. The World Bank recognises important mechanisms to achieve accountability, which extend to bureaucratic hierarchies, independent bodies and administrative forums.<sup>531</sup> The "ruling internally" dimension<sup>532</sup> of local government accountability coincides with the framework of public accountability based on the same actors functioning in the broader context. Reflective of the broader bureaucracy, the "ruling internally" dimension<sup>533</sup> refers predominantly to local civil servants responding to or being accountable to senior administrative officers.<sup>534</sup> Actors<sup>535</sup> in the aforesaid dimension include administrative personnel, senior management, professional actors including accountants and legal practitioners, audit officers, budget officers, supervisors and members of legislatures bodies.<sup>536</sup> Officials therefore adhere to the responsibilities assigned to them and account to others administratively, as prescribed by statute and council.<sup>537</sup>

Accountability in the South African intra-governmental dimension follows hierarchal, regulatory, delegatory and professional compliance structural designs. Examples of intra-municipal actors functioning internally include senior officials such as the municipal manager and section 56 managers, departmental managers and related officials such as chief executive officers, chief audit executives and internal audit officials.<sup>538</sup> Typical mechanisms to advance accountability among senior and other officials are hierarchal relationships whereby the accounting officer or senior management exercise managerial control over those officials subordinate to them.<sup>539</sup> Senior officials are also regulated with

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<sup>531</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18.

<sup>532</sup> See para 2.5.3 in Chapter 2.

<sup>533</sup> See para 2.5.3 in Chapter 2.

<sup>534</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18.

<sup>535</sup> The types of accountability associated with internal actors in the "ruling internally" dimension are *inter alia* bureaucratic accountability, administrative accountability, professional accountability, ethical accountability and delegation accountability.

<sup>536</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18.

<sup>537</sup> See para 4.2 in Chapter 4 for a detailed discussion of internal municipal structures and mechanisms for accountability.

<sup>538</sup> See para 4.2 in Chapter 4 for a detailed discussion of internal municipal structures and mechanisms for accountability.

<sup>539</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18. Also see para 4.2 below for a detailed discussion of internal mandatory structures and mechanisms for accountability.

reference to statutory obligations and also stand under council's delegation in the performance of certain responsibilities.

Moreover to the delegations mentioned under accountability towards the electorates, delegations in local government also make provision for actors to function as delegators and delegates in the intra-governmental dimension.<sup>540</sup> In terms of intra-governmental accountability, delegations play an important role in the administrative performance of a municipality and responsibilities can be sub-delegated from the main delegates (senior managers), and the sub-delegates (departmental managers) have the responsibility to report back to the delegator on the performance of the work assigned to them. In this context, main delegates include the accounting officer and the members of the executive management committee, whereas sub-delegates include officials under the supervision of a main delegate, to whom specific powers are delegated under the original delegation thereof.<sup>541</sup> For example, the accounting officer or the chief financial officer can be assigned a responsibility, which responsibility can then be sub-delegated to a departmental manager for execution. The elements of accountability, answerability in observance of the delegated responsibility, and enforcement in the absence of positive answerability emphasise the importance of delegations in intra-governmental accountability.

It follows that those responsibilities delegated by council are features of delegation accountability and devolution accountability in the context of the intra-governmental dimension. It is therefore contended that devolution and delegation also form part of ruling internally.<sup>542</sup>

The internal assessment of administrative decisions also forms part of the intra-governmental accountability dimension, whereby decisions of an administrative nature are adjudicated on the basis of the decision's constituting an administrative act. Section

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<sup>540</sup> See para 2.5.6 in Chapter 2.

<sup>541</sup> See para 4.2.1 in Chapter 4.

<sup>542</sup> See para 2.4. in Chapter 2.

62 appeals relate to the internal remedies available consequent to an administrative decision, whereas the judicial review of an administrative decision can be taken only once the necessary internal remedies have been exhausted that relate to the electoral dimension of local government accountability, in observance of legal accountability.<sup>543</sup> Administrative accountability dictates that there should be administrative courts and forums to address citizens' issues with decision-making by local government.<sup>544</sup>

Internal audits in South African municipalities are often associated with legal and professional accountability in the intra-governmental dimension,<sup>545</sup> whereas external audits facilitated by the AG for the purposes of regulatory audited financial conduct could be clustered under the intergovernmental dimension<sup>546</sup> in observance of legal accountability and political accountability. The said accountability audits are deemed important since they serve as an early detection system in preventing maladministration in an institutional environment.<sup>547</sup>

Similarly, Yilmaz, Beris and Serrano-Berthet describe independent bodies conducting administrative audits on local government structures in response to the growth of increased complexities in local government bureaucracies and the progressive challenges arising in the local government sector, for example.<sup>548</sup> It follows that the engagement of independent agencies to investigate accountability in the intra-governmental dimension is increasing due to the growing awareness of the need for strengthened accountability. The professional skills of central government agencies, regulatory entities and ombudsmen are available from such agencies.<sup>549</sup> Examples of the aforesaid in municipalities include external auditors who focus on the misuse of public funds, ombudsmen to conduct citizens' investigations into institutional actions and decisions,

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<sup>543</sup> See para 4.3 in Chapter 4.

<sup>544</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18.

<sup>545</sup> See para 4.2 in Chapter 4.

<sup>546</sup> See para 4.4 in Chapter 4.

<sup>547</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18.

<sup>548</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18. Also see para 4.2 in Chapter 4 for a detailed discussion in relation to the extensive intra-governmental mechanisms.

<sup>549</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18.



theme-specific agencies including anti-corruption commissions, and review boards facilitating inspections.<sup>550</sup>

Pursuant to the increasing regulatory agenda in local government, local government institutions are assisted by professional experts to ensure good governance and transparency.<sup>551</sup> Examples include auditors, engineers, technicians and lawyers.<sup>552</sup> As previously explained under the discussion of professional accountability,<sup>553</sup> this type of accountability is additionally regulated by professional rules and practices.<sup>554</sup>

### *2.5.8 What does accountable local government look like and how does it perform?*

The review of the literature suggests that there are a number of identifiable characteristics of an accountable municipality, namely:

- It replicates the traits of public accountability, namely bureaucratic accountability, legal accountability, professional accountability and political accountability.
- It observes "democratic accountability" as observed in an autonomous sphere of government that comprises "social accountability" in the form of civic participation in governance and "moral accountability" as an ethical local government structure.<sup>555</sup>
- It is responsive in terms of its obligations and *inter alia* accounts for the discharge of its duties to its civic accountability forums.<sup>556</sup>
- It is transparent in terms of achievements and failures, and acts with honesty and integrity as part of its moral responsibility towards its constituents.

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<sup>550</sup> Yilmaz, Beris and Serrano-Berthet *Local Government Discretion* 18.

<sup>551</sup> Christie 2018 *Public Integrity* 81.

<sup>552</sup> See Chapter 2 for a detailed discussion of professional accountability in the context of local government.

<sup>553</sup> See para 2.2.2 in Chapter 2.

<sup>554</sup> Christie 2018 *Public Integrity* 81.

<sup>555</sup> Cendón "Accountability and Public Administration" 42.

<sup>556</sup> See para 2.2.2(d) in Chapter 2 for a discussion of the duties towards civic accountability forums.

- It embraces decentralised accountability.
- It performs in accordance with the proposed local government accountability model with its three dimensions.
- It has the necessary structures and mechanisms to ensure accountability on a continuous basis.

### *2.5.9 Features of an unaccountable local authority*

Ribot reflects on what (local) government looks like when considered not accountable, and summarises it as follows:

- There is a lack of legal accountability and recourse.<sup>557</sup>
- There is a lack of the proper separation of the powers of the judicial, executive and legislative branches of government.
- There is a lack of proper decentralised systems and structures of governance.
- There is a lack of a proper balance of powers between the executive, the legislature and the administration.
- There is a lack of ability to engage in social accountability practices to account for proper horizontal accountability.
- Transparency is absent.
- There are little or no public reporting, public discussion and civic participatory processes.<sup>558</sup>

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<sup>557</sup> See para 2.5.6.3 in Chapter 2.

<sup>558</sup> Ribot *African Decentralization* 72.

## **2.6 Concluding remarks**

Local government in South Africa has in recent times transformed into an increasingly technical and highly regulated environment, which has inadvertently given rise to the overstating of concepts like "accountability" without giving it concrete meaning. Currently the notion of local government accountability is used broadly to describe local governance delinquency and often does not relate to the actual types of accountability prevalent in the local government domain. It is suggested that in the absence of a clear meaning of local government accountability, good governance and transparency cannot be achieved.

An exploration of the notion of local government accountability seeks to address the interpretational vacuum. Critical consideration of the meaning of accountability in the local government domain suggests an extended accountability of local government in the three-sphere government system. Such accountability demands responsiveness or responsibility in context because of the specific relational obligations associated therewith.<sup>559</sup>

Public accountability is not identical to local government accountability. Based on the information captured in this chapter, different types of accountability have found their way into the local government domain, but they need to be adapted to fit into the centres of power and the governance dimensions of municipalities. For this reason, a local government accountability model is proposed that addresses the multi-dimensional nature of local government. Local government accountability as per this model includes intergovernmental accountability, intra-governmental accountability and being accountable to local electorates. Apart from the commonly perceived perception of local government, which is that it is primarily service delivery orientated, the local government accountability model dissects the institutional ambit of local government institutions to determine the precise obligations associated with the different actors in local government. The model also provides the basis for further exploring and understanding the theoretical

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<sup>559</sup> See para 2.2 in Chapter 2.

perspectives of the role of local government accountability in environmental governance in South Africa, which receives attention in the chapters to follow.

## CHAPTER 3

### LOCAL GOVERNMENT IN ENVIRONMENTAL GOVERNANCE IN SOUTH AFRICA

#### *3.1 Introduction*

For more than a decade already there has been an international call for local governments to take up a role as actors in environmental governance.<sup>560</sup> It is for example held in SDG 11 of the UN that cities must become more safe, resilient and sustainable as part of the universal pursuit for sustainable development.<sup>561</sup> The New Urban Agenda of the UN further claims that city governments are important actors in the pursuit of sustainability. Despite the well-known challenges faced by municipalities,<sup>562</sup> local government in South Africa is well positioned to contribute to environmental governance in the domestic context.<sup>563</sup>

The main objective of this chapter is to explore the role of local government in environmental governance in South Africa in relation to the roles played by others. The chapter is structured as follows.

First, environmental governance is described. More often the term is used decorously to pronounce on the competent standard required for good environmental governance, but a deeper understanding is required of the dimensions of environmental governance in terms of South African law and policy. The chapter builds on how South African scholars see environmental governance and its actors.

Second, the chapter considers primary legal and academic resources that feed into the understanding of LEG. It asks what LEG looks like, what it includes and what it excludes.

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<sup>560</sup> Otto-Zimmermann 2011 [http://www.bu.edu/pardee/files/2011/04/07-SDI.pdf?PDF=sdi-007-government 3](http://www.bu.edu/pardee/files/2011/04/07-SDI.pdf?PDF=sdi-007-government%203).

<sup>561</sup> See para 1.1 in Chapter 1.

<sup>562</sup> CoGTA *Local Government Turnaround Strategy* 18-19.

<sup>563</sup> See para 3.4 in Chapter 3.

The analysis focusses on the relevant local governance actors and typical governance instruments (legal compliance registers, materiality frameworks and permits).

Third, the chapter establishes what is expected from local government in relation to its constitutional and statutory environmental mandate and duties.

Finally, the chapter ventures into conceptualising where local government accountability comes into play. In other words, considering the definition of LEG read with the constitutional and statutory environmental duties of local government in South Africa, what does "accountability" as defined in Chapter 2 of this study add, and to what extent is it needed.

The research in the chapter was conducted by means of a literature review, comprising scholarship from South Africa and abroad. The sources analysed include the Constitution, legislation, case law, legal journals and scholarly books.

### ***3.2 Environmental governance defined***

Environmental governance has progressively become an important theme in public law. Kotzé describes the term as initially being loosely used and as representative of different things.<sup>564</sup> Godden and Peel, for example, believe "environmental governance" to be a self-contained discipline specifically focussed on the application of legal remedies to environmental problems.<sup>565</sup> They go further to define the concept as referring to a medley of legislation, legal rules and principles derived from statute and case law in a framework of policy, institutional and social structures.<sup>566</sup> Bell, McGillivray and Pedersen describe "environmental governance" as a term used to distinguish between decision-making forms such as top-down traditional approaches and more inclusive approaches to decision-making.<sup>567</sup>

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<sup>564</sup> Kotzé "Environmental Governance" 103.

<sup>565</sup> Godden and Peel *Environmental Law* 61.

<sup>566</sup> Godden and Peel *Environmental Law* 61.

<sup>567</sup> Bell, McGillivray and Pedersen *Environmental Law* 34.

Du Plessis interprets environmental governance to be inclusive of the following: the collection of legislative, executive and administrative functions, processes and instruments used by government to ensure sustainable behaviour by all as far as the governance of environmental activities, products, services, processes and tools is concerned.<sup>568</sup> In a further proliferation of definitions, Kotzé suggests that environmental governance reflects the following: a management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and the effects of human activities on the total environment (including all environmental media, and biological, chemical, aesthetic and socio-economic processes and conditions) at international, regional, national and local levels.<sup>569</sup> Bennett and Satterfield describe the elements of governance as including institutional, structural and procedural elements with their associated outcomes to produce effective, equitable, responsive and robust environmental governance.<sup>570</sup> Environmental governance further includes political processes, legal and management processes.<sup>571</sup> These descriptions in combination suggest that those responsible for environmental governance must also be held accountable.

The definitions above suggest that environmental governance *inter alia* comprises of primary features, namely blends of legal sources (laws, policies, rules and norms) that guide conduct, and governance processes (direction, co-ordination, capacity, accountability and efficiency).<sup>572</sup> These governance processes would typically influence environmental governance and especially the legislation created by parliament or the legislative authority involved.<sup>573</sup> The extent of an institution's accountability in terms of environmental governance is determined by its legislative responsibilities and obligations.

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<sup>568</sup> Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 155. Also see Kotzé "Environmental Governance" 108.

<sup>569</sup> Kotzé "Environmental Governance" 108.

<sup>570</sup> Bennett and Satterfield 2018 *Wiley Conservation Letters* 8.

<sup>571</sup> Feris 2010 *PER / PELJ* 75. Also see para 2.5.5.1 above - *Political accountability*.

<sup>572</sup> Bennett and Satterfield 2018 *Wiley Conservation Letters* 7.

<sup>573</sup> Feris 2010 *PER / PELJ* 75.

Although scholars continue to develop the concept of environmental governance, research is not (yet) as extensive on the responsibilities and accountability attached thereto.<sup>574</sup> Pellizzoni states, however, that the mere acknowledgement of the importance of governance has been overtaken by a growing interest in accountability and liability.<sup>575</sup> For the purposes of this study, it is therefore important to briefly look at three approaches to environmental governance and how they intersect with accountability.

Administrative rationalism as the first approach to environmental governance is based on the principle that environmental problems are better resolved with the insight of experts rather than citizens' or consumers' understandings. In terms of the definition, the resolution of environmental issues therefore necessitates the contribution of relevant expertise and resources, rather than citizens' action to administer environmental governance.<sup>576</sup> It is evident to administrative rationalism that the related governance approach is hierarchal in nature, rather than socially orientated.<sup>577</sup> Examples include the use of professionals in the environmental impact assessment processes and knowledgeable input solicited from government agencies.<sup>578</sup> This approach of environmental governance is not limited to technical external advice in the form of expert opinions solicited, but also includes the input of government agencies and environmentally related agencies functioning in the environmental governance domain.<sup>579</sup> Noteworthy in administrative rationalism is the absence of social processes or citizen participation, which are important from both a democratic governance and public accountability perspective.<sup>580</sup>

The second approach to environmental governance as a form of economic rationalism is that the concept bears reference to the intelligent deployment of market mechanisms to

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<sup>574</sup> See para 3.4 in Chapter 3.

<sup>575</sup> Pellizzoni 2007 *Environmental Politics* 541.

<sup>576</sup> Ashton and Aydos 2020 *Seqüência Estudos Jurídicos e Políticos* 50. Also see Godden and Peel *Environmental Law* 65.

<sup>577</sup> Godden and Peel *Environmental Law* 65.

<sup>578</sup> Godden and Peel *Environmental Law* 66. Also see Ashton and Aydos 2020 *Seqüência Estudos Jurídicos e Políticos* 50.

<sup>579</sup> Ashton and Aydos 2020 *Seqüência Estudos Jurídicos e Políticos* 51.

<sup>580</sup> See para 2.5.6.2 in Chapter 2.



achieve public ends.<sup>581</sup> Some of the more prevalent theories include privatisation, deregulation, free market conservatism and neoliberalism.<sup>582</sup> The curtailed role of government is central to this approach and the influence of government is minimal. The accountability traits of economic rationalism are comparable to the elements of private accountability.<sup>583</sup> Economic rationalism as an approach to environmental governance is limited in the extent of its accountability.

The concept of "democratic pragmatism", an associated approach to environmental governance, is also described as collaborative governance.<sup>584</sup> Unlike economic rationalism, which advocates deregulation and an administrative rationalism which stimulates increased bureaucracy, democratic pragmatism allows for a bottom-up style of governance specific to environmental problem solving.<sup>585</sup> This style of governance is supplemented with concepts such as democratic governance and participatory governance, allowing community participation in aspects of governance. It follows in the context of accountability that democratic pragmatism closely correlates with the features of accountability in democratic governance systems.<sup>586</sup> Democratic pragmatism as a type of environmental governance would therefore incorporate accountability in democratic government systems.

The literature that informs the above discussion points to three approaches to environmental governance that help to understand the fit of accountability. These three approaches are: 1) administrative rationalism; 2) economic rationalism and 3) democratic pragmatism. Considering the focus of this chapter, the above three approaches are not discussed in depth.

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<sup>581</sup> Dryzek *Politics of the Earth* 122. Also see the discussion in para 2.2.1 in Chapter 2.

<sup>582</sup> Godden and Peel *Environmental Law* 67.

<sup>583</sup> See para 2.2.1 in Chapter 2.

<sup>584</sup> Ansell and Gash 2008 *Journal of Public Administration Research and Theory* 543: Collaborative governance, as it has come to be known, brings public and private stakeholders together in collective forums with public agencies to engage in consensus-oriented decision making.

<sup>585</sup> Godden and Peel *Environmental Law* 61.

<sup>586</sup> See para 2.4 in Chapter 2.

### **3.3 Actors in environmental governance**

Different institutions are individually and collectively responsible for environmental governance. For the purposes of this chapter, the focus is on local government as a public sector environmental governance actor. Other public sector actors typically include the Department of Environmental Affairs, the Department of Rural Development and Land Reform, the Department of Water Affairs and the Department of Agriculture, Forestry and Fisheries.<sup>587</sup>

The private sector is also increasingly prominent in environmental governance and the typical actors or relevance in the local arena include NGOs, corporate actors and the electorate. As explained previously,<sup>588</sup> non-governmental actors like the electorate are also actors in terms of environmental governance. Related to democratic governance and participatory governance, the electorate as actors contributes in terms of community orientated aspects of environmental governance such as environmental activism and public participation in environmental processes.<sup>589</sup>

Other non-governmental actors include corporate actors, who contribute to the governance of industry and the corporate environment. Corporate actors' responsibility is often demonstrated in how they balance economic objectives with environmental obligations. Aucamp, Retief and King explain, for example, that such actors utilise their economic behaviour as market mechanism to influence consumer decisions.<sup>590</sup>

Chapter 9 institutions are also important environmental actors who provide oversight and advance answerability in the context of governmental actors performing environmental responsibilities. Chapter 9 institutions are obliged to strengthen constitutional democracy<sup>591</sup> and *inter alia* to discharge their environmental obligations as directed under

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<sup>587</sup> Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 147.

<sup>588</sup> See para 3.2 in Chapter 3.

<sup>589</sup> Aucamp, Retief and King "Social Dimension of Environmental Management" 1177. Also see para 3.2 in Chapter 3.

<sup>590</sup> Aucamp, Retief and King "Social Dimension of Environmental Management" 1199.

<sup>591</sup> Section 181(1) of the Constitution.

section 24(b) of the Constitution.<sup>592</sup> The environmental actors hereto include the Public Protector, the South African Human Rights Commission (hereafter SAHRC), the AG and the Independent Electoral Commissioner.<sup>593</sup>

Concerning collaboration among the public sector actors, the law provides several principles and guidelines for co-operation and mutual support. For example, the Constitution provides for the requirement of co-operation in that it places a positive duty on spheres of government to support and strengthen the capacity of municipalities.<sup>594</sup> Bray suggests that weaker spheres usually need to be properly developed to fulfill their role in a co-operative relationship, in the absence of which development, co-operative governance will not succeed.<sup>595</sup> The polycentric nature of such government therefore provides institutional diversity through the diversity of its purposes and functions, which makes it strong "against change and [able to avoid] institutional collapse when faced with adversity".<sup>596</sup>

The NEMA provides for co-operative agreements pertaining to environmental management as configured between responsible spheres of government, which include local government.<sup>597</sup> The NEMA serves as an example of co-operative governance in South Africa, as the concept of co-operative governance is used as causal link to bring together environmental governance amid numerous national and provincial departments, who exercise environmental orientated functions.<sup>598</sup>

It follows that the concept of co-operative governance in the context of the NEMA creates a co-responsibility amongst the elements of co-operative governance. For example, Oosthuizen, Van der Linde and Basson explain that the NEMA requires the submission of statutory plans by different provincial and national departments and hence highlights their

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<sup>592</sup> Section 24(b) of the Constitution.

<sup>593</sup> Sections 181(1)(a), (b), (e) and (f) of the Constitution.

<sup>594</sup> Olivier "Co-operative Government and the Intergovernmental Division of Environmental Powers and Functions" 351.

<sup>595</sup> Bray 2002 *THRHR* 529.

<sup>596</sup> Bennett and Satterfield 2018 *Wiley Conservation Letters* 9.

<sup>597</sup> Bray 2005 *THRHR* 364.

<sup>598</sup> Preamble of NEMA.

co-responsibility in terms of environmental governance.<sup>599</sup> The NEMA is therefore evidently a holistic conduit for the purposes of functional co-operative environmental governance and creates co-responsibility amongst the governmental actors. Other legislation such as the *Systems Act* provides that municipalities exercise their constitutional co-operative mandate<sup>600</sup> and the *Intergovernmental Relations Framework Act*<sup>601</sup> provides for intergovernmental forums to be established to ensure the realisation of the principles of co-operative government.<sup>602</sup>

The above suggests that even when zooming in on "local" environmental governance, the total environmental governance effort of South Africa will also always depend on the co-operation and involvement of many different actors in the public and private spheres.

### **3.4 Local environmental governance defined**

In one of the very few definitions that exists in the literature, Du Plessis defines LEG as follows:

The management process executed by local government and communities to holistically regulate human activities and the effects of these activities on their own and the total environment... at local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the present and future interests' human beings hold in the environment. The management process necessitates a collection of legislative, executive and administrative functions, instruments and auxiliary processes that could be used by local government, the private sector and citizens to stimulate sustainable behaviour within the community as far as products, services, processes, tools and livelihoods are concerned, both in a substantive and procedural sense.<sup>603</sup>

This definition serves to show that LEG involves municipalities and communities alike, and that it has to do with a complex management process aimed at the substantive and procedural regulation of activities that may impact on the environment. However, while the definition identifies some useful elements of LEG, it does not explicitly provide for

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<sup>599</sup> Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 147.

<sup>600</sup> Section 3(1) of the *Systems Act*.

<sup>601</sup> *Intergovernmental Relations Framework Act* 13 of 2005 (hereafter the IRFA).

<sup>602</sup> Section 24 of the IRFA.

<sup>603</sup> Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 120.

local government accountability. Put differently, the definition of LEG is focussed on what ought to be but does not take the understanding of LEG one step further by also questioning the fit of accountability on the part of those responsible for executing LEG. The implications of this may be that the responsibilities of local environmental actors might not be properly exercised and the actors might not be properly monitored in terms their discharging their responsibilities. It follows that failure to appreciate local environmental actors' responsibility means that answerability cannot be assigned in terms of the LEG actors.

### ***3.5 Local environmental governance in the South African context***

#### *3.5.1 Actors responsible for local environmental governance*

Despite being configured in one governance arena, the actors in LEG described by Du Plessis and Nel are, at best distinct but yet mutually conflicted.<sup>604</sup> They include politicians, municipal officials and the electorate. Du Plessis and Nel indicate that environmental governance and actors thereto are arranged to differentiate between the governing, governance and complying to requirements from other spheres of governance dimensions.<sup>605</sup> These actors are also categorised in terms of the local environmental functions they perform and the responsibilities they exhibit towards their communities they govern and governing themselves.<sup>606</sup>

The actors in LEG *inter alia* include municipal councils, which are hybrid in nature and exercise both executive and legislative functions associated with LEG.<sup>607</sup> Other specific bearers of LEG powers include ward committees, councillors and traditional leaders,<sup>608</sup> and municipal administrators as LEG functionaries who exercise administrative LEG duties,

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<sup>604</sup> Du Plessis and Nel "Introduction" 1-28.

<sup>605</sup> Du Plessis and Nel "Introduction" 1-28.

<sup>606</sup> Du Plessis and Nel "Introduction" 1-28.

<sup>607</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-23 – 2-24.

<sup>608</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-23 – 2-24. Also see para 4.2.2.1 in Chapter 4.

such as municipal managers, senior managers of local authorities, city planners, building control officers and environmental inspectors.<sup>609</sup>

The aforementioned actors are accompanied by external actors as regulated by national and provincial environmental law. Actors in the provincial and national sphere *inter alia* include provincial and national departments responsible for key environment-related portfolios such as the Department of Co-operative Governance and Traditional Affairs, the Department of Environment, Forestry and Fisheries, the Department of Water and Sanitation, the Department of Agriculture, the Department of Land Reform and Rural Development and the Department of Human Settlements. Intergovernmental responsibility towards these actors will therefore be based on functions derived from the sectoral environmental laws pertaining to local government.<sup>610</sup>

The other external actors that provide checks and balances in terms of LEG include civil society, which provides for "community interphase". The electorate can therefore interact with internal municipal functionaries to influence performance and monitor the execution of responsibilities.<sup>611</sup> Nel, Du Plessis and Retief also explain that yet other external actors include parastatals, local and foreign agents, political parties, the media and the private sector.<sup>612</sup> Other indirectly involved actors include chapter 9 institutions such as the SAHRC, the Public Protector and the AG, to mention but a few.<sup>613</sup>

### *3.5.2 Typical governance instruments for local environmental governance*

As with any mode of governance, LEG depends on instrumentation by means of which municipalities can regulate or manage the relevant issues, as suggested by the definition provided earlier. LEG has primarily to do with local government "governing", and in this

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<sup>609</sup> Also see Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-1 – 2-52 for a detailed discussion in relation to LEG actors. See para 4.2.2 in Chapter 4 on how the actors in local government function with the internal dimension of municipalities.

<sup>610</sup> See para 3.5.5 in Chapter 3.

<sup>611</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-25 – 2-26. Also see para 4.3 in Chapter 4.

<sup>612</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-25 – 2-26. Also see para 4.3 and 4.4 in Chapter 4.

<sup>613</sup> See para 4.4.6 in Chapter 4.

regard some meaningful research has been done by Nel, Du Plessis and Du Plessis, who explore the governance instruments that are a) applicable to LEG (municipalities governing) and b) provided in terms of South African environmental and local government law.

It is theorised by Nel, Du Plessis and Du Plessis that instruments related to "being governed" have to do with understanding the applicable law by means of related materiality frameworks, managing environmental authorisations (including permits and licences), ensuring compliance with environmental law, and the potential for prosecution pertaining to the same.<sup>614</sup>

LEG, however, also extends into the internal arrangements of a municipality and the relationship between municipalities and other organs of state. The instruments that find application in these instances typically include assessments pertaining to legal compliance registers, legal compliance auditing and service delivery indicators. The "internal governed" dimension, referred to as "government governance" by Nel, Du Plessis and Du Plessis, envisages the internal processes of "controlling, regulating and verifying the activities of municipal office bearers".<sup>615</sup> Similar to corporate entities, the public sector (inclusive of municipalities) must also adhere to principles of good governance as described in the King IV report.<sup>616</sup> Good governance is reflective of elements such as ethical and effective leadership, of which the outcomes relate *inter alia* to a culture of ethics, good performance and, importantly, effective control.<sup>617</sup> Also applicable to municipalities, the King IV Report can contribute to good corporate governance. Good governance can in return safeguard the capacity of a municipality *inter alia* "to protect and advance the interests of those whom it serves".<sup>618</sup> It is incumbent on municipal leadership to equip its internal structures in such a way as to ensure proper checks and

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<sup>614</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-14.

<sup>615</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-20.

<sup>616</sup> IODSA *King IV* - Part 6.2 Supplement for Municipalities 80.

<sup>617</sup> IODSA *King IV* - Part 6.2 Supplement for Municipalities 80.

<sup>618</sup> IODSA *King IV* - Part 6.2 Supplement for Municipalities 79.

balances.<sup>619</sup> It is therefore suggested that various LEG instruments be made available to ensure a proper functional "governing internally" dimension. The availability of such instruments would amount to a proper functional system of delegations. They would deal with such issues as adequate monitoring and oversight functions, a functional Integrated Development Planning Structure, proper financial control and internal auditing functions, supply chain management (hereafter SCM) systems and proper human resource control.<sup>620</sup>

### *3.5.3 The constitutional law framework feeding into local environmental governance*

The Constitution recognises municipalities' right to govern on its own initiative, the affairs of its local communities.<sup>621</sup> Steytler and De Visser view the use of the phrase "on its own initiative" as an indication of the end of subservient local government where municipalities merely implement legislation.<sup>622</sup> LEG in South Africa is rooted in the Constitution, which provides for: a) a constitutional environmental right and supporting procedural rights; b) co-operative governance; c) the workings and objects of local government as relevant to the human environment; d) the principles regulating the public administration; and e) schedules that outline the division of governing authority between the three spheres of government.

Each of these applicable constitutional provisions will be discussed briefly.

Section 24 and other substantive and procedural rights in the Bill of Rights advance expectations raised by the concept of LEG. Local government institutions gain legitimacy through the Constitution as local government is a semi-autonomous sphere of governance and is guided by the universal constitutional environmental objective found under section 24 of the Constitution. Feris and Fuo suggest that the substantive rights related to the environment find their way into the local government domain by means of section 24 read

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<sup>619</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-20.

<sup>620</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-21.

<sup>621</sup> Steytler and De Visser *Local Government Law of South Africa* 5-5. See also section 151(1) of the Constitution.

<sup>622</sup> Steytler and De Visser *Local Government Law of South Africa* 5-5.



together with section 7(2) of the Constitution, where obligations are created in relation to the environmental functions associated with local government.<sup>623</sup>

Chapter 3 of the Constitution provides practical illustration that LEG is also facilitated through the provision of co-operative governance,<sup>624</sup> which replicates the objective of robust environmental governance.<sup>625</sup> The co-operative system contributes to the constitutional environmental obligations as set out in section 24 of the Constitution. Notwithstanding the unitary outcome achieved by section 24 of the Constitution, the co-operative nature of LEG has various inter-relationships based on the specific dimension exercised with reference to the LEG aspect thereof. Bray identifies other benefits in the opinion that proper co-ordination through co-operative governance has the potential to align fragmented environmental legislation and avoid the duplication of environmental administration.<sup>626</sup>

Local government as a semi-autonomous sphere of government is considered to be an important actor in relation to environmental governance. Bray notes the prominence of local government as a distinctive sphere and confirms that "national government cannot undermine the provincial and local spheres of government; nor can the national sphere dominate the other spheres".<sup>627</sup> Irrespective of the fragmented nature of the national environmental governance framework, the concept of co-operative governance serves as a unifying factor to stimulate the application of sustainable behaviour in the local government domain.

The establishment of environmental governance institutions is also representative of the citizenry and their interests.<sup>628</sup> An illustration of the alignment of the two concepts is that the different spheres of government share a collective vision and environmental obligation confirmed through their formal endorsement as co-operative actors in the different

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<sup>623</sup> Feris and Fuo "Environmental Rights Protected in the Constitution" 6-5.

<sup>624</sup> Section 40 of the Constitution.

<sup>625</sup> See "robust governance" as explained in para 3.2 in Chapter 3.

<sup>626</sup> Bray 2005 *THRHR* 370.

<sup>627</sup> Bray 2005 *THRHR* 369.

<sup>628</sup> Bray 2005 *THRHR* 364.

spheres and their perceived legitimacy in the eyes of their constituents.<sup>629</sup> It is suggested that actors and institutions need be both horizontally and vertically connected. Authority on the decentralised levels needs to be provided with sufficient support and oversight from other spheres of government.<sup>630</sup>

Chapter 7 of the Constitution validates local government's role from a co-operative governance perspective, as is seen in terms of section 152. The relevant constitutional objects of local government include the objectives of providing democratic and accountable government for local communities, the provision of services to communities in a sustainable manner, and the promotion of a safe and healthy environment.<sup>631</sup> The implication of section 152(1)(d) of the Constitution is that local government has a role to ensure that local development takes place in an environmentally sustainable manner.<sup>632</sup> Local government is therefore an important actor in environmental governance with specific obligations.

Section 154 of the Constitution confirms the duty of the national and provincial spheres to support and strengthen municipalities so that they can manage their own affairs, *inter alia* including their environmental affairs. The duty to support and foster weak municipalities would normally be associated with the sharing of resources and skills.

Chapter 10 of the Constitution confirms how public administration needs to perform these obligations. The constitutional principles of public administration require the efficient, economic and effective use of resources, which requires local government to observe aspects such as sustainable development.<sup>633</sup> These environmental outcomes are captured under the objects of local government to ensure that services to communities are delivered in a sustainable manner;<sup>634</sup> together with an emphasis on its role of promoting

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<sup>629</sup> Bennett and Satterfield 2018 *Wiley Conservation Letters* 9.

<sup>630</sup> Bennett and Satterfield 2018 *Wiley Conservation Letters* 9.

<sup>631</sup> Section 152(1) of the Constitution.

<sup>632</sup> Steytler and De Visser *Local Government Law of South Africa* 5-9.

<sup>633</sup> Section 195(1)(b) of the Constitution.

<sup>634</sup> Section 152(1)(b) of the Constitution.

a safe and healthy environment.<sup>635</sup> The partnerships reflective of the different spheres of government strengthen the obligation of the public administration to be accountable in the performance of its administrative roles,<sup>636</sup> simultaneously confirming the independence of the different spheres of government, notwithstanding the supervisory role of the national sphere of government. The said accountability also bears reference to local government's responsibility, as one of the spheres of government accountable for the performance of its public administrative duties as set out in the Constitution.

Schedule 4B and Schedule 5B of the Constitution list the functional areas of municipalities.<sup>637</sup> As a result, the powers of local government cannot be amended by national or provincial legislation and this can only be changed by amendments to the Constitution.<sup>638</sup> This has been aptly described as fundamental to preserve local government's institutional integrity.<sup>639</sup>

Municipalities have both direct and inter-related environmental responsibilities based on the executive authority held in both parts B of Schedule 4 and 5. Contained in part B of Schedule 4 are air pollution, fire-fighting services, municipal planning, water sanitation services and sewerage disposal systems, which are considered direct environmental functional areas.<sup>640</sup> There are also semi-environment related functional areas which include: tourism, municipal health services, storm water management services and pontoons, ferries, jetties, piers and harbours, as contained in part B of Schedule 4 of the Constitution.<sup>641</sup> Under part B of Schedule 5, the environmental functional areas are noise pollution, refuse dumps and solid waste disposal, of which the semi-environment related

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<sup>635</sup> Section 152(1)(c) of the Constitution.

<sup>636</sup> Section 195(1)(f) of the Constitution.

<sup>637</sup> Section 156(1)(a) of the Constitution.

<sup>638</sup> Steytler and De Visser *Local Government Law of South Africa* 5-5.

<sup>639</sup> Steytler and De Visser *Local Government Law of South Africa* 5-5.

<sup>640</sup> SALGA *Defining the Role of Local Government in Environmental Management* 7.

<sup>641</sup> SALGA *Defining the Role of Local Government in Environmental Management* 8. See also Steytler and De Visser *Local Government Law of South Africa* 5-11.

functional areas are beaches, cleansing, the control of public nuisances, fences and public parks.<sup>642</sup>

In addition to the constitutional law framework that informs LEG in South Africa, a range of environmental and local government law statutes also finds application to the extent that it creates duties and obligations for local government and establishes decision-making principles. The environmental law statutes include the NEMA, the NWA and the WSA, which are discussed in turn below, focussing on the framework legislation and the specific environmental management acts. The local government law statutes include the *Structures Act*, the *Systems Act*, the MFMA, the *Local Government: Municipal Property Rates Act* (hereafter the MPRA) and the *Spatial Planning and Land Use Management Act* (hereafter the SPLUMA). These are discussed in paragraph 3.5.6 below.

#### *3.5.4 The relevant environmental law framework*

##### a) National Environmental Management Act 107 of 1998

The national environmental management principles as contained in the NEMA include development that must be socially, environmentally and economically sustainable;<sup>643</sup> sustainable development *inter alia* to avoid the pollution and degradation of the environment; the avoidance of waste;<sup>644</sup> the responsibility for environmental health and its safety consequences;<sup>645</sup> the participation of communities;<sup>646</sup> and the environment's being held in public trust for the people.<sup>647</sup>

Freedman confirms the inclusion of local government's public trust role as interpreted in terms of an understanding of the "state". The role of local government is therefore based

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<sup>642</sup> SALGA *Defining the Role of Local Government in Environmental Management* 8. See also Steytler and De Visser *Local Government Law of South Africa* 5-12.

<sup>643</sup> Section 2(3) of the NEMA.

<sup>644</sup> Section 2(4)(a) of the NEMA.

<sup>645</sup> Section 2(4)(e) of the NEMA.

<sup>646</sup> Section 2(4)(f) of the NEMA.

<sup>647</sup> Section 2(4)(o) of the NEMA.

on the "state's" being appointed as trustee in relation to public trust resources.<sup>648</sup> As the public trustee, the state is obliged by the NEMA to protect the environment as the common heritage of all South African citizens.<sup>649</sup> Freedman confirms the need for the public trust doctrine, based on the colonial and apartheid governments' abandonment of the public trusteeship of our natural resources and the absence of the state's regulatory duties in relation to the environment.<sup>650</sup> Kotzé and Knox-Mosdell further explain that because of the wide definition of environment, as framed in terms of local government public trusteeship, pollution mitigation responsibilities are also part of the scope of LEG, for example.<sup>651</sup>

Apart from these principles that should direct local government decision making in terms of LEG, the NEMA further provides direct local governmental duties and responsibilities in relation to the environment. For example, the participation of communities finds its way into these duties by means of section 24 of the NEMA.<sup>652</sup> The environmental impact assessment (hereafter EIA) process is an important responsibility of municipalities. Nel, Du Plessis and Du Plessis describe the responsibilities of municipalities hereto as twofold, firstly as proponents and secondly as commenting authorities.<sup>653</sup> Among the local environmental responsibilities in terms of listed activities, municipalities must ensure the performance of an independent public participation process by an independent practitioner and comment on the activity in relation to the fit of the activity in terms *inter alia* of its IDP and Spatial Development Framework (hereafter SDF).<sup>654</sup> Hereto municipalities must also register interested parties in terms of the process.<sup>655</sup>

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<sup>648</sup> Freedman "Conservation, Sustainable Use of Natural Resources and the Notion of Public Trusteeship" 8-14.

<sup>649</sup> Section 2(4)(o) of the NEMA.

<sup>650</sup> Freedman "Conservation, Sustainable Use of Natural Resources and the Notion of Public Trusteeship" 8-14.

<sup>651</sup> Kotzé and Knox-Mosdell "Regulation and Mitigation of Environmental Pollution" 7-8.

<sup>652</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-50.

<sup>653</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-51.

<sup>654</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-51.

<sup>655</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-51.

Section 28 of the NEMA also establishes a duty of care for municipalities. This is in accordance with any person's obligation to take reasonable measures to prevent pollution from happening, recurring or continuing or, in circumstances where harm to the environment cannot be prevented, to minimise the pollution accordingly.<sup>656</sup> Under section 28 of the NEMA the environmental duties extended to local government in terms of the national environmental framework legislation include discharging its "duty of care" by addressing the probable pollution and degradation of the environment. Failure in this regard will result in the activation of the Director General's responsibility to issue the necessary directive, although the responsibility to issue the same can be delegated to local government.<sup>657</sup> Currently, proposed amendments to section 28 foresee the responsibility in terms of the enforcement of the duty of care being extended to the municipal manager of the relevant municipality.<sup>658</sup> Enforcement in response to local environmental transgressions can be facilitated through the appointment of environmental management inspectors by the MEC, under section 31C of the NEMA.<sup>659</sup> The municipal Environmental Management Inspectorates (EMIs) are responsible for enforcement and *inter alia* the issuing of administrative notices.<sup>660</sup> The duties of municipalities to monitor and protect the environment are captured under section 31L of the NEMA, which allows local authorities to observe conditions of permits and based on non-compliance to issue the necessary directives to enforce the same.<sup>661</sup>

Section 45 of the NEMA places a duty on a municipal council to internally develop its by-laws related to the local environmental mandate by establishing monitoring and enforcement procedures, procedures for public participation, and related reporting procedures.<sup>662</sup>

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<sup>656</sup> Section 28(4) of the NEMA.

<sup>657</sup> Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-18.

<sup>658</sup> Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-18.

<sup>659</sup> Section 31C of the NEMA.

<sup>660</sup> Section 31L of the NEMA.

<sup>661</sup> Section 31L of the NEMA.

<sup>662</sup> Section 45(1) of the NEMA. Also see para 2.5.6 above - *Intra-municipal accountability*.

Other local environmental duties extended to local government under the NEMA are included in section 30, which obliges local government to issue directives in relation to the controlling of any emergency incident which has occurred within its jurisdiction.<sup>663</sup> Similar duties of local government are extended under the Major Hazard Installations Regulations,<sup>664</sup> for example local government is responsible for emergency plans to be followed outside premises classified as major hazard installations.<sup>665</sup>

Extended to local environmental responsibilities, rehabilitation costs expended by municipalities can also be assigned to the emitter by a court in terms of criminal proceedings. This benefit will prevail in instances of conviction of an offence under the provisions of Schedule 3 of the NEMA, whereby the local authority can request that costs be tendered for responsibilities towards rehabilitation.<sup>666</sup> The costs tendered are actually or likely to be incurred to rehabilitate the environment or prevent damage to the environment.<sup>667</sup>

In oversight of the environmental framework legislation discussed, it is evident that municipalities have both environmental duties and responsibilities. Local environmental duties and responsibilities do not only stem from environmental framework legislation, but various responsibilities are also found in the sectoral Environmental Management Acts. Sectoral legislation therefore creates specific local environmental responsibilities in relation to air quality, biodiversity, protected areas, waste management and integrated coastal management. These sectoral environmental duties and responsibilities are discussed below.

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<sup>663</sup> Section 30 of the NEMA. Also see Kotzé and Knox-Mosdell "Regulation and Mitigation of Environmental Pollution" 7-33.

<sup>664</sup> Major Hazard Installations Regulations i.t.o the *Occupational Health and Safety Act* 85 of 1993, published in GN R692 in GG 22506 of 30 July 2001. (Hereafter the Major Hazard Installations Regulations)

<sup>665</sup> Regulation 9(3) in the Major Hazard Installations Regulations.

<sup>666</sup> Section 34(1) of the NEMA.

<sup>667</sup> Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-21.

### 3.5.5 Sectoral environmental legislation

#### a) *National Water Act 36 of 1998*

The NWA predominantly speaks to national government in terms of water resource management, although it sets out a number of duties relevant to the service operations of local government. These responsibilities mainly include the provision of water services, although a strict divide between water resource protection and water service delivery is not possible.<sup>668</sup>

Municipalities must comply with both resource protection and water service delivery legislation.<sup>669</sup> Municipalities are responsible for developing water services development plans specific to their jurisdiction.<sup>670</sup> Municipalities are also responsible to ensure that all water uses listed in section 21 of the NWA are authorised by the Department of Water Affairs, before the commencement of the activity.<sup>671</sup> Effluent discharge from waste water treatment plants and sludge disposal are categorised as water uses that require licensing, for example.<sup>672</sup>

Other related local environmental duties under the auspices of the NWA include the prevention of pollution, which focusses on emergency incidents and the subsequent control of pollution.<sup>673</sup> The aforesaid section designates the responsibility to issue a directive to mitigate and restore the effects of pollution from emergency incidents.<sup>674</sup> In the event of a failure to issue the directive timeously, the section further allows for the apportionment of liability and the provision of costs pertaining to any required action

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<sup>668</sup> Swart, Adams and van den Berg, Young "Water Services Provision and the Protection of Water Resources" 14-7.

<sup>669</sup> Swart, Adams and van den Berg, Young "Water Services Provision and the Protection of Water Resources" 14-7.

<sup>670</sup> Section 12(1) of the NWA.

<sup>671</sup> Swart, Adams and van den Berg, Young "Water Services Provision and the Protection of Water Resources" 14-11.

<sup>672</sup> Swart, Adams and van den Berg, Young "Water Services Provision and the Protection of Water Resources" 14-11.

<sup>673</sup> Section 20 of the NWA.

<sup>674</sup> Section 20(5) of the NWA.



restoring or mitigating the pollution in relation to the emergency situation.<sup>675</sup> The enforcement of responsibilities, as regulated by the NWA, includes administrative and criminal action in terms of section 151 of the NWA.<sup>676</sup>

Although duties to prevent the pollution of water resources are apportioned to catchment management agencies, the responsibilities hereto can also be delegated to municipalities.<sup>677</sup> Local environmental responsibilities can include a directive issued against a probable polluter of water resources, as contained under section 19(3) of the NWA.<sup>678</sup> The directive is used to enforce specific conduct from the probable polluter and to prevent the related pollution of water resources. Municipalities can also be regulated by the Catchment Management Agency (CMA) to ensure the prevention of and remedying the effects of pollution.<sup>679</sup>

b) *Water Services Act* 108 of 1997

The delivery of water and sanitation services is a local government mandate<sup>680</sup> and the *Water Services Act* (hereafter the WSA)<sup>681</sup> regulates municipalities responsibilities thereto. The WSA provides that water services must be undertaken consistent with the broader goals of water resource management.<sup>682</sup> The Act should also be interpreted against the background of the constitutional environmental and water rights. Duties in terms of the provision of water services are therefore subject to the attainment of both sections 24 and 27 substantive rights in terms of the Constitution.<sup>683</sup> The main duties of municipalities in terms of the WSA include the following: the provision of access to a basic water supply

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<sup>675</sup> Sections 20(6)(b) and 20(7) of the NWA.

<sup>676</sup> Section 151 of the NWA.

<sup>677</sup> Section 86(1)(d) of the NWA.

<sup>678</sup> Section 19(3) of the NWA.

<sup>679</sup> Swart, Adams and van den Berg, Young "Water Services Provision and the Protection of Water Resources" 14-13.

<sup>680</sup> Swart, Adams and van den Berg, Young "Water Services Provision and the Protection of Water Resources" 14-15.

<sup>681</sup> *Water Services Act* 108 of 1997 (hereafter the WSA).

<sup>682</sup> Preamble of the WSA.

<sup>683</sup> Section 3 of the WSA.

and basic sanitation.<sup>684</sup> Hence local environmental responsibilities are performed by local authorities either as water services authorities<sup>685</sup> or as water services providers.<sup>686</sup>

Responsibilities include the regulating of access to water,<sup>687</sup> the industrial use of water,<sup>688</sup> and ensuring the efficient, affordable, economical and sustainable access to water services in the jurisdictional area of the water services institution.<sup>689</sup> Importantly, the obligation to provide access to water services extends to emergency situations, where reasonable access to basic sanitation services also needs be provided at the cost of the municipality.<sup>690</sup> Compulsory national standards are provided to regulate the responsibility of provision of water services.<sup>691</sup>

The development of by-laws provides for minimum standards in relation to the provision of water and proper sanitation systems. The water services authority's by-laws must meet the following regulatory requirements in terms of the local environmental mandate: technical conditions of supply, quality standards associated with the supply of water and sanitation services,<sup>692</sup> the installation, alteration, operation and protection of water services works,<sup>693</sup> and the unlawful or wasteful use of water.<sup>694</sup>

An additional regulatory measure which deals with the treatment of effluent also requires specific standards and further mandates water services authorities to regulate the same by means of by-laws. The local environmental responsibility in terms of managing effluent obliges local authorities to regulate and adopt standards of service and technical conditions of provision or disposal, and to decide the circumstances in which industrial

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<sup>684</sup> Section 2 of the WSA.

<sup>685</sup> See the definition of "water services authority" in terms of the WSA.

<sup>686</sup> See the definition of "water services provider" in terms of the WSA.

<sup>687</sup> Section 6(1) of the WSA.

<sup>688</sup> Section 7(1) of the WSA.

<sup>689</sup> Section 11 of the WSA.

<sup>690</sup> Section 11(5) of the WSA.

<sup>691</sup> Swart, Adams and van den Berg, Young "Water Services Provision and the Protection of Water Resources" 14-16.

<sup>692</sup> Section 21(1)(b) of the WSA.

<sup>693</sup> Section 21(1)(c) of the WSA.

<sup>694</sup> Section 21(1)(g) of the WSA.

effluent is limited or prohibited (for example, the discharge of industrial effluent into storm-water infrastructure or natural water resources).<sup>695</sup>

Local environmental responsibilities oblige water services authorities (municipalities) to submit water services development plans in accordance with the necessary IDP process followed by local authorities.<sup>696</sup> The contents of the water services development plan is to include probable local environment-related evidence like existing industrial water use in the jurisdiction,<sup>697</sup> existing industrial effluent disposal in the jurisdictional area,<sup>698</sup> the number and location of persons not provided with basic water and sanitation,<sup>699</sup> projections of future water services required, and projections of future water for industrial use and disposal of effluent discharge required,<sup>700</sup> and lastly existing and projected water conservation, recycling and environmental protection measures.<sup>701</sup>

Limitations of local responsibilities include the prohibition of the discontinuation of water services from one water services institution to another for the purposes of non-payment, unless 30 days' notice for the limitation and 60 days' notice for the discontinuation of services has been provided to the other water services institution, relevant province and related Minister.<sup>702</sup>

c) *National Environmental Management: Biodiversity Act 10 of 2004*

The regulatory role of municipalities in terms of biodiversity management is becoming increasingly important.<sup>703</sup> The NEM: BA requires the management and conservation of South Africa's biodiversity, *inter alia* the sustainable use of indigenous biological resources.<sup>704</sup> The Act also finds application to local government. Like other framework

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<sup>695</sup> Sections 21(3)(b)(i), (ii) and (v) of the WSA.

<sup>696</sup> Section 12(1) of the WSA.

<sup>697</sup> Section 13(e) of the WSA.

<sup>698</sup> Section 13(f) of the WSA.

<sup>699</sup> Section 13(g) of the WSA.

<sup>700</sup> Section 13(h) of the WSA.

<sup>701</sup> Section 13(j) of the WSA.

<sup>702</sup> Section 4(5) of the WSA.

<sup>703</sup> Paterson "Biodiversity" 19-4.

<sup>704</sup> Preamble of the NEM: BA.

legislation, the NEM: BA provides local governments' obligation to adhere to the national biodiversity framework established by the Minister, and consequently to request the Minister to make a determination to establish a bioregion and publish a bioregional plan.<sup>705</sup> Local authorities can further contribute to biodiversity management with the development of biodiversity management plans in relation to an ecosystem, indigenous species or migratory species.<sup>706</sup>

The responsibilities of municipalities in terms of management plans are apparent under section 48 of the NEM: BA, where any municipality must demonstrate in terms of its IDP that the biodiversity management plan is aligned and incorporates both the national framework and any bioregional plan.<sup>707</sup> The Minister must appoint the local authority and assign responsibilities to the responsible actor for the implementation of the management plan.<sup>708</sup> The Minister can enter into biodiversity management agreements with local actors<sup>709</sup> and also monitor the performance of actors by means of monitoring mechanisms requiring the actors to report regularly in terms of predetermined indicators.<sup>710</sup>

Responsibilities are executed in terms of monitoring mechanisms that include invasive species status reports,<sup>711</sup> and assistance is given to municipalities in terms of the preparation of invasive species monitoring, control and eradication plans.<sup>712</sup> Based on listed ecosystems, a municipality is further required to account in its IDP for the need to protect listed ecosystems<sup>713</sup>

Parallel to the duty of care under the framework legislation, local environmental responsibilities such as authorisations are exercised under the NEM: BA. Pursuant to proper delegations to municipalities, as mentioned under the framework legislation,<sup>714</sup>

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<sup>705</sup> Section 40(2) of the NEM: BA.

<sup>706</sup> Section 43(1) of the NEM: BA.

<sup>707</sup> Section 48(2)(c) of the NEM: BA.

<sup>708</sup> Section 43(2) of the NEM: BA.

<sup>709</sup> Section 44 of the NEM: BA.

<sup>710</sup> Section 49 of the NEM: BA.

<sup>711</sup> Section 77 of the NEM: BA.

<sup>712</sup> Section 76(3) of the NEM: BA.

<sup>713</sup> Section 54 of the NEM: BA.

<sup>714</sup> See para 3.5.4 in Chapter 3.

local environmental duties are included under section 69(2) and section 73(2) of the NEM: BA, which focusses on alien species and invasive species.<sup>715</sup> Comparable to the procedure of the IDP, the exercising of powers in terms of the NEM: BA is also subject to participatory governance by means of public participation and consultation.<sup>716</sup>

Directives can be issued to non-compliant actors and municipalities have the power to recover the costs incurred while executing their duties.<sup>717</sup> Requests to issue directives to probable non-compliant actors can be facilitated in writing to competent authorities.<sup>718</sup> Local responsibilities not only relate to the issuing of directives, but include the regulation of indigenous genetic and biological resources in an ecologically sustainable manner.<sup>719</sup>

Responsibilities exercised as the issuing authority include permits in relation to bioprospecting or the exportation of indigenous biological resources.<sup>720</sup> Additionally, permits allowing the authorisation of restricted activities pertaining to listed, threatened or protected, alien or invasive species are also regulated under the local environmental responsibilities.<sup>721</sup>

Internally, duties include the development and implementation of internal biodiversity management capacity through the Integrated Development Framework. Like the requirement that municipalities must develop their own environmental plans in terms of section 11 of the NEMA, internal administration will be guided by its own local environmental framework which, for example, will include the biodiversity management plan and the invasive species monitoring, control and eradication plan.<sup>722</sup>

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<sup>715</sup> See ss 69 and 73 of the NEM: BA. Also see Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-27.

<sup>716</sup> Sections 99 and 100 of the NEM: BA.

<sup>717</sup> Sections 69(3) and 73(3) of the NEM: BA.

<sup>718</sup> Section 74 of the NEM: BA.

<sup>719</sup> Section 80(1)(c) of the NEM: BA.

<sup>720</sup> Section 81 of the NEM: BA.

<sup>721</sup> Section 87 of the NEM: BA.

<sup>722</sup> Section 76(2) of the NEM: BA.

d) *National Environmental Management: Air Quality Act 39 of 2004*

The *National Environmental Management: Air Quality Act*<sup>723</sup> regulates air quality through measures to prevent air pollution and secure ecologically sustainable development.<sup>724</sup> Municipalities have historically played an important role in management and enforcement of matters relating to air quality.<sup>725</sup> The NEM: AQA provides local environmental duties to local authorities and further binds all spheres of government.<sup>726</sup> Based on Schedule 4B of the Constitution, municipalities have executive authority pertaining to air pollution, whereas the national and provincial obligations are limited to oversight.<sup>727</sup> Municipalities are directly responsible *inter alia* for the provision of the improvement of air quality and the reduction of the negative impact of poor air quality on human health and the environment.<sup>728</sup> Decisions must be consistent with section 24 of the Constitution<sup>729</sup> and the national environmental management principles as captured under section 2 of the NEMA.<sup>730</sup>

Metropolitan and district municipalities are the responsible actors in the implementation of a licensing system and the concurrent enforcement of regulatory atmospheric emissions.<sup>731</sup> The consideration of emission applications is facilitated in terms of section 36 of the NEM: AQA, and municipalities must exercise their responsibility to advise applicants on the outcome of their decisions as licensing authorities.<sup>732</sup> Failure to exercise their responsibilities allows administrative intervention, however, where provincial and national functionaries can act on behalf of the licensing authority and issue the emissions licence.<sup>733</sup> Central to the consideration of applications and decisions is also the responsibility that specific procedures be established for the consideration of an

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<sup>723</sup> *National Environmental Management: Air Quality Act 39 of 2004* (hereafter the NEM: AQA).

<sup>724</sup> Preamble of the NEM: AQA.

<sup>725</sup> Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-28.

<sup>726</sup> Section 4(2) of the NEM: AQA.

<sup>727</sup> Engelbrecht and Kornelius "Air Quality Management" 12-1.

<sup>728</sup> Section 16(1)(a) of the NEM: AQA.

<sup>729</sup> Section 40(2)(c) of the NEM: AQA.

<sup>730</sup> Section 40(2)(d) of the NEM: AQA.

<sup>731</sup> Section 36(1) of the NEM: AQA.

<sup>732</sup> Section 36(1) of the NEM: AQA.

<sup>733</sup> Section 36(3A)(a) of the NEM: AQA.

application. These procedural steps can include requests for additional information, and internal investigations of applications and invitations for the submission of written comments to organs of state.<sup>734</sup> Mandatory hereto, however, would be the requirement of the licensing authority to observe the *audi alteram partem* rule and allow the applicant an opportunity to make representations on any comments and objections to the said application.

A further local environmental duty requires the municipality to develop an internal system to communicate any outcome in relation to a licence application within 30 days<sup>735</sup> or consider and finalise any application in terms of section 24 of the NEMA within 60 days from the date upon which the environmental authorisation was made.<sup>736</sup> Other internal administrative oversight processes that need to be facilitated by municipalities include the review processes, and the variations and renewals of emission licences.<sup>737</sup>

Municipalities are obliged to establish an air quality inspectorate and further capacitate air quality officers in its organogram to administer air quality management in the municipality.<sup>738</sup> Part of their responsibilities is the establishment of air quality management plans which must form part of the municipalities' IDPs.<sup>739</sup> Regulating local standards is the responsibility of the municipalities, which may use by-laws to enforce such standards. In this context the local environmental responsibilities of municipalities are to regulate substances which could have a negative effect on health and also present dangers to wellbeing and the environment.<sup>740</sup> Participatory governance is also their responsibility, in that local communities are allowed to interact during the consultative processes prior to the promulgation of the local standards.<sup>741</sup>

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<sup>734</sup> Section 38(1)(a), (b) and (c) of the NEM: AQA.

<sup>735</sup> Section 40(4) of the NEM: AQA.

<sup>736</sup> Section 40(3) of the NEM: AQA.

<sup>737</sup> Sections 45, 46 and 47 of the NEM: AQA.

<sup>738</sup> Section 14(3) of the NEM: AQA.

<sup>739</sup> Section 15(2) of the NEM: AQA.

<sup>740</sup> Section 11(1) of the NEM: AQA.

<sup>741</sup> Section 11(4) of the NEM: AQA.

The enforcement of unlawful conduct pertaining to listed activities is a local environmental responsibility. More specifically hereto, the enforcement of compliance, the proper assessment and the issuing of atmospheric emission licences is centralised in municipalities.<sup>742</sup> To this end, municipalities are also responsible for implementing a system of fines under the NEM: AQA and for levying administrative fines based on the carrying out of an unlawful activity prior to the consideration of any application to legalise the said activity.<sup>743</sup> The *ultra vires* enforcement of criminal prosecution pertaining to the purported unlawful activity is the responsibility of the South African Police Services.<sup>744</sup> Municipalities are obliged to consider all applications for the legalisation of atmospheric emissions except under circumstances where it comes to the attention of the licensing authority that the applicant is under criminal investigation, when the application can be held in abeyance pending the conclusion or outcome of the external South African Police Service investigation.<sup>745</sup>

Other enforcement responsibilities include directives issued by the air quality officer of municipalities to enforce the submission of atmospheric impact reports.<sup>746</sup> The submission of such reports is normally enforced based on a reasonable suspicion that there is non-compliance or that there are defects or that a review is pending in relation to the licensing requirements.<sup>747</sup> Municipalities are also responsible for monitoring holders of emission licences and requiring industries to assign emission control officers based on the size and nature of the listed activity.<sup>748</sup> In terms of air quality management,<sup>749</sup> municipalities must therefore monitor the essential internal capacity of holders of the emission licences. Air control officers of industries are also required to have the necessary competence in relation to air quality management<sup>749</sup>

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<sup>742</sup> Section 22A of the NEM: AQA.

<sup>743</sup> Section 22A(7) of the NEM: AQA.

<sup>744</sup> Section 22A(9)(a) of the NEM: AQA.

<sup>745</sup> Sections 22A(10)(a) and (b) of the NEM: AQA.

<sup>746</sup> Section 30(a) of the NEM: AQA. Also see Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-28, for more information on air quality officers in the context of enforcement.

<sup>747</sup> Sections 30(a) and (b) of the NEM: AQA.

<sup>748</sup> Section 48(1) of the NEM: AQA.

<sup>749</sup> Section 48(2) of the NEM: AQA.



Finally, various supervisory aspects are centralised with national government. The national framework establishes national standards for municipalities to monitor ambient air quality and point, non-point and mobile source transmissions.<sup>750</sup> The responsible Minister directs municipalities in relation to air quality standards and substances or mixtures of substances which present health threats or risks to well-being and the environment.<sup>751</sup>

The procedure for measuring emissions and ambient air quality and the related reporting format are also regulated by the Minister as supervisory mechanisms.<sup>752</sup> Notwithstanding the executive mandate to municipalities, the discretionary powers of the Minister allow national or provincial actors to control the declaration of priority areas in the event of air quality standards being exceeded or likely to be exceeded.<sup>753</sup> These oversight powers extend to the national or provincial sphere in the development of a priority area air quality management plan which needs to be developed by the national air quality officer.<sup>754</sup> Similar to the declaration of priority areas, declarations of listed activities which cause atmospheric emissions are also the prerogative of the minister, who regulates listed activities pertaining to the nature thereof.<sup>755</sup> Although the declaration of listed activities is within the discretion of external actors, the consequences of unlawful conduct in relation to listed activities are dealt with by the licensing authorities.

e) *National Environmental Management: Waste Act 59 of 2008*

The *National Environmental Management: Waste Act*<sup>756</sup> confirms a municipality's executive environmental duty to deliver waste management services.<sup>757</sup> Elements of the local environmental duties can *inter alia* include the licensing and control of waste activities, the remediation of contaminated land, compliance and enforcement, and finally

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<sup>750</sup> Section 8(a) of the NEM: AQA.

<sup>751</sup> Sections 9(1)(a) and (b) of the NEM: AQA.

<sup>752</sup> Sections 12(a), (b) and (c) of the NEM: AQA.

<sup>753</sup> Section 18(1) of the NEM: AQA.

<sup>754</sup> Sections 19(1)(a) and (b) of the NEM: AQA.

<sup>755</sup> Section 21(1) of the NEM: AQA.

<sup>756</sup> *National Environmental Management: Waste Act 59 of 2008* (hereafter the NEM: WA).

<sup>757</sup> Section 9(1) of the NEM: WA. Also see Alberts and Van Rooyen "Solid Waste Management" 13-13.

the proper administration of a waste information system.<sup>758</sup> Notwithstanding the executive mandate, waste management services are subject to adherence to national and provincial standards.<sup>759</sup>

The execution of the waste management duties of municipalities is subject to the national waste management strategy, which specifically binds all organs of state<sup>760</sup> and determines the way responsibilities are executed by local government.<sup>761</sup> The national waste management strategy can *inter alia* pronounce on targets for waste reduction.<sup>762</sup> Supplementary determinations which bind local governments' executive authority in terms of the national norms and standards are the probable classification of waste,<sup>763</sup> the planning and provision of waste management services<sup>764</sup> and the way the storage, treatment and disposal of waste is facilitated.<sup>765</sup> Based on the requirement of provincial and national waste management plans, municipalities are responsible for ensuring proper alignment of their own integrated waste management plans with provincial and national waste management plans.<sup>766</sup> Moreover, the Minister with the concurrence of the Minister of Finance can also regulate and set national standards in relation to tariffs for the waste services provided by municipalities.<sup>767</sup>

Aligned to the national waste management strategy and the interrelatedness in terms of co-operative governance, the Minister and the Member of Executive Council (hereafter the MEC) facilitate a supportive function whereby the national and provincial governments have a duty to strengthen local authorities to perform their local environmental mandate of waste management.<sup>768</sup> Part of the responsibility of the municipalities as waste management actors is the requirement of municipalities to obtain waste management

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<sup>758</sup> Preamble of the NEM: WA.

<sup>759</sup> Section 9(2)(a) of the NEM: WA.

<sup>760</sup> Section 6(3)(a) of the NEM: WA.

<sup>761</sup> Section 6(3)(b)(i) of the NEM: WA.

<sup>762</sup> Section 6(2) of the NEM: WA. Also see Alberts and van Rooyen "Solid Waste Management" 13-42.

<sup>763</sup> Section 7(1)(a) of the NEM: WA.

<sup>764</sup> Section 7(1)(b) of the NEM: WA.

<sup>765</sup> Section 7(1)(c) of the NEM: WA.

<sup>766</sup> Section 11(6) of the NEM: WA.

<sup>767</sup> Section 7(3) of the NEM: WA.

<sup>768</sup> Section 9(4) of the NEM: WA.

licences from the related licensing authority.<sup>769</sup> Alberts explains that due to the very nature of municipalities' waste management activities, the obtaining of licences for their landfill sites is compulsory.<sup>770</sup> Municipalities are also similarly obliged under statute to provide information when required by the Minister or the MEC.<sup>771</sup> Supervisory obligations are often inherited by means of delegations in terms of which municipalities must oversee statutory responsibilities like the preparation of industry waste management plans.<sup>772</sup>

Municipalities must ensure the provision of sustainable waste services under their executive authority by means of effective and efficient management.<sup>773</sup> They are responsible for ensuring access for all to waste services.<sup>774</sup> Municipalities' waste services functions entail the storage, collection and transportation of waste. The storage of waste is regulated by sections 21 and 22 of the NEM: WA, which stipulate requirements in relation to any person who stores waste and generates waste.<sup>775</sup> The requirements for the storage of waste include the safe storage of waste, the prevention of accidental spillage and the prevention of pollution of the environment.<sup>776</sup> Section 22 obliges persons who generate waste to be collected by municipalities to adhere to the collection requirements, *inter alia* the criteria pertaining to the container used and the collection location approved by the municipality. Moreover, municipalities can also regulate the storage of recyclable waste through specific by-laws.<sup>777</sup> Waste collection rendered to citizenry is subject to the following obligational criteria: the equitable allocation to all constituents within the municipal jurisdiction, the obligation to pay for waste services rendered, the withholding of services based on reasonable conditions, and the right of a municipality to differentiate between categories of users in the setting of service standards.<sup>778</sup> The unauthorised collection of waste is prohibited unless the collection is

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<sup>769</sup> Section 19 of the NEM: WA.

<sup>770</sup> Alberts and Van Rooyen "Solid Waste Management" 13-14.

<sup>771</sup> Section 63 of the NEM: WA.

<sup>772</sup> Alberts and Van Rooyen "Solid Waste Management" 13-15.

<sup>773</sup> Section 9(2)(e) of the NEM: WA.

<sup>774</sup> Sections 9(2)(c) and (e) of the NEM: WA.

<sup>775</sup> Sections 21 and 22 of the NEM: WA.

<sup>776</sup> Sections 21(a), (b) and (e) of the NEM: WA.

<sup>777</sup> Section 22(2) of the NEM: WA.

<sup>778</sup> Sections 23(1)(a), (b), (c) and (d) of the NEM: WA.

performed within the ambit of the NEM: WA; for example, when the collection is facilitated by municipalities.<sup>779</sup> Collection of waste is a principal responsibility of municipalities, whereby no waste may be removed from premises without being a municipality or municipal service provider authorised by statute.<sup>780</sup> Included under NEM: WA, a positive duty is also placed on municipalities to provide, if reasonably possible, containers for recyclable waste in terms of waste collection.<sup>781</sup>

In circumstances where the transporting of waste is performed for financial gain, this must be regulated by the local authority to ensure that the person to undertake the waste transportation is registered with the municipality.<sup>782</sup> Further supervision by the municipality must be done to ensure that the commercial waste transporter takes all reasonable steps to prevent the spillage or littering of waste from the collection vehicle, has confirmed acceptance of the waste with the recipient facility prior to offloading, and that the written confirmation of the depositing site is obtained prior to the offloading of the hazardous waste so transported.<sup>783</sup> Littering as a prohibited activity<sup>784</sup> must be regulated in terms of the promulgation of waste management by-laws. Further to the abovementioned "governing others" dimension, it is accepted that a municipality as a holder of waste has to ensure that waste is managed to minimise its environmental impacts and untoward health consequences due to its waste management obligation towards the community.

Hence, to ensure environmentally sound waste management, as a holder of waste a municipality must also take reasonable measures to adhere to the waste hierarchy and comply with the general duties under section 16 of the NEM: WA.<sup>785</sup> Internal governance measures must ensure the reasonable avoidance of the generation of waste, the proper recovery of waste, the disposal of waste in an environmentally sound manner, the

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<sup>779</sup> Sections 23 and 24 of the NEM: WA.

<sup>780</sup> Alberts and Van Rooyen "Solid Waste Management" 13-32.

<sup>781</sup> Alberts and Van Rooyen "Solid Waste Management" 13-32.

<sup>782</sup> Section 25(1)(a) of the NEM: WA.

<sup>783</sup> Sections 25(2), (3) and (4) of the NEM: WA.

<sup>784</sup> See Section 27 of the NEM: WA.

<sup>785</sup> Alberts and Van Rooyen "Solid Waste Management" 13-18.

management of waste in order not to endanger health and the environment, the exercise of internal control over employees, and the prevention of the unauthorised use of waste.<sup>786</sup> Examples of proper internal responsibilities include the approval of a municipal integrated waste management plan which coincides with planning co-ordination in terms of statutory IDPs and must be reflected in the Annual Report (hereafter the AR) of the municipality.<sup>787</sup> Further measures in the "governing internally" domain include the approval and promulgation of proper waste management by-laws by municipal councils, waste management strategies to facilitate and promote recycling, provisional policies to facilitate waste services to rural and poorer communities, etc.

f) *National Environmental Management: Integrated Coastal Management Act 24 of 2008*

The *National Environmental Management: Integrated Coastal Management Act*<sup>788</sup> focusses on the establishment of an integrated system to ensure coastal and estuarine management in South Africa.<sup>789</sup> Municipalities' duties include to act as custodians or trustees of the coastal zones and to take reasonable measures to attain substantive environmental rights in the interest of their communities and the citizenry at large.<sup>790</sup> These local environmental obligations are based on the state's duty to fulfil environmental rights in terms of coastal management.<sup>791</sup> Parramon-Gurney and Knox-Mosdell explain that coastal municipalities have responsibilities *inter alia* in terms of coastal access land and obligations specific to the adoption of municipal coastal management plans (hereafter MCMPs).<sup>792</sup>

Municipalities therefore hold local environmental duties, the responsibilities of which are codified in terms of the NEM: ICMA. Glavovic, Cullinan and Groenink emphasise the active

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<sup>786</sup> Sections 16(1)(a), (b), (c), (d), (e) and (f) of the NEM: WA.

<sup>787</sup> Section 13(3) of the NEM: WA.

<sup>788</sup> *National Environmental Management: Integrated Coastal Management Act 24 of 2008* (hereafter the NEM: ICMA).

<sup>789</sup> Preamble of the NEM: ICMA.

<sup>790</sup> Section 12 of the NEM: ICMA.

<sup>791</sup> Section 3 of the NEM: ICMA.

<sup>792</sup> Parramon-Gurney and Knox-Mosdell "Marine and Coastal Management by Local Government" 21-8.

involvement of all spheres of government to achieve consistent decision making.<sup>793</sup> Hence municipalities have obligations in terms of their intergovernmental environmental responsibilities. They are obliged to ensure that any planning programme or proposal required in terms of the NEMA or any local government framework legislation, such as an IDP or a land development plan, is aligned with the national and provincial coastal management programme.<sup>794</sup>

Further responsibilities include municipalities within coastal zones having to avoid their IDPs contradicting any other statutory plans adopted by either national or provincial organs of state.<sup>795</sup> Equally, the Minister must ensure consistency between national coastal management plans (hereafter CMPs) and plans originating from others organs of state.<sup>796</sup> Parallel to the obligation to report to provincial and national structures on MCMPs, the review of MCMPs is also at the discretion of the MEC of the relevant province.<sup>797</sup> The review or approval of the MCMPs is under the advice of the Provincial Coast Committee and the MEC, and in the event of the plan's not being approved, the municipality must amend or replace it.<sup>798</sup>

In accordance with the general practice of co-operative governance, municipalities must be represented on provincial coastal committees<sup>799</sup> and may be represented on the national coastal committee.<sup>800</sup> Other measures utilised in the co-operative governance domain are directives by MECs to municipalities.<sup>801</sup> These directives are utilised to instruct municipalities to redress adverse risks pertaining to the coastal environment, or to implement a MCMP or action specific to a provincial coastal management programme.<sup>802</sup> Directives to municipalities may be issued only as part of a specific co-operative process

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<sup>793</sup> Glavovic, Cullinan and Groenink "The Coast" 659.

<sup>794</sup> Section 51(a) of the NEM: ICMA.

<sup>795</sup> Section 52(4) of the NEM: ICMA.

<sup>796</sup> Section 52(2) of the NEM: ICMA.

<sup>797</sup> Section 55(1) of the NEM: ICMA.

<sup>798</sup> Section 55(3) of the NEM: ICMA.

<sup>799</sup> Section 40(2)(b) of the NEM: ICMA.

<sup>800</sup> Section 36(2B) of the NEM: ICMA.

<sup>801</sup> Parramon-Gurney and Knox-Mosdell "Marine and Coastal Management by Local Government" 21-8.

<sup>802</sup> Section 88(1) of the NEM: ICMA.

which involves first addressing the matter with the responsible municipality and allowing sufficient time for the municipality to respond thereto.<sup>803</sup> Any failure to respond by the related municipality will be regarded as *prima facie* confirmation of non-compliance, upon which the province can intervene to the extent of remedying the non-compliance.<sup>804</sup>

Local environmental responsibilities in terms of public participation are also prevalent under the NEM: ICMA. Central to participation is the primary responsibility that municipalities must ensure consultative and public participation processes which must bring the review of coastal management programmes to the attention of the citizenry.<sup>805</sup> The publication of information must also be done in terms of giving 30 days' notice to the public and conveying sufficient information to allow the citizenry to comment thereon.<sup>806</sup> The practical implications hereto must be rolled out in terms of the requirements of MCMPs and the requirements of public participation and timeframes prior to the adoption of a plan.<sup>807</sup> Proper notice to the community requires a 60-day notice period before any adoption of a MCMP or any amendment thereto.<sup>808</sup> Interaction with the community will include notice to the public and subsequently making summary records available for inspection by the public.<sup>809</sup>

Municipalities' duties include trusteeship of the coastal public property on behalf of the citizenry they govern.<sup>810</sup> Hereto, access to public coastal properties can be subject to necessary limitations as regulated by municipalities. For example, the use and enjoyment of the property may not hinder the authorities in the performance of their duty to protect the environment.<sup>811</sup> Municipalities are therefore not prohibited from applying restrictions or prohibitions to protect the environment.<sup>812</sup>

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<sup>803</sup> Section 88(2) of the NEM: ICMA.

<sup>804</sup> Section 88(3) of the NEM: ICMA.

<sup>805</sup> Section 53(1)(b) of the NEM: ICMA.

<sup>806</sup> Section 53(1)(c) of the NEM: ICMA.

<sup>807</sup> Section 48(2) of the NEM: ICMA.

<sup>808</sup> Section 48(3) of the NEM: ICMA.

<sup>809</sup> Section 48(3)(a) of the NEM: ICMA.

<sup>810</sup> Section 11(1) read with s 12(a) of the NEM: ICMA.

<sup>811</sup> Section 13(1)(b)(ii) of the NEM: ICMA.

<sup>812</sup> Section 13(2)(b) of the NEM: ICMA.

The local environmental responsibilities extend to municipalities' obligation to enforce conduct by means of by-laws regulating access to coastal areas.<sup>813</sup> Obligations enforced through the by-laws include restrictions or prohibitions in terms of municipal coastal management, the enforcement of national and provincial management programmes, and compliance with any other national or provincial statutes.<sup>814</sup> Adjunctive to municipalities' coastal land access responsibilities are the control of activities on the specific land, the attaching of signposts marking entry points, protecting and enforcing the rights of the public, and maintaining the land to ensure public access.<sup>815</sup> Further responsibilities subject to the availability of resources include the provision of the necessary facilities, including parking areas, toilets and related amenities.<sup>816</sup>

Municipalities are also planning institutions as part of LEG. Obligations created by statute and the NEM: ICMA require the performance of specific internal environment-related responsibilities, of which the preparation of municipal coastal management programmes is key to its measurement of performance. Moreover municipalities must prepare and adopt municipal coastal management programmes to manage coastal zones within their jurisdiction.<sup>817</sup> MCMPs are dynamic and not generic and must be reviewed every 5 years and amended when necessary.<sup>818</sup> The internal configuration of the programme expects the MCMP to be consolidated with the prevailing IDP of the municipality and the SDF of a municipality.<sup>819</sup> Mandatory to the development of the MCMP are internal requirements including that the document must be a coherent municipal policy directive to manage coastal zones within the jurisdiction of the municipality.<sup>820</sup> Central hereto is also the requirement of proper performance indicators to measure the achievement of

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<sup>813</sup> Sections 18(1) and 50 of the NEM: ICMA. Also see Parramon-Gurney and Knox-Mosdell "Marine and Coastal Management by Local Government" 21-38 for a detailed discussion of by-laws in the context of coastal management.

<sup>814</sup> Section 18(3) of the NEM: ICMA.

<sup>815</sup> Sections 20(1)(a), (b), (c) and (d) of the NEM: ICMA.

<sup>816</sup> Section 20(1)(e) of the NEM: ICMA.

<sup>817</sup> Section 48(1)(a) of the NEM: ICMA.

<sup>818</sup> Sections 48(1)(b) and (c) of the NEM: ICMA.

<sup>819</sup> Section 48(4) of the NEM: ICMA.

<sup>820</sup> Section 49(1)(a) of the NEM: ICMA.



objectives.<sup>821</sup> Internal responsibilities must also ensure that the MCMP is consistent with national and provincial CMPs and national estuarine management protocol.<sup>822</sup> With the MCMP, municipalities must adopt a statement of their vision and objectives to ensure proper management of the coastal zones.<sup>823</sup> Proper internal administration requires priorities and strategies to be configured to ensure the achievement of coastal management objectives and assist with the achievement of national and provincial objectives.<sup>824</sup> The planning responsibilities of municipalities are to develop strategies and priorities to address the high percentage of vacant plots and the low occupancy of residential dwellings, and finally to designate development zones to facilitate mixed-cost housing in consideration of previously disadvantaged individuals.<sup>825</sup> The administration should also prioritise coastal "erosion and accretion".<sup>826</sup> To formalise the implementation and enforcement of the MCMP externally, internal administration requires the MCMP to be codified in terms of municipalities' by-laws.<sup>827</sup> Further responsibilities to internal governance include municipalities' ensuring alignment with the NEM: ICMA and the *Systems Act*. Proper co-ordination herewith is highlighted in sections 51 and 52 of the NEM: ICMA, which obliges internal municipal functionaries to ensure coherence between local and environmental statutory requirements.<sup>828</sup>

g) *National Environmental Management: Protected Areas Act 57 of 2003*

The state holds trusteeship in terms of the *National Environmental Management: Protected Areas Act*,<sup>829</sup> whereby the state in fulfillment of the section environmental rights of the Constitution<sup>830</sup> must promote the sustainable use of the protected areas and ensure

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<sup>821</sup> Section 49(2)(d) of the NEM: ICMA.

<sup>822</sup> Section 49(1)(b) of the NEM: ICMA.

<sup>823</sup> Sections 49(2)(a) and (b) of the NEM: ICMA.

<sup>824</sup> Sections 49(2)(c)(i) and (ii) of the NEM: ICMA.

<sup>825</sup> Sections 49(2)(c)(iii) and (v) of the NEM: ICMA.

<sup>826</sup> Section 49(2)(c)(vi) of the NEM: ICMA.

<sup>827</sup> Section 50 of the NEM: ICMA.

<sup>828</sup> Sections 51 and 52 of the NEM: ICMA.

<sup>829</sup> *National Environmental Management: Protected Areas Act 57 of 2003* (hereafter the NEM: PAA). Also see Freedman "Conservation, Sustainable Use of Natural Resources and the Notion of Public Trusteeship" 8-15, for more information pertaining public trusteeship in context of the NEM: PAA.

<sup>830</sup> Section 3(a) of the NEM: PAA.

communities' participation in the management of protected areas.<sup>831</sup> Aligned with municipalities' responsibility in terms of their local environmental duties, local protected areas like nature reserves and open spaces are managed by municipalities.<sup>832</sup> Municipal environmental obligations require municipalities to be consulted in observance of norms and standards to achieve the objects of the NEM: PAA. Protected areas are declared, based on the category of declaration being representative of the environmental objective to be achieved.<sup>833</sup> Central to a municipality's role in facilitating its local environmental duty, prior to the declaration of a special nature reserve, nature reserve, wilderness area or protected area, the Minister must consult with the municipality concerned.<sup>834</sup> The Minister can further appoint a municipality as part of its local environmental responsibility as a management authority<sup>835</sup> and oblige the submission of a management plan for the protected area.<sup>836</sup> Municipalities are further obliged to align any management plan with the municipality's IDP.<sup>837</sup>

Municipalities as local environmental functionaries play active roles in promoting and creating the sustainable use of protected areas. As environmental functionaries municipalities are responsible for declaring areas within their jurisdiction as protected areas to achieve a medley of local environmental outcomes. These outcomes include the interrelationship between natural environmental biodiversity, human settlement and economic development, *inter alia*.<sup>838</sup> An example hereof could be the prioritisation of open spaces and green belts in municipal precincts to harmonise human, environmental and economic activities.

The responsibility of municipalities to ensure enforcement in the context of local protected areas is prominent in the NEM: PAA.<sup>839</sup> Snijman and Petterson explain that in the

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<sup>831</sup> Sections 2(e) and (f) of the NEM: PAA.

<sup>832</sup> See the definition of "local protected areas" in s 1 of the NEM: PAA.

<sup>833</sup> Section 17 of the NEM: PAA.

<sup>834</sup> Section 31 of the NEM: PAA.

<sup>835</sup> Section 38(1)(a) of the NEM: PAA.

<sup>836</sup> Section 39(2) of the NEM: PAA.

<sup>837</sup> Section 39(4) of the NEM: PAA.

<sup>838</sup> Section 17(j) of the NEM: PAA.

<sup>839</sup> Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-8.

eThekwini Metropolitan Municipality, where municipal conservation areas are designated as formal nature reserves in terms of the NEM: PAA, municipal field rangers with EMI powers are allowed to enforce national environmental statute.<sup>840</sup> The enforcement responsibilities in terms of NEM: PAA therefore allow local authorities to pursue non-compliant environment behaviour with specific consequences.<sup>841</sup>

### 3.5.6 *The relevant local government law framework*

LEG is not rooted only in the Constitution and the extensive framework of environmental legislation. It is very much embedded in the framework local government laws of South Africa as well. The discussion below turns to the relevant provisions in the local government law framework legislation that was established after the Constitution was adopted in 1996. The Acts covered include the *Systems Act*, the *Structures Act*, the MPRA, the SPLUMA,<sup>842</sup> the MFMA and other related statutes.

#### a) *Local Government: Municipal Systems Act 32 of 2000*

The *Systems Act* provides for local mechanisms and processes to progressively provide for the social and economic upliftment of local communities. These systems are not unrestrained and provide for the purported upliftment in observance of harmonising the communities' activities with the local natural environment. Therefore, the *Systems Act* echoes the local environmental responsibilities in that the provision of basic services cannot be separated from the environment. The aforesaid statement is further confirmed in the definition of "environmentally sustainable" as contained in the *Systems Act*.<sup>843</sup> It is established that the provision of services must be performed with the aim of ensuring the mitigation of risk to the environment, with the optimal potential of benefits to the environment and in oversight of legislation protecting the environment.<sup>844</sup> Hence the rationale of local environmental responsibilities in terms of the *Systems Act* is clearly

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<sup>840</sup> Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-8.

<sup>841</sup> Snijman and Petterson "Environmental Law Compliance and Enforcement" 9-8.

<sup>842</sup> *Spatial Planning and Land Use Management Act* 16 of 2013 (hereafter the SPLUMA).

<sup>843</sup> See the definition of "environmentally sustainable" in s 1 of the *Systems Act*.

<sup>844</sup> See the definition of "environmentally sustainable" in s 1 of the *Systems Act*.

configured. The Act envisages municipal councils as having a duty to provide services to the local community in an economically sustainable manner and to promote the constitutional object of a safe and healthy environment in the municipality.<sup>845</sup>

Equally, in the context of municipalities as captured in the *Systems Act*, the exercise of the duties and responsibilities of councils, their constituents and their administrations is subject to the Constitution.<sup>846</sup> In the above context this pertains to the local government actors' responsibilities and duties as configured in relation to the environmental rights granted in section 24 of the Constitution. Confirmation of the environmental duty of the executive and the legislative powers exercised by municipalities is evident in section 11(2) of the *Systems Act*, where promoting a safe and healthy environment is regarded as part of a municipality's executive and legislative authority. Further evidence of local government's environmental duty is found in the concept of developmental government as contained in Chapter 5 of the *Systems Act*. Developmentally orientated planning of municipalities must be undertaken to achieve the provision of services to the community in a sustainable manner and to promote a healthy environment as part of the constitutional objects of local government.<sup>847</sup> Chapter 8 of the *Systems Act* further expands on the municipality's environmental obligations in that municipal services must be environmentally sustainable,<sup>848</sup> and it allows for services tariff principles to be adopted which encourage the effective use of resources, the recycling of waste and the achievement of appropriate environmental objectives.<sup>849</sup> Local environmental duties are evident not only in local government systems but also in local government structures.

b) *Local Government: Municipal Structures Act* 117 of 1998

In observance of the constitutional principles to ensure sustainable municipal services and advance a healthy and safe environment,<sup>850</sup> the *Structures Act* develops structures to fulfil

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<sup>845</sup> Sections 4(2)(d) and (i) of the *Systems Act*.

<sup>846</sup> Section 7 of the *Systems Act*.

<sup>847</sup> Section 23(1)(a) of the *Systems Act*.

<sup>848</sup> Section 73(2)(d) of the *Systems Act*.

<sup>849</sup> Section 74(2)(h) of the *Systems Act*.

<sup>850</sup> Sections 151(1)(b) and (d) of the Constitution.

the objects of local government. These structures are also functionaries to achieve more specifically in this instance local environmental obligations. The structures are representative of functionaries such as municipal councils, ward committees, committees of council, executive committees, metropolitan sub-councils and related municipal office bearers. Examples of obligatory environmental duties under the *Structures Act* include the establishment of municipal councils<sup>851</sup> whereby councils, within their capacity, must achieve the aforementioned constitutional objects including the provision of sustainable services and a healthy and safe environment.<sup>852</sup> Municipal councils, as established executive and legislative structures in terms of the *Structures Act*, are therefore the constitutional bearers of environmental rights in the local government domain. Additional structures hereto in the form of committees are created to support a municipal council in the attainment of its environmental duties.<sup>853</sup> Political functionaries such as executive committees and executive mayors of municipalities must cause services to communities to be delivered in a sustainable way.<sup>854</sup> Other structures such as sub-councils and ward committees can acquire environmental responsibilities by means of delegations from council authority.<sup>855</sup> Environmental custodianship can also emanate from traditional leaders that are part of local government and deemed co-responsible for the execution of the environmental duties of local government. Notwithstanding the possibility of their direct participation, traditional leaders must be afforded an opportunity to present their views in relation to any decision affecting their area directly, which by way of example could include environmental issues.<sup>856</sup> Specific environmental duties are also included under the division of powers and functions between district and local municipalities of which district municipalities are obliged with specific environmentally related powers and functions (responsibilities), which include integrated development planning, potable water systems, sewerage disposal systems, solid waste disposal sites and municipal health.<sup>857</sup>

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<sup>851</sup> Section 18(1) of the *Structures Act*.

<sup>852</sup> Section 19(1) of the *Structures Act*.

<sup>853</sup> Section 33(b)(i) of the *Structures Act*.

<sup>854</sup> Sections 44(3)(e) and 56(3)(e) of the *Structures Act*.

<sup>855</sup> Sections 64(a) and 74(b) of the *Structures Act*.

<sup>856</sup> Section 81(3) of the *Structures Act*.

<sup>857</sup> Sections 84(1)(a), (b), (d), (e) and (i) of the *Structures Act*.

The *Structures Act* further configures statutory interventions by national and provincial government in instances of the non-attainment of its constitutional objects.<sup>858</sup> Examples hereof could include the failure to maintain a safe and healthy environment in instances of the provision of bulk services, such as in waste water treatment plants.

c) *Local Government: Municipal Finance Management Act 56 of 2003*

The MFMA is part of the local government framework legislation which finds indirect application to LEG in South Africa. The local government financial framework legislation has embedded local environmental duties which regulate local government's financial functions which influence local environmental responsibilities. These functions are specific functions which have the potential of effecting basic municipal services. Consistent with the definition of "basic municipal services",<sup>859</sup> risks and actions that would endanger public health or safety or the environment need to be considered under specific circumstances, and a positive environmental obligation is placed on functionaries and administrators alike. Specific activities hereto are prohibited and include the disposal of assets<sup>860</sup> and capital assets<sup>861</sup> needed for the provision of basic municipal services. In the event of an asset's being disposed of, the requirements moreover will include a municipal council's considering the environmental duties and resolving in a meeting open to the public that the asset is not required for basic municipal services. Any decision hereto should be based on reasonable grounds and include development prospects, the requirements of bulk infrastructure and the consideration of planning instruments like the IDP.<sup>862</sup> Diligence is required, however, in the assessment of the disposal of assets, noting that once a capital asset is deemed unnecessary for basic municipal services the decision cannot be reversed.<sup>863</sup>

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<sup>858</sup> Section 19(1) of the *Structures Act*.

<sup>859</sup> See the definition of "basic municipal services" under s 1 of the MFMA.

<sup>860</sup> Section 14(1) of the MFMA.

<sup>861</sup> Section 90(1) of the MFMA.

<sup>862</sup> Sections 14(2)(a) and 90(2)(a) of the MFMA.

<sup>863</sup> Section 14(3) of the MFMA.

In the event of funds from National Treasury being stopped in terms of section 38 of the MFMA, basic municipal services must be monitored, should the withdrawal of funding influence basic municipal services.<sup>864</sup> Should risks in terms of health or environmental consequences be realised, a section 139 intervention can therefore be facilitated, based on the inadequate provision of basic services.<sup>865</sup> Similar hereto, any mandatory or discretionary intervention which requires the liquidation of assets in terms of a financial recovery plan (hereafter FRP) may not include assets required for minimum basic municipal services, for example.<sup>866</sup>

Further recognition of the importance of municipalities' environmental responsibilities requires courts to adjudicate the termination of financial obligations and creditors' claims only once consideration has been provided in terms of the assets needed to provide minimum basic municipal services.<sup>867</sup> Primary to any financial decision of council is the consideration of its local environmental responsibilities. An example hereto also relates to the provision of security in terms of section 48 of the MFMA, whereby a municipal council may provide security in the form of a lien, pledging, cession or hypothecating only after consideration is given to whether the asset is necessary to basic municipal services.<sup>868</sup> If established that the continuance of the asset is necessary for the provision of security, then consideration must be given to how the asset will be protected.<sup>869</sup> Notwithstanding the provision of an asset for the purposes of security, a statutory limitation prohibits in the event of default by the municipality any consequent action which would infringe on the provision of the minimum requirements of basic municipal services and equally local environmental responsibilities.<sup>870</sup>

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<sup>864</sup> Section 38(3) of the MFMA.

<sup>865</sup> See para 4.4.2.1 in Chapter 4.

<sup>866</sup> Section 142(1)(b)(i) of the MFMA.

<sup>867</sup> Section 155(1)(b) of the MFMA.

<sup>868</sup> Section 48(3)(a) of the MFMA.

<sup>869</sup> Section 48(3)(b) of the MFMA.

<sup>870</sup> Section 48(4) of the MFMA.

d) *Local Government: Municipal Property Rates Act 6 of 2004*

Further recognition of municipalities' local environmental duties is found in the MPRA, where municipalities have executive powers to impose rates on properties. Notwithstanding the existence of the aforementioned powers to levy rates in observance of properties within their jurisdiction, municipalities are prohibited from levying rates on property within the meaning of the NEM: PAA and the NEM: BA.<sup>871</sup> Section 17 of MPRA is therefore an example of an environmental prohibition in terms of a local environmental duty. Specific to this statutory section, parts of special nature reserves, national parks or any nature reserves (as described in the NEM: PAA), or national botanical gardens (as described in terms of the NEM: BA), that is not developed, may not be levied in terms of the MPRA for property rates purposes.<sup>872</sup> Other variables to be considered in terms municipalities environmental responsibility to determine property value must also include aspects such as pollution and contamination.<sup>873</sup>

e) *Spatial Planning and Land Use Management Act 16 of 2013*

The SPLUMA finds direct application to LEG. The basis of the environmental obligations included in the SPLUMA is the recognition of the state's responsibility for observing the constitutional obligations related to environmental rights and development planning.<sup>874</sup> Hereto, local government has an environmental duty to ensure land use management, spatial planning management and land development management that protect the environment. The said duties are present under both the objects and the norms and standards of the SPLUMA.<sup>875</sup> Other duties derived from these principles include decision-making which must minimise negative environmental impacts,<sup>876</sup> and ensuring the

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<sup>871</sup> Section 17(1)(e) of the MPRA.

<sup>872</sup> Section 17(1)(e) of the MPRA.

<sup>873</sup> De Klerk 2015 *South African Valuer* 16.

<sup>874</sup> Preamble of the SPLUMA.

<sup>875</sup> Sections 3(d) and 6(1)(c) of the SPLUMA.

<sup>876</sup> Section 7(c)(ii) of the SPLUMA.



"sustainable livelihoods of communities" which could be affected by environmental "shocks".<sup>877</sup>

Local environmental obligations also extend to planning instruments such as SDFs, and municipalities are obliged to ensure that SDFs contain environmental objectives related to previously marginalised actors, such as previously disadvantaged areas, rural areas, informal settlements, etc.,<sup>878</sup> and the SDFs must also observe all environmental management instruments adopted by the related environmental authorities.<sup>879</sup> Municipal SDFs must be integrated with both provincial and national SDFs.<sup>880</sup> Further evidence includes the fact that any application which may cause prejudice in relation to national health interests must be referred to the Minister.<sup>881</sup> Municipalities are further responsible in terms of public consultation to submit comments in terms of EIA processes.<sup>882</sup> Different intergovernmental arrangements allow municipalities to execute environmental responsibilities through the Infrastructure Coordinating Commission and different IGR processes.

Examples of local environmental duties can be also seen in planning instruments like municipal SDFs and municipal land use schemes. Municipalities' environmental duties in terms of municipal SDFs are to conduct the assessment of environmental pressures and opportunities in their jurisdiction including *inter alia* assessment of environmental sensitivities, for example.<sup>883</sup> Local land use schemes must also comply with environmental legislation and concur with any environmental management instruments regulated by relevant environmental management agencies.<sup>884</sup> Municipalities' responsibilities further

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<sup>877</sup> Section 7(d) of the SPLUMA.

<sup>878</sup> Section 12(1)(h) of the SPLUMA.

<sup>879</sup> Section 12(1)(m) of the SPLUMA.

<sup>880</sup> Section 14(f) of the SPLUMA.

<sup>881</sup> Section 52(2)(a) of the SPLUMA.

<sup>882</sup> Regulation 7(2) of the Environmental Impact Assessment Regulations, published in GN R982 in GG 38282 of 4 December 2014 (the EIA Regulations).

<sup>883</sup> Section 21(j) of the SPLUMA.

<sup>884</sup> Section 24(1)(b) of the SPLUMA.

extend to ensuring proper record keeping of all their decisions pertaining to any amendment scheme or land use management decision.<sup>885</sup>

Municipal planning tribunals' (hereafter MPTs) responsibilities are configured amongst other things to ensure compliance with environmental legislation when an application attracts environmental issues.<sup>886</sup> MPTs or the authorised officials are authorised to consider and resolve land use applications internally.<sup>887</sup> Appeal authorities also consider appeals in terms of decisions of the MPT or authorised official *a quo*.<sup>888</sup> Local environmental responsibilities in terms of the SPLUMA include enforcement and monitoring, for example, where municipalities designate land use inspectors in terms of the SPLUMA to investigate non-compliant land uses.<sup>889</sup>

### *3.5.7 Other national statutes*

In addition to the body of constitutional, environmental and local government law discussed above, a number of other national statutes also have bearing on the execution of LEG by municipalities. These Acts include the *National Health Act*,<sup>890</sup> the *Disaster Management Act* and the *National Building Regulations and Building Standards Act*.<sup>891</sup>

#### a) *National Health Act* 61 of 2003

Although the functional area of health is a provincial and national competence, metropolitan and district municipalities are mandated to provide municipal health services as assigned under section 156(4) of the Constitution.<sup>892</sup> The objects of the NHA are to provide uniformity of health services, which includes "the protecting, respecting, promoting and fulfilling of the rights of the people of South Africa to an environment that

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<sup>885</sup> Section 31 of the SPLUMA.

<sup>886</sup> Section 42(2) of the SPLUMA.

<sup>887</sup> Section 26(4) of the SPLUMA.

<sup>888</sup> Section 51(3) of the SPLUMA.

<sup>889</sup> Section 32(3) of the SPLUMA.

<sup>890</sup> *National Health Act* 61 of 2003 (hereafter the NHA).

<sup>891</sup> *National Building Regulations and Building Standards Act* 103 of 1977 (hereafter the NBRBSA).

<sup>892</sup> Section 32(3) of the NHA.

is not harmful to their health or well-being".<sup>893</sup> The environmental mandate moreover is codified and specifically derived from the definition of "municipal health services" in terms of the Act, which includes: (a) water quality monitoring; (c) waste management; (g) environmental pollution control and (h) disposal of the dead.<sup>894</sup> Hence the NHA is an important statute in relation to local environmental obligations. Municipalities are responsible for concluding the necessary service level agreements with provinces to ensure that the necessary municipal health services are provided and for confirming the performance standards to be monitored by provincial government.<sup>895</sup> Hereto, municipal health managers are responsible for drafting a municipal health plan in observance of national and provincial programmes, which include both policies and guidelines.<sup>896</sup> Notwithstanding its compliance with national and provincial guidelines, the municipal health plan must be drafted in line with the municipal IDP.<sup>897</sup> Oversight of compliance in terms of the relevant municipal health plan is provided by the relevant MEC in the province.<sup>898</sup>

Functionaries ensuring external compliance include health officers, who must be appointed by the mayor of a metropolitan or district municipality through the internal dimension.<sup>899</sup> These health officers ensure external compliance by the citizenry through enforcement. These local environmental enforcement duties include environmental health inspections in terms of any probable violation of a right associated with section 24(a) of the Constitution, including pollution and health nuisance.<sup>900</sup> Extended powers to search and seize, with or without a warrant, under the obligation of enforcement are made available to ensure the proper performance of the local environmental responsibilities.<sup>901</sup> Other environmental enforcement responsibilities given to health officers relate to

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<sup>893</sup> Section 2(c)(ii) of the NHA.

<sup>894</sup> Section 1 of the NHA.

<sup>895</sup> Sections 32(3)(a) and (c) of the NHA.

<sup>896</sup> Section 33(1) of the NHA.

<sup>897</sup> Section 33(1) of the NHA.

<sup>898</sup> Section 33(2) of the NHA.

<sup>899</sup> Section 80(1)(c) of the NHA.

<sup>900</sup> Section 83(1) of the NHA.

<sup>901</sup> Sections 84 and 86 of the NHA.

resistance against entry of a premise, the disposal of items seized, and additional compliance procedures in terms of the NHA.<sup>902</sup>

Specific compliance and enforcement obligations in terms of municipalities' local environmental mandates include the management of land identified and used for the burial of human remains. Cemeteries, funeral parlours and crematoriums are the direct executive responsibility of municipalities in terms of Schedule 5B of the Constitution.<sup>903</sup> Although the local environmental responsibilities of burial sites relates more to regulated land use management, the environmental responsibilities hereto are discussed under the heading of the NHA, because the local environmental responsibilities are derived from the Regulations relating to the management of human remains under section 90(4) of the NHA. Municipal environmental obligations dictate that no land or site can be used for burial purposes unless specific environmental obligations hereto have been met.<sup>904</sup> The environmental responsibilities necessitate environmental authorisation in terms of the NEMA, the EIA Regulations and GN R543 of June 2010, and in the case of private sites local environmental obligations relate to a land survey.<sup>905</sup> Municipalities' approval must be in writing and address issues of waste removal and ablution, *inter alia* addressing sanitation and the availability of potable water. Local environmental regulatory aspects will in addition include the environmental requirements of burial sites and the monitoring of the same.<sup>906</sup> For example, burial sites need to be outside the 100-year floodplain, and located 350 m from ground water resources used for the purposes of drinking water. They must have the proper geotechnical composition, and consideration must be given to the requirements relating to water tables and burial depth.<sup>907</sup> Another regulatory requirement includes the burial of radioactive human remains. For instance, municipalities must

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<sup>902</sup> Sections 85, 87 and 88 of the NHA.

<sup>903</sup> Section 156(1)(a) of the Constitution.

<sup>904</sup> Regulation 15(1) of the Regulations Relating to the Management of Human Remains, published in GN R363 in GG 36473 of 22 May 2013.

<sup>905</sup> Regulation 15(1) of the Regulations Relating to the Management of Human Remains.

<sup>906</sup> Regulation 15(2) of the Regulations Relating to the Management of Human Remains.

<sup>907</sup> Regulation 15(2) of the Regulations Relating to the Management of Human Remains.

consider the amount of "incorporated radioactivity" in observation of the specific environmental conditions and climate in relation to the burial of radioactive remains.<sup>908</sup>

As with cemeteries, extended regulations require the proper municipal environmental authorisation and oversight of crematoriums<sup>909</sup> and the exhumation of bodies.<sup>910</sup> Pertinent to municipalities' environmental responsibilities, municipalities must ensure that the minimum environmental requirements are met in relation to crematorium facilities.<sup>911</sup> Particulars pertaining to only one of these requirements include the conformity of emissions levels to ambient air quality standards in terms of the NEM: AQA.<sup>912</sup> The exhumation of human bodies cannot be facilitated without the approval of the relevant municipality in whose jurisdiction the exhumation is due to take place.<sup>913</sup> Municipalities' environmental responsibilities must cause an environmental health practitioner to be present during the exhumation, which the environmental health practitioner must monitor so that no related health hazard is created due to the exhumation.<sup>914</sup>

b) *Disaster Management Act 57 of 2002*

The definition of "disaster" in the *Disaster Management Act*<sup>915</sup> could encompass natural or human-related occurrences which cause damage to property, infrastructure or the environment.<sup>916</sup> Van Niekerk explains that disasters is not an isolated event, hence it should not be considered as the responsibility of one sphere or agency.<sup>917</sup> However, municipalities more often have important roles in terms of disaster management.<sup>918</sup> Municipalities therefore have environmental obligations in the event of a disaster and the management thereof. Local government actors must be represented in intergovernmental

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<sup>908</sup> Regulation 25(1)(a) of the Regulations Relating to the Management of Human Remains.

<sup>909</sup> Regulation 17 of the Regulations Relating to the Management of Human Remains.

<sup>910</sup> Regulation 27 of the Regulations Relating to the Management of Human Remains.

<sup>911</sup> Regulation 18(1) of the Regulations Relating to the Management of Human Remains.

<sup>912</sup> Regulation 18(1)(g) of the Regulations Relating to the Management of Human Remains.

<sup>913</sup> Regulation 26(1)(a) of the Regulations Relating to the Management of Human Remains.

<sup>914</sup> Regulation 27(1)(d) and (f) of the Regulations Relating to the Management of Human Remains.

<sup>915</sup> *Disaster Management Act 57 of 2002* (hereafter DMA).

<sup>916</sup> See the definition of "disaster" in s 1 of the DMA.

<sup>917</sup> Van Niekerk "Disaster Risk Reduction" 23-8.

<sup>918</sup> Also see Meyer and Roos "Hazardous Substances Management and Control" 18-78.

structures like the Intergovernmental Committee on Disaster Management<sup>919</sup> and the National Disaster Management Advisory Forum.<sup>920</sup> Municipalities therefore have advisory functions associated with the intergovernmental sphere when the aforementioned forums consider aspects pertaining to disasters. Municipalities are guided by the national disaster management framework.<sup>921</sup> The Head of the National Centre may delegate or assign duties to municipal disaster management centres.<sup>922</sup> From an IGR perspective, the national disaster management centre needs to develop guidelines to integrate disaster management guidelines in terms of provincial, national and municipal development plans.<sup>923</sup> Municipalities or municipal disaster management centres need to coordinate their activities with the national disaster management centres.<sup>924</sup> Municipal disaster management frameworks must align with provincial and national disaster management frameworks.<sup>925</sup>

Municipalities have responsibilities whereby every metropolitan and district municipality must establish and implement a disaster management framework.<sup>926</sup> Metropolitan and district municipalities must establish as part of the administration a disaster management centre within their municipal jurisdictions.<sup>927</sup> The performance of the powers and duties of the municipal disaster management centre is subject to the municipality's IDP and directives of the municipal council issued in terms of the national framework.<sup>928</sup> Internal requirements necessitate the appointment of heads of the municipal disaster management centres.<sup>929</sup> The submission of the ARs of the municipal disaster management centre must be done on an annual basis to the municipal council.<sup>930</sup> Internal coordinating activities will include the establishment of municipal disaster management advisory forums, the

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<sup>919</sup> Section 4(1)(c) of the DMA.

<sup>920</sup> Section 5(1)(d) of the DMA.

<sup>921</sup> Section 7(2)(e) of the DMA.

<sup>922</sup> Section 14(1)(c) of the DMA.

<sup>923</sup> Section 19(e) of the DMA.

<sup>924</sup> Section 15(4) of the DMA.

<sup>925</sup> Section 42(3) of the DMA.

<sup>926</sup> Section 42(1) of the DMA.

<sup>927</sup> Section 43(1) of the DMA. Also see Van Niekerk "Disaster Risk Reduction" 23-17.

<sup>928</sup> Section 44(3)(b) of the DMA. Also see Van Niekerk "Disaster Risk Reduction" 23-16.

<sup>929</sup> Section 45 of the DMA.

<sup>930</sup> Section 50(1) of the DMA. Also see Van Niekerk "Disaster Risk Reduction" 23-25.

preparation of disaster management plans by municipal entities and of a disaster management plan for municipal areas.<sup>931</sup>

The local responsibilities of municipalities include the prevention and mitigation of the adverse effects of a disaster in communities by exercising their powers and functions in relation to section 44 of the Act.<sup>932</sup> Municipal councils are primarily responsible for reacting to local disasters.<sup>933</sup> The local responsibilities will include the co-ordination and management of the local disaster team *inter alia* to mitigate and respond to the disaster.<sup>934</sup> Moreover municipal councils must promulgate by-laws to authorise the necessary directives to include the release of resources and personnel, the implementation of the Municipal Disaster Management Plan (hereafter MDMP), the evacuation of temporary shelters, the regulation of traffic and other emergency procedures.<sup>935</sup> Transgressions of local directives promulgated in terms of the by-laws are responded to with the necessary penalties thereto.<sup>936</sup>

c) *National Building Regulations and Building Standards Act 103 of 1977*

Part B of Schedule 4 of the Constitution places building control in the functional competence of municipalities. Municipalities are therefore the custodians of building control in their municipal jurisdictions.<sup>937</sup> Wessels explains that municipalities hold a large burden of responsibility to ensure that the building environment *inter alia* meets sustainable economic, social and environmental outcomes.<sup>938</sup> A positive duty is placed on local government to prevent adverse environmental consequences<sup>939</sup> in the performance of their duty as regulators of the building environment. Among its local responsibilities is

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<sup>931</sup> Sections 51, 52 and 53 of the DMA. Also see Van Niekerk "Disaster Risk Reduction" 23-18.

<sup>932</sup> Section 44 of the DMA. Also see ss 47 and 48 of the DMA.

<sup>933</sup> See s 54(1) of the DMA. Also see ss 54(1)(a) and (b) for the differentiation of responsibility between metropolitan and district municipalities.

<sup>934</sup> Section 55(2) of the DMA.

<sup>935</sup> Sections 55(2)(a), (b), (c), (d) and (e) of the DMA.

<sup>936</sup> Section 55(4) of the DMA.

<sup>937</sup> Section 4(1) of the NBRBSA.

<sup>938</sup> Wessels "Green Building" 25-4.

<sup>939</sup> Regulation F6 of the National Building Regulations, published in GN R2378 in GG 12780 of 12 October 1990 (hereafter the National Building Regulations).

the duty to monitor building activities and enforce environmentally compliant behaviour.<sup>940</sup>

Other examples include the enforcement of by-laws and building regulations in terms of sustainable practices where the monitoring and enforcement of materials stored<sup>941</sup> and building rubble<sup>942</sup> accumulating on site are properly regulated. These legislated monitoring and enforcement obligations amongst others are facilitated by building control officers through the approval of building plans, the issuing of building permits, the issuing of certificates of completion<sup>943</sup> and the issuing of compliance notices.<sup>944</sup> Other enforcement measures include the authority to demolish structures on the obtainment of the necessary court order.<sup>945</sup>

Local environmental standards responsibilities can include Parts P and Q of the NBRBSA. These standards relate directly to probable environmental risks in the construction of structures and include drainage<sup>946</sup> and non-water-borne means of sanitary disposal.<sup>947</sup> For example, where any person wants to engage in the discharge of effluent or any liquid or solid matter, the activity must be approved by the municipality.<sup>948</sup> Another example relates to the following situation: "Where water-borne sewage disposal is not available, other means of sewage disposal shall be permitted by the local authority."<sup>949</sup> Notwithstanding the prescripts of the NBRBSA, municipalities can deviate from the standard based on the perceived immateriality thereof.<sup>950</sup> Hence, deviation will not be applicable to any related environmental standards prescribed hereto.

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<sup>940</sup> Regulations F3 and F5 of the National Building Regulations.

<sup>941</sup> Regulation F9 of the National Building Regulations.

<sup>942</sup> Regulation F8 of the National Building Regulations.

<sup>943</sup> Section 14 of the NBRBSA.

<sup>944</sup> Sections 10, 11 and 12 of the NBRBSA.

<sup>945</sup> Section 21 of the NBRBSA.

<sup>946</sup> Part P of the NBRBSA.

<sup>947</sup> Part Q of the NBRBSA.

<sup>948</sup> Regulation P4(1) of the National Building Regulations.

<sup>949</sup> Regulation Q1 of the National Building Regulations.

<sup>950</sup> Section 18(1) of the NBRBSA.



The promulgation of by-laws is utilised to contribute to a healthy environment. By-laws can regulate procedure and standards to observe environmental duties.<sup>951</sup> Other critical actions should include progressive environmental measures adopted internally by council to regulate conduct in the local building industry. These include the drafting of internal directives and policies which assume "environmentally and sustainable measures" in the building regulatory environment. The appointment of building control officers must also be completed by municipalities, to allow officers to perform duties as determined in terms of the statute.<sup>952</sup> Responsibilities are further extended in terms of the appointment of building control officers who must have attained the minimum qualifications of a building control officer.<sup>953</sup>

External responsibilities extend to the allowance of appeals when a person is aggrieved by a failure to grant approval or other related matters. The appeal will be considered by an external review board.<sup>954</sup> External intervention is also applicable where municipalities fail to exercise their powers to approve an application in a certain timeframe, when the judiciary is allowed to intervene.<sup>955</sup>

### *3.5.8 Pronouncements of the courts on local environmental governance*

The legislative framework relevant to LEG and as outlined in the sections above gives one a good overview of the duties and responsibilities of local government in relation to the environment. These duties and responsibilities are at the basis of understanding what local government is accountable for. The judiciary, however, is tasked with interpreting, clarifying and applying this legislative framework and it therefore merits to also look into some of the judgments in recent years that shed light on the environmental duties and functions of municipalities in South Africa's system of co-operative government. The

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<sup>951</sup> Regulation A2(1)(f)(v) of the National Building Regulations.

<sup>952</sup> Section 5 of the NBRBSA.

<sup>953</sup> Regulation A16 of the National Building Regulations.

<sup>954</sup> Section 9(1) of the NBRBSA.

<sup>955</sup> Section 8 of the NBRBSA.

following cases are briefly considered: *Nel v Hessequa Local Municipality*<sup>956</sup> (hereafter the *Hessequa* case), *Mazibuko v City of Johannesburg*<sup>957</sup> (hereafter the *Mazibuko* case), *Maccsand (Pty) Ltd v City of Cape Town*<sup>958</sup> (hereafter the *Maccsand* case), and *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality*<sup>959</sup> (hereafter the *Kgetlengrivier* case). Note that this is not an exhaustive list but that for the present purposes only a select few cases are discussed to illustrate the courts' engagement with and approach to matters of LEG.

### 3.5.8.1 *Hessequa* case

In the *Hessequa* case the applicants approached the Western Cape Division of the High Court to have by-laws that were promulgated by the Hessequa Local Municipality, declared unconstitutional and set aside.<sup>960</sup> The applicants averred that the local municipality, through its by-laws, did not have the necessary authority to regulate and enforce conduct pertaining to the use of rivers within its jurisdiction.<sup>961</sup> The Court interpreted local government's competencies in terms of Schedule 4B and 5B, read with section 156 of the Constitution, to include natural amenities like public spaces and municipal recreation.<sup>962</sup>

Du Plessis and Fuo contend that the execution of environmental powers does not necessarily need be facilitated by means of assignment but based on the legal arguments in the *Hessequa* matter on the principles considered in terms of "subsidiarity" and

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<sup>956</sup> *Nel v Hessequa Local Municipality* (Western Cape Division of the High Court) (unreported) case number 12576/2013 of 14 December 2015 (hereafter the *Hessequa* case).

<sup>957</sup> *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (hereafter the *Mazibuko* case).

<sup>958</sup> *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) (hereafter the *Maccsand* case).

<sup>959</sup> *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality* (UM 271/2020) [2020] ZANWHC 95 (18 December 2020) (hereafter the *Kgetlengrivier* case).

<sup>960</sup> In the *Hessequa* case the matter relates to the Hessequa Local Municipality that adopted specific by-laws in relation to the management and use of local amenities like the rivers in their jurisdiction. The by-laws *inter alia* regulated boating activities, prohibited deemed unlawful behaviour in relation to the use of the amenities, imposed a procedure of compliance and allowed for enforcement in terms of the removal and seizure of boats when deemed non-compliant.

<sup>961</sup> *Hessequa* case para 9.

<sup>962</sup> *Hessequa* case para 11.

"developmental local government".<sup>963</sup> Therefore, environmental powers can be assumed and performed if incidental to the proper performance of such functions.<sup>964</sup>

Local environmental responsibilities would therefore also include authority in terms of rivers within municipalities' jurisdiction and consequently allow enforcement thereof by means of the by-laws promulgated by the local authority.<sup>965</sup> Du Plessis and Fuo explain that the court was correct and consistent in terms of their interpretation of local (environmental) governance, in that the local authorities correctly exercised their environmental responsibilities.<sup>966</sup> This is affirmed in that the by-laws passed are in line with municipalities' local environmental responsibilities as conceived in terms of sections 24 and 152(1)(d) of the Constitution.<sup>967</sup>

#### 3.5.8.2 *Mazibuko* case

In the *Mazibuko* case the court highlighted the juncture between providing access to water (a right) and the duty to manage water services sustainably.<sup>968</sup> The court recognised the fact that the preservation of water is the responsibility of all three spheres of government.<sup>969</sup> More specifically, local environmental responsibilities are established in that the installation of pre-paid water meters is reasonably incidental to providing services to residents in a sustainable manner.<sup>970</sup> The City of Johannesburg had therefore exercised the implementation of by-laws to execute its local environmental responsibility in the sustainable use and preservation of water.

#### 3.5.8.3 *Kgetlengrivier* case

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<sup>963</sup> Du Plessis and Fuo 2017 *CJLG* 77.

<sup>964</sup> Du Plessis and Fuo 2017 *CJLG* 77.

<sup>965</sup> *Hessequa* case para 31.

<sup>966</sup> Du Plessis and Fuo 2017 *CJLG* 75.

<sup>967</sup> Du Plessis and Fuo 2017 *CJLG* 75.

<sup>968</sup> The matter relates to consideration of whether a pilot project in the City of Johannesburg to address water losses and non-payment for water services in Soweto was lawful. The project was designed to reduce water losses, for which the pre-paid meters were installed. The charges would relate to the use of water in excess of the 6 kilolitre per household monthly.

<sup>969</sup> *Mazibuko* case para 3.

<sup>970</sup> *Mazibuko* case para 3.

The *Kgetlengrivier* case also advanced the understanding of local environmental duties in the context of the contravention of municipal environmental obligations.<sup>971</sup> The court confirmed the local environmental responsibilities of the Kgetlengrivier Local Municipality stating that it was in breach of its obligations to avoid environmental contamination.<sup>972</sup> The contravention caused ongoing raw sewage to spill into the Koster and Elands rivers. Based on its obligations, the municipality and its municipal manager were compelled to take the necessary steps to immediately remedy the spillages, to mitigate the consequences of the pollution and to rehabilitate the areas affected by the spillages.<sup>973</sup> The significance of the interdict also extends to the fact that local environmental responsibilities have subsequent liability in the absence of accountability in that the municipal manager was handed down a suspended sentence of 90 days imprisonment.<sup>974</sup>

#### 3.5.8.4 Other cases

In *Johannesburg Municipality v Gauteng Development Tribunal*,<sup>975</sup> it is confirmed that current constitutional government authority has moved away from the old-order government authority, in that the current constitutional model of governance confers powers on lower tiers of government, whereas all old-order governance responsibilities were vested only in Parliament.<sup>976</sup>

In the *Maccsand* matter, the court further explains that local environmental responsibilities may be executed in the performance of primary competencies as directed in terms of the Constitution.<sup>977</sup> These powers are allocated to all three spheres of government in terms of the Constitution, based on the "functional vision" and appropriateness of each

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<sup>971</sup> In the *Kgetlengrivier* case, the North West Division of the High Court granted an urgent interdict in favour of the Kgetlengrivier Concerned Citizens. In the order issued by the high court, both the Kgetlengrivier Local Municipality and its municipal manager were interdicted from allowing raw sewerage to overflow into the Koster and Elands rivers.

<sup>972</sup> *Kgetlengrivier* case para 4. Also see para 3.5.5 above - *National Water Act 36 of 1998* under *Sectoral environmental law*.

<sup>973</sup> *Kgetlengrivier* case para 7.

<sup>974</sup> *Kgetlengrivier* case para 9.

<sup>975</sup> *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA).

<sup>976</sup> *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 24.

<sup>977</sup> *Maccsand* case para 47.

sphere.<sup>978</sup> Jafta J confirmed that because the powers allocated among the different spheres of government are not hermetically sealed, the exercise of inter-related or incidental responsibilities may sometimes overlap.<sup>979</sup> Local environmental responsibilities can therefore be exercised in a local government functional area without necessarily causing intrusion into another sphere's competency. Co-operative governance is therefore central to LEG in this context.

The nature of LEG was also amplified in *Le Sueur v Ethekwini Municipality*,<sup>980</sup> where Gyanda J confirmed that municipalities are authorised to legislate in relation to environmental matters which relate to the protection of the environment at local level.<sup>981</sup> Humby dissects and explains that the capacitation of municipalities in the exclusive domain of environmental legislation is not an intrusion on national and provincial legislative powers to legislate on the environment, but explains it in the following way:<sup>982</sup>

Said relationship with environmental governance from a local government level is motivated in relation to the state's obligation pertaining the constitutional rights conceived in relation to the environment as contained in section 24 of the Constitution. Second the scope of legislative and executive powers in relation to section 156 of the Constitution, which relates to Du Plessis's local government's environmental prevalence under the subsidiarity principle (as discussed earlier) thirdly; the constitutional model of co-operative governance and the relevance of environmental functions as considered in terms of constitutional co-operative governance. Fourth; the interpretation of 'municipal planning' and the incidental nature of environmental aspects featuring in the consideration of the local government functional area and lastly national and provincial support for local government.<sup>983</sup>

Further to the prevalence of local government's legislative power to legislate on environmental matters, the *Le Sueur* judgement includes local government under the interpretation of "state", of which the obligation relates to local government's role in fulfilling the rights granted under section 24 of the Constitution.<sup>984</sup> Notwithstanding the associated obligation to fulfill constitutional rights, Gyanda J expanded on local

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<sup>978</sup> *Maccsand* case para 47.

<sup>979</sup> *Maccsand* case para 47.

<sup>980</sup> *Le Sueur v Ethekwini Municipality* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) (the *LeSueur* case).

<sup>981</sup> *Le Sueur* case para 2.

<sup>982</sup> Humby 2014 *PER / PELJ* 1664.

<sup>983</sup> Humby 2014 *PER / PELJ* 1665.

<sup>984</sup> *Le Sueur* case para 19.

government's associated obligation to administer environmental affairs in terms of section 156 of the Constitution.<sup>985</sup> Important is the now settled argument that local government is required to execute specific duties and responsibilities pertaining to local environmental governance.

This applies primarily to any matter assigned to the local authority in terms of section 156(1)(b), or any matter that can be dealt with most effectively at local government level. Such environmental matters must be administered at local government level.<sup>986</sup>

Humby suggests that specific allocations derived from specific functional areas in the constitutional schedules are not "hermetically sealed" and that purported overlaps of powers are not *per se* "impermissible and do not constitute the illegal veto of the powers of one sphere by another".<sup>987</sup> Interpretation of the *Le Sueur* judgment therefore approves the prevalence of LEG and further reinforces the notion that environmental aspects are ideally governed, both executively and legislatively, in all three spheres of government.<sup>988</sup> Added reference hereto is made by Gyanda J, who confirms that the national environmental management principles as contained in the NEMA are applicable to all organs of state whose performance of actions may affect the environment.<sup>989</sup>

Accordingly, Gyanda J supports his findings by referring to Ngcobo J's pronouncement in *Fuel Retailers Association v DG: Environmental Management, Mpumalanga*,<sup>990</sup> where the aforesaid NEMA principles are deemed applicable to the actions of all organs of state.<sup>991</sup>

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<sup>985</sup> Humby 2014 *PER / PELJ* 1665; "... although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern or sphere of National and Provincial responsibility... Local governments in the form of Municipalities are in the best position to know, understand and deal with issues involving the environment at local level" - *Le Sueur* case para 20

<sup>986</sup> Humby 2014 *PER / PELJ* 1667.

<sup>987</sup> Humby 2014 *PER / PELJ* 1667.

<sup>988</sup> Humby 2014 *PER / PELJ* 1667.

<sup>989</sup> *Le Sueur* case para 34.

<sup>990</sup> *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC).

<sup>991</sup> *Le Sueur* case para 34.

Therefore, more specifically from a planning law perspective, it is suggested that local authorities have always had LEG functions and duties in municipal jurisdictions, although the interpretation of the *Le Sueur* judgment and Gyanda J's deliberations<sup>992</sup> could be thought to validate the view that environmental governance is a concern of local government, particularly in the context *inter alia* of the legislative mandate of local government. It should be noted, though, that not all legal commentators are swayed by the *Le Sueur* judgment to accept that local government has powers associated with the environment.

Humby cites Bronstein in disagreeing with the rationale of the *Le Sueur* judgment, suggestive of local government being a legislative branch of environmental aspects, pertaining municipal planning, is not correct. Humby contends that in observance of the *Le Sueur* matter, the action of the making of a by-law could be considered to be for the purposes of effective administration, rather than in the exercising of original powers in relation to municipal planning.<sup>993</sup> Notwithstanding Humby's critique, the *Le Sueur* judgment still survives as a precedent for LEG, and further fortifies the concept under the auspices of "an original constitutional power" rather than as an act of an incidental nature or accompanying the exercise of local government environmental powers, based on the original power of municipal planning.

It is submitted that the *Le Sueur* judgment, read together with Humby's analysis of the same, reinforces Du Plessis' interpretation of LEG through the principle of subsidiarity, in which some environmental matters must be assigned to where they can most effectively be administered; e.g. to local government.<sup>994</sup> It follows that local government is burdened with the functions and duties associated with LEG in South Africa.

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<sup>992</sup> *Le Sueur* case para 40.

<sup>993</sup> Humby 2014 *PER / PELJ* 1676.

<sup>994</sup> See Du Plessis' discussion of subsidiarity under para 3.4 above - *Local environmental governance defined*.

### ***3.6 Accountability for local environmental governance***

As explained in paragraph 2.5.1 above, the constitutional principles which govern public administration in South Africa include accountability.<sup>995</sup> Municipalities are obliged to provide local communities with democratic and accountable governance.<sup>996</sup>

Accountability and transparent governance are important to ensure a municipality functions "effectively, efficiently and ethically".<sup>997</sup> It follows that municipal accountability adds value to LEG through apportioning responsibility and transparency as configured in law and as was elaborated on in section 3.5 above. The section below explores features of accountability in order to understand exactly how accountability in the context of local environmental governance looks and performs.

#### *3.6.1 Features of accountability complementing local environmental governance*

Accountability in the context of local environmental government reflects traits of public responsibility.<sup>998</sup> Responsibility is entrenched in the "collection of legislative, executive and administrative functions, instruments and auxiliary processes"<sup>999</sup> that apply *inter alia* to LEG. To meet the demands and deliver the desired outcomes of LEG, accountability informs LEG on how local government must perform its functions in terms of framework and sectoral environmental law.<sup>1000</sup> As previously argued, the prevailing definition of LEG does not explicitly acknowledge accountability and how it supplements LEG. To advance a discussion on the part that accountability plays in LEG, it is necessary to zoom in on the accountability apportioned to specific role-players in local government.<sup>1001</sup>

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<sup>995</sup> Section 195(1)(f) of the Constitution.

<sup>996</sup> Section 152(1)(a) of the Constitution.

<sup>997</sup> Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-36.

<sup>998</sup> See para 2.2.2 in Chapter 2.

<sup>999</sup> Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 120.

<sup>1000</sup> See para 3.5 in Chapter 3 to understand the extent of accountability created by local government framework and sectoral environmental law.

<sup>1001</sup> See para 3.5 in Chapter 3.



Read with the relevant constitutional provisions, accountability consorts perfectly with the concept of LEG. Derived from the development of the concept of LEG,<sup>1002</sup> the definition of accountability developed in Chapter 2 can also be used to complement the definition of LEG.<sup>1003</sup> Therefore, it is argued that accountability has the potential to augment LEG. LEG can only be strengthened if accountability in terms of LEG and the legal duties that underpin it are a) understood; and b) prioritised. Local environmental accountability as a sector-specific form of accountability may be defined as the responsibility of local government officials and councillors to account for the execution of their obligations, duties and functions in terms of law (by way of instrumentation, processes etc) and to bear the consequences and liability for non-compliance and execution failures.<sup>1004</sup>

### *3.6.2 What do accountable municipalities look like and how do they perform?*

In addition to the definition above, it merits to identify some features that will inevitably go with an accountable municipality.

Firstly, an accountable municipality would be able to justify and explain its conduct in relation to the explicit and implicit environmental duties emanating from the substantive and procedural rights in the Constitution.<sup>1005</sup> It would also be able to demonstrate and explain its execution (responsibility) or failure (answerability) to execute its developmental functions in terms of chapter 7 of the Constitution and its adherence to the constitutional principles underpinning the public administration.<sup>1006</sup>

Secondly, accountable municipalities execute local environmental responsibilities.<sup>1007</sup> It is suggested that accountable municipalities are responsive and responsible in exercising

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<sup>1002</sup> Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 120.

<sup>1003</sup> See para 3.4 in Chapter 3.

<sup>1004</sup> The definition of accountability in para 2.3 in Chapter 2.

<sup>1005</sup> See para 3.5.3 in Chapter 3.

<sup>1006</sup> See para 3.5.3 in Chapter 3.

<sup>1007</sup> See para 3.5 in Chapter 3 to understand the extent of the accountability created by the local government for local environmental governance in the South African context.

their local environmental duties in relation to other actors as perceived from an accountable local environmental law perspective.<sup>1008</sup>

Thirdly, municipalities that are accountable understand that local environmental responsibilities and duties are to be performed across sectors and institutions.<sup>1009</sup> These municipalities perform their duties and responsibilities derived from environmental law both from an environmental framework and from an environmental sectoral law perspective. Accountable municipalities prevent the pollution of water resources, for example.<sup>1010</sup> Accountable municipalities observe environmental obligations that *inter alia* include adherence to national biodiversity frameworks<sup>1011</sup> and local alignment with the national and provincial coastal management programmes.<sup>1012</sup>

Accountable municipalities have "strong leadership and management skills" and "fair and consistent mechanisms to monitor and pursue subsequent enforcement".<sup>1013</sup> An accountable municipality would typically have environmental by-laws that help to regulate community behaviour to the advancement of the municipality's environmental obligations and responsibilities.<sup>1014</sup> Municipalities that are accountable enforce citizens' conduct to prevent the related pollution of water resources<sup>1015</sup> and ensure compliance with environmental legislation in terms of planning activities.<sup>1016</sup>

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<sup>1008</sup> See para 3.5 in Chapter 3 to understand the extent of the accountability created by the local government for local environmental governance in the South African context.

<sup>1009</sup> UNEP *Environmental Rule of Law* 45.

<sup>1010</sup> See para 3.5.5(a) in Chapter 3 with regard to the NWA to understand the extent of the accountability created by the statutory functions and duties of local government feeding into LEG.

<sup>1011</sup> See para 3.5.5(c) in Chapter 3 with regard to the NEM: BA to understand the extent of the accountability created by the Sectoral Environmental Law.

<sup>1012</sup> See para 3.5.5(f) in Chapter 3 with regard to the NEM: ICMA to understand the extent of the accountability created by the Sectoral Environmental Law.

<sup>1013</sup> UNEP *Environmental Rule of Law* 45.

<sup>1014</sup> See para 3.5.4(a) in Chapter 3 with regard to the NEMA to understand the extent of the accountability created by the statutory functions and duties of local government feeding into LEG.

<sup>1015</sup> See para 3.5.5(a) in Chapter 3 with regard to the NWA to understand the extent of the accountability created by the statutory functions and duties of local government feeding into LEG.

<sup>1016</sup> See para 3.5.6(e) in Chapter 3 with regard to the SPLUMA to understand the extent of the accountability created by the framework local government law.

Municipal officials in accountable municipalities ensure proper co-ordination and synergy between local framework and environmental sectoral law.<sup>1017</sup> Accountable municipalities develop "independent audit and review mechanisms", allow for the "collection, use and dissemination of reliable data" and promote the internal environmental "capacity of personnel and institutions".<sup>1018</sup> Accountable municipalities develop internal biodiversity management capacity through the Integrated Development Framework,<sup>1019</sup> facilitate internal administrative review processes in terms of Air Quality Management<sup>1020</sup> and do internal administrative planning with the prioritisation of open spaces and green belts in terms of the urban environment.<sup>1021</sup>

### *3.6.3 What do unaccountable municipalities look like and how do they perform?*

Unaccountable municipalities are unresponsive to their local environmental obligations in terms of their constitutional obligations. Municipalities that do not act as protectors of their local environment and do not pursue sustainability in the performance of their duties and responsibilities are unaccountable.<sup>1022</sup> These municipalities do not execute their duty of care in relation to the environment and do not monitor and enforce their environmental responsibilities.<sup>1023</sup> Unaccountable municipalities do not have by-laws to enforce their local environmental responsibilities.<sup>1024</sup>

Municipalities that are not accountable do not adhere to specific standards in relation to waste water treatment plants and cause ongoing contamination and spillages in local

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<sup>1017</sup> See para 3.5 in Chapter 3 to understand the extent of the accountability created by the local government for local environmental governance in the South African context.

<sup>1018</sup> UNEP *Environmental Rule of Law* 45.

<sup>1019</sup> See para 3.5.5(c) in Chapter 3 with regard to the NEM: BA to understand the extent of the accountability created by the Sectoral Environmental Law.

<sup>1020</sup> See para 3.5.5(d) in Chapter 3 with regard to the NEM: AQA to understand the extent of the accountability created by the Sectoral Environmental Law.

<sup>1021</sup> See para 3.5.5(g) in Chapter 3 with regard to the NEM: PAA to understand the extent of the accountability created by the Sectoral Environmental Law.

<sup>1022</sup> See para 3.5.3 in Chapter 3.

<sup>1023</sup> See para 3.5.4 (a) in Chapter 3 with regard to the NEMA.

<sup>1024</sup> See para 3.5.4 (a) in Chapter 3 with regard to the NEMA.

communities.<sup>1025</sup> Similarly, these municipalities do not provide for clean drinking water and effluent control in their communities that causes health and sanitary risks.<sup>1026</sup>

More often than not, unaccountable municipalities lack the proper execution of decentralised and delegated responsibilities. Unaccountable municipalities lack political and democratic accountability in that they are frequently unresponsive to their communities.<sup>1027</sup> Unaccountability is also reflected in impassive public participation processes or the absence thereof, poor judicial and administrative track records, and finally a lack of subsidiarity. It follows that unaccountable municipalities do not adhere to environmental law as described in reference to the public participatory or social responsibilities in the local constituencies.<sup>1028</sup> These accountability deficits (unaccountable behaviour) in the context of local environmental law reflect their social accountability and legal accountability limitations.<sup>1029</sup>

Unaccountable municipalities do not comply with environmental directives from other spheres of government that negatively influence environmental wellbeing in their communities.<sup>1030</sup> Grounded on Du Plessis' synopsis of the importance of local government in modern society as an aspect of holistic governance, unaccountable municipalities compromise co-operative environmental governance, which, depending on the degree of non-compliance, causes breaches of intergovernmental protocol and probable interventions.<sup>1031</sup> Unaccountable behaviour displayed by a municipality in the intergovernmental dimension is consequently met with the usurping of its executive or legislative autonomy through intergovernmental intervention, for example.<sup>1032</sup>

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<sup>1025</sup> See para 3.5.5 (a) in Chapter 3 with regard to the WSA.

<sup>1026</sup> See para 3.5.5 (a) in Chapter 3 with regard to the WSA.

<sup>1027</sup> See para 2.2.2 in Chapter 2.

<sup>1028</sup> See para 3.5 in Chapter 3 for a detailed discussion in terms of local government's environmental governance requirements.

<sup>1029</sup> See para 2.5.6 in Chapter 2.

<sup>1030</sup> See para 3.5.5(f) in Chapter 3.

<sup>1031</sup> See para 4.4 in Chapter 4.

<sup>1032</sup> See s 63 of the WSA, for example, where other spheres of government can formally intervene to take over the responsibility of the original competency holder.

A failure to facilitate a specific responsibility leads to unaccountable governance and a probable breach of the requisite LEG. Du Plessis describes local government as the cornerstone of modern democratic governance, and states that municipalities are its guardians in the geographical areas where their citizens live.<sup>1033</sup>

Unaccountable municipalities normally experience poor organisational responsibility or leadership, poor execution of internal administrative processes, a lack of professional accountability due to the inadequacy or lack of professional appointments in their institutions, a lack of ethical leadership, and lastly weakened system of delegations and oversight thereof.

Unaccountable municipalities do not have engineers and water treatment specialists to guide technical processes in effluent treatment processes, for example. In observance of environmental law, for example, unaccountable municipalities do not observe environmental responsibilities in the context of the environmental planning required in terms of their IDPs.<sup>1034</sup> Accountability deficits can therefore manifest in the context of bureaucratic accountability, administrative accountability and professional accountability.<sup>1035</sup> "Answerability" or "liability" in the case of unaccountable municipalities, with respect to their environmental governance effort, is consequential on a failure to act in a regulated manner.<sup>1036</sup>

### *3.6.4 Accountability in environmental (local) governance - to whom and why?*

#### 3.6.4.1 Accountability to other organs of state and chapter 9 institutions

As explained in Chapter 2, accountability applies to the relationship between the state and citizens as well as between different organs of state. The other organs of state to which

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<sup>1033</sup> Du Plessis "Local Government and the Pursuit of Urban Sustainability" 266.

<sup>1034</sup> See para 3.5 in Chapter 3 for a detailed discussion in terms of local government's environmental governance requirements.

<sup>1035</sup> See para 2.5.7 in Chapter 2.

<sup>1036</sup> See para 3.5 in Chapter 3 for a detailed discussion in terms of local government's environmental governance requirements.

local government owes accountability include other spheres of government, provincial and national departments and chapter 9 institutions.

Accountability towards other organs of state in terms of LEG is based on the assumption that municipalities are regulated by constitutional directives and the concept of co-operative environmental governance, which includes other spheres of government.<sup>1037</sup> Accountability in this dimension is therefore mainly constituted to regulate how accountability amongst spheres of government is performed, based on the quasi-federal nature of our co-operative governance.<sup>1038</sup> Consequent types of accountability in the intergovernmental accountability dimension will therefore include legal accountability,<sup>1039</sup> decentralised accountability, delegation accountability and devolution accountability, amongst other categories. The decentralised, delegation and devolution accountability categories are therefore founded on the municipality's answerability towards the actors in the co-operative domain,<sup>1040</sup> based on the functionaries' environmental duties as conceived by the Constitution, the NEMA and various other statutes. An example is local government's execution of its water services responsibilities, where in the absence of adequate responsibilities exercised by the water services authority, the Minister can intervene and seize the responsibilities.<sup>1041</sup>

Further to municipalities' answerability and consequent liability in accountability towards other organs of state, these institutions and procedures could for example include Inter-Governmental Regulations Forums, a Committee for Environmental Co-ordination, dispute resolution mechanisms, etc.<sup>1042</sup> Legislation which makes specific provision for the premise of accountability in the concept of co-operative environmental governance is the IRFA.<sup>1043</sup> The importance of the IRFA is attributed to its emphasis on accountable and coherent governance amongst the spheres of government, to ensure the progressive realisation of

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<sup>1037</sup> Kotzé "Environmental Governance" 121. Also see para 3.5.3 in Chapter 3.

<sup>1038</sup> See para 4.4 in Chapter 4.

<sup>1039</sup> See para 2.5.5 in Chapter 2.

<sup>1040</sup> See para 2.5.5 in Chapter 2.

<sup>1041</sup> See s 63 of the WSA.

<sup>1042</sup> Kotzé "Environmental Governance" 123.

<sup>1043</sup> Kotzé "Environmental Governance" 123.

constitutional rights which, with reference to co-operative environmental governance, include the realisation of a safe and healthy environment.

The different types of accountabilities in relation to the accountability towards other organs of state dimension and the necessary mechanisms in law to provide for LEG will be properly analysed in the following chapter.<sup>1044</sup> National government's oversight role and a probable mechanism thereto is the Municipal Regulations on the Standard Chart of Accounts (hereafter the MSCOA), which allows National Treasury to verify municipal information pertaining to its credibility, reliability and accuracy, for example.<sup>1045</sup> The most frequently encountered accountability institution in the public domain is the function provided by the Auditor-General of the Republic of South Africa (hereafter the AGSA), whose functions include the assessment of the accountability of all organs of state, including that of municipalities.<sup>1046</sup> The AGSA is accountable only to the National Assembly in terms of the Constitution of the Republic of South Africa.<sup>1047</sup>

#### 3.6.4.2 Accountability to the citizenry and the ratepayers

All environmental or quasi-environmental institutions which govern others are the face of environmental rule of law that is turned to the public.<sup>1048</sup> The components of the environmental rule of law *inter alia* include accountability, which needs to be present when asserting compliance and enforcement or acting as a functionary to ensure the rule of law. Accountability to citizenry and ratepayers comprises of numerous types of accountabilities, as described in the preceding chapter.<sup>1049</sup> Examples hereof include

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<sup>1044</sup> See para 4.3 in Chapter 4.

<sup>1045</sup> National Treasury *Municipal SCOA Circular No 6 of 2016* 3.

<sup>1046</sup> Preamble of the *Public Audit Act* 25 of 2004.

<sup>1047</sup> Section 188 of the Constitution.

<sup>1048</sup> UNEP *Environmental Rule of Law* 10.

<sup>1049</sup> See para 2.5.6 in Chapter 2.

political accountability,<sup>1050</sup> democratic accountability,<sup>1051</sup> social accountability,<sup>1052</sup> moral accountability,<sup>1053</sup> legal accountability,<sup>1054</sup> administrative accountability<sup>1055</sup> and subsidiarity accountability.

Accountability to the citizenry and the ratepayers represents different types of accountability, of which the responsibility (to whom) and answerability (about what) differs, depending on the type of accountability. For example, legal accountability will be suggestive of environmental by-laws enforced by officials, and in the absence thereof the subsequent liability in the form of "enforcement, judicial action, reprimand, injunction and penalties".<sup>1056</sup> Although instruments to ensure accountability will be discussed in the next chapter, examples of instruments that can be used to enforce environmental by-laws are compliance and enforcement-based instruments such as municipal courts and municipal police services.<sup>1057</sup> Other forms of legal accountability include quasi-judicial functions derived from original planning functions, like MPTs, internal appeals, valuation appeals and land use appeals.

Social accountability<sup>1058</sup> and moral accountability<sup>1059</sup> in terms of accountability towards the citizenry are enforced by activists or socially aware citizens. They deliver on governance principles such as openness and transparency and participatory governance.

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<sup>1050</sup> See the discussion in para 2.2.2(a) in Chapter 2 in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1051</sup> See the discussion in para 2.2.2(d) in Chapter 2 in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1052</sup> See the discussion in para 2.5.6.2 in Chapter 2 for a discussion on social accountability and being accountable to local electorates in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1053</sup> See the discussion in para 2.2.2 in Chapter 2 for a discussion on public sector accountability pertaining to the different types of accountabilities and the necessary elements thereto.

<sup>1054</sup> See the discussion in para 2.5.6.3 in Chapter 2 for a discussion on legal accountability and being accountable to local electorates in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1055</sup> See the discussion in para 2.2.2 in Chapter 2 for a discussion on administrative accountability and public sector accountability in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1056</sup> Mashaw "Accountability and Institutional Design" 128.

<sup>1057</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-31. See para 4.3 in Chapter 4.

<sup>1058</sup> See para 2.5.6.2 in Chapter 2 for a detailed discussion of "social accountability".

<sup>1059</sup> See para 2.5.6.2 in Chapter 2 for a detailed discussion of "moral accountability".



Civil-role players normally help with improved environmental law compliance in the local community and to promote accountability in LEG.<sup>1060</sup> Democratic accountability, in the form of elections, also forms part of accountability to the citizenry, but is generally regarded as inherently weak due to the extended intervals in between elections.<sup>1061</sup>

Finally, (social) accountability to the electorate is exerted through civil actors such as civil associations, the citizenry and the media, which exert pressure on government by using formal or informal mechanisms.<sup>1062</sup> Political accountability<sup>1063</sup> as a counterbalance to social accountability can also accommodate answerability from political powers through the provision of recalling public representatives, impeachment proceedings, and votes of no-confidence.<sup>1064</sup>

### 3.6.4.3 Accountability in the municipality towards council and management

Accountability in terms of LEG will ordinarily also interrogate the internal doings of municipalities. From an internal perspective, environmental (local) governance requires municipalities to hold themselves accountable for their own internal processes.<sup>1065</sup> Accountabilities most prevalent hereto will include bureaucratic accountability,<sup>1066</sup> administrative accountability,<sup>1067</sup> professional accountability,<sup>1068</sup> ethical accountability,<sup>1069</sup> delegation accountability<sup>1070</sup> and devolution accountability.<sup>1071</sup> As previously stated,

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<sup>1060</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-41.

<sup>1061</sup> Democratic accountability has been extensively discussed in Chapter 2; any further enquiry pertaining to the same can be interrogated in the previous chapter.

<sup>1062</sup> Jelmin *Democratic Accountability in Service Delivery* 7.

<sup>1063</sup> See para 2.2.2(a) in Chapter 2 for a detailed discussion of "political accountability".

<sup>1064</sup> Jelmin *Democratic Accountability in Service Delivery* 7.

<sup>1065</sup> Paragraph 4.2 in Chapter 4.

<sup>1066</sup> See the discussion in para 2.2.2 in Chapter 2 in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1067</sup> See the discussion in para 2.2.2(b) in Chapter 2 pertaining to administrative accountability in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1068</sup> See the discussion in para 2.2.2(c) in Chapter 2 pertaining to professional accountability in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1069</sup> See the discussion in para 2.2.2(d) in Chapter 2 pertaining to democratic accountability in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1070</sup> See the discussion in para 2.5.7 in Chapter 2 for discussion of delegation accountability.

<sup>1071</sup> See the discussion in para 2.5.7 in Chapter 2 for the types of accountabilities associated with internal actors in the "ruling internally" dimension are *inter alia* bureaucratic accountability, administrative accountability, professional accountability, ethical accountability and delegation accountability. Also see

accountability mostly resonates with the delegator of executive and legislative functionality (most often the council of a local authority), whereby accountability based on the decisions of the delegatee are determined by the mandatory obligation to report back to the delegator on the manner in which the delegatee exercised its functions.<sup>1072</sup>

Bureaucratic accountability is legislatively positioned with the administrative head of the municipality, being the accounting officer, who is the principal accountable person for administrative action.<sup>1073</sup> LEG therefore becomes the *de facto* responsibility of the bureaucratic head. If the administrative head fails to exercise the responsibility, the liability will lie with the accounting officer.<sup>1074</sup> An example hereof is when interdictory proceedings are launched against a municipality to desist from environmental degradation actions such as the illegal operation of waste landfill sites without the approval of the licensing authority.

In the event that the high court grants an order to interdict the municipality "to cease and desist" from certain actions and the municipality does not comply with the order, the municipal manager runs the risk of being detained for contempt of court (*ex facie curiae*). Hereto in *De Villiers v Kruger*, the bench of the Western Cape Division of the High Court demonstrated its willingness to rule on matters pertaining to a contempt of court by municipalities.<sup>1075</sup>

Another accountability issue prevailing in bureaucratic accountability is the close proximity of politicians and administrators. Political pressures often dilute bureaucratic accountability and cause "non-responsiveness", which impacts on the larger democratic

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the discussion in para 2.2.2 in Chapter 2 in relation to the different types of accountabilities and the necessary elements thereto.

<sup>1072</sup> See para 3.2.1 in Chapter 3.

<sup>1073</sup> See para 2.2.2(b) in Chapter 2.

<sup>1074</sup> See para 3.5.8.3 in Chapter 3 for a discussion on the *Kgetlengrivier* case. Also see para 4.2 in Chapter 4.

<sup>1075</sup> *De Villiers v Kruger* (15162/2017) [2018] ZAWCHC 66 (8 June 2018). Also see the *Kgetlengrivier* case: hereto the judge ordered imprisonment (same suspended on the basis of compliance to the order within a specific timeframe) of the municipal manager of the Kgetlengrivier Local Municipality.

accountability environment e.g. compromising the state's mandate to deliver services.<sup>1076</sup> Failures to deliver in terms of local environmental responsibilities such as access to water, proper sanitation and the provision of waste services often resonate in the democratic accountability domain and cause blame to be apportioned to politicians in public office.

Based on the internal accountability or oversight function of LEG, professional accountability<sup>1077</sup> and ethical accountability<sup>1078</sup> are frequently applicable to the functionality of professionals in the municipality. As explained in Chapter 2, professionals such as accountants, legal practitioners and officials performing legal duties in terms of statute are bound by the professional prescripts of their professions.<sup>1079</sup> Accountants, engineers and legal practitioners are regulated by their professional regulatory bodies and bound by their professions' Codes of Conduct / Codes of Good Practice (such as the Legal Practice Council, different Bar Councils, the South African Institute for Chartered Accountants, etc.) to ensure that their behaviour in the performance of their duties is ethical. Notwithstanding their internal obligations owing to their employment (an accountant, for instance, may be employed in internal auditing) they are also bound by the rules governing their profession. Similar hereto is the conduct required of legal practitioners, which requires them as officers of the court<sup>1080</sup> to abide by the prescripts of being a "fit and proper person" in the profession.<sup>1081</sup> Therefore, irrespective of the obligation of accountability in the "governing internally" dimension, practitioners are obliged to "ensure accountable conduct".<sup>1082</sup>

Municipalities often exercise their discretion to include the condition of a "fit and proper person" as an inherent requirement for a position of oversight. Consequently, legal practitioners are often appointed in internal compliance and enforcement roles such as

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<sup>1076</sup> Ajam 2019 <https://theconversation.com/stronger-laws-can-keep-politicians-from-meddling-in-financial-decisions-116097>.

<sup>1077</sup> See para 2.2.2(c) in Chapter 2 for a detailed discussion of "professional accountability".

<sup>1078</sup> See para 2.2.2 in Chapter 2 for a detailed discussion of "ethical accountability".

<sup>1079</sup> See para 2.2.2(c) in Chapter 2 for a discussion of "professional accountability".

<sup>1080</sup> Section 24(2)(c) of the *Legal Practice Act* 28 of 2014.

<sup>1081</sup> Slabbert 2011 *PER / PELJ* 209.

<sup>1082</sup> *Legal Practice Act* 28 of 2014. Also see the discussion of professional accountability under para 2.2.2(c) in Chapter 2.

functionaries in an Office of the Municipal Ombudsman, to internally investigate complaints received from the citizenry.<sup>1083</sup> Mechanisms to regulate internal LEG will generally include internal mechanisms created by statute, namely Integrated Development Frameworks, Service Delivery and Budget Delivery Implementation Plans (hereafter SDBIPs), Terms of Reference, Standards and Codes of Environmental Compliance, Internal Directives of Environmental Health, Council Resolutions regulating internal conduct, etc.

Internal committees that monitor local environmental accountability will include oversight committees or MPACs, audit committees, internal audit committees, ethics committees, performance management committees, etc.<sup>1084</sup> It is suggested that the functionality of internal governance is essentially dependent on the effectiveness of a municipality's committee system and other related oversight committees.<sup>1085</sup> Thus the aforesaid committees are critical to monitor accountability in a municipality.

### ***3.7 Concluding remarks***

The objective of this chapter was to understand the environmental responsibilities of local government that are significant in terms of environmental obligations and accountability.

In short, it has been shown that up until now, LEG has been mainly representative of both formal and informal institutions, processes and mechanisms in terms of local environmental law. One of the shortcomings of the concept is the absence of holding those responsible for LEG to account.

The chapter initially needed to understand LEG and the design thereof. LEG was then considered in the context of the constitutional environmental right and supporting procedural rights thereto, co-operative governance, the objects of local government and the principles regulating the public administration.

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<sup>1083</sup> CoJ *Ombudsman By-law*, 2014.

<sup>1084</sup> See para 4.2 in Chapter 4.

<sup>1085</sup> SALGA *Municipal Public Accounts Committee* 15.

The chapter further looked into the mix of the Constitution, local government and environmental law to determine what the local environmental responsibilities of municipalities are. It was found that local environmental duties and responsibilities are extensive in terms of environmental law.

Some of the preliminary conclusions are that based on the understanding of the local environmental responsibilities, LEG will be improved if accountability in terms of LEG and the legal duties that underpin it is clearly defined and prioritised. A failure of municipalities to discharge their responsibilities in terms of environmental law can cause municipalities to be deemed unaccountable. Such failure consequently will lead to a failure to meet the municipalities' constitutional duty towards supplying an "accountable public service".<sup>1086</sup> More importantly, unaccountable municipalities are likely to fail in their realisation of the constitutional environmental obligations.<sup>1087</sup>

Another preliminary finding suggests that LEG can be realised only through the performance of (accountability) responsibilities in municipalities and consequence management through the provision of answerability or liability in the absence of the proper performance of local environmental responsibilities.<sup>1088</sup>

It is suggested that local environmental accountability as a sector-specific form of accountability may at this present time be defined as: The responsibility of local government officials and councillors to account for the execution of their obligations, duties and functions in terms of law (by way of instrumentation, processes etc.) and to bear the consequences and liability for non-compliance and execution failures.<sup>1089</sup>

The next chapter ventures into the nature and scope of intergovernmental and other mechanisms in law that regulate the environmental accountability of different structures

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<sup>1086</sup> See para 3.5.3 in Chapter 3.

<sup>1087</sup> See para 3.5.3 in Chapter 3.

<sup>1088</sup> See para 3.4 in Chapter 3 for a detailed discussion in relation to the local environmental governance defined. Moreover, it needs to be considered that only once actual environmental duties exist can the responsibilities be performed from a local government perspective.

<sup>1089</sup> Also see the definition of accountability in para 2.3 in Chapter 2.

in local government. These mechanisms are to be discussed in detail to understand how accountability and more specifically responsibility can be enforced in South Africa. The cataloguing of responsibilities in the three dimensions of LEG helps delineate environmental accountability for local government.<sup>1090</sup> A proper transition from unaccountable behaviour to (local) environmental accountability can be enabled via a range of available mechanisms.

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<sup>1090</sup> See para 3.6 in Chapter 3.

## **CHAPTER 4**

### **MECHANISMS AND STRUCTURES FOR ENVIRONMENTAL ACCOUNTABILITY IN LOCAL GOVERNMENT**

#### ***4.1 Introduction***

So-called internal and external environmental accountability mechanisms are considered in this chapter. These range from internal mechanisms to mechanisms involving the electorate. The mechanisms discussed in this chapter focus specifically on those applicable to Category A municipalities and include internal mechanisms and structures, mechanisms and structures involving the electorate, and intergovernmental mechanisms and structures.

First, accountability mechanisms (institutions) will be considered from an intra-governmental perspective. "Intra-governmental" in this context denotes mechanisms that govern the internal accountability of municipalities. These internal mechanisms include those involving the planning, performance and evaluation of council, the municipal manager, senior management, the executive mayor, the MAYCO and section 79/80 committees, etc.

Accountability mechanisms focussed specifically on the electorate (external mechanisms) will be considered and include those concerned with compliance with environmental law and answerability in the way that environmental decisions are taken or the absence thereof. Examples include access to information, the provision of environmental services and the regulated use of natural resources such as water and soil. These mechanisms typically enable the electorate (communities) to approach a court of law in the event of a local government's failing to deliver as legally required.<sup>1091</sup>

Finally, the chapter analyses the intergovernmental mechanisms that fortify environmental accountability in municipalities, as provided for in legislation. These

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<sup>1091</sup> See para 4.3.8.2 in Chapter 4.

mechanisms include intergovernmental assignments, intergovernmental interventions and the role of chapter 9 institutions in terms of municipalities' environmental law responsibilities, amongst others.

The accountability mechanisms as provided for in environmental law are examined against those described in the relevant literature and scholarly discourse in combination with sources such as municipal policy documents and by-laws. The focus of this chapter is confined to considering the mechanisms that facilitate accountability in municipalities. The ultimate objective of this chapter is to analyse and discuss the nature and scope of the mechanisms specific to environmental law, created in law and available to government and communities to ensure the accountability of different structures and functionaries in local government.

#### ***4.2 Internal mechanisms and structures***

Further to the outcomes of the first chapter and the types of accountability in the internal dimension, the following types of accountability are most prevalent: bureaucratic accountability, administrative accountability, professional accountability, ethical accountability, delegation accountability and lastly devolution accountability.

Accountability in the intra-governmental dimension is not by incidental consequence, but is as mentioned previously constitutionally implied in terms of section 195 of the Constitution, which requires public administration to be accountable.<sup>1092</sup> This constitutional obligation is reaffirmed in terms of statute: the *Systems Act* confirms that local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution.<sup>1093</sup> The statutory confine of providing accountable administration is further enforced in that municipalities must strive to achieve the objects

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<sup>1092</sup> Section 195(1)(f) of the Constitution. Also see para 1.3 in Chapter 1.

<sup>1093</sup> Section 50(1) of the *Systems Act*.



of local government<sup>1094</sup> and the administration must organise itself to cause a culture of public service and accountability.<sup>1095</sup>

Following on the above points, intra-governmental accountability is not only envisaged as an objective or principle of governance, but administration is mandated to organise itself to achieve a palpable accountability. Intra-governmental accountability is hence not embodied as an intellectual concept but as an objective and responsibility of local administrations.<sup>1096</sup> Fundamental to intra-governmental accountability, however, is the accountability of the accounting officer and senior management. The accounting officer is the *de facto* head of the administration of the municipality.<sup>1097</sup> The accounting officer is also considered the link between the administration and the executive arm on the one hand and the political structures on the other. Expressive confirmation hereof is the overarching statutory requirement of holding the accounting officer accountable for the overall performance of the administration. The municipality must consequently develop a culture of accountability in observance of operational, effective and appropriate administrative units and mechanisms,<sup>1098</sup> allocate the necessary responsibilities to management<sup>1099</sup> and utilise the availability of delegation to transfer responsibility to the most effective level in the administration.<sup>1100</sup> Therefore, internal governance is dependent on holding itself accountable through internal mandatory structures and mechanisms for accountability. These structures and mechanisms are dependent on a statutory framework to seek specific roles and responsibilities of both political structures, the accounting officer and the administration.<sup>1101</sup> Suggested hereto is the importance of a functional system of delegation in a municipality to achieve accountable local internal governance. The system

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<sup>1094</sup> Section 50(2) of the *Systems Act*.

<sup>1095</sup> Section 51(b) of the *Systems Act*.

<sup>1096</sup> See Section 51(1)(g) of the *Systems Act*, in terms of which the administration must organise itself to ensure the performance of its functions.

<sup>1097</sup> Section 54A of the *Systems Act*.

<sup>1098</sup> Sections 51(1)(g)-(i) of the *Systems Act*.

<sup>1099</sup> Section 51(1)(h) of the *Systems Act*.

<sup>1100</sup> Section 51(1)(k) of the *Systems Act*.

<sup>1101</sup> See Section 160(1) of the Constitution, whereby a municipal council is responsible for decisions concerning the way that its powers are exercised and the performance of all the functions of the municipality.

of delegation serves as an internal constitution to manage intra-governmental responsibilities and ensure more proficient responsiveness amongst staff.

#### *4.2.1 System of delegations*

Intra-municipal accountability<sup>1102</sup> in terms of the system of delegations can be appropriately categorised under accountability involving executive powers, accountability involving legislative powers, and accountability involving administrative powers. The word "delegation" originates from Latin origins, where "delegate" means "from you to someone else".<sup>1103</sup> A delegation is considered to be non-discretionary and will normally utilise a mandatory approach to the instruction.<sup>1104</sup>

Delegations can further be categorised into delegations' instruments derived from original legislation and subordinate legislation.<sup>1105</sup> In terms of understanding the relationship of delegation, council delegates its responsibility to the delegate. The delegation is derived from statute, and council supervises the delegation and accounts for the specific performance thereof. Founded on the philosophy of delegation, the principal functionary in whom the responsibility is vested stays accountable for the execution of the matter delegated.<sup>1106</sup> The two primary elements of delegations are "responsibility" and "accountability", which are divergent in nature. For the purposes of understanding the implications of the two elements, reference needs to be made in relation to the associated functionaries in terms of delegations. In terms of the "delegated official", the official is responsible for the finalisation of the delegated task, with the delegated official incurring specific "responsibility" thereof,<sup>1107</sup> whereas the "principal functionary" remains accountable and cannot be divested. The principal functionary in whom the power is vested therefore stays accountable for the outcome of the delegation.<sup>1108</sup>

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<sup>1102</sup> See para 2.5.7 in Chapter 2.

<sup>1103</sup> National Treasury and DPSA *Cabinet Memorandum 56 of 2013* 5.

<sup>1104</sup> *Schidiack v Union Government* 1912 AD 642 648.

<sup>1105</sup> National Treasury and DPSA *Cabinet Memorandum 56 of 2013* 5.

<sup>1106</sup> National Treasury and DPSA *Cabinet Memorandum 56 of 2013* 5.

<sup>1107</sup> National Treasury and DPSA *Cabinet Memorandum 56 of 2013* 6.

<sup>1108</sup> National Treasury and DPSA *Cabinet Memorandum 56 of 2013* 6.

As mentioned previously, the municipal council is responsible for the exercising of both executive and legislative authority.<sup>1109</sup> It is mandated as part of its responsibility to "provide, without favour or prejudice, democratic and accountable government".<sup>1110</sup> Therefore, a council of a municipality is responsible for all decisions, subject to its own system of delegations.<sup>1111</sup> The primary mechanism of accountability in relation to the internal mandatory enforcement of accountability is consequently municipalities' system of delegations. The system of delegations reflects the corpus of accountability in municipalities. Fundamental to its own internal accountability is its responsibility in regulating its own internal affairs.<sup>1112</sup> The system of delegations is designed to maximise administrative and operational efficiency and importantly to cause a municipal council to allow for proper checks and balances in the form of the delegatee's having to account to the delegator (the holder of original powers).<sup>1113</sup> Accountability is secured in the Latin maxim *delegatus non potest delegare*, which translates as *one to whom power is delegated cannot himself further delegate that power*.<sup>1114</sup> The principle of delegation therefore creates an indisputable obligation on the delegatee to be responsible for the powers delegated on the basis of the delegation from the delegator. It may further be considered that any delegation that is contra legislation is *pro non scripto*; therefore, any unlawful delegation can be considered void *ab initio* and has no legal consequence, including accountability and the liability pertaining to the unlawful delegation. Lawful delegation, however, constitutes an administrative action of a functionary and consequently has legal consequences (accountability and liability), although a decision taken in terms of a delegation can be appealed.<sup>1115</sup>

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<sup>1109</sup> Section 11(1) of the *Systems Act*.

<sup>1110</sup> Section 4(2)(d) of the *Systems Act*.

<sup>1111</sup> Section 11(1) of the *Systems Act*.

<sup>1112</sup> Section 11(3)(d) of the *Systems Act*.

<sup>1113</sup> Section 59(1) of the *Systems Act*.

<sup>1114</sup> Baxter *Administrative Law* 433.

<sup>1115</sup> Section 62(1) of the *Systems Act*. See the discussion of section 62 appeals under para 4.3.6 in Chapter 4.

#### *4.2.2 Division of duties and responsibilities among office holders and municipal committees*

The council of a municipality remains central to the achievement of performance and oversight and cannot relinquish its accountability by means of delegation. The functions of municipal councils which may not be delegated include the passing of by-laws, the approval of budgets, the imposition of rates and other taxes, the raising of loans,<sup>1116</sup> the appointment of section 79 committees,<sup>1117</sup> and the appointment,<sup>1118</sup> discipline and dismissal of the municipal manager and section 56 employees.<sup>1119</sup>

##### 4.2.2.1 The Council

The municipal council as the accountable entity authorises the appointment of the municipal manager<sup>1120</sup> and section 56 senior managers,<sup>1121</sup> regulates discipline relating to the municipal manager<sup>1122</sup> and section 56 senior managers,<sup>1123</sup> and accounts for the dismissal of senior managers. The responsibility of the council in the appointment of senior managers is further regulated to ensure accountability in terms of the relevant legislation, which includes the following: Local Government: Regulations of Appointment and Conditions of Employment of Senior Managers, 2014,<sup>1124</sup> Upper Limits of Total Remuneration Packages Payable to Municipal Managers and Managers Directly Accountable to Municipal Managers,<sup>1125</sup> Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal

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<sup>1116</sup> Section 160(2) of the Constitution.

<sup>1117</sup> Section 79 of the *Structures Act*.

<sup>1118</sup> Section 56(1)(a) of the *Systems Act*.

<sup>1119</sup> GN R344 in GG 42545 of 28 June 2019.

<sup>1120</sup> Section 54A(1)(a) of the *Systems Act*. Also see *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v President of the Republic of South Africa* 2000 1 SA 661 (CC).

<sup>1121</sup> Section 56(1)(a)(i) of the *Systems Act*.

<sup>1122</sup> GN R344 in GG 34213 of 21 April 2011.

<sup>1123</sup> GN R344 in GG 34213 of 21 April 2011.

<sup>1124</sup> See Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, published in GN 21 in GG 37245 of 17 January 2014 setting uniform standards for matters concerning municipal personnel administration, systems and procedures.

<sup>1125</sup> GN 1224 in GG 42023 of 8 November 2018.

Managers, 2006,<sup>1126</sup> Local Government: Disciplinary Regulations for Senior Managers, 2011,<sup>1127</sup> and the Municipal Regulations on Minimum Competency Levels as amended in 2018.<sup>1128</sup> However, recent times have seen the accountability of council for the oversight of senior employees further increased, in that certain intergovernmental and regulatory checks and balances<sup>1129</sup> have been declared unconstitutional based on the *Local Government: Municipal Systems Amendment Act* being declared unconstitutional based on a procedural irregularity.<sup>1130</sup> In *South African Municipal Workers' Union v Minister of Co-operative Governance and Traditional Affairs*,<sup>1131</sup> the *Systems Amendment Act* assented to by the President on 5 July 2011 was declared unconstitutional by the Constitutional Court, causing the invalidity of probable regulations promulgated under the amendment act under section 72 and section 120 of the *Systems Amendment Act*.<sup>1132</sup>

Notwithstanding the regulatory position of senior managers, council is also responsible from a common law perspective for the enforcement of the necessary disciplinary procedure for senior managers with the said prospects of what is often described as consequence management.<sup>1133</sup> Disciplinary action is consequently measured out in accordance with the related transgression, but consequence management is unfortunately often seen as a punitive measure in a one-size-fits-all purported accountability regime and often results in the sewing of mistrust rather than the creation of accountable behaviour. Consequently, a decision to enforce a precautionary suspension of a senior

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<sup>1126</sup> The Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, published in GN R805 in GG 29089 of 1 August 2006 (hereafter the Performance Regulations), as amended, deals with the measuring and evaluation of the performance of municipal managers and managers directly accountable to municipal managers, as envisioned in s 72(1)(h) of the *Systems Act*.

<sup>1127</sup> The Local Government: Disciplinary Regulations for Senior Managers, published in GN R344 in GG 34213 of 21 April 2011 deals with disciplinary measures and the conduct of municipal managers and managers directly accountable to municipal managers, as envisioned in s 72(1)(j) of the *Systems Act*.

<sup>1128</sup> The Municipal Regulations on Minimum Competency Levels, published in GN R493 in GG 29967 of 15 June 2007, amended in 2018, and made in terms of s 168 of the MFMA.

<sup>1129</sup> See CoGTA *Circular 1 of 2019* and CoGTA *Circular 2 of 2020*.

<sup>1130</sup> CoGTA *Circular 1 of 2019*.

<sup>1131</sup> *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* 2017 5 BCLR 641 (CC).

<sup>1132</sup> *Local Government: Municipal Systems Amendment Act* 7 of 2011.

<sup>1133</sup> See para 2.2.2 (b) in Chapter 2.

manager is the responsibility of the municipal council. The recommendation to do so should be based on the merits of the case, which should be properly presented to council prior to placing the employee on precautionary suspension.<sup>1134</sup> The regulated bureaucratic accountability procedure in relation to disciplinary matters, the retention of records of disciplinary procedures, and performance management will be subsequently discussed under a separate heading under "other internal accountability mechanisms".

Internal financial accountability is another primary responsibility of council, of which the following powers cannot be delegated: the approval of the annual budget,<sup>1135</sup> the spending and approval of cost on capital budgets,<sup>1136</sup> the revision of the annual budget by means of an adjustment budget,<sup>1137</sup> a decision to recover unauthorised, wasteful and fruitless expenditure,<sup>1138</sup> and a decision to institute criminal proceedings in relation to irregular expenditure that constitutes a criminal offence, such as theft or fraud.<sup>1139</sup> Consequence management in the form of the disciplinary board is the responsibility of the municipal council, as regulated by an internal accountability mechanism.<sup>1140</sup> The council is moreover exclusively answerable to ensuring internal accountability relating to financial exposure in the form of contracts having financial consequences,<sup>1141</sup> the provision of securities and guarantees,<sup>1142</sup> and the consideration of incurrence pertaining to debt.<sup>1143</sup>

Other (internal) accountability mechanisms which will be discussed separately, which cannot be delegated and which need to be conducted by Council, relate to processes involving public participation. For example, the granting of long-term rights of municipal

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<sup>1134</sup> GN R344 in GG 34213 of 21 April 2011. Also see *Minah v Elias Motswaledi Local Municipality* [2019] 5 BLLR 481 (LC), for a divergent approach hereto.

<sup>1135</sup> Section 16 of the MFMA.

<sup>1136</sup> Section 19 of the MFMA.

<sup>1137</sup> Section 28(4) of the MFMA.

<sup>1138</sup> Section 32(2) of the MFMA.

<sup>1139</sup> Sections 32(6) and (7) of the MFMA.

<sup>1140</sup> National Treasury *MFMA Circular No 76 of 2015* 1.

<sup>1141</sup> Section 33 of the MFMA.

<sup>1142</sup> Section 48 of the MFMA.

<sup>1143</sup> Sections 45 and 46 of the MFMA.

assets over R10m,<sup>1144</sup> and requesting and adjudicating the public participation process thereto.<sup>1145</sup> Principal internal accountability also relates to the conclusion of service delivery agreements which relate to alternative service delivery mechanisms in terms of section 79 of the *Systems Act*. The aforesaid, as part of accountability towards the community, will also be discussed under accountability mechanisms which are at the disposal of the community.<sup>1146</sup>

#### 4.2.2.2 The Accounting Officer

Other actors associated with and designated accountable in the system of delegations vary from senior executives in the administration to middle management and related functionaries. The municipal manager is the head of the administration and the accounting officer in terms of section 54A of the *Systems Act*. The municipal manager as head of the administration is accountable for the establishment of an "efficient, effective and accountable administration".<sup>1147</sup> In addition, the accounting officer will cause the appointment of senior managers directly accountable to the municipal manager.<sup>1148</sup> The main accountabilities are referenced to be municipal transformation, basic service delivery, local economic development, financial viability, good governance and public participation.<sup>1149</sup> It is further conceived that a clear separation is envisaged in terms of the executive and administrative arm, with no political readings associated with the office of the accounting officer.<sup>1150</sup> The various dimensions of accountability can be clustered under specific powers and functions delegated from council to the accounting officer,<sup>1151</sup> powers and functions of the accounting officer as derived from statute,<sup>1152</sup> and the

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<sup>1144</sup> Regulations 37(b) and 34(4) of the Municipal Asset Transfer Regulations, published in GN R878 in GG 31346 of 22 August 2008 (hereafter the Asset Transfer Regulations).

<sup>1145</sup> Regulations 34(3) and 34(4) of the Asset Transfer Regulations.

<sup>1146</sup> See para 4.3 in Chapter 4.

<sup>1147</sup> Section 55(1)(a) of the *Systems Act*.

<sup>1148</sup> Section 56(1)(a) of the *Systems Act*.

<sup>1149</sup> Regulation 37 of the Performance Regulations.

<sup>1150</sup> See s 56A of the *Systems Act*, whereby the limitation of the political rights of municipal managers and senior managers is enforced through the prohibition of senior managers' holding political office in a political party, irrespective of the same being temporary, in an acting capacity, or permanent.

<sup>1151</sup> Section 55(1)(m) of the *Systems Act*.

<sup>1152</sup> Section 55(1)(p) of the *Systems Act*.

oversight responsibility and monitoring of bureaucratic powers by the accounting officer.<sup>1153</sup> Internal accountability mechanisms pertaining to oversight and monitoring in the office of the accounting officer include the bid adjudication committee, the audit committee and the performance management committee. As the chairperson of the executive committee or senior management committee, the accounting officer can correspondingly utilise the executive committee or senior management committee as an internal accountability mechanism, although the bid adjudication committee can be considered as a probable internal accountability mechanism. Due to its characteristics of responsiveness rather than enforceability, the bid adjudication committee will be discussed together with the bid specification committees and the bid evaluation committees under accountability mechanisms from a "governing others" perspective.

Powers delegated from council and subsequently forming part of the transference of accountability to the accounting officer entail the general accountability of the proper administrative governance of the municipality, which includes the opening and closing of bank accounts, deciding which bank accounts must be utilised for specific funds collected and which need to be deposited, deciding which bank account will be utilised as the primary bank account of the local authority, developing an effective cash management and investment policy, transferring the ownership of a municipal property or capital assets sold, the assessment of property to establish whether it is needed for basic services, and lastly the determination of the fair market value of a property or capital asset.<sup>1154</sup> Other aspects of generic accountability outside the ambit of internal delegation include exercising fiduciary responsibility,<sup>1155</sup> general financial accountability,<sup>1156</sup> asset and liability management,<sup>1157</sup> revenue management,<sup>1158</sup> expenditure management<sup>1159</sup> and expenditure on staff benefits.<sup>1160</sup> These mandatory accountability arrangements are,

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<sup>1153</sup> Section 55(2) of the *Systems Act*.

<sup>1154</sup> Sections 7(1), 7(2), 8(1), 8(3), 8(4), 12(2), 13(2), 14(2)(a) and (b), and 14(4) of the MFMA.

<sup>1155</sup> Section 61 of the MFMA.

<sup>1156</sup> Section 62 of the MFMA.

<sup>1157</sup> Section 63 of the MFMA.

<sup>1158</sup> Section 64 of the MFMA.

<sup>1159</sup> Section 65 of the MFMA.

<sup>1160</sup> Section 66 of the MFMA.



however, directly apportioned to the accounting officer and pertain to original powers delegated in the ordinary framework of the system of delegations. They include numerous features of different types of accountabilities, namely ethical accountability, professional accountability, moral accountability and bureaucratic accountability.

The features hereof include ethical principles for example acting with fidelity, honesty, integrity and in the best interests of the municipality,<sup>1161</sup> taking responsibility for ensuring that the resources of the municipality are used efficiently and effectively,<sup>1162</sup> taking responsibility for ensuring that unauthorised, irregular or fruitless and wasteful expenditure and losses are prevented,<sup>1163</sup> safeguarding assets, and managing liability in relation to the assets.<sup>1164</sup> Reporting, as an accountability mechanism, is also essential in terms of proper answerability. In terms of the delegations extended to the municipal manager, the accounting officer needs to report observations pertaining to accountability to both council<sup>1165</sup> and the executive mayor.<sup>1166</sup> Central hereto is allowing for accountability in the form of appropriate reporting to enforce good and accountable governance and to cause demonstrable communication between the heads of the various branches, namely the administration and the executive.

#### 4.2.2.3 Senior political executives

In contrast to the above, senior political executives incorporated in a municipality's system of delegations can include an executive mayor or executive committee. Other political functionaries include the Chief Whip of council and the various members of the MAYCO, of which the aforesaid relate to the composition of political structures and political office bearers in the municipality.<sup>1167</sup> The ambit of the specific category and type of municipality will influence the extent of executive accountability in terms of the system of delegations,

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<sup>1161</sup> Section 61(1)(a) of the MFMA.

<sup>1162</sup> Section 62(1)(a) of the MFMA.

<sup>1163</sup> Section 62(1)(d) of the MFMA.

<sup>1164</sup> Section 63(1)(a) of the MFMA

<sup>1165</sup> Sections 11(4)(a) and (b) of the MFMA.

<sup>1166</sup> Section 31(c) of the MFMA.

<sup>1167</sup> Section 53(4) of the *Systems Act*.

however.<sup>1168</sup> It is suggested that the delegation of executive powers is common in most government systems and promotes accountability and efficiency.<sup>1169</sup> It is perceived that based on its close proximity to the citizenry, the sphere of local government is purportedly deemed to be the most politicised sphere of government. Perceived hereto, the highly politicised environment has the potential to dilute democratic accountability and political accountability in the related sphere of government. Consequently, to be properly accountable; municipalities require the responsibilities of the executive or political functionaries to be adequately pronounced, to ensure proper differentiation between the powers of the politicians and the bureaucracy.<sup>1170</sup> The system of delegations should, for example, assist to properly cause a distinction between the responsibilities of the political functionaries and the bureaucracy. It is suggested that based on the delegation of executive powers it further causes quick, efficient, and responsive government.<sup>1171</sup>

The system of delegations further serves as a mechanism to regulate interaction between the officials and the elected representatives. The interaction between the executive mayor and the municipal manager is exemplary.<sup>1172</sup> In turn, the system of delegations will avoid the blurring of responsibility, whereby public representatives may encroach on the performance of administrative responsibilities in the municipality or oblige the executive functionaries to account for the performance of their responsibilities. The accountability of the executive authority cannot be demarcated to a specific piece of legislation, but as in the case of the other actors, the accountability of the executive authority is thoroughly traversed in multiple sources of legislation, which include *inter alia* the *Structures Act*, the *Systems Act*, the MFMA, the MPRA and the *Municipal Fiscal Powers and Functions Act*.<sup>1173</sup>

Examples of original powers assigned to the executive mayor relate to the following: to identify the service delivery needs of the community, to give council strategic direction

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<sup>1168</sup> Section 53(3) of the *Systems Act*.

<sup>1169</sup> The White Paper 143.

<sup>1170</sup> Section 53(5) of the *Systems Act*.

<sup>1171</sup> The White Paper 143.

<sup>1172</sup> Section 53(5)(e) of the *Systems Act*.

<sup>1173</sup> *Local Government: Municipal Fiscal Powers and Functions Act* 12 of 2007 (hereafter the MFPFA).

with programmes and services, to address priority service delivery to the community, to determine the best way to facilitate programmes and services, and to evaluate key performance indicators (hereafter KPIs) in relation to progress made with service delivery to the community.<sup>1174</sup> Original executive powers included under the MFMA comprise of general responsibilities<sup>1175</sup> pertaining to budget processes,<sup>1176</sup> budgetary control and the early identification of financial problems,<sup>1177</sup> intergovernmental reporting<sup>1178</sup> and the exercise of rights and powers over municipal entities.<sup>1179</sup> The executive mayor is accountable for providing general political guidance over the financial affairs of a municipality, which include responsibilities assigned in terms of the MFMA.<sup>1180</sup> *Inter alia* hereto, the executive mayor is responsible for the budget preparation process and must report to council and the MEC for finance on any delay in the approval of an annual budget<sup>1181</sup> and on the identification of financial problems.<sup>1182</sup> Critical to the mandatory adherence to budget requirements is the approval of an annual budget by the municipal council.<sup>1183</sup> Non-compliance or unfunded budgets are purported transgressions that could stimulate statutory non-compliance and associated liability in the form of section 55 of the MFMA<sup>1184</sup> and subsequently should the non-compliance persist, executive intervention in the form of section 139 of the Constitution.<sup>1185</sup> Notwithstanding, it is submitted that the primary responsibility for the resolution of a municipality's financial problems stays with the municipality itself<sup>1186</sup> and is interpreted to supersede the original powers of the executive mayor. In the event of a failure of financial oversight or accountability in the performance of the mayoral responsibilities, this can, however, be investigated in terms

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<sup>1174</sup> Section 56 of the *Systems Act*.

<sup>1175</sup> Section 52 of the MFMA.

<sup>1176</sup> Section 53 of the MFMA.

<sup>1177</sup> Section 54 of the MFMA.

<sup>1178</sup> Section 55 of the MFMA.

<sup>1179</sup> Section 56 of the MFMA.

<sup>1180</sup> Sections 52(a) and (b) of the MFMA.

<sup>1181</sup> Section 53(2) of the MFMA.

<sup>1182</sup> Section 54(2) of the MFMA.

<sup>1183</sup> Section 24 of the MFMA.

<sup>1184</sup> Section 24 of the MFMA.

<sup>1185</sup> Section 139(4) of the Constitution.

<sup>1186</sup> Section 135(1) of the MFMA.

of a probable transgression in terms of the code of conduct for councillors,<sup>1187</sup> although the investigation will exclude liability<sup>1188</sup> in the event of the power's being exercised during the performance of the original functions of the executive mayor in terms of the MFMA. Further discussion of probable financial misconduct transgressions in terms of sections 171 to 175 of the MFMA will be discussed under the disciplinary board as an internal accountability mechanism.<sup>1189</sup> Of concluding importance, however, are the powers of the executive mayor derived from council.

The delegation of powers from council to the executive mayor creates additional mandatory executive obligations which envisage the strategic and developmental responsibility of the executive mayor in the performance of the delegations. The delegated powers consequently allow the executive mayor to take an executive decision on matters delegated by council and importantly to report back accordingly and to refer to council specific reports upon which he cannot take a decision based on the limitation of the powers afforded to the executive mayor. Under old-order legislation and the previous dispensation, the role of the mayor was mostly ceremonial and the transition of the position of mayor to executive leadership in new-order legislation coincides with the continued recognition of local government as an independent sphere of government. Combined with the increased accountability of the executive mayor, the original ceremonial role has been overtaken by the increased accountability of the mayor, as being on the executive mayor / accounting officer interface, accounting for the political supervision of the administration, integrating the work of committees, identifying key service delivery areas and approving key performance areas (hereafter KPAs) and performance contracts in line with the identified needs of the community.<sup>1190</sup>

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<sup>1187</sup> Schedule 1 - *Code of Conduct for Councillors* in the *Systems Act*.

<sup>1188</sup> Section 176(1) of the MFMA.

<sup>1189</sup> See para 4.2.8 in Chapter 4.

<sup>1190</sup> Section 57(2)(b) of the *Systems Act*.

#### 4.2.2.4 Mayoral committees

The executive mayor can delegate his or her powers reserved by legislation to MAYCO<sup>1191</sup> and as discussed previously the executive mayor may also utilise his powers to appoint or dismiss a member of the mayoral MAYCO committee.<sup>1192</sup> Inherent to the powers of the executive mayor is also the capacity to appoint a member of the MAYCO as chairperson of a section 80 committee.<sup>1193</sup> Similar to the delegations facilitated in terms of section 59 of the *Systems Act*, delegations of the executive mayor to a MAYCO member do not divest the executive mayor of the accountability associated with the performance of the duty. Comparable delegatory provisions are also contained in the MFMA, whereby the executive mayor can consequently delegate his powers to MAYCO.<sup>1194</sup> It is therefore suggested that MAYCOs are representatives of the principal functionary and consequently the MAYCO members do not represent separate executive authorities as accountability actors. The executive mayor retains supervision over the exercising of the duties and those who receive the delegated power are not susceptible to the latitude of discretion in exercising the powers of the executive mayor.<sup>1195</sup>

#### 4.2.2.5 The Chief Whip of Council

It follows that while conceived under the original Westminster system of governance and currently formalised through various statutes, policies and Hansards in both national and provincial governments, the concept of Chief Whip does not enjoy similar formal legal standing in South African local government.<sup>1196</sup> Napier and Labuschagne confirm that very little is available in academic literature pertaining to Whippership, notwithstanding the notion of Whippership being part of both politics and governance since the 18<sup>th</sup> century.<sup>1197</sup> In an

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<sup>1191</sup> Section 80(3)(b) of the *Structures Act*

<sup>1192</sup> Section 60(1)(d) of the *Structures Act*

<sup>1193</sup> Section 80(3)(a) of the *Systems Act*.

<sup>1194</sup> Section 59(1)(a) of the MFMA.

<sup>1195</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

<sup>1196</sup> The position of the Whip of a municipal council has since been formalised by statute in terms of the *Municipal Structures Amendment Act*, whereby the election, functions and matters pertaining the office of the Whip of a municipal council are regulated by statute.

<sup>1197</sup> Napier and Labuschagne 2014 *SJCH* 38.

historical background, Napier and Labuschagne confirm "that Winston Churchill, a former Prime Minister of Great Britain, was rumoured to have stated that a (political) party without a Whip's Office is like a city without a sewer",<sup>1198</sup> the aforesaid bearing reference to the importance of the Whippery to ensuring that parties function optimally in parliaments associated with the Westminster System. The only formal appearance of the notion in a local government context is in the Notice of Upper Limits on Councillors' Remuneration.<sup>1199</sup>

While the position is pronounced as that of a full-time councillor under the aforesaid notice, no statutory process is formalised for the appointment of the Chief Whip of council as with the rest of the political office bearers such as the executive mayor and the speaker of council.<sup>1200</sup> Notwithstanding the lack of formalised processes, as conceived in the internal processes of municipalities the importance of the Whippery in relation to optimal performance cannot be underestimated.<sup>1201</sup>

As an internal political accountability mechanism relating to the oversight of political functionaries, the Whippery is critical to the "governing internally" dimension of LEG. In the absence of any formal appearance of a reference to the position of Chief Whip in the local government context,<sup>1202</sup> it is suggested that the functionary parameters of the office of the Chief Whip are determined on the basis of an inference from municipalities' standing orders of council, internal policies, committees' terms of reference and the system of delegations. Noting the political inference in relation to the Chief Whip of council, any delegations to the Chief Whip will more often than not relate to the interface with other politicians and the capacity building, monitoring and performance of public representatives in council. Henceforth, any accountability or responsibility of the Chief

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<sup>1198</sup> Napier and Labuschagne 2014 *SJCH* 38.

<sup>1199</sup> SALGA *Guideline Document* 40.

<sup>1200</sup> Napier and Labuschagne 2014 *SJCH* 51.

<sup>1201</sup> Napier and Labuschagne 2014 *SJCH* 52.

<sup>1202</sup> SALGA *Guideline Document* 40.

Whip will be in reference to accountability mechanisms such as the rules committee, the ethics committee, the ward arbitration committee and the political executive committee.

#### 4.2.2.6 The Speaker of Council

Further to the provision of delegations and original powers of the executive mayor and the other executive political functionaries, the speaker of council also receives delegated oversight functions in the legislative and executive domain. Although council is responsible for the executive and legislative powers exercised in a municipality, the speaker of council is regarded as the custodian of accountability in oversight of the responsibilities performed by council. Likewise, the responsibility as the custodian of accountability and oversight is delegated to the speaker of council in terms of the system of delegations.<sup>1203</sup> Examples hereof can be given, where many of the internal accountability mechanisms are managed from the office of the speaker; namely the ethics committee, the rules committee, the MPAC (the oversight committee), the ward committee system, the petitions committee, community participation directives, the peoples' assembly and other related accountability mechanisms which will be discussed under internal mechanisms following the section related to the system of delegations. In terms of the maintenance of proper conduct by councillors and subsequent investigation pertaining to non-compliance, the speaker of council is delegated to preside at council meetings, to ensure quarterly meetings of council, to maintain order at council meetings, to ensure compliance with the code of conduct for councillors. and to facilitate compliance with the standing orders of council.<sup>1204</sup>

Further to the *post facto* liability of councillors with regard to probable non-compliance and the alleged transgression of the standing orders of council or the code of conduct, the speaker will investigate probable transgressions, facilitate the *audi alteram partem* rule, and report the outcome to the member of the executive committee pertaining to the outcome and the sanction in relation to the decision.<sup>1205</sup> The terms of reference, the

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<sup>1203</sup> Section 37(b) of the *Structures Act*.

<sup>1204</sup> Section 37 of the *Structures Act*.

<sup>1205</sup> See para 13 of the *Systems Act's* Schedule 1 - *Code of Conduct for Councillors*.

procedure and the powers to sanction a wrongdoer will be elaborated upon under the discussion of the Ethics Committee as an internal accountability mechanism. Based on his/her role as "overseer of accountability", most of the responsibilities delegated to the speaker of council will include the functionality and essence of accountability mechanisms in the municipality. Oversight by the speaker of council of the executive and legislative responsibilities performed can therefore be two dimensional and extend both to the internal accountability dimension and the external accountability dimension, which anticipates mechanisms at the disposal of communities.<sup>1206</sup> Hence seen an hybrid accountability mechanism, which embraces traits of accountability types such as moral accountability, social accountability, political accountability, democratic accountability and bureaucratic accountability. Internal accountability mechanisms are likely to include section 79 committees such as the petitions committees, ethics committees and MPACs established under the guidance of the office of the speaker.

#### 4.2.2.7 Sections 79 and 80 committees

Sections 79 and 80 committees are internal committees of municipalities that assist in the execution of the functions and powers of council and are essential for the effective and efficient performance of the powers of council.<sup>1207</sup> The internal committees contribute to accountability as internal mechanisms, although they are not primary to the mandate or functionality of the committees. Section 79 committees are committees of council and provide the prospect of oversight and accountability. The rationale advancing the prospect of oversight is the deemed distinctiveness between the section 79 committees (committees of council) and the section 80 committees, which are committees of the executive mayor. Although municipalities do not have inherent clear separation of powers, section 79 committees simulate separation between the executive branch and the legislative branch.

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<sup>1206</sup> Sections 16, 17 and 18 of the *Systems Act*.

<sup>1207</sup> Section 79(1)(a) of the *Structures Act*.



To validate the prospect of the section 79 committees' being regarded as internal accountability mechanisms, the following characteristics prevail. Municipal councils appoint the chairpersons of the section 79 committees, unlike the situation with section 80 committees, which are chaired by members of the MAYCO appointed by the executive mayor. Council approves the co-option of members who are not members of council. Thereby, appointments are normally based on professional accreditation and expertise rather than membership. Dissimilar to section 80 committees, which are restricted to representation based on being elected members of council, section 79 committee members often offer additional professional accountability as an inherent requirement, an example hereof being found in the criteria of the MPT and Appeal Authority, which requires professional attributes like engineering qualifications, town planning qualifications, legal qualifications or environmental qualifications in those appointed as members.<sup>1208</sup> In contrast, section 80 committees under the custodianship of the executive mayor must report to the executive mayor,<sup>1209</sup> and the executive mayor is also allowed to vary or revoke any decision taken by the committee.<sup>1210</sup>

Evident in the presented traits of section 79 and section 80 committees, it can be seen that section 79 committees are more amenable to be considered an internal accountability mechanism due to their deemed detachment from the executive arm of the municipality and their independence, due to the purported external component of their representation. Given as a requirement of a constitutional democracy, the executive must be held accountable by a separate structure.<sup>1211</sup> Section 80 committees are weak in their oversight or perceived role as internal accountability mechanisms due to their interrelatedness and symbiotic relationship with the executive arm of a municipality, and only function from a democratic and political accountability perspective. Although section 80 committees are representative of the political demographics of council<sup>1212</sup> and can be deemed internal

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<sup>1208</sup> Section 36(1)(b) of the SPLUMA.

<sup>1209</sup> Section 80(4) of the *Systems Act*.

<sup>1210</sup> Section 80(3)(d) of the *Systems Act*.

<sup>1211</sup> National Treasury *MFMA Circular No 92 of 2018* 4, 8.

<sup>1212</sup> The composition of section 80 committees is based on political parties' representation in the municipal council. They therefore adhere to democratic accountability.

accountability mechanism, the true extent of their accountability is reliant on the latitude tolerated by the executive mayor. Unlike section 80 committees, some of their section 79 counterparts reflect a better-balanced composition of accountability traits such as professional accountability (a requirement of professional membership), social and moral accountability (external exposure in the form of public hearings, etc) and also democratic and political accountability (based on the elected political representation thereto).

Section 79 committees considered internal accountability mechanisms include the MPAC, the petitions committee and the ethics committee. Prior to the new-order municipal finance legislation, accountability and oversight were monitored by opposition watchdogs in section 80 committees, but the MFMA created additional internal accountability mechanisms through the MPAC.<sup>1213</sup> This committee originated from the establishment of what were previously known as oversight committees, which were created in terms of section 129 of the MFMA. New-order financial legislation established improved accountability criteria and advanced beyond the traditional accountability mechanisms. Although confined to the ambit of section 129 of the MFMA, the functioning of MPAC has extended beyond the ambit of legislation.<sup>1214</sup> The MPAC is modelled on the framework of the Standing Committee on Public Accounts (hereafter SCOPA). The model is used as an internal accountability mechanism in both the provincial and the national legislatures.<sup>1215</sup>

The development of MPAC as an accountability mechanism is framed under multiple internal policy documents in municipalities, terms of reference (hereafter ToR) and developmental circulars from National Treasury.<sup>1216</sup> Although adopted only under section 129 of the MFMA, the accountability cycle as referenced by the National Treasury and included under the AR is extensive with oversight in relation to the IDP, the budgetary processes, SDBIPS, current-year reporting, financial statements and finally the AR.<sup>1217</sup> It

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<sup>1213</sup> National Treasury *MFMA Circular No 92 of 2018* 1.

<sup>1214</sup> National Treasury *MFMA Circular No 92 of 2018* 4.

<sup>1215</sup> National Treasury *MFMA Circular No 92 of 2018* 5.

<sup>1216</sup> Section 129(4) of the MFMA. Also see National Treasury *MFMA Circular No 92 of 2018*.

<sup>1217</sup> National Treasury *MFMA Circular No 63 of 2012* 8. Also see the implementation of the Municipal Regulations on a Standard Chart of Accounts, published in GN 312 in GG 37577 of 22 April 2014 (hereafter the MSCOA).

is suggested that the purpose of the AR is to promote the accountability of council on decisions taken by the executive and legislative authorities of municipalities.<sup>1218</sup> The AR<sup>1219</sup> is also conceived of as a standalone internal accountability mechanism in its own right, but it is utilised as the basis for scrutiny of the municipal accounts. The AR will be traversed again under performance management as an internal accountability mechanism. Related accountability is also determined on the annual financial statements, findings and determinations of the AG for the specific financial year, which report on unauthorised, irregular, or fruitless and wasteful expenditure, and review and recommend to council actions pertaining to unauthorised, irregular, or fruitless and wasteful expenditure.<sup>1220</sup>

The extent of the powers of the MPAC is limited in nature, however. The current provision of the statute is limited to section 129 of the MFMA. To explain the aforementioned statement, it is important to understand that the MPAC, unlike SCOPA, cannot under statute subpoena witnesses and information. For example, where the MPAC would summon the executive mayor to report on the findings of a forensic audit report, perhaps including recommendations pertaining to criminality, the statutory obligation necessitates the executive mayor only to report to council on such findings and does not recognise the MPAC under the previous instance.<sup>1221</sup> Further hereto, the MPAC is also severely curtailed in relation to the enforcement of its findings and can merely recommend to council specific action based on its findings. Sections 171 to 175 of the MFMA in relation to financial misconduct do not even acknowledge the MPAC's "perceived powers" as an accountability mechanism.<sup>1222</sup>

It is to the further detriment of the accountability of municipalities that based on the membership of the committee, the MPAC does not prescriptively dictate any minimum

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<sup>1218</sup> National Treasury *MFMA Circular No 63 of 2012* 13.

<sup>1219</sup> Section 46 of the *Systems Act*.

<sup>1220</sup> National Treasury *Improving Oversight and Accountability* 15.

<sup>1221</sup> Regulation 3(2) of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, published in GN R430 in GG 37699 of 30 May 2014.

<sup>1222</sup> National Treasury *Improving Oversight and Accountability* 15.

type of professional qualification for eligibility to serve as a member of the committee, e.g. a forensic auditor, an accountant or an attorney. Hence, the MPAC's findings are dependent on the performance and competence of the internal auditing of the municipality. Although the MFMA is clear on the publication of guidelines,<sup>1223</sup> the value of the MPAC as an internal accountability mechanism is underdeveloped. It requires statutory teeth to establish its status as an internal accountability mechanism. The ethics committee, in comparison, is better positioned to investigate and process purported contraventions in terms of the code of conduct for councillors.

Emphasis on the ethics committee as an internal accountability mechanism is confirmed by De Visser in that municipal internal processes in observance of the code of conduct are designed to ensure accountability.<sup>1224</sup> Although De Visser stresses the role of councillors in the observance of external accountability, he confirms that a failure of external accountability in municipalities can be remedied through mechanisms of internal accountability.<sup>1225</sup> The code of conduct refers to the requirement that municipalities must have structured mechanisms of accountability. The ethics committee resorts under the aforementioned requirement of accountability.<sup>1226</sup> It is a committee of council,<sup>1227</sup> which functions under the auspices of the speaker of council<sup>1228</sup> to ensure compliance in terms of Schedule 1 of the *Systems Act*.<sup>1229</sup> The chairperson of the ethics committee is the speaker of council and findings and recommendations are made for the determination of and approval by council. The procedure of the ethics committee is quasi-judicial in nature; hence it does not subscribe to the formal procedures and rules of evidence of a formal court of law. The process is observant of natural justice in essence, including the observation of the *audi alteram partem* rule. The terms of reference of the committee are approved by council. The formalisation of sanctions, however, is confirmed by statute, in

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<sup>1223</sup> Section 129(4) of the MFMA.

<sup>1224</sup> De Visser "Local Accountability" 13.

<sup>1225</sup> De Visser "Local Accountability" 8.

<sup>1226</sup> Preamble of the *Systems Act's* Schedule 1 - *Code of Conduct for Councillors*.

<sup>1227</sup> Subitem 14(b) of the *Systems Act's* Schedule 1 - *Code of Conduct for Councillors*.

<sup>1228</sup> Subitem 1 of the *Systems Act's* Schedule 1 - *Code of Conduct for Councillors*.

<sup>1229</sup> Section 54 of the *Systems Act*.

terms of which the committee can recommend the following: a formal warning, the issue of a reprimand to a councillor, or a request to the MEC to suspend the councillor, fine the councillor, or remove the councillor from office.<sup>1230</sup> Recommendations of the ethics committee are by consent of all the members in the committee, or recommendations to council may be carried by the majority of the committee members. Extended accountability is also seen in members' privilege to present any dissenting view in the form of a minority report to council, which must be presented concurrently with the majority report to council.<sup>1231</sup> Transgressions relate not only to the code of conduct as previously referenced, but also to the standing orders of council. This allows the ethics committee to investigate and sanction transgressions accordingly. Statute further regulates more grave transgressions of decorum and privileges,<sup>1232</sup> which are accordingly adjudicated from the bench. Mathenjwa cites the *Waters v Khayalami Metropolitan Council* case<sup>1233</sup> as the catalyst for the statutory regulation of privileges and immunities in municipalities.<sup>1234</sup> For example, councillors can be held liable pertaining to the transgressions of privileges like freedom of speech, where liability might be attached to utterances and presentations outside of council meetings which are defamatory.<sup>1235</sup> Answerability is not only a consequence in terms of political accountability as an internal accountability mechanism, but also includes the concept of bureaucratic accountability.<sup>1236</sup>

#### 4.2.3 Reporting processes

It is envisaged that if the IDP is configured as the blueprint of municipalities, then the answerability of municipalities lies in the AR. The AR as a mechanism providing accountability and transparency links citizens and the municipality.<sup>1237</sup> Steccolini supports

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<sup>1230</sup> Subitem 14(2) of the *Systems Act's* Schedule 1 - *Code of Conduct for Councillors*.

<sup>1231</sup> Provision for the privilege to submit a minority report is not pronounced under statute or Schedule 1 - *Code of Conduct for Councillors*, but is facilitated in observation of natural justice or should be adopted by council under the ethics committee's terms of reference and procedures.

<sup>1232</sup> Section 28 of the *Structures Act*.

<sup>1233</sup> *Waters v Khayalami Metropolitan Council* 1997 3 SA 476 (W).

<sup>1234</sup> Mathenjwa 2015 *Obiter* 669.

<sup>1235</sup> De Visser 2003 *LGB* 3.

<sup>1236</sup> See para 2.2.2 in Chapter 2.

<sup>1237</sup> National Treasury *Improving Oversight and Accountability* 5.

the contention of the AR's being considered the primary medium of accountability,<sup>1238</sup> this statement being qualified in that the AR cannot be utilised as an overall report on accountability.<sup>1239</sup> Notwithstanding the inherent limitations of only internal assessments, ARs<sup>1240</sup> in public administration are regarded as key reporting instruments and are utilised internally to report against "performance targets and budgets".<sup>1241</sup> The AR as a bureaucratic accountability and administrative accountability instrument emphasises liability in the context of non-performance and stimulates corrective action or enforcement. ARs are used for internal accountability checks and balances<sup>1242</sup> such as performance reporting, and also as accountability mechanisms to report to local communities on the decisions of the municipality.<sup>1243</sup> Based on the information contained, the AR is not only a valuable source of internal accountability utilised by the MPAC, the internal audit committee and council, but it also serves as an assessment tool for intergovernmental (external) accountability mechanisms such as the AGSA and intergovernmental initiatives such as Operation Clean Audit (hereafter OPCA). Important from an environmental accountability perspective, the AR can be used to flag departmental progress in terms of environmental sensitive undertakings like the prevention of effluent spillages, the monitoring of environmental services upgrades like the upgrading of sanitation infrastructure, and the monitoring of natural water sources to prevent the pollution thereof. Specific performance indicators hereto need to be contained as related outcomes in performance management systems.

#### *4.2.4 Performance management system*

Responsibility vis-à-vis the related discharge of responsibility can be confirmed only if accurately measured. Performance management systems as accountability mechanisms

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<sup>1238</sup> Steccolini *Local Government Annual Report 8*.

<sup>1239</sup> Steccolini *Local Government Annual Report 8*.

<sup>1240</sup> Also see National Treasury *Municipal SCOA Circular No 6 of 2016*.

<sup>1241</sup> National Treasury *Guideline for Legislative Oversight 4*.

<sup>1242</sup> Sections 121(2)(a) and (b) of the MFMA.

<sup>1243</sup> Section 121(2)(c) of the MFMA.

are mandatory for municipalities,<sup>1244</sup> and a municipality "must administer its affairs in an economical, effective, efficient and accountable manner".<sup>1245</sup> Performance management systems also need to promote a perceived culture of accountability amongst actors in the municipalities.<sup>1246</sup> Core components of the performance management system include KPIs in reference to the municipality's development priorities and IDP objectives,<sup>1247</sup> measurable performance targets,<sup>1248</sup> development priorities and objectives,<sup>1249</sup> steps to improve performance not met,<sup>1250</sup> and the establishment of a process to report regularly to council and relevant actors involved in performance management.<sup>1251</sup> The internal accountability mechanism is therefore based on set criteria and extends to external mechanisms available to the community.<sup>1252</sup>

The types of KPIs are related to generic KPI's relevant to local government,<sup>1253</sup> some of which can be applied to municipalities in general, some of which are specific to the municipality concerned, and some of which can be adjusted to fit the municipality concerned.<sup>1254</sup> These KPI's do not represent solitary accountability mechanisms in relation to internal performance, but are further supplemented by the SDBIPs<sup>1255</sup> of a local municipality. Whereas the KPI's are generated to monitor the IDP and the achievement of the targets in an accountable manner, the SDBIP's are designed to monitor and align the targets derived from the IDP to the budget of a local authority.<sup>1256</sup>

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<sup>1244</sup> Section 40 of the *Systems Act*. Also see Section H.3: Support Mechanisms for Municipal Transformation of the White Paper.

<sup>1245</sup> Section 38(c) of the *Systems Act*.

<sup>1246</sup> Section 38(b) of the *Systems Act*.

<sup>1247</sup> Section 41(1)(a) of the *Systems Act*.

<sup>1248</sup> Section 41(1)(b) of the *Systems Act*.

<sup>1249</sup> Section 41(1)(c) of the *Systems Act*.

<sup>1250</sup> Section 41(1)(d) of the *Systems Act*.

<sup>1251</sup> Section 41(1)(e) of the *Systems Act*.

<sup>1252</sup> Section 42 of the *Systems Act*.

<sup>1253</sup> Section 43(a) of the *Systems Act*.

<sup>1254</sup> Section 43(1)(b) of the *Systems Act*.

<sup>1255</sup> Section 1 of the MFMA defines the SDBIP as: "a detailed plan approved by the mayor of a municipality in terms of section; 53(1)(c)(ii) for implementing the municipality's delivery of services and the execution of its annual budget and which must include (as part of the top-layer) the following: (a) projections for each month of- (i) revenue to be collected, by source; and (ii) operational and capital expenditure, by vote; (b) service delivery targets and performance indicators for each quarter".

<sup>1256</sup> National Treasury *MFMA Circular No 13 of 2005* 1.

Achievement and subsequent accountability are therefore measured against quantifiable outcomes that need to be implemented by the municipality in relation to the period under consideration.<sup>1257</sup> Both SDBIP's and KPI's need to be verified against the targets, the verification of which is subjected to internal auditing to confirm the achievement and accountability.<sup>1258</sup> The accountability is two dimensional and described in MFMA Circular No 13; MFMA, as a monitoring tool for both internal accountability and at the disposal of the community.<sup>1259</sup> Although approved by the executive mayor,<sup>1260</sup> the responsibility is centred on the municipal manager, and the tool cascades down in terms of performance to the senior managers.<sup>1261</sup> The internal accountability and performance mechanisms to achieve targets of the institution are collectively regulated in terms of the Service Delivery Implementation Plan and KPI's, although senior managers and managers are also individually measured through a medley of performance regulations in terms of their performance contracts. The employment relationship held with employees of the municipality and more importantly the accounting officer's relationship with senior managers are examples. The accounting officer as an internal accountability actor in relation to senior managers develops performance contracts between the accounting officer and the individual senior managers. Consequently senior managers in different clusters enter into performance contracts with managers in various departments. Another important internal accountability mechanism which coincides with performance is the internal audit and external audit committees.<sup>1262</sup>

#### *4.2.5 Materiality frameworks and compliance management systems*

Legal compliance frameworks in local government are essential for sectorial compliance due to the fragmented nature of government's environmental duties in terms of the South African environmental law framework.<sup>1263</sup> Nel, Du Plessis and Du Plessis explain that key

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<sup>1257</sup> National Treasury *MFMA Circular No 13 of 2005* 1.

<sup>1258</sup> See s 45 of the *Systems Act* and s 165(2)(b)(v) of the MFMA.

<sup>1259</sup> National Treasury *MFMA Circular No 13 of 2005* 1.

<sup>1260</sup> Section 69(3)(a) of the MFMA.

<sup>1261</sup> Section 69(3)(b) of the MFMA.

<sup>1262</sup> Section 45(a) of the *Systems Act*.

<sup>1263</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-11.



to the said legal register is the anticipation of supplementary duties flowing from various line functions and directorates associated with provincial and national spheres of government.<sup>1264</sup> This materiality framework can be indexed to make provision for diverse statutes and regulations of which the related duties and compliance issues can be registered to allow for the implementation and auditing of the relevant compliance levels.

Nel, Du Plessis and Du Plessis find that the auditing of the various compliance levels is often determined by means of segments framed under who is responsible, for what, by when, and who must facilitate the action.<sup>1265</sup> Compliance instruments do not necessarily have to observe legislated environmental obligations, but can also be obliged in terms of processes being facilitated in relation to accredited international standards such as ISO 9001,<sup>1266</sup> ISO 45001, and more specifically from an environmental perspective ISO 14001,<sup>1267</sup> of which the regulated accreditation authorities include entities such as the International Organisation for Standardisation (hereafter ISO)<sup>1268</sup> and local standardisation authorities such as the South African National Accreditation Services (hereafter SANS).

These instruments are presented as unilateral commitments or as self-regulating, and although the self-accreditation or self-regulation does not fit into the "being governed by others" dimension, the governance approach is facilitated through the provision of external certification schemes and labelling schemes.<sup>1269</sup>

#### *4.2.6 Integrated development plans*

Fuo explains that municipalities are obliged to adopt IDPs as their principle strategic performance instruments.<sup>1270</sup> He affirms the importance of municipalities' promoting proper performance management to ensure accountability amongst functionaries like

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<sup>1264</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-11.

<sup>1265</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-17.

<sup>1266</sup> Lehmann "Voluntary Compliance Measures" 281.

<sup>1267</sup> Lehmann "Voluntary Compliance Measures" 281.

<sup>1268</sup> Lehmann "Voluntary Compliance Measures" 281.

<sup>1269</sup> Lehmann "Voluntary Compliance Measures" 275.

<sup>1270</sup> Fuo 2013 *PER / PELJ* 255.

"political structures, political office bearers, councillors and including [their] general administration" to contribute towards their internal operation.<sup>1271</sup> Nel, Du Plessis and Du Plessis affirm the importance of the IDP as an internal instrument to contribute to LEG; more specifically in the "governing internally" domain.<sup>1272</sup> However, the IDP can be regarded as successful only if the LEG instrument focusses on proper planning with specific objectives and outcomes pertaining to municipal and environmental duties.<sup>1273</sup> For instance, as soon as SDFs are contained in a municipality's integrated development framework, reference must be made to specific strategic assessments of environmental impacts in the SDF.<sup>1274</sup> A similar mechanism in the context of the IDPs of municipalities is business plans used by municipal-owned entities<sup>1275</sup> (hereafter MOEs) in category A municipalities. Business plans in MOEs are comparable to IDP documents in municipalities in the context of planning mechanisms. Business plans from MOEs provide strategic and operational direction and feed into the host municipality's IDP for planning purposes.<sup>1276</sup>

As suggested in the discussion of the IDP presented as an internal accountability mechanism, the intention thereof is to be developmentally orientated, *inter alia* including the objects of the Constitution, more specifically the provision of services in a sustainable manner<sup>1277</sup> and the promotion of a healthy environment.<sup>1278</sup> Hence, facets of sustainability and environmental issues will be projected in internal accountability mechanisms such as the IDP, which manifest themselves either as original powers, assigned powers (including delegation or agency), or incidental powers (the *Le Sueur* case).<sup>1279</sup> Pertinent hereto is that the internal accountability mechanisms will follow the classification of environmental duties in the internal accountability dimension.

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<sup>1271</sup> Fuo 2013 *PER / PELJ* 255.

<sup>1272</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-21.

<sup>1273</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-22.

<sup>1274</sup> Regulation 2(4) of the Local Government: Municipal Planning and Performance Management Regulations, published in GN R796 in GG 22605 of 24 August 2001.

<sup>1275</sup> Chapter 8A of the *Systems Act*.

<sup>1276</sup> JDA 2019/20 *Business Plan* 497.

<sup>1277</sup> See s 151(1)(b) of the Constitution.

<sup>1278</sup> See s 151(1)(c) of the Constitution.

<sup>1279</sup> The *Le Sueur* case.

#### 4.2.7 Internal Auditing and Audit Committee

The AG has called for increased powers to effectively deter material irregularities in local government associated with financial recklessness and misconduct.<sup>1280</sup> The continued maladministration of finances has the potential to destroy financial sustainability in local authorities. Moreover, the AGSA confirms the following: "Accountability failures of local government have a negative impact on the lives of citizens."<sup>1281</sup> Fitzgerald and Giroux refer to the magnitude of the task of auditing local government, and say that more measures are required to ascertain whether the operations of local government are being performed effectively and efficiently, given the extensive resources that are being provided to local government. Internal auditing functions are internal protection mechanisms to self-correct internal accountability non-conformances prior to the external auditing facilitated by the AGSA.<sup>1282</sup> The AG and related powers and functions will be discussed under institutions contributing to municipal accountability. Internal auditing and audit committees are regulated under the MFMA.<sup>1283</sup> A similarity can be drawn between the audit function and the MPAC in that both committees utilise the AR of a municipality as the "primary term[s] of reference" although, as mentioned previously, the internal audit department is better resourced and more professionally skilled to facilitate proper statutory accountability through the powers given in terms of the statute and the professional accountability of individuals.<sup>1284</sup> Caution needs to be observed, however, in that a failure to appoint skilled professionals also has the potential to destroy this internal accountability mechanism.<sup>1285</sup> The internal audit unit is a diverse accountability structure and not only provides an assessment of the responsibility and accountability of internal actors, but is multi-dimensional in its approach. The internal audit unit therefore advises

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<sup>1280</sup> AGSA 2019  
<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 22.

<sup>1281</sup> AGSA 2019  
<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 8.

<sup>1282</sup> Section 45(b) of the *Systems Act*.

<sup>1283</sup> Sections 165 and 166 of the MFMA.

<sup>1284</sup> Fitzgerald and Giroux 2014 *Research in Accounting Regulation* 69.

<sup>1285</sup> National Treasury *MFMA Circular No 65 of 2012* 1.

not only the accounting officer on internal audits pertaining to performance management (which relates to internal accountability), but also advises on external compliance issues such as compliance with the MFMA and DORA (which relates to intergovernmental accountability).<sup>1286</sup> The independence and skills of the internal auditors are of extreme importance, which suggests that the outsourcing of the internal audit function should be facilitated,<sup>1287</sup> in which case accountability would be ensured professionally and ethically.<sup>1288</sup>

Auxiliary to the presence of internal audit units in municipalities is the mandatory requirement that municipalities should have internal audit committees.<sup>1289</sup> Reminiscent of OPCA, various accountability mechanisms have gained traction over the past 10 years to improve accountability in local government. It is suggested that the presence of audit committees heightens the level of accounting disclosure, which purportedly increases transparency. The audit committee *inter alia* reports to council and seeks to advise on matters relating to the outcomes of internal audits, risk management, effective governance, performance and accounting practices.<sup>1290</sup> Van der Nest, Thornhill and De Jager explain that in South Africa audit committees are regulated accountability mechanisms.<sup>1291</sup> The annual financial statements are another mandatory internal accountability mechanism. They provide an authoritative and credible representation of the financial position of the local authority, accounting to council on issues raised by the AG and investigating issues of the municipalities as mandated by the council.<sup>1292</sup> Based on the requirement of appropriate experience,<sup>1293</sup> the audit committee's functionality as an internal accountability mechanism ranks higher than the capacity of the MPAC and therefore is further required to assist the MPAC in its functions, as noted earlier. Having centralised powers and unrestricted access to the financial records further capacitates the

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<sup>1286</sup> Sections 165(2)(b)(v) and (vii) of the MFMA.

<sup>1287</sup> Section 165(3) of the MFMA.

<sup>1288</sup> West and Berman 2003 *International Journal of Public Administration* 332.

<sup>1289</sup> Section 166(1) of the MFMA.

<sup>1290</sup> Section 166(2)(a) of the MFMA.

<sup>1291</sup> Van der Nest, Thornhill and De Jager 2008 *J Public Adm* 545.

<sup>1292</sup> Sections 166(2)(b), (c) and (d) of the MFMA.

<sup>1293</sup> Sections 166(2)(b), (c) and (d) of the MFMA.

audit committee to efficiently and effectively render the necessary functions of an internal accountability mechanism.<sup>1294</sup> Detachments or sub-committees of the Audit Committee are often representative of the Information Communication Technology Governance Committee, the Performance Audit Committee and the Risk Management, Anti-fraud and Anti-corruption Committee, which account to the Audit Committee and make the necessary recommendations in relation to the consideration of the sub-committees. Additional to the functioning of audit committees in municipalities, section 175 of the MFMA provides the opportunity to regulate purported financial misconduct and to institute criminal proceedings against persons engaged in financial offences<sup>1295</sup> and financial misconduct.<sup>1296</sup> The Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings was promulgated to provide for the establishment of internal accountability mechanisms in municipalities. The promulgation of the regulations was prompted by calls for "consequence management" to contemplate prosecutions relating to financial misconduct and financial offences.<sup>1297</sup> Increased numbers of financial offences and instances of financial conduct in the local government domain might require the internal audit committees to mandate professional development to further include criminal and forensic auditing skills.

#### *4.2.8 Disciplinary Board*

The council of a municipality is assigned the obligation to establish a disciplinary board to investigate and monitor the institution of proceedings against wrongdoers.<sup>1298</sup> As with investigations against senior employees and purported suspensions of senior employees, only council can internally resolve to institute proceedings in relation to financial misconduct and financial offences. On receipt of the said allegations, the mayor or the

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<sup>1294</sup> Section 166(3)(a) of the MFMA.

<sup>1295</sup> See s 173 of the MFMA.

<sup>1296</sup> See ss 171 and 172 of the MFMA.

<sup>1297</sup> National Treasury *MFMA Circular No 76 of 2015* 1.

<sup>1298</sup> Regulation 4(1) of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, published in GN R430 in GG 37699 of 30 May 2014 (hereafter the Municipal Regulations on Financial Misconduct Procedures).

accounting officer is required to table the allegations to council,<sup>1299</sup> after which the council will instruct the disciplinary board to investigate the allegations. On finalisation of the investigation, the disciplinary board will make specific recommendations to council pertaining to the institution of proceedings against the purported wrongdoer.<sup>1300</sup>

As an internal accountability mechanism, the disciplinary board is strengthened by statute, whereby external actors such as the national or provincial treasuries are also mandated to investigate possible contraventions.<sup>1301</sup> Further authority is also provided enabling treasury to intervene in instances where council fails to resolve a matter on the recommendation of the disciplinary board.<sup>1302</sup> The disciplinary board is composed of the chief audit executive, auditors and senior legal officers, a composition which provides additional professional accountability to reinforce the substance of the disciplinary board as an internal accountability mechanism.<sup>1303</sup> The disciplinary board therefore displays accountability traits comprising of professional accountability, legal accountability, administrative accountability and bureaucratic accountability. The disciplinary board may enforce internal accountability against officials (bureaucratic accountability) and public representatives (political accountability), and also has the powers to initiate criminal liability through presenting to council recommendations to commence action in terms of Regulation 10 of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings.

Internal accountability sources used by the disciplinary board to recommend probable sanctions include *inter alia* the code of conduct for councillors<sup>1304</sup> in the event of a councillor's perpetrating an alleged transgression, and the code of conduct for officials,<sup>1305</sup> with reference to officials being investigated for probable transgressions.<sup>1306</sup> Although

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<sup>1299</sup> Regulation 3(2) of the Municipal Regulations on Financial Misconduct Procedures.

<sup>1300</sup> Regulation 4(2) of the Municipal Regulations on Financial Misconduct Procedures.

<sup>1301</sup> Regulation 5(4)(b) of the Municipal Regulations on Financial Misconduct Procedures.

<sup>1302</sup> Regulation 6(2) of the Municipal Regulations on Financial Misconduct Procedures.

<sup>1303</sup> Regulations 4(6)(a), (b) and (c) of the Municipal Regulations on Financial Misconduct Procedures.

<sup>1304</sup> The *Systems Act's* Schedule 1 - *Code of Conduct for Councillors*.

<sup>1305</sup> The *Systems Act's* Schedule 1 - *Code of Conduct for Councillors*.

<sup>1306</sup> Regulations 9(2) and (3) of the Municipal Regulations on Financial Misconduct Procedures.

related to the previous discussion of the accountability of senior managers, the consequences of being found guilty of financial misconduct are enforced through the *Systems Act*, which prohibits the placement of the individual in any municipality for a period of not less than 10 years.<sup>1307</sup> It is suggested that the disciplinary board as an internal accountability mechanism is *sui generis* and not only extends to internal enforcement but seeks to stimulate external accountability in the form of legal accountability and subsequent criminal liability. It is further suggested that the disciplinary board is an example of the clear separation of powers especially in its probable interface with both council and external accountability actors like the national treasury, the provincial treasury and the South African Police Services. The only other probable accountability mechanisms which do not relate to internal accountability but exhibit the same separation of powers and independence are the bid evaluation committee and the bid adjudication committees, and the municipal ombudsman. The discussion of the bid evaluation and bid adjudication committees will take place under the accountability accessible to the communities ("governing others") dimension.

#### *4.2.9 Internal Ombudsman*

The internal ombudsman, as already said, retains relative independence and autonomy as an accountability mechanism, although the office of the ombudsman includes traits of both internal accountability and of accountability available to the community. The ombudsman will be discussed under internal accountability mechanisms as the office reports to the municipal council and is therefore an accountability mechanism of the municipal council. The powers and functions of the ombudsman derive from the *Systems Act* and are based on the right to the resolution of complaints to the municipal council, other political structures, political office bearers or the administration.<sup>1308</sup> The powers and functions to attain the internal dimension of accountability are based on the Code of Conduct for Municipal Staff Members. An example hereof relates to the City of Johannesburg's Office of the Ombudsman, which conducted investigations in relation to

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<sup>1307</sup> Section 57A(3) of the *Systems Act*.

<sup>1308</sup> Section 5(1)(b) of the *Systems Act*.

purported transgressions in relation to Items 2, 4(1)(a) or (b), 5, 6(1), 7, 8, 9 or 12 of the Code of Conduct for Municipal Staff Members contained in Schedule 2 to the *Systems Act*.<sup>1309</sup> The second dimension of the Office of the Ombudsman as an accountability measure at the disposal of local communities is based on section 5 of the *Systems Act*, which extensively unpacks the rights and duties of communities.<sup>1310</sup> The dual dimensional accountability traits exercised by this internal accountability mechanism are first bureaucratic accountability and second social and political accountability to the communities.

The investigatory powers of the office of the ombudsman are restricted to conduct and transgressions associated within an enclosed space of the related municipality. The ambit of this internal accountability mechanism does not include complaints in terms of regulated statutes, which complaints are to be directed to associated functionaries in terms of the legislation. Complaints of probable criminal transgressions are also not considered and are referred to enforcement agencies such as the National Prosecuting Authority and the South African Police Services.<sup>1311</sup> Enquiries to be referred to other functionaries can also include aspects pertaining to financial regulation, which are considered by Internal Auditing, complaints against councillors, which are considered by the Ethics Committee under the guidance of the Speaker of Council,<sup>1312</sup> and lastly complaints in relation to the decisions of the municipal council.<sup>1313</sup> Due to the deemed relatively autonomous nature of the ombudsman as an internal accountability mechanism, except for reporting on its activities to the municipal council and the internal dimension of the office of the ombudsman, it mirrors the functions of other external intergovernmental chapter 9 institutions. The internal accountability mechanism of the internal ombudsman is often associated only with metropolitan municipalities due to the

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<sup>1309</sup> Section 6(a) of the CoJ *Ombudsman By-law*, 2014.

<sup>1310</sup> See s 6(b) of the CoJ *Ombudsman By-law*, 2014 in which the probable accountability measures at the disposal of local communities are curtailed to any failure to comply with the provisions of ss 5(1)(b), (c), (f) or (g) of the *Systems Act*.

<sup>1311</sup> Section 12(1)(a) of the CoJ *Ombudsman By-law*, 2014.

<sup>1312</sup> Section 12(1)(d) of the CoJ *Ombudsman By-law*, 2014.

<sup>1313</sup> Section 7(1)(a) of the CoJ *Ombudsman By-law*, 2014.



extensive financial expenditure associated with the technical and professional skills required for the operation of this function in municipalities.

### **4.3 Mechanisms and structures involving the electorate**

#### *4.3.1 Local participatory measures*

Participation processes in municipalities are critical for democratic accountability, as argued in the second chapter. Among the requirements of democratic accountability is holding municipalities accountable through conducting elections, as discussed above. But as critically discussed in Chapter 2, young democracies are often weak in accountability and rely solely on infrequent democratic accountability mechanisms for example elections. Therefore, mechanisms such as participation of the citizenry seek to hold governments accountable beyond the mere elementary and weak controls of democratic accountability. The ensuing discussion will focus on the last category of accountability measures for municipalities, the participatory measures and mechanisms at the disposal of local communities.

Pursuant to its objective of democratic and accountable governance,<sup>1314</sup> the concept of participatory democracy is designed to accommodate the voice of the people through multiple participatory mechanisms in municipalities. The principle of public participation is also adopted in terms of Principle 10<sup>1315</sup> of the *Rio Declaration* and further evidenced in terms of the *Aarhus Convention*.<sup>1316</sup> Three principles inform the concept of public participation, as discussed. As adopted under the *Aarhus Convention*, they are the

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<sup>1314</sup> Section 152(1)(a) of the Constitution.

<sup>1315</sup> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have access to information concerning the environment that is held by public authorities ... the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceeding, including redress and remedy shall be provided."

<sup>1316</sup> *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998).

following: consequent access to information, public participation in environmental decision-making, and access to justice in environmental matters.<sup>1317</sup>

There is an increased emphasis on broader modes of governance in environmental law, especially on public participation and accountable government.<sup>1318</sup> Godden and Peel contend that public participation is important in establishing proper accountability due to the central responsibility of the state for environmental protection.<sup>1319</sup> They explain this observation as follows: "Under the latter command and control regulatory approach, governments remain the primary environmental actors, although this primacy is tempered by the vital role of the courts in reviewing executive action and, increasingly, by informed and active citizens."<sup>1320</sup> Bell, McGillivray and Pedersen explain that public participation originated from general participation in development planning processes. Many processes relating to the planning sphere allow for opportunities to obtain public comments and local participation in planning applications, whereas the environmental domain is constrained to the extent of relying on technical and professional commentaries.<sup>1321</sup>

Bell, McGillivray and Pedersen suggest that environmental regulation has been closed to public input due to the intimate relationship between industry and the regulators, the lack of transparency pertaining to decision making, and the discretionary setting of environmental standards.<sup>1322</sup> Process changes have been rapid and public participation is increasing, with formal processes like EIA gaining momentum and the requirements conversed in the Aarhus Convention being implemented.<sup>1323</sup>

Todd claims that "strengthening citizens' enforceability" contributes to accountability in the face of the overpowering monopoly of the public service.<sup>1324</sup> Further to the

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<sup>1317</sup> *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998).

<sup>1318</sup> Godden and Peel *Environmental Law* 87.

<sup>1319</sup> Godden and Peel *Environmental Law* 87.

<sup>1320</sup> Godden and Peel *Environmental Law* 87.

<sup>1321</sup> Bell, McGillivray and Pedersen *Environmental Law* 335.

<sup>1322</sup> Bell, McGillivray and Pedersen *Environmental Law* 334.

<sup>1323</sup> Bell, McGillivray and Pedersen *Environmental Law* 334.

<sup>1324</sup> Tod *Strengthening Accountability for Improved Service Delivery* 280.

constitutional objective of accountability, local government legislation is employed to encourage community participation through participatory mechanisms.<sup>1325</sup> These mechanisms for community participation are differentiated in relation to political mechanisms<sup>1326</sup> (political structures for participation in terms of the *Structures Act*),<sup>1327</sup> administrative mechanisms and procedure for participation in municipal governance (governing systems in terms of the *Systems Act*),<sup>1328</sup> and finally generic provisions pertaining to participation in terms of legislation.<sup>1329</sup> Environmental mandates can also be found under principles of spatial sustainability and spatial resilience.<sup>1330</sup> In oversight of the principle of spatial sustainability, municipalities are mandated to ensure their spatial planning and land use management systems are progressive in terms of Environmental Management Systems.<sup>1331</sup> Examples of accountability mechanisms in terms of LEG are SDFs which include local spatial development and district spatial development.

These participatory mechanisms are also arranged as accountability mechanisms which must be geared to enable the citizenry to participate in the governing of municipalities, and can be clustered as follows: mechanisms for the acceptance of petitions and complaints, mechanisms for the notification and public comments procedure, mechanisms for public hearings<sup>1332</sup> and hearings by the municipal council and other political structures, and mechanisms for consultative sessions and reporting back to the local community.<sup>1333</sup> Examples hereof include section 79 proceedings of municipalities, IDPs, participatory budgets, section 80 service delivery mechanisms, petitions, formal questions to council, ward committees, etc. These participatory mechanisms are therefore also considered as accountability measures and mechanisms at the disposal of the local community.

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<sup>1325</sup> Chapter 4 - *Community Participation* of the *Systems Act*.

<sup>1326</sup> Section 17(1)(a) of the *Systems Act*.

<sup>1327</sup> Schedule 1 of the *Structures Act*.

<sup>1328</sup> Section 17(1)(b) of the *Systems Act*.

<sup>1329</sup> Section 17(1)(e) of the *Systems Act*.

<sup>1330</sup> See the discussion of the SPLUMA in para 3.5.6(e) in Chapter 3 pertaining to local government's environmental mandate in terms of framework local government law.

<sup>1331</sup> Section 7(b)(iii) of the SPLUMA.

<sup>1332</sup> DPME *Citizen-based Service Delivery Monitoring* 6.

<sup>1333</sup> Section 17(2) of the *Systems Act*.

### 4.3.2 Access to information

Another accountability mechanism at the disposal of communities is citizens' rights of access to information. Access to information is regulated by the *Promotion of Access to Information Act*.<sup>1334</sup>

Marais, Quayle and Burns suggest that the main objective of the PAIA is to "promote transparency, accountability and effective governance in public bodies".<sup>1335</sup> In the matter of *Brúmmmer v Minister for Social Development*,<sup>1336</sup> Ngcobo confirmed this notion:

The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'.<sup>1337</sup>

Access to information, similar to other rights, is not unlimited though,<sup>1338</sup> and must therefore be reasonably balanced with the rights of others.<sup>1339</sup> Similarly, municipalities are obliged to facilitate requests to allow access to information they hold as public bodies, in accordance with PAIA. A request for access to information must be duly complied with by municipalities unless the access is specifically restricted by statute.<sup>1340</sup> To facilitate requests of access to information, municipalities are responsible for the adoption of section 14 manuals.<sup>1341</sup> Such manuals outline the procedure to grant the community access to information as among municipalities' accountability measures to ensure adequate accountability and transparency.<sup>1342</sup> For example, from an environmental perspective, interest groups or citizens can use access to information as an accountability mechanism to solicit legislatively regulated information which *inter alia* includes the

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<sup>1334</sup> The PAIA.

<sup>1335</sup> Marais, Quayle and Burns 2017 *AJPA* 45.

<sup>1336</sup> *Brúmmmer v Minister for Social Development* 2009 6 SA 323 (CC).

<sup>1337</sup> *Brúmmmer v Minister for Social Development* 2009 6 SA 323 (CC) para 62.

<sup>1338</sup> Section 9(b)(i) of the PAIA.

<sup>1339</sup> Section 9(b)(ii) of the PAIA.

<sup>1340</sup> Section 5 of the PAIA.

<sup>1341</sup> Section 14 of the PAIA.

<sup>1342</sup> eThekweni Metropolitan Municipality *Section 14 Manual* 6.

conditions of waste disposal site licences<sup>1343</sup> or air emission licences.<sup>1344</sup> The custodian of the procedure and the information is the Information Officer, who in the case of municipalities is the municipal manager.<sup>1345</sup> Although the municipal manager is legislatively appointed as the "information officer", the responsibility for the facilitation of access to information is normally associated with the IGR Department. The accountability mechanism is strengthened by the deemed presumption against the refusal of the information requested, whereby the onus is on the public body to prove that the disclosure of the information can be rightfully refused under Chapter 4 of the Act.<sup>1346</sup> This presumption was confirmed in the matter of *Centre for Social Accountability v Secretary of Parliament*,<sup>1347</sup> where the court confirmed that the granting of access to information is the rule and the refusal should be considered the exception to the rule.<sup>1348</sup>

Notwithstanding the rights of communities associated with access to information, it is generally accepted that municipalities are obliged to protect unregulated access to information. Municipalities are therefore accountable for regulating different categories<sup>1349</sup> of access to information with the necessary checks and balances. Notwithstanding the aforesaid secondary administrative rights-based accountability mechanisms in municipalities, local communities recurrently approach the courts as accountability mechanisms with requests to intervene. Examples of remedial action to challenge the validity of administrative action include statutory appeals, judicial reviews, interdicts, *mandamus*, declaratory orders and criminal proceedings.<sup>1350</sup> Similarly municipalities frequently use the courts to fulfil their statutory duties.<sup>1351</sup> Examples hereto include

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<sup>1343</sup> See para 3.5.5(e) in Chapter 3 pertaining to the NEM: WA for discussion on the sectoral legislation applicable to the legislative waste management requirements.

<sup>1344</sup> See para 3.5.5(d) in Chapter 3 pertaining to the NEM: AQA for discussion on the sectoral legislation applicable to the environmental air quality management duties of municipalities.

<sup>1345</sup> Definition of "information officer"; s 1 of the PAIA.

<sup>1346</sup> Section 81(3)(a) of the PAIA.

<sup>1347</sup> *Centre for Social Accountability v Secretary of Parliament* 2011 5 SA 279 (ECG).

<sup>1348</sup> *Centre for Social Accountability v Secretary of Parliament* 2011 5 SA 279 (ECG) para 59.

<sup>1349</sup> Sections 14(1)(d)(e) and 15 of PAIA.

<sup>1350</sup> Devenish *et al Administrative Law and Justice* 423.

<sup>1351</sup> *City of Tshwane Metropolitan Municipality v Ghani* 2009 5 SA 563 (T) 568D.

section 32(2) of the SPLUMA, in terms of which municipalities may apply for court interdicts and demolition orders, and may request preventative and remedial orders.

#### *4.3.3 Community complaint processes*

Petitions are valuable accountability mechanisms in municipalities and enhance one of the constitutional objects of local government, which is to encourage the involvement of communities.<sup>1352</sup> In the context of the types of accountability prevalent in the local government domain, petitions, complaints and public hearings are social accountability<sup>1353</sup> and moral accountability mechanisms.<sup>1354</sup> In Gauteng, petitions are regulated in terms of the *Gauteng Petitions Act*,<sup>1355</sup> which allows for the formation of a provincial petitions committee. The *Gauteng Petitions Act* obliges the Provincial Petitions Committee to exercise maximum accountability and transparency.<sup>1356</sup> It is suggested that the said principles are shared in terms of the committee's co-operative relationship with other petition committees in municipalities, including metropolitan, district and local municipalities in Gauteng. Petition committees are established in municipalities in terms of section 79<sup>1357</sup> committees' procedure, and council is responsible for the adoption of the necessary processes and procedure to allow the functionality thereof. Generally, the petition committee functions under the auspices of the speaker of council and is protected under the legislative custodianship of the office of the speaker. Being a committee of council, the petitions committee reports to council and accounts for its activities. Regulated in terms of its procedure pertaining to the acceptance, timeframes, formalised petition hearings and regulated feedback on petitions, the petitions committee is considered a respected accountability mechanism serving the community.

In observance of the participatory nature of the proceedings the petitions committee can introduce public hearings, which are normally facilitated to allow citizens to participate

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<sup>1352</sup> Section 152(1)(e) of the Constitution.

<sup>1353</sup> See para 2.2.2 in Chapter 2.

<sup>1354</sup> See para 2.2.2 in Chapter 2.

<sup>1355</sup> *Gauteng Petitions Act* 5 of 2002.

<sup>1356</sup> Section 3(1)(c) of the *Gauteng Petitions Act* 5 of 2002.

<sup>1357</sup> Section 79 of the *Structures Act*.

and address the functionaries on the matter petitioned. The same accountability mechanism is also available for the proceedings associated with the MPAC, which can under the guidelines of National Treasury conduct public hearings.<sup>1358</sup> The degree of accountability is, however, dependant on proper procedure and the level of functionality of the committee, which will vary depending on the capacitation and knowledge in different municipalities. Other measures of accountability based on the same principle of political accountability are community participation in terms of council processes, which include formal questions of which notice has been given to the executive mayor, enrolment of motions for council's consideration and participation in ward committees. Unlike the previous accountability mechanism discussed, which guarantees direct participation in the proceedings of the petition hearings, council proceedings are an indirect participation mechanism which requires the representation of a councillor elected to the municipal council.

The mechanism can be utilised by members of the community to consult with the accountable ward councillor and in the event of a portfolio-related problem such as electricity, water and sanitation, with the relevant portfolio representative councillor serving on the related section 80 portfolio committee. The procedures are generally enabled in terms of the standing orders of council, which *inter alia* make provision for matters to be raised by means of questions to the executive mayor (or MAYCO members, depending on the portfolio) or new motions introduced into these proceedings.<sup>1359</sup> Written questions from councillors of which notice has been given oblige the executive mayor to respond, and are normally received either by the office of the speaker or the office of the executive mayor. They are then escalated downwards in relation to the enquiry to the relevant technical department. On receipt of the answer tendered, the reply will serve at the next ordinary council meeting of the local authority.<sup>1360</sup>

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<sup>1358</sup> See s 129(4)(a) of the MFMA.

<sup>1359</sup> See SALGA *Standing Rules and Orders for the Meetings of the Council and its Committees*.

<sup>1360</sup> Rule 37 of SALGA *Standing Rules and Orders for the Meetings of the Council and its Committees*.

The responsibility of the executive mayor can be enforced with anticipated sanctions as gazetted and contained in the standing orders of council.<sup>1361</sup> Motions introduced in council meetings assist with the resolution of matters and the adoption of specific decisions by council.<sup>1362</sup> As mentioned previously, these motions are reserved for members only, and need to be enrolled with the office of the municipal manager, who will record the anticipated motion in a register reserved for specific motions of this nature. Other probable participatory accountability processes in municipalities include the adoption of ward committees as part of the governance structures in a specific local authority. As with the previous comments on elections as accountability mechanisms, it is suggested that the ward committee system allows for direct accountability between an elected public representative (a ward councillor) and the constituents of the ward. Napier emphasises that based on the functioning of ward committees a ward councillor has a "direct and special responsibility" to constituents.<sup>1363</sup> A further proliferation of democratic accountability is found in the election of committee members who represent specific portfolio positions in the ward committee, which makes ward committees more responsive to the needs and aspirations of the community.<sup>1364</sup>

Although ward committee members are primarily accountable to members of the community,<sup>1365</sup> the ward committee configured as an accountability mechanism is restricted to the facilitation of matters through the elected structures of the ward. Hence, ward committee members are only part of a collective mechanism advisory to the ward councillor, and do not have individual accountability to the community. Though established to endorse the governance value of participatory democracy, its contribution as an accountability mechanism to the community is confined to a ward communication structure. It does not have any executive or legislative accountability. With participation limited to statutory civil participation, the only actual accountability mechanism is

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<sup>1361</sup> Rule 52 of SALGA *Standing Rules and Orders for the Meetings of the Council and its Committees*.

<sup>1362</sup> Rule 28 of SALGA *Standing Rules and Orders for the Meetings of the Council and its Committees*.

<sup>1363</sup> Napier 2008 *SJCH* 164.

<sup>1364</sup> DPLG *Ward Committee Resource Book* 10.

<sup>1365</sup> SALGA *Code of Conduct for Ward Committee Members* 2.



community consultation. Napier describes different degrees of citizen participation and rightfully cautions on the regression of "informing and consultation" to "tokenism", which allows those citizens excluded from executive decision-making "to have a voice or an opportunity to exchange information".<sup>1366</sup> Hence, it can be asked if citizens at this level contribute to decision-making, and if not, ward committees "lack the power to have their voices heard",<sup>1367</sup> meaning that the structure is obsolete in effecting change or service delivery. Ward committees should therefore not provide mere lip service towards soliciting public participation, but the structure should effectively contribute towards citizens' complaint resolution. Other than ward committees serving as purported accountability measures to the broader community, supplementary participatory mechanisms like public comments and statutory notifications also enforce the accountability of municipalities.

Accountability does not therefore only create the responsibility to account for decisions and actions taken, but requires the decision-maker to transparently explain and to justify those decisions. Public participation mechanisms include public notices of council meetings,<sup>1368</sup> budget meetings<sup>1369</sup> and IDP meetings.<sup>1370</sup> Other participatory mechanisms include mechanisms to display documents that need to be made public and statutory requests for public comments, which advance the contribution of community participation and enhance accountability in municipalities.<sup>1371</sup> Participatory processes that advance community participation include the promulgation of by-laws,<sup>1372</sup> the long-term use or selling of council capital assets,<sup>1373</sup> land-use applications,<sup>1374</sup> property rates and valuation roll comments,<sup>1375</sup> external service delivery mechanisms<sup>1376</sup> and environmental processes.<sup>1377</sup> Though, as another accountability measure which will be discussed under

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<sup>1366</sup> Napier 2008 *SJCH* 166.

<sup>1367</sup> Napier 2008 *SJCH* 166.

<sup>1368</sup> Section 19 of the *Systems Act*.

<sup>1369</sup> Sections 22 and 23 of the MFMA.

<sup>1370</sup> Section 29(1)(b) of the *Systems Act*.

<sup>1371</sup> Section 21A of the *Systems Act*.

<sup>1372</sup> Section 12(3)(b) of the *Systems Act*.

<sup>1373</sup> Regulations 6 and 34(3)(b) of the Asset Transfer Regulations.

<sup>1374</sup> Section 28(2) of the SPLUMA.

<sup>1375</sup> Section 50 of the MPRA.

<sup>1376</sup> Section 80(2) of the *Systems Act*.

<sup>1377</sup> Department of Environmental Affairs *Public Participation Guideline 7*.

the heading Criminal and Civil Litigation,<sup>1378</sup> legal accountability as an accountability measure is often resorted to by local communities when internal accountability, intergovernmental accountability and participatory processes have failed.

#### 4.3.4 *Right to protest*

Notwithstanding the above discussion of the formal accountability mechanisms at the disposal of the community, members of the community frequently mobilise civil action through protest action and other mediums of community activism<sup>1379</sup> to the extent that civil mobilisation is entirely unregulated. Accountability is sought through the social accountability pressure generated, which includes protest action and NGOs' activities.<sup>1380</sup> Suggestive that new democracies are weak, informal accountability mechanisms seek to achieve horizontal accountability in between elections.<sup>1381</sup> Almén and Burell recognise the use of protest as a social accountability mechanism to induce "social change and hold governments accountable".<sup>1382</sup> Pertinent to the pressure generated through informal accountability mechanisms is the public attention directed to the purported dissatisfaction, which can stimulate diverse outcomes, including the inducement of citizen-public officials to "interface".<sup>1383</sup> In the context of South Africa, in contrast to informal accountability mechanisms, formal accountability mechanisms are generated through multiple local democratic participatory instruments.<sup>1384</sup> Almén and Burell suggest that public protests, although sometimes successful in demanding better service delivery, cannot procure answerability from public officials.<sup>1385</sup> Public protests are therefore symptomatic of internal<sup>1386</sup> and intergovernmental accountability<sup>1387</sup> failures and are regarded as *post facto* mechanisms which have the potential to remedy demands but are ineffective in

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<sup>1378</sup> See para 4.3.8 in Chapter 4.

<sup>1379</sup> See s 152(1)(e) of the Constitution.

<sup>1380</sup> See para 2.5.6.2 in Chapter 2.

<sup>1381</sup> Almén and Burell 2018 *Social Movement Studies* 717.

<sup>1382</sup> Almén and Burell 2018 *Social Movement Studies* 717.

<sup>1383</sup> Malena, Forster and Singh *Social Accountability* 4.

<sup>1384</sup> SALGA *Community Protest*.

<sup>1385</sup> Almén and Burell 2018 *Social Movement Studies* 717.

<sup>1386</sup> See para 2.5.7 in Chapter 2.

<sup>1387</sup> See para 2.5.6 in Chapter 2.

generating answerability. Therefore, based on the absence of answerability, the informal accountability is regarded as weak and does not qualify as public accountability.<sup>1388</sup> It could even be suggested that protests are contra to the principles of developmental local government due to their unsustainable nature as accountability instruments, whereas the outcomes of developmental local government are mandated in the national context thereof and not isolated pockets of social accountability.<sup>1389</sup> Hence civil protests can "achieve partial social accountability"<sup>1390</sup> but are ineffective as an informal accountability mechanism to remedy internal and intergovernmental accountability failures.

#### *4.3.5 Non-governmental action*

Another type of local government activism is the resurgence of NGOs, which has generated increased activism pertaining to municipal accountability, or rather the lack thereof. NGOs are social and moral accountability-type mechanisms and are well-established in the environmental domain. The term "NGO" is synonymous with watchdog activists' groups and aid agencies which pursue a public interest agenda rather than commercial interests. Unlike protests, which are considered sporadic and informal in nature,<sup>1391</sup> NGOs are accountability mechanisms which are focussed on the importance of answerability rather than isolated demands. Unlike protests as mechanism to achieve short-term demands NGOs focus on answerability objectives and use the NGO-public official interface to vigorously pursue answerability through formal and regulated accountability mechanisms in the governmental accountability mechanism domain. More often NGOs are created in response to the emergence of a public interest agenda based on a failure of governance accountability measures and mechanisms. In contrast with the informal mechanism of protest mobilisation, NGOs are not only equipped with the necessary social agenda to be considered a formal social accountability mechanism, but also have additional accountability characteristics such as professional accountability,

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<sup>1388</sup> Section 195(1)(f) of the Constitution.

<sup>1389</sup> Part B, Section 2 of the White Paper 53.

<sup>1390</sup> Almén and Burell 2018 *Social Movement Studies* 717.

<sup>1391</sup> Young and Dhanda "Role of Governments and Nongovernmental Organizations" 221.

political accountability, moral accountability and ethical accountability to maintain the moral high ground as accountability mechanisms.<sup>1392</sup> The sharing of skills and the provision of capacity for service delivery by NGOs could potentially increase accountability and further decrease the number of service delivery protests.<sup>1393</sup>

#### 4.3.6 Section 62 appeals

Section 62 appeals are regulated through the *Systems Act*. As previously discussed in this chapter, section 59 of the *Systems Act* permits municipal councils to develop a system of delegations which is facilitated to provide the necessary checks and balances pertaining to the execution of council's powers. However, any decision in terms of a delegation can also be appealed, this being another accountability mechanism. The section 62 appeal mechanism is framed as both an internal and an external accountability mechanism, but it is predominantly used as an external accountability mechanism at the disposal of the community. The powers of the appeal authority to confirm, vary or revoke the decision under consideration are significant in terms of the extent of the authority carried by the accountability mechanism.<sup>1394</sup> Although an appeal under the auspices of the section 62 appeal committee is considered a "wide appeal", specific restrictions prevail thereto, for example where the interpretation could lead to absurdity in that tenders need to be re-evaluated as part of the wide appeal.<sup>1395</sup> The accountability mechanism allows the internal decisions of municipalities to be internally appealed as an additional internal remedy and to be subject to a section 62 appeal as an accountability measure. An example hereto is when a decision with probable environmental consequences can be appealed prior to seeking recourse in terms of statutory remedies. The accountability mechanism therefore serves as an internal safety net to guard against flawed environmental procedure.

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<sup>1392</sup> See para 2.2.2 in Chapter 2 for a detailed discussion of the characteristics of the various types of accountability.

<sup>1393</sup> DPME *Citizen-based Service Delivery Monitoring* 9.

<sup>1394</sup> Section 62(3) of the *Systems Act*.

<sup>1395</sup> *CC Groenewald v M5 Developments* (283/09) [2010] ZASCA 47 (31 March 2010) para 23.

#### 4.3.7 Bid committees

SCM is an important accountability measure to achieve not only internal accountability but accountability towards the citizenry on how municipalities facilitate procurement.<sup>1396</sup> The placement of the discussion of SCM under the accountability measures at the disposal of the community is based on the constitutional accountability requirements of procurement departments in municipalities, which include: "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."<sup>1397</sup> Hence, municipalities are accountable to their communities to provide for a system that is "fair, equitable, transparent, competitive and cost effective".<sup>1398</sup> In terms of the MFMA, municipalities are obliged to develop their own SCM framework, which gives credence to the constitutional principles in terms of procurement.<sup>1399</sup> Nel, Du Plessis and Du Plessis refer to the SCM policies of municipalities that enable the inclusion of environmental specifications.<sup>1400</sup> Bid committees as accountability mechanisms must therefore consider environmental aspects if regulated in terms of internal SCM frameworks and Supply Chain Management Policies (hereafter SCMP) and cause outward accountability in the electorate dimension.

Accountability measures of the SCM framework need to include transparency in bidding processes,<sup>1401</sup> and accountability measures to combat fraud, the invalidation of unlawfully taken decisions, and dispute settlement.<sup>1402</sup> Central to the accountability mechanisms will be the Bid Specification Committee, the Bid Evaluation Committee and the Bid

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<sup>1396</sup> Ambe and Badenhorst-Weiss 2012 *African Journal of Business Management* 11005.

<sup>1397</sup> Section 217(1) of the Constitution.

<sup>1398</sup> Extract of s 217(1) of the Constitution.

<sup>1399</sup> Section 111 of the MFMA.

<sup>1400</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-25.

<sup>1401</sup> Sections 112(1)(e), (g), (h), (i), (j), (k) and (l) of the MFMA.

<sup>1402</sup> Section 112(1)(m), (n), (o), (p) and (q) of the MFMA. Also see *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* (SCA) (unreported) case number 233/2015 of 1 October 2015 for further information on how the courts interpret "dispute resolution and mechanisms thereto".

Adjudication Committee.<sup>1403</sup> These committees act as mechanisms to ensure proper accountability. Specific to the appointment of contractors to perform environmentally sensitive functions, the Bid Specification Committee is obliged to consider and approve specifications which are observant of environmental compliance. For example, in the event of landfill management activities, prospective bidders will have to comply with environmental or landfill licensing requirements to ensure accountability specific to LEG. The accountability of the bid committees is determined by the way that it upholds section 217 of the Constitution and implements the SCM framework. Non-adherence to legal compliance management in terms of the municipalities' own SCM frameworks is primary to the accountability failures of bid committees. In the absence of accountability, internal and external accountability actors resort to the determination of the *post facto* legal consequences thereof.<sup>1404</sup> Section 26 committees are therefore often the subject of legal scrutiny in relation to compliance. Volmink describes the court's test of compliance as being either in terms of strict compliance or in terms of the flexible approach<sup>1405</sup> thereto.<sup>1406</sup> Notwithstanding the aforementioned application of compliance as an accountability measure, the judicial system has settled on "strict compliance"<sup>1407</sup> as the measure of accountability for bid committees. The court defined the ambit of an "acceptable tender"<sup>1408</sup> as observant of "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document",<sup>1409</sup> unless the said "conditions are immaterial, unreasonable or unconstitutional".<sup>1410</sup> Non-compliant behaviour can be remedied with objection and appeal procedures as directed under a

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<sup>1403</sup> Regulation 26(1)(a) of the Municipal Supply Chain Management Regulations, published in Gen N 868 in GG 27636 of 30 May 2005 (hereafter the SCM Regulations).

<sup>1404</sup> See s 7(2) of PAJA pertaining to the exhausting of internal remedies and s 62 of the *Systems Act*. Also see *Groenewald v M5 Developments (Cape)* 2010 5 SA 82 (SCA) for more information on the use of s 62 appeals in terms of SCM adjudication.

<sup>1405</sup> See Volmink 2014 *APPLJ* 48-50 for more information on the flexible approach followed by our courts.

<sup>1406</sup> Volmink 2014 *APPLJ* 48.

<sup>1407</sup> *Dr JS Moroka Municipality v Betram (Pty) Limited* [2014] 1 All SA 545 (SCA).

<sup>1408</sup> Section 1 of the *Preferential Procurement Policy Framework Act* 5 of 2000 (hereafter the *PPPF Act*).

<sup>1409</sup> Definition of "acceptable tender" as per s 1 of the *PPPF Act*.

<sup>1410</sup> *Dr JS Moroka Municipality v Betram (Pty) Limited* [2014] 1 All SA 545 (SCA) para 10.

municipality's supply chain procedure or under specific directive of Regulation 49 of the MFMA: Supply Chain Management Regulations.<sup>1411</sup>

It follows that non-responsive conduct by accountability mechanisms such as bid committees is a cause for probable findings by the AG,<sup>1412</sup> is the stimulus of fraud and corruption,<sup>1413</sup> hollows the reputation of the proper fiscal governance and accountability of municipalities, but more importantly strains the resources needed to achieve developmental governance. Based on the aforementioned, bid committees operating in the municipal supply chain environment therefore have increasingly critical roles to play as accountability mechanisms in ensuring LEG.

#### *4.3.8 Criminal and civil litigation*

Notwithstanding the internal accountability and intergovernmental accountability mechanisms available to the local community, legal accountability mechanisms are often used as culpability remedies. Legal remedies are most often resorted to where internal accountability and intergovernmental accountability have failed. Similar to the increase in chapter 9 institution interventions and involvement in affairs of municipalities, the bench has also seen an increase in matters derived from a local government perspective. Matters pertaining to the concepts of accountability and liability are subsequently often augmented before the bench.

Du Plessis describes the public law domain as vital for actors to ensure environmental compliance,<sup>1414</sup> of which enforcement can therefore be applied through *inter alia* the judiciary with a diverse variety of criminal measures and administrative measures to compel accountability and ensure statutory enforcement.<sup>1415</sup> It follows that based on municipalities environmental responsibility, the courts are often a valuable mechanism to

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<sup>1411</sup> The SCM Regulations.

<sup>1412</sup> AGSA *MFMA 2017/18* 5.

<sup>1413</sup> AGSA *MFMA 2017/18* 5.

<sup>1414</sup> Du Plessis "Understanding the Legal Context" 17.

<sup>1415</sup> Du Plessis "Understanding the Legal Context" 19-23.

ensure compliance in relation to LEG. Central hereto is the judiciary as an environmental governance actor by means of the application of criminal and civil procedure.

#### 4.3.8.1 Criminal litigation

With reference to criminal offences in the environmental domain, offences of this nature are often referred to as environmental crimes. As part of the municipalities' statutory environmental responsibilities already discussed<sup>1416</sup> and the court's discretion in the Public Environmental Law spectrum, many criminal provisions are also found in the South African environmental law framework. These provisions allow for enforcement in relation to statutory transgressions in the local environmental domain. Specific to certain statutory transgressions contained in the South African environmental law framework, municipalities can therefore use the courts as an accountability mechanism in relation to LEG.<sup>1417</sup>

In its simplest form, "environmental harm" will more often be regulated through the provision of the following rationale: if the benefits associated with industrial activities outweigh the harm caused, then the activity can be regulated without reserving strict compliance. In contrast to the aforesaid, it is therefore contended that criminal law is more often used to address clearly unacceptable deviant behaviour and not to "regulate or balance the degree of harm" apportioned. Consequently, the best application of environmental crimes is based on clearly unacceptable behavior, or to enforce a specific regulatory framework.<sup>1418</sup> Criminal sanctions are therefore perfectly suited to act as deterrents to specific criminal offences.<sup>1419</sup> An example hereto is found in terms of section 151 of the NWA, which creates a statutory offence which is committed through any deliberate act or negligent omission which pollutes or is likely to pollute a water resource

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<sup>1416</sup> See para 3.2 in Chapter 3 for a discussion on statutory environmental responsibilities feeding into the municipal domain.

<sup>1417</sup> See para 3.5. in Chapter 3 for a discussion on the use of criminal provisions in terms of sectoral environmental law enforcement.

<sup>1418</sup> Bell, McGillivray and Pedersen *Environmental Law* ed 276.

<sup>1419</sup> Kidd "Criminal Measures" 241.



unlawfully.<sup>1420</sup> Based on the specific fundamentals associated with criminal law, the aforementioned fixed elements relating to the specific statutory transgressions must be established. It follows that the elements of the specific transgression will then be applied from a local environmental perspective to meet the onus of proof associated with the purported transgression. Hence, the same will apply in relation to environmental transgressions whereby it is generally accepted that the state, in cases of environmental criminal law, needs to discharge the specific onus of proof in terms of the purported transgression. Kidd, however, notes the prevalence of previous reverse onus provisions, as contained under old-order environmental legislation, which is considered contra section 35 of the Constitution.<sup>1421</sup>

Finally, the following statement provides credence to criminal litigation as an accountability mechanism in LEG: "Moreover, when public interest in the environment and the consequences of environmental harm increases, there is an equivalent escalation in the amount of moral opprobrium that attaches to environmental offences."<sup>1422</sup> Hence, as explained previously, public law relationships dictate that public authorities are obliged not only to guard the individual's interests, but also to consider broader public interests as reflected under the NEMA.<sup>1423</sup> The same can be applied in the context of municipalities, whereby specific criminal offences in terms of the South African environmental law framework can be used by municipalities to deter local deviant environmental behaviour and serve as accountability mechanisms.

#### 4.3.8.2 Civil litigation

It follows that municipalities are obliged to enforce compliance with environmental obligations with criminal sanctions against wrongdoers. In the absence of criminal sanctions, municipalities risk communities' enforcing the formal accountability measures

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<sup>1420</sup> Sections 151(1)(i)-(j) of the NWA. Also see para 3.5.3 in Chapter 3 for discussion on legislative ambit of the NWA.

<sup>1421</sup> Kidd "Criminal Measures" 246.

<sup>1422</sup> Bell, McGillivray and Pedersen *Environmental Law* 277.

<sup>1423</sup> Bray "Administrative Justice" 159.

through private accountability measures. Given the deterioration of their governance capabilities and their capacity-based liabilities, municipalities are increasingly besieged with applications and action matters in high and lower court proceedings. Unlike the above administrative accountability mechanisms, the citizenry seeks recourse in terms of criminal proceedings or civil litigation. Examples of civil litigation include high court applications to enforce specific conduct from municipalities. Further to the second "specific quantum-related remedial action" mentioned, the citizenry seeks remedies through action proceedings against municipalities. Contrasting with the other legal accountability mechanisms discussed, civil litigation is expensive and unfortunately further extends the already dire situation of the municipal fiscus. Whilst the choice of litigation instrument will depend on the differentiation between the remedy of enforcement or compensation, litigation as an accountability mechanism is used sparingly by the citizenry, based on the cost implications thereof.

Enforcement-based litigation mechanisms will often include high court applications such as spoliation applications, rule nisi applications (interim interdicts), interdictory procedures, urgent applications (*mandamus*) and review applications. Although distinct in the nature of the previously mentioned types of applications, an interrelated legal characteristic of the said applications is that they are purposed to remedy factual situations or default, for example to force authorities to act in a certain manner or restrain them from acting in a specific manner. Freedman explains that these remedies associated with the *mandament of spolie* are not to protect the purported applicant but rather to prevent persons from resorting to self-help.<sup>1424</sup> Further to the use of the *mandament of spolie* for the discontinuation of services, Freedman refers to the matter of *City of Cape Town v Strümpher*<sup>1425</sup> to explain that the Supreme Court of Appeal extended the *mandament* to include "not to protect possession, but rather to discourage self-help and thus protect public order".<sup>1426</sup> Prevalent examples hereof in the local government domain

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<sup>1424</sup> Freedman 2015 *TSAR* 198. Also see *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA) para 21.

<sup>1425</sup> *City of Cape Town v Strümpher* 2012 4 SA 207 (SCA).

<sup>1426</sup> Freedman 2015 *TSAR* 198.

would see municipalities resorting to credit control measures to withhold services like electricity and water as an enforcement measure.<sup>1427</sup> Importantly, because the remedy of *mandament* can be applied to the protection of an incorporeal right, the applicant needs to base his application not on the fact that said "contractual extent" services of the supply of "electricity and water" had been unlawfully spoliated, but that the said incorporeal right (quasi-possession) to services like electricity and water has been unlawfully spoliated.<sup>1428</sup> Prevalent to the explanation of Freedman,<sup>1429</sup> that the termination cannot be based on contractual obligations, the Supreme Court of Appeal recently followed the same rationale and dismissed a spoliation application in *Eskom Holdings SOC Limited v Masinda*.<sup>1430</sup>

The court noted the fact that the application was based on the spoliation of a contractual supply of electricity and not on the unlawful spoliation of the said quasi-possessional right to electricity.<sup>1431</sup> Hence, the supposed spoliation was best arranged under a "personal right" rather than a "quasi-possessional right".<sup>1432</sup> Therefore, the application was dismissed.<sup>1433</sup> Similarly, litigation as an accountability mechanism is considered a progressive instrument at the disposal of the community to provide clarity pertaining to confirmed constitutional rights issues such as water,<sup>1434</sup> housing,<sup>1435</sup> property,<sup>1436</sup> planning<sup>1437</sup> etc. Friedman JP in *Baloro v University of Bophuthatswana* confirmed the role of the honourable courts in progressively anticipating the aims and the spirit of the Constitution.<sup>1438</sup>

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<sup>1427</sup> *Eskom Holdings SOC Limited v Masinda* (1225/2018) [2019] ZASCA 98 (18 June 2019).

<sup>1428</sup> Freedman 2015 *TSAR* 199.

<sup>1429</sup> Freedman 2015 *TSAR* 199.

<sup>1430</sup> *Eskom Holdings SOC Limited v Masinda* [2019] ZASCA 98.

<sup>1431</sup> *Eskom Holdings SOC Limited v Masinda* (1225/2018) [2019] ZASCA 98 (18 June 2019) para 25.

<sup>1432</sup> *Eskom Holdings SOC Limited v Masinda* (1225/2018) [2019] ZASCA 98 (18 June 2019) para 25.

<sup>1433</sup> *Eskom Holdings SOC Limited v Masinda* (1225/2018) [2019] ZASCA 98 (18 June 2019) para 25.

<sup>1434</sup> The *Mazibuko* case.

<sup>1435</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>1436</sup> *Jordaan vs City of Tshwane Metropolitan Municipality* 2017 6 SA 287 (CC).

<sup>1437</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57.

<sup>1438</sup> Devenish *et al Administrative Law and Justice* 423.

It is suggested that legal proceedings against municipalities, unlike the above litigation instruments utilised as accountability mechanisms at the disposal of the community, cannot be considered as legal accountability mechanisms. Claims against organs of state are regulated by the *Institution of Legal Proceedings against Certain Organs of State Act*,<sup>1439</sup> and municipalities are also included in the regulatory ambit thereof. Central to the regulatory framework is the objective of protecting municipalities against external litigants. Procedure is therefore regulated to include mandatory timeframes and service procedures of notice of claims and papers filed pertaining to the same.

More often, action or summons procedures are used by litigants to obtain financial relief against defendants where the objective of the legal process is to claim for damages or debt owed to the plaintiffs. Hence, summons issued against municipalities to obtain judgments to settle damages or creditors' claims,<sup>1440</sup> although considered probable symptoms of the internal and external failure of accountability, are more prejudicial than supportive to municipalities' developmental government mandate.<sup>1441</sup> Subsequent execution of the judgments obtained against municipalities are destructive in their very nature. Plaintiffs normally obtain writs of execution against local authorities to take possession of municipalities' movable property, which may include service delivery vehicles, plant and machinery. Execution against property not only impedes municipalities' delivery of services, but also has the effect of undermining financial accountability, with municipalities hampered with legal expenses including the costs of suit, costs to stay execution, and storage costs associated with attachment and subsequent removal. For example, if judicial attachment is executed against movables owned by a municipality, like vehicles, plant and machinery, the operation of environmentally sensitive services like waste water treatment, waste management and water reticulation risks being negatively

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<sup>1439</sup> *Institution of Legal Proceedings Against Certain Organs of State Act* 40 of 2002.

<sup>1440</sup> *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs* 2012 4 SA 91 (KZD) para 12.

<sup>1441</sup> *Matjhabeng Local Municipality v Man in One CC* (3429/2018) [2018] ZAFSHC 121 (30 July 2018) para 6.

affected. This can result in unattended spillages, unattended overflow of waste transfer stations and unattended water reticulation problems.

Unlike other spheres of government, the *State Liability Act*,<sup>1442</sup> as the statutory mechanism to guard against the execution of state property utilised for service delivery, does not protect municipal property.<sup>1443</sup> Litigation by summons procedure could therefore be described as being indicative of an obligation to "specific performance" or "financial liability"<sup>1444</sup> rather than as an attempt to "achieve local governance outcomes" as derived from local government's constitutional objectives. The outcome is therefore restitutive only from an individual perspective, rather than leading to the attainment of the collective accountability measures at the disposal of local communities.

Finally, civil litigation also has limited potential as an accountability mechanism in the context of unresponsive or failed "political accountability" in institutions. Pursuant to legal remedies as accountability mechanisms, legal processes and litigation in local government often lead to a procedural maze to attain legal recourse. The expectation of legal recourse as a culpability mechanism therefore must also be exploited to understand the legal remedies available in relation to a failure of "political accountability" and the diverse legal accountability branches available in relation to a failure of "administrative accountability".<sup>1445</sup>

Founded in municipalities' recognition as autonomous in a system of co-operative government, as part of a semi-federal government system sphere of government, the legal standing of municipal councils is autonomous in exercising legislative powers.<sup>1446</sup> Hence their legislative acts are not considered subordinate legislation and therefore cannot be subjected to legal process and judicial review.<sup>1447</sup> Bekink explains that municipal

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<sup>1442</sup> The SLA.

<sup>1443</sup> *Mateis v Plaaslike Munisipaliteit Ngwathe* (254/02) [2003] ZASCA 9 (7 March 2003) para 9.

<sup>1444</sup> *Vhembe District Municipality v Stewarts & Lloyds Trading (Booyens) (Pty) Limited* [2014] 3 All SA 675 (SCA) para 12.

<sup>1445</sup> See para 3.5.8 in Chapter 3.

<sup>1446</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 36.

<sup>1447</sup> Bekink *Principles of South African Constitutional Law* 453.

councils are "deliberative bodies" consisting of elected representatives who take legislative decisions based on political alignment.<sup>1448</sup> Hence their decisions are politically accountable and not susceptible to judicial scrutiny.<sup>1449</sup> Legal oversight of "political accountability" as an accountability mechanism at the disposal of communities is therefore restricted to constitutional review.<sup>1450</sup> The availability of legal remedies in the event of the failure of administrative accountability is supplementary to that of constitutional legal remedies. Notwithstanding the paucity of legal accountability mechanisms in relation to political accountability, other accountability mechanisms are available in relation to "just administrative action".

Notwithstanding the use of litigation to achieve accountability outcomes on behalf of the community, other avenues of accountability through quasi-judicial proceedings are also at the disposal of the community. Therefore, regardless of the availability of consultative procedures and the assistance of intergovernmental role-players, municipalities are frequently subjected to administrative action, quasi-judicial and judicial processes enrolled by citizens to remedy culpability issues.<sup>1451</sup>

#### *4.3.9 Law enforcement and environmental compliance*

Aside from specific compliance solicited from other legal accountability mechanisms such as criminal and civil litigation accountability mechanisms, direct enforcement of environmental compliance is also facilitated by municipalities. The direct enforcement of environmental compliance is similar to criminal procedure in that the said enforcement is based on statutory directives, except that municipalities are enforcing environmental compliance aspects as agents (through the delegation of environmental powers) or directly appointed municipal inspectors to enforce sectoral environmental legislation.<sup>1452</sup>

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<sup>1448</sup> See *Democratic Alliance v eThekweni Municipality* 2012 2 SA 151 (SCA).

<sup>1449</sup> Bekink *Principles of South African Constitutional Law* 453.

<sup>1450</sup> Bekink *Principles of South African Constitutional Law* 453.

<sup>1451</sup> See para 4.3.10 in Chapter 4 for a discussion on the application of quasi-judicial mechanisms in relation to accountability towards the electorate.

<sup>1452</sup> Du Plessis "Local Government and the Pursuit of Urban Sustainability" 272.

Farmer, Faure and Vagliasindi state that most environmental crimes are committed unintentionally and are based on ignorance, so post-detection discretion is allowed in the choice of corrective actions rather than formal prosecution.<sup>1453</sup> Administrative fines are frequently applied for minor environmental offences.<sup>1454</sup> Concern is raised as to whether the punitive fine system could be regarded as inconsequential, causing prosecution and judges to focus more on more serious transgressions. Winstanley, however, asserts that criminal sanctions are appropriate for more serious cases of "intentional and persistent wrongdoing"; administrative measures present the possibility of remediation of the environment without consequent criminal sanctions, and are also likely to be taken seriously by the offenders.<sup>1455</sup>

The concurrent availability of both the fines and prosecution could also cause misunderstanding about under what circumstances which method of enforcement should be applied.<sup>1456</sup> Administrative fines should also not be underestimated as a punitive mechanism of enforcement which could be considered as a probable deterrence and could supplement an environmental governance framework. Enforcement in the municipal domain is more often implemented in terms of the promulgated by-laws of a municipality.

Municipalities have the right to promulgate and enforce local environmental by-laws, associated standards, and regulated legislation.<sup>1457</sup> The authority of municipalities to draft by-laws is exercised in various ways. They can be used to accomplish the municipality's constitutional obligation in relation to the environment and further to pursue the local government constitutional obligation to provide a safe and healthy environment. By-laws are proficient accountability mechanisms to ensure accountability towards the community in reference of LEG.

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<sup>1453</sup> Farmer, Faure and Vagliasindi "Environmental Crime in Europe" 324.

<sup>1454</sup> See para 3.5.5 in Chapter 3 pertaining to local government's environmental mandate in terms of a selection of sectoral environmental law for discussion in relation to the use of administrative fines as local environmental compliance mechanisms in terms of sectoral environmental laws.

<sup>1455</sup> Winstanley "Administrative Measures" 225.

<sup>1456</sup> Farmer, Faure and Vagliasindi "Environmental Crime in Europe" 324.

<sup>1457</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-28.

Municipalities derive their legislative powers to draft by-laws from specific sources, which include the promulgation of standard drafted environmental by-laws, the promulgation of model environmental management by-laws, and the promulgation of issued by-laws conceived from sector legislation.<sup>1458</sup> Accountability towards the community in reference of LEG is *inter alia* therefore commonly practised through the provision of environmentally relevant by-laws, non-compliance with which is enforced through specific by-laws, related statute or environmental laws. By-laws are used not only to ensure compliance with local mandates, but also as a co-operative approach stemming from other sectoral mandates or different spheres of governance.

Paterson and Kotzé suggest with reference to the array of environmental compliance and enforcement instruments and notwithstanding the "constitutional dictate of co-operative governance" that there is a need for an "integrated and co-ordinated approach to environmental governance".<sup>1459</sup> In observance of the concept of LEG as advocated by Nel, Du Plessis and Du Plessis, it is suggested that municipalities are sometimes not only able to enforce their own by-laws but also to acquire the additional mandate to enforce environmental statutes promulgated by provincial and national authorities.<sup>1460</sup> In the aforesaid context, by-laws are utilised as a broader accountability mechanism, not only to enforce local environmental compliance mandates, but also broader environmental governance mandates. The enforcement of an array of instruments imposed by municipalities confirms municipalities' role as a co-operative conduit for environmental enforcement and illustrates municipalities responsibility in LEG.<sup>1461</sup>

Accountability towards the electorate is not attained solely through the enforcement of by-laws, but is often supplemented by the provision of subsidiary enforcement mechanisms such as municipal police services, municipal courts and special by-law enforcement agencies in specific municipalities. These by-law enforcement agencies are

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<sup>1458</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-28.

<sup>1459</sup> Paterson and Kotzé "Towards a More Effective Environmental Compliance and Enforcement Regime" 371.

<sup>1460</sup> Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 3-31.

<sup>1461</sup> Kotzé "Environmental Governance" 124.



often located in the user departments. They might include environmental health practitioners in the form of air quality officers, waste management enforcement officers, environmental management inspectors, building control inspectors, land use management inspectors and centralised by-law unit enforcers.<sup>1462</sup> Originating from national statute, the specific status of peace officers is often allocated to sectoral legislation providing law enforcement status to municipal officials.<sup>1463</sup>

#### 4.3.10 *Other mechanisms*

Other mechanisms utilised by the citizenry as accountability mechanisms are appeal authorities, valuation appeal boards (hereafter VABs) and MPTs, for example. Central to these accountability mechanisms are the "principles of natural justice",<sup>1464</sup> which guide these processes and place them at the disposal of the community to ensure "fair and unbiased hearings" before a decision is taken.<sup>1465</sup> Administrative tribunals give rise to the exercising of public decision-making processes which allow for citizenry commentaries, objections or approvals prior to the exercising of the executive decision-making powers of municipalities. Quasi-judicial proceedings simulate hearings to consider public matters, but are semi-formal in their approach to decorum and procedural aspects, and do not exhibit the formal accusatorial nature of court proceedings. Examples hereof are contained in the way that arguments are presented by applicants and objectors to the said proceedings, which do not follow the same formal rules as courts.<sup>1466</sup>

##### 4.3.10.1 Municipal planning tribunals

MPTs are quasi-judicial proceedings in relation to the execution of the planning powers of municipalities. Specifically, municipalities are obliged to regulate and enforce land use in

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<sup>1462</sup> SALGA *Municipal Health Services Status Quo Report 2017-2018* 19.

<sup>1463</sup> SALGA *Municipal Health Services Status Quo Report 2017-2018* 19.

<sup>1464</sup> "The requirements of natural justice must depend on the circumstances of the case, the matter of enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth." *Russel v Duke of Norfolk* [1949] 1 All ER 109 (CA) 118.

<sup>1465</sup> Laubscher *et al SPLUMA* 213.

<sup>1466</sup> Rose-Innes *Judicial Review of Administrative Tribunals* 163.

their jurisdictions.<sup>1467</sup> The executive authority of a municipality is obliged to provide guidance on the development of its land use scheme,<sup>1468</sup> including public consultation and the adoption thereof.<sup>1469</sup> In terms of the land use scheme, all necessary applications must be submitted and considered by municipalities.<sup>1470</sup> Consequently, MPTs were established under the SPLUMA to consider land use applications in the municipality's jurisdiction.<sup>1471</sup> A municipal council is accountable for ensuring sufficient financial, administrative and professional capacity in relation to the MPT prior to its establishment.<sup>1472</sup> Specific to this accountability mechanism, which is available to the citizenry, is the procedure thereof, which includes parties' understanding the actual land development applied for, the affordance to parties to have reasonable time in which to prepare for the hearing, and every party's right to state their case.<sup>1473</sup> Likewise, the right to adduce evidence and cross-examine witnesses, the right to legal representation and that the hearings must be held in public.<sup>1474</sup> Preceding the commencement of the MPT's operations, the municipal council must publish a section 37(4) notice to the effect that the tribunal is ready to consider matters.<sup>1475</sup>

It is important to note, for the purposes of accountability, that the membership of the MPT excludes municipal councilors. It consists only of officials and external professional members with expertise in spatial planning, land use management and planning law, hence increasing accountability of the mechanism through the addition of the associated professional accountability element.<sup>1476</sup>

Aspects of probable bias are also regulated to prevent probable conflicts of interest, which could be regarded as "undermining the good standing of the accountability

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<sup>1467</sup> *Buffalo City Metropolitan Municipality v Jikwana* (EL99/14, ECD399/14) [2014] ZAECELLC 8 (30 September 2014) para 21.

<sup>1468</sup> Section 23(1)(a) of the SPLUMA.

<sup>1469</sup> Section 24(1) of the SPLUMA.

<sup>1470</sup> Section 33(1) of the SPLUMA.

<sup>1471</sup> Section 35(1) of the SPLUMA.

<sup>1472</sup> Laubscher *et al SPLUMA* 193.

<sup>1473</sup> Laubscher *et al SPLUMA* 213, 214.

<sup>1474</sup> Laubscher *et al SPLUMA* 213, 214.

<sup>1475</sup> Section 37(4) of the SPLUMA.

<sup>1476</sup> Van Wyk *Planning Law* 156.

mechanism".<sup>1477</sup> MPTs function according to their own procedures and rules,<sup>1478</sup> which include land use by-laws promulgated by Council. These legislative instruments must, however, adhere to the constitutional principles of public administration.<sup>1479</sup> The importance of the MPT as an accountability mechanism is confirmed in the Premier of a Province's powers to intervene in terms of section 139 of the Constitution when municipalities fail to appoint MPTs.<sup>1480</sup> Parallel to the citizenry's privilege to use accountability mechanisms such as the MPTs are the accountability mechanisms of appeal authorities.

#### 4.3.10.2 Appeal authorities

Consequent on municipalities' executive powers in relation to "municipal planning"<sup>1481</sup> and new-order legislation such as the SPLUMA, which mandates their establishment, appeal authorities can also be considered accountability mechanisms available to the community. Prior to the enactment of new-order legislation like the SPLUMA and the confirmation of municipalities' executive powers pertaining to "municipal planning", appeals were reserved for institutions like the provincial townships' boards created under old-order provincial legislation for example the Town Planning and Townships Ordinance.<sup>1482</sup> Currently authority pertaining to appeals under municipal planning is the responsibility of the municipal executive. The extent of the powers of the appeal authority as accountability mechanism allows for a "wide appeal"<sup>1483</sup> based on the appeal authorities' extensive powers to vary, confirm or revoke the decision of the authorised official or MPT.<sup>1484</sup>

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<sup>1477</sup> See ss 38(3) and (4) of the SPLUMA. Also see *Bernert v ABSA Bank Ltd* [2010] JOL 26562 (CC) para 28 for a pronouncement on "conflict of interest".

<sup>1478</sup> Regulation 12 of the Spatial Planning and Land Use Management Regulations, published in GN R239 in GG 38594 of 23 March 2015 (hereafter the Spatial Planning and Land Use Management Regulations).

<sup>1479</sup> See *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkelings (Edms) Bpk* 2011 3 SA 434 (WWC) para 162.

<sup>1480</sup> Section 37(4) of the SPLUMA.

<sup>1481</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57

<sup>1482</sup> *Town-Planning and Townships Ordinance* 15 of 1986. Also see Van Wyk *Planning Law* 154.

<sup>1483</sup> See Laubscher *et al SPLUMA* 266 confirmation of "wide appeal" to allow the consideration of an appeal which was considered procedurally unfair in terms of PAJA.

<sup>1484</sup> Regulation 26(1)(b) of the Spatial Planning and Land Use Management Regulations.

Notwithstanding the pursuance of quasi-judicial procedures and the sanctuary found in the observance of natural justice, which amplifies the degree of accountability, Laubscher *et al*/raise concerns pertaining to the probable deficiency of professional accountability in the appeal authority. As with the previous findings of accountability mechanisms which constitute political accountability, it is suggested that the executive (the political actor) as the appeal authority might lack the necessary skills and knowledge to consider land use and spatial development matters.<sup>1485</sup> Similar to the appointment of professionals to section 79 committees,<sup>1486</sup> professional expertise could also be appointed to improve the competence of the appeal authority as an accountability mechanism in terms of quasi-judicial proceedings.<sup>1487</sup> The appeal authority's accountability is enhanced through the regulatory provision of a proper procedure and timeframes for the submission of appeals, and the requirement of the submission of reasons for the appeal.<sup>1488</sup>

#### 4.3.10.3 Valuation Appeal Boards

The last quasi-judicial accountability mechanism at the disposal of the citizenry is related to financial accountability and the related levying of taxes by municipalities. To this end, the VAB is considered an accountability mechanism.<sup>1489</sup> Members of the VAB in specific municipalities are appointed by the relevant MEC of that province, although the proposal of members needs to be vetted by the executive mayor of the municipality if the proposed members reside outside of the jurisdiction of that municipality.<sup>1490</sup> Central to the accountability mechanism is the requirement of professional accountability, which requires members of the VAB to have the knowledge and skills of an accredited and professional valuer in terms of the *Property Valuers Profession Act*.<sup>1491</sup> Evident to the administrative responsibility of the VAB is the requirement that the performance of the duties of members

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<sup>1485</sup> Laubscher *et al* SPLUMA 267.

<sup>1486</sup> Section 79(2)(d) of the *Structures Act*.

<sup>1487</sup> Laubscher *et al* SPLUMA 267.

<sup>1488</sup> See s 51(1) of the SPLUMA.

<sup>1489</sup> Section 54(1) of the MPRA.

<sup>1490</sup> Regulations 7(1), (2) and 3(c) of the Municipal Property Rates Regulations, published in GN R1036 in GG 29304 of 18 October 2006 (hereafter the Municipal Property Rates Regulations).

<sup>1491</sup> *Property Valuers Profession Act* 47 of 2000.

of the board be executed in good faith, absent of favour or prejudice.<sup>1492</sup> The impartiality of the VAB is further regulated in terms of the conduct prescribed for its members, which prohibits conduct that fails to subscribe to ethical and moral accountability.<sup>1493</sup> Similar to other quasi-judicial forums, the VAB can determine its own procedures.<sup>1494</sup>

The accountability of the VAB is substantially enhanced by its capacity to enforce the attendance of witnesses and the presentation of evidence by means of summoning witnesses, the deposition of oaths or solemn affirmations, the questioning of witnesses and the retention of documents as evidence.<sup>1495</sup> Like other administrative tribunals, the VAB is mandated to notify, give adequate notice<sup>1496</sup> and consider submissions from all parties, after which the chairperson of the VAB must provide reasons<sup>1497</sup> for the subsequent decision by the VAB within 30 days of the hearing. Evidence of the VAB's being an accountability mechanism from a LEG perspective is the principle or consideration applied to environmental damages and remedial costs thereto in the determination of the value of properties in terms of the MPRA. For example, in determining the specific market value of any mining property, the property value must be determined taking also into account the degree of severity of contamination and probable pollution due to radiation.<sup>1498</sup>

#### ***4.4 Intergovernmental accountability mechanisms and structures***

To understand the aspect of intergovernmental structures and mechanisms for accountability towards other organs of state (the external accountability of municipalities), it is imperative to grasp the interpretation of the notion of accountability in an intergovernmental context. As established by the Constitutional Court, the dispersal of

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<sup>1492</sup> Section 62(1)(a) of the MPRA. Also Devenish *et al Administrative Law and Justice* 236 for an explanation of the "implied powers" of an administrative body to render operation thereof effective.

<sup>1493</sup> Sections 62(1)(b), (c) and (d) of the MPRA.

<sup>1494</sup> See s 67 of the MPRA.

<sup>1495</sup> See ss 75(1)(a), (b), (c) and (d) of the MPRA.

<sup>1496</sup> Regulation 8(1) of the Municipal Property Rates Regulations.

<sup>1497</sup> Devenish *et al Administrative Law and Justice* 133 for further explanation of the interpretation of "reasons provided and the ambit thereof".

<sup>1498</sup> De Klerk 2015 *South African Valuer* 16.

powers among spheres of government is suggestive of "co-operative government" and does not aspire to "competitive federalism".<sup>1499</sup> Although precise in its application for the purposes of exclusive competence, concurrent functions are often suggested to blur accountability;<sup>1500</sup> therefore structures and measures of intergovernmental accountability serve to regulate relationships. It is anticipated that the intergovernmental structure and measures of accountability of municipalities are dependent on the legal character of the intergovernmental powers and functions performed. Hence intergovernmental accountability can be derived from the type of assignment, delegation or agency issued to municipalities.

#### *4.4.1 Intergovernmental accountability assignments, delegations and agencies*

The mechanisms of accountability differ according to the form of intergovernmental control exercised, being either an assignment, a delegation or an agency in terms of IGR. These different controls will be discussed below. On the basis of the assignment of powers and functions to local government, the assignment of functions can be categorised under two types, namely legislative assignments and executive assignments.<sup>1501</sup> "Legislative assignment" assumes that municipalities which accept legislative assignment for the exercise of powers and functions in accordance with legislation are both responsible and accountable for the powers and functions assumed.<sup>1502</sup> Founded on the powers and functions being exercised in the municipality's own name as the "assigned functionary", the assigning organ of state does not accrue any liability. "Executive assignment", however, anticipates an agreement or instrument in terms of which the power is assigned, and implies that the municipality to which the relevant powers and functions are assigned is deemed responsible and accountable for the powers and functions assigned to it in terms of the original legislation.<sup>1503</sup> Consequentially, both types of assignment cause

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<sup>1499</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 287.

<sup>1500</sup> DPLG *Implementation of the IRFA* 15.

<sup>1501</sup> Clause 2 of the Guidelines on Allocation of Additional Powers and Functions to Municipalities, published in Gen N 490 in GG 29844 of 26 April 2007 (hereafter the Guidelines on Allocation of Additional Powers).

<sup>1502</sup> Clause 2(a) of the Guidelines on Allocation of Additional Powers.

<sup>1503</sup> Clause 2(b) of the Guidelines on Allocation of Additional Powers.

powers and functions to be performed in the municipality's own name, thus eliminating any accountability and liability of the assigning organ of state. The performance of coastal governance mandates by municipalities derived from a national perspective would be an example of such an assignment.<sup>1504</sup>

"Delegations" with reference to the structural design of intergovernmental accountability are in contrast to "assignments". Here, the responsibility and accountability remain with the executive organ of state, irrespective of the powers and functions being delegated to municipalities. The difference in the nature of the assignment can further be described as follows: first, that the delegation is facilitated in the name of the delegating organ of state; second, that the act is in accordance with the directions and conditions of the delegating organ of state; third, that decisions of the delegating municipality bind the organ of state; and last, that the delegations may be revoked at any time.<sup>1505</sup> Examples of environmental delegations to municipalities include the oversight of statutory responsibilities such as the preparation of industry waste management plans.<sup>1506</sup>

In contrast with assignment and delegation, the concept of "agency" strictly implies agreements by which municipalities act as agents of the organ of state, which must be allowable in terms of the law.<sup>1507</sup> It is suggested that the ordinary rules governing agencies' relationships apply to intergovernmental agencies, whereby municipalities perform in the name and on behalf of the principal. Subsequently, the municipality must function within the mandate of the principal, and its actions bind the principal in accordance with the mandate extended.<sup>1508</sup> From the above discussion, it is evident that accountability is assessed from a technical perspective in observance of the legal character of the types of intergovernmental structures. All three types of intergovernmental controls are prevalent in intergovernmental accountability, although the degree of accountability and the identity of the accountability actors will be dependent on whether the powers are

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<sup>1504</sup> See para 3.5.5(f) in Chapter 3.

<sup>1505</sup> Clause 2(d) of the Guidelines on Allocation of Additional Powers.

<sup>1506</sup> See para 3.5.5(e) in Chapter 3.

<sup>1507</sup> Clause 2(d) of the Guidelines on Allocation of Additional Powers.

<sup>1508</sup> Clause 2(d) of the Guidelines on Allocation of Additional Powers.

controlled by means of assignment or delegation, or conferred by means of legal agency. Examples of environmental agencies performed by municipalities include mandates to prevent the pollution of water resources.<sup>1509</sup>

As suggested with reference to the multiple intergovernmental accountability controls available in the intergovernmental space, the differentiated degree of accountability is also dependent on the individual elements of accountability. The dominant elements of intergovernmental measures for accountability are legal accountability, decentralised accountability and delegation accountability. Intergovernmental accountability is not an inert concept and incorporates aspects of decentralised accountability in adopting legal principles like the principle of subsidiarity. This principle extends accountability beyond the original context of mere intergovernmental controls. The principle of subsidiarity, which causes the allocation of decentralised powers to the most appropriate location,<sup>1510</sup> effectively broadens intergovernmental accountability beyond the above legal comprehension of the controls. Hence intergovernmental accountability must include the assessment of the "capacity to perform powers and functions",<sup>1511</sup> and the functionary needs to be assessed on the exercising of the powers provided.<sup>1512</sup>

Based on the above, it is suggested that irrespective of the type of intergovernmental assignment or delegation of powers and functions to municipalities, individual assignees must account on the broad ambit of intergovernmental accountability and not only on the control suggested above. It is suggested that answerability for the allocation of powers can be facilitated in the observance of intergovernmental accountability based on the controls of accountability and the extended ambit thereof.

Accountability in the intergovernmental domain is regulated not only by the above legal principles but also from a co-operative governance perspective, which includes *inter alia* intergovernmental forums, intervention measures and intergovernmental joint protocols.

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<sup>1509</sup> See para 3.5.5(a) in Chapter 3.

<sup>1510</sup> DPLG *Implementation of the IRFA* 16.

<sup>1511</sup> Section C 2.2 of the White Paper 99.

<sup>1512</sup> DPLG *Implementation of the IRFA* 16.



Oversight of these measures and structures will allow us to understand how the different spheres of government account for the powers and functions assigned, delegated or provided to municipalities on the basis of co-operative governance and intergovernmental alignment, concurrently and bilaterally.<sup>1513</sup> Designed to regulate interrelationships, the intergovernmental framework anticipates co-ordinating coherent government, monitoring the implementation of policy and legislation, and realising national priorities.<sup>1514</sup>

Accountability in the sense of co-operative governance, unlike the legal character of intergovernmental controls, is therefore shared by all spheres of government.<sup>1515</sup> Examples of intergovernmental accountability structures extend to the President's Co-ordinating Forum, the National Intergovernmental Forum and the Provincial Intergovernmental Forums. These mechanisms embody the constitutional provisions of co-operative government and provide proper interface with representatives of local government.<sup>1516</sup> Oversight is provided of issues related to performance, detecting failures, initiating preventative action and initiating corrective action,<sup>1517</sup> addressing priorities and objectives in provinces and municipalities,<sup>1518</sup> and co-operating on developmental challenges.<sup>1519</sup>

The intergovernmental duty to pursue co-operation by means of mutual trust and good faith corresponds to the co-operative nature of the intergovernmental accountability mechanisms.<sup>1520</sup> The constitutional mandate of co-operative government requires accountability actors in the intergovernmental domain to avoid litigation.<sup>1521</sup> Therefore,

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<sup>1513</sup> Section 41(c) of the Constitution; requiring accountable and coherent government as a whole thus implicating structures' and institutions' intergovernmental accountability.

<sup>1514</sup> Section 4 of the IRFA.

<sup>1515</sup> Section 5 of the IRFA.

<sup>1516</sup> Sections 6(1)(h), 10(1)(d) and 17(1)(d), (e) and (f) of the IRFA.

<sup>1517</sup> Sections 7(c), 11(c) and 17(1)(d), (e) and (f) of the IRFA.

<sup>1518</sup> Section 11(b)(iii) of the IRFA.

<sup>1519</sup> Section 23(a) of the IRFA.

<sup>1520</sup> Part 1, para 2 of the Intergovernmental Dispute Prevention and Settlement: Practice Guide: Guidelines: Effective Conflict Management, published in Gen N 491 in GG 29845 of 26 April 2007 (hereafter the Practice Guide).

<sup>1521</sup> Part 1, para 1 of the Practice Guide. Also see *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 SA 715 (CC) para 41.

"liability" from a constitutional and co-operative governance perspective is a "political responsibility" rather than an "adversarial responsibility".<sup>1522</sup> Similarly, dispute resolution in the intergovernmental sphere is also considered an intergovernmental accountability mechanism. The Intergovernmental Dispute Prevention and Settlement: Practice Guide: Guidelines for Effective Conflict Management suggests that "Whereas adversarial litigation is rule-based, politics deals with interests and the accommodation of diverse interests - the very purpose of co-operative government." Hence, the statutory obligation of dispute resolution needs first to be exhausted prior to seeking answers from the bench.<sup>1523</sup> In contrast to delegation, assignments and agencies where environmental mandates are assigned to municipalities to ensure environmental accountability, local interventions can also remove responsibilities to guarantee local environmental accountability.

#### *4.4.2 Provincial and national intervention in local government*

The provincial governments as components of coherent and accountable government provide "supporting oversight" to municipalities in their respective provinces. Further to the capacity building and assessment done by provincial governments, provision needs to be made for the varying capacity and revenue needs of specific municipalities.<sup>1524</sup> Their roles as intergovernmental accountability actors include intervention-orientated and monitoring and capacitation-orientated agency.<sup>1525</sup> In terms of the monitoring role, oversight will include the purported achievement of good governance and accountability, *inter alia* proper oversight of municipalities' performance of assigned duties and the attainment of the constitutional objectives of local government.<sup>1526</sup> The intervention role in terms of intergovernmental accountability will be discussed initially.

Unlike monitoring and capacitation measures, any type of intervention in the affairs of an autonomous sphere is purported to be contra to the spirit of the Constitution. Hence,

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<sup>1522</sup> Part 1, para 2 of the Practice Guide.

<sup>1523</sup> *Cape Gate (Pty) Ltd v Eskom Holdings SOC Ltd* 2019 4 SA 14 (GJ) paras 163, 43.

<sup>1524</sup> Section C 1.3.2 of the White Paper 81.

<sup>1525</sup> Section C 1.3.2 of the White Paper 84-85.

<sup>1526</sup> Section C 1.3.2 of the White Paper 84.

interventions in the affairs of local government are avoided where possible.<sup>1527</sup> Examples hereof will include interventions arising from specific financial contraventions, and municipalities' non-responsiveness to the provision of basic services such as water, electricity and sanitation.<sup>1528</sup> As among the remedies provided by the Constitution, an intervention is done on a temporary basis and primarily to exercise specific powers and functions, when the municipality cannot or does not perform specific powers.<sup>1529</sup> The purpose of interventions in local government amongst other reasons is to achieve accountability in the local government institution. Consequently, there are three section 139 key types of intervention.<sup>1530</sup>

#### 4.4.2.1 Section 139 interventions

It is suggested that with interventions, the related intervening functionary (the administrator) steps into the shoes of the municipal council and usurps the executive powers of the municipal council, based on the degree of intervention. Therefore, the provincial government does not necessarily step into the accountability void left by the council when a municipality is placed under administration, but merely seeks to facilitate the provision of good and accountable governance. Based on the assessment and capacity of the municipality, the provincial government facilitates the necessary type of intervention. The varying degrees of intervention include the issuing of a directive to the municipal council pursuant to its failure to perform its responsibilities. Subsequently, conditions are provided whereby the municipality needs to perform and achieve sufficient compliance to attain accountability.<sup>1531</sup> In this instance, intervention as an intergovernmental accountability measure is used to induce proper coherence, and the municipality retains its responsibilities and answerability as a municipality.

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<sup>1527</sup> *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape* (553/2019) [2020] ZAECHC 47 (21 May 2020).

<sup>1528</sup> *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 1 BCLR 72 (CC) para 14.

<sup>1529</sup> Section 139(1) of the Constitution.

<sup>1530</sup> Section C 1.3.2 of the White Paper 85.

<sup>1531</sup> Section 139(1)(a) of the Constitution.

The second type of intervention entails the "assuming of responsibilities" to achieve the minimum standards for the rendering of services, as a measure to prevent unreasonable action prejudicial to the interests of others, or to maintain economic unity.<sup>1532</sup> To remedy specific unattainable consequences,<sup>1533</sup> the provincial executive will consider and ring-fence specific duties of the municipality and assume executive powers from the municipal council based on "just cause" to avoid probable prejudice. Under "partial intervention", the municipal council retains executive responsibility and answerability, except for the listed intervention criteria. An example hereof is seen in the council's mandatory responsibility to review an intervention regularly and make recommendations to the provincial executive, whereby council retains executive authority but reports to the provincial executive.<sup>1534</sup> Notwithstanding the restricted ambit of a partial administration and the retention of partial executive powers by the municipal council, the appointment of an administrator is the most common practice. In terms of the identified intervention objectives, the administrator will be responsible for restoring essential or minimum standards and services to the community. The intervention objectives will normally be described in the intervention's Terms of Reference and the municipality's FRP, which will be discussed as a monitoring and capacitation measure.

An example of the accountability mechanism in the local environmental context allows the intervention by either the provincial executive or the Minister in instances where the water services authority has failed to perform specific duties in terms of the WSA.<sup>1535</sup> The intervention is consequently performed in terms of section 139 of the Constitution and allows the intervening power to step into the shoes of the failing municipality and perform the responsibility of the water services authority.<sup>1536</sup> The environmental importance linked to the accountability mechanism relates to the protection of essential national standards

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<sup>1532</sup> Section 139(1)(b) of the Constitution.

<sup>1533</sup> Sections 139(1)(b)(i) to (iii) of the Constitution.

<sup>1534</sup> Section 139(2)(c) of the Constitution; the practice described under para (c) also has the potential to improve internal accountability mechanisms and ensure better accountability post the intervention phase.

<sup>1535</sup> Section 63(1) of the WSA.

<sup>1536</sup> Section 63(1) of the WSA.

and to meeting the minimum standards for providing water services.<sup>1537</sup> Hence, the fact that the section 63 intervention can be used in isolation serves as a further suggestion of the important standing of the intergovernmental accountability mechanism.

Dissolving the municipal council is a third category of intervention and relates to "full administration", where the local authority is stripped of all responsibilities and accountability, and an administrator assumes both responsibility and answerability consequent to the intervention.<sup>1538</sup> The full intervention route is a road travelled only under exceptional circumstances, as it suffocates the constitutional principles of accountable governance and co-operative governance.<sup>1539</sup> An example of circumstances which might provoke full administration might be probable infringements relating to the Bill of Rights, which encroach on human dignity and life.<sup>1540</sup> Primarily, the exercising of a full administration of a municipality suggests that there have been failures not only of external dimensional accountability but also of internal accountability.<sup>1541</sup> Greffrath and Van der Waldt attribute such internal failure to ineffective and inaccessible systems of accountability, among other things.<sup>1542</sup> Ledger and Rampedi further suggest that most interventions do not indicate significant improvements in operational outcomes and governance after the intervention,<sup>1543</sup> the aforesaid being indicative of a failure of internal accountability. For example, after a full intervention the newly elected councillors often resemble the public representatives who served prior to the intervention, this being due to the public representatives being political appointees. Hence, the success of such interventions in terms of intergovernmental accountability measures can be questionable.

In isolation, interventions do not necessarily cause external accountability outcomes but merely constitute interim relief until the executive powers of the council are restored. The

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<sup>1537</sup> Sections 63(2)(b)(i)-(ii) of the WSA.

<sup>1538</sup> Section 139(1)(c) of the Constitution.

<sup>1539</sup> *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 1 BCLR 72 (CC) para 1.

<sup>1540</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34.

<sup>1541</sup> Greffrath and Van der Waldt 2016 *New Contree* 149.

<sup>1542</sup> Greffrath and Van der Waldt 2016 *New Contree* 145.

<sup>1543</sup> Ledger and Rampedi *Mind the Gap* 12.

prevailing problem, therefore, is the lack of political accountability rather than a lack of internal accountability. The real contribution of the provincial executive as an intergovernmental accountability structure during an intervention is in terms of the monitoring and assessment of municipalities. Separate to the above discussion of the facilitation of the executive accountability of council's powers during an intervention, intergovernmental accountability of "administrative intervention processes" lies with the provincial executive. These administrative processes are considered twofold: first allowing for the procedural responsibilities<sup>1544</sup> of the provincial executive during interventions in terms of section 139(1)(b) and (c) of the Constitution, and second the responsibility for the monitoring of the accountability measures implemented.

It is held that monitoring by means of the aforementioned accountability measures creates direct accountability derivatives such as institutional capacity and new skills, as visualised as objectives of co-operative government. These accountability hybrids occur in the context of the budget-related<sup>1545</sup> and financial<sup>1546</sup> obligations of municipalities. Both the execution of budgetary and financial monitoring are responsibilities of the provincial executive that are configured as monitoring instruments of intergovernmental accountability.<sup>1547</sup> In budget or financial crises, the provincial executive will first monitor and capacitate municipalities to adhere to the adoption of their budgets<sup>1548</sup> and rectify their financial breaches before intervening more directly in the municipal processes. The MFMA therefore regulates specific budget and financial accountability measures in being prescriptive of under which circumstances the ensuing monitoring and capacitation

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<sup>1544</sup> See s 139(2) of the Constitution for the procedural responsibilities pertaining to provincial executive interventions in terms of s 139(1)(b) interventions, and further see s 139(3) for the procedural responsibilities pertaining to provincial executives' dissolution of municipal councils in terms of s 139(1)(c).

<sup>1545</sup> Section 139(4) of the Constitution.

<sup>1546</sup> Section 139(5) of the Constitution.

<sup>1547</sup> Sections 136(3) and (4) of the MFMA.

<sup>1548</sup> Ardigo 2019 <https://www.u4.no/publications/local-government-accountability-mechanisms.pdf> 15, in which it is suggested that three key elements need to be present for participatory budgeting to ensure local accountability, namely "strong government support, availability of resources and organised civil society".

measures<sup>1549</sup> need to be used. Distinction is made between the types of financial interventions discussed previously and the monitoring measures used. The differentiation of discretionary and mandatory provincial interventions is designed to mandate the use of specific monitoring measures under the prevailing intervention. Therefore, the financial interventions are dovetailed to fit into the section 139 intervention criteria. Central to the accountability measures used in financial interventions are FRP's, which are mandated intergovernmental accountability measures under both discretionary and mandatory provincial interventions. Should the financial material breaches not be rectified, an additional capacitation process such as the adoption of an FRP<sup>1550</sup> as an accountability mechanism is used. Mandatory in nature, the FRP establishes prerequisites that must be contained in the recovery plan, which include addressing the root cause of the financial dilemma, a protocol designed to restore financial capability, the setting of mandatory objectives, and the time frame anticipated for the financial recovery.<sup>1551</sup> Irrespective of the financial intervention, full accountability for its liabilities remains with the local authority.<sup>1552</sup> Only once the FRP is approved<sup>1553</sup> may the municipality seek further interim relief in terms of a high court order to stay the execution proceedings sought by creditors against the municipality.<sup>1554</sup>

#### 4.4.2.2 Municipal Financial Recovery Plan

FRPs are supportive in nature, but both the Member of the Executive Council and the executive mayor of a municipality need to be consulted in the adoption of the FRP. A FRP of a mandatory provincial intervention needs to be prepared by the Municipal Financial

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<sup>1549</sup> AGSA 2019  
<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 10, which refers to key officials' lacking appropriate skills and competencies and a lack of monitoring processes.

<sup>1550</sup> See s 139(5)(a) of the Constitution in which the financial recovery plan is used as an accountability tool and binds the municipal council in relation only to the extent necessary to resolve its financial incapacity.

<sup>1551</sup> Sections 142(1)(i), (ii), (iii) and (vi) of the MFMA.

<sup>1552</sup> Sections 151(a) and (b) of the MFMA.

<sup>1553</sup> Section 153(2)(a) of the MFMA. Also see *Cape Gate (Pty) Ltd v Eskom Holdings SOC Ltd* 2019 4 SA 14 (GJ) paras 36, 10.

<sup>1554</sup> Sections 153(1)(a) and (b) of the MFMA.

Recovery Service (hereafter MFRS), which serves as an additional intergovernmental structure for accountability. A FRP is not only specific to financial recovery but includes criteria related to institutional governance and good governance, which are part of the turnaround outcomes. Moreover, the FRP will include specific work streams such as financial sustainability, shared services and governance, planning and development, and basic services which will *inter alia* be responsible for cluster-related outcomes. Examples of environmental outcomes might be the repair of water and sanitation infrastructure, the implementation of a water management plan, or urgent repairs to infrastructure to prevent the degradation of the environment.

The MFRS is an institution in the public service and functions in the intergovernmental domain. Its main responsibilities are to provide technical skills in the preparation of an FRP, to monitor the implementation of an FRP, and to provide intergovernmental capacitation of municipalities.<sup>1555</sup> Similar to other public service entities, the MFRS is accountable to National Treasury as a special purpose vehicle to identify the financial problems of municipalities.<sup>1556</sup> While the MFRS is positioned to make a valuable contribution to facilitating accountable municipalities, concern needs to be expressed in relation to the increasing number of interventions in municipalities, and one wonders whether the MFRS, based on its current resources and personnel, can cope with the increasing consignment of failing municipalities.<sup>1557</sup>

#### *4.4.3 Intergovernmental reporting*

The National Treasury is responsible for the division of revenue amongst the national, provincial and local spheres of government.<sup>1558</sup> The funding of municipalities or the equitable division of local government's shares amongst municipalities is consequently performed in terms of the DORA. Section 215 of the Constitution requires local

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<sup>1555</sup> Section 158 of the MFMA.

<sup>1556</sup> Section 142(1)(a) of the MFMA.

<sup>1557</sup> See other intergovernmental accountability monitoring mechanisms like the Public Service Accountability Monitor (PSAM) for more information.

<sup>1558</sup> Section 214(1)(a) of the Constitution.



government to promote transparency, accountability and effective financial management through the provision of municipal budget processes.<sup>1559</sup> The National Treasury must ensure transparency and expenditure control in every sphere of government, including local government. The DORA is used as an accountability instrument to enforce transparency and accountability in the equitable share allocation process and to ensure that expenditure is reported on by recipient municipalities.<sup>1560</sup> Additional accountability measures are also structured to account for the provision of Schedule 4 allocations, which relate to the supplementary funding of programmes.<sup>1561</sup>

The intergovernmental accountability measure mandates municipalities to confirm the apportionment of the additional grants in its municipal budget and consequently publish the information, which publication will lie open for public inspection in accordance with the statute.<sup>1562</sup> The responsibilities of municipalities in relation to Schedule 5 allocations are also reported in the form of monthly budget statements to account for the expenditure or accruals.<sup>1563</sup> National Treasury can therefore appraise municipal accountability in terms of the spending of the scheduled funding and subsequently withdraw funding based on the following: non-compliance with the DORA, conditional allocations not spent, or specific underspending.<sup>1564</sup> The accountability of municipalities can be further enforced through the stopping of allocations on the grounds of municipalities' "persistent and material non-compliance" with a condition of allocation and substantial under-expenditure,<sup>1565</sup> which could negatively impact on the accountability and good governance of a municipality.

Specific to the intergovernmental accountability between municipalities, provincial treasuries and National Treasury, the statute harmonises intergovernmental accountability measures. This is done in relation to equitable share and conditional allocations as effected in terms of the budgets of category C municipalities. The relevant

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<sup>1559</sup> Section 215(1) of the Constitution.

<sup>1560</sup> Section 2(c) of the DORA.

<sup>1561</sup> Section 11 of the DORA.

<sup>1562</sup> Section 21A of the *Systems Act*.

<sup>1563</sup> Section 12(2)(b) of the DORA.

<sup>1564</sup> Sections 16(1)(a)(b) and (c) of the DORA.

<sup>1565</sup> Sections 17(1)(a)(b) and (c) of the DORA.

accounting officer of the Category C municipality is responsible for submitting the annual budget of the local authority to the National Treasury and all Category B municipalities in its jurisdiction.<sup>1566</sup> The relevant district municipality will therefore account in its annual budget for the relevant equitable share and conditional allocations received and the anticipated allocation thereof.

#### *4.4.4 Representative local government*

As the custodian of local government's developmental nature and inclusiveness as an independent sphere of government, the South African Local Government Association (hereafter SALGA) is central to municipalities' inclusion in the intergovernmental domain. SALGA is a constitutional mechanism formed to represent organised local government in the intergovernmental domain.<sup>1567</sup> Noting the previously historically weak position held by local government in the preceding dispensation, the Constitution has improved the participation of organised local government in all spheres of government.<sup>1568</sup> Consequently, SALGA represents local government interests in the National Council of Provinces, the Financial and Fiscal Commission, the Budget Forum, MinMecs,<sup>1569</sup> the President's Co-ordinating Council and any legislative processes affecting the status, institutions, powers and functions of municipalities.<sup>1570</sup> Irrespective of organised local government in the form of SALGA, it also serves as an employers' organisation and represents the employers in the South African Local Government Bargaining Council.<sup>1571</sup> Its extended influence in supplementing and strengthening local government testifies to SALGA's position as an intergovernmental accountability measure. The White Paper on Local Government confirms that SALGA harnesses the potential to underwrite the developmental nature of municipalities through offering specialised services to build

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<sup>1566</sup> See s 28(1) of the DORA; specific hereto is the oversight of all allocations in terms of the budget of Category B municipalities; specific to conditional grants and equitable share allocations distributed from the Category C municipalities.

<sup>1567</sup> Section 163(a) of the Constitution.

<sup>1568</sup> Section C 3.1 of the White Paper 100.

<sup>1569</sup> Intergovernmental Forum composite of Ministers and Members of the Executive Committees.

<sup>1570</sup> Section C 3.1 of the White Paper 101.

<sup>1571</sup> Section C 3.1 of the White Paper 101.

capacity in municipalities, supplement research and knowledge dissemination, engage in training, and develop and facilitate "shared learning between municipalities".<sup>1572</sup> As an intergovernmental capacity mechanism SALGA is not authoritarian in nature, but embraces co-operative governance and contributes to accountable local governance (intergovernmental accountability) through building capacity, monitoring and assessment. Like organised local government, other organs of state and the different spheres of government, it contributes to coherent and accountable local governance.

#### *4.4.5 Municipal intergovernmental forums and the national / provincial secondment of staff*

Important intergovernmental structures include organised local government (SALGA),<sup>1573</sup> the Forum of South African Director Generals and the Budget Council and Budget Forum,<sup>1574</sup> which is an intergovernmental advisory and perceived accountability structure established in terms of the *Intergovernmental Fiscal Relations Act*.<sup>1575</sup>

Other intergovernmental forums configured as intergovernmental accountability structures are municipal intergovernmental forums. IGR forums are created as governance-sharing platforms to improve the capacity in and accountability of municipalities. Important to IGR forums is the potential thereof to move beyond mere compliance and improve accountability and collective outcomes.<sup>1576</sup> Central to the structural accountability deficiencies of Category B and C municipalities as originally configured, the district intergovernmental forums seek to promote IGR and coherent development in the district.<sup>1577</sup> However, as with the previously discussed structural accountability problems<sup>1578</sup> associated with district municipalities, it is suggested that "aspirant metros" and "secondary cities" in districts with better capacitated local

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<sup>1572</sup> Section C 3.1 of the White Paper 102.

<sup>1573</sup> Section 2 of the *Organised Local Government Act* 52 of 1997. Also see s 163(a) of the Constitution.

<sup>1574</sup> Van Niekerk 2015 *J Public Adm* 846-847.

<sup>1575</sup> *Intergovernmental Fiscal Relations Act* 97 of 1997 (hereafter IFRA).

<sup>1576</sup> DPLG *Implementation of the IRFA* 65.

<sup>1577</sup> See s 24 of the IRFA.

<sup>1578</sup> See para 4.2 in Chapter 4 for a discussion of how the structural design of municipalities affects the accountability outcomes.

municipalities ignore these intergovernmental forums.<sup>1579</sup> Another aspect of importance would relate to the proper co-ordination of funding and the receipt of grants by district municipalities to avoid unfunded consequences for local municipalities.

As referenced earlier, although the powers of district and local municipalities are distinct, horizontal co-operation among municipalities is important to expand on the effectiveness of local government.<sup>1580</sup> Such co-operation, besides being effective, also has the potential to improve the governance capacity of a municipality.<sup>1581</sup> An example of this might be the secondment of a senior manager by the MEC of a provincial government to improve governance and service delivery in a specific municipality.<sup>1582</sup> Co-operation also needs to be extended to proper inter-municipal forums which collaborate on the necessary capacity building and the developmental challenges affecting municipalities.<sup>1583</sup> Interrelated forums include the Municipal Managers Intergovernmental Forum, the Chief Financial Officers' Forum and the IDP Managers' Forum. Steytler and Jordan correctly contend, however, that other accountability issues which are based on the origins of district and local municipalities are currently set to complicate relationships. These *inter alia* include local municipalities' having to account for and bear the "brunt of community dissatisfaction" with service delivery issues which are the responsibility of district municipalities.<sup>1584</sup>

Other environmental IGR processes will *inter alia* include examples such as the Vaal River Intervention Plan, where multiple organs of state and semi-organs of state are involved in the rehabilitation of waterways in the Sedibeng District Municipality. The complexity of the rehabilitation of both the natural waterways and the current sanitation infrastructure is evident in the IGR process, role-players being the National Departments of Human

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<sup>1579</sup> DPLG *Implementation of the IRFA* 27.

<sup>1580</sup> Section C 3 of the White Paper 100. Also see Van Niekerk 2015 *J Public Adm* 843.

<sup>1581</sup> *Transfer of Staff to Municipalities Act* 17 of 1998, although the Act designated that said transfer of staff to render efficient municipal services may be done by a MEC in the related province.

<sup>1582</sup> Regulation 20 of the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers (GN 21 in GG 37245 of 17 January 2014).

<sup>1583</sup> See ss 29(a) and (b) of the IRFA.

<sup>1584</sup> Steytler and Jordan *District-Local Municipalities Relations* 17.

Settlements, Water and Sanitation, Co-Operative Governance and Traditional Affairs (hereafter CoGTA) Gauteng, the Sedibeng District Municipality, the Emfuleni Local Municipality (hereafter ELM), Rand Water, the East Rand Water Company and various private stakeholders.

Based on the service delivery responsibilities of municipalities, intergovernmental accountability mechanisms not only extend to the immediate objective of accountability mechanisms to sustain financial viability and capacity (section 139 interventions, the division of revenue, etc.), but also affect sustainability outcomes when municipalities are financially destitute. Olivier believes that financial viability and capacity are important enablers for sustainability.<sup>1585</sup> Hence it is suggested, for example, that the DORA must anticipate the requirements of municipalities to provide basic services such as water and sanitation.<sup>1586</sup> Olivier further notes the importance of the DORA pertaining to the performance of functions such as air quality management, disaster management and planning; of which the obligations emanating from statute (the NEMA, the NEM: AQA, the NEM: BA, the NEM: PAA, etc.) also need to be considered.<sup>1587</sup> Other examples relate to intergovernmental dispute resolution as an accountability mechanism (discussed previously) and finally, as contained in the IRFA, the facilitation of accountability in the context of intergovernmental mechanisms in terms of the Implementation Protocol as conceived through the IRFA.

Apart from the co-operative nature of the different spheres of government, it is suggested that intergovernmental accountability mechanisms will equally apply to attaining accountable outcomes from an environmental perspective. These accountability mechanisms could contribute towards intergovernmental accountability in terms of LEG

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<sup>1585</sup> Olivier "Co-operative Government and the Intergovernmental Division of Environmental Powers and Functions" 355.

<sup>1586</sup> Olivier "Co-operative Government and the Intergovernmental Division of Environmental Powers and Functions" 355.

<sup>1587</sup> Olivier "Co-operative Government and the Intergovernmental Division of Environmental Powers and Functions" 355.

aspects such as water and sanitation, air quality management, waste management and general LEG.

#### 4.4.6 Chapter 9 institutions

Serving the general purpose of strengthening the current constitutional regime in South Africa, chapter 9 institutions also have a decisive role to play as accountability mechanisms in the local government domain. Actors such as the human rights commission, public protector, ombudsman bodies and the AG are also actors in LEG.<sup>1588</sup> These actors are generally under the directive of legislation that regulates purported unlawful environmental conduct as an environmental crime in the environmental governance domain. These institutions are independent and are accountable only to the National Assembly for the performance of their functions and activities.<sup>1589</sup> Municipalities in breach of their constitutional responsibilities and obligations can be held accountable by these chapter 9 institutions as part of municipalities' measures and mechanisms of accountability. Political accountability is fundamental to the role of these chapter 9 institutions. Mbiada portrays the concept of political accountability as the responsibility to hold government accountable for its actions and omissions, which underlines the importance of chapter 9 Institutions as accountability mechanisms,<sup>1590</sup> an example hereof being the role of the Public Protector as an accountability mechanism of municipalities.<sup>1591</sup>

##### 4.4.6.1 Public Protector

The Public Protector, as a chapter 9 institution with the obligation to support our constitutional democracy, is autonomous in its conduct and has the powers to investigate state affairs or public administration in any sphere of government.<sup>1592</sup> Central to the role of the Public Protector is the oversight of public administration,<sup>1593</sup> hence the role of

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<sup>1588</sup> See para 3.5.1 in Chapter 3.

<sup>1589</sup> Section 181(5) of the Constitution.

<sup>1590</sup> Mbiada 2017 *PER / PELJ* 1.

<sup>1591</sup> Mbiada 2017 *PER / PELJ* 3.

<sup>1592</sup> Section 182(1)(a) of the Constitution.

<sup>1593</sup> Section 195(1)(f) of the Constitution.

holding local government accountable for the performance of its constitutional duties as envisaged in terms of section 152 of the Constitution. Chapter 9 institutions hence supplement our courts in facilitating accountability in terms of municipalities' provision of services "in a sustainable manner" conducive to the achievement of a "healthy environment".<sup>1594</sup> Mbiada extensively cites the importance of the role played by the Public Protector as an accountability mechanism in municipalities in relation to the realisation of socio-economic rights such as access to adequate housing.<sup>1595</sup> An example of the Public Protector's role as an accountability mechanism in the context of LEG can be observed in terms of directives for the investigation of section 32 transgressions<sup>1596</sup> specific to probable irregular, fruitless or wasteful expenditure which had to be apportioned and expended for the purposes of environmental projects or remediation.

#### 4.4.6.2 Auditor-General

The chapter 9 institutional assignment of the AGSA assists with the assessment of both bureaucratic accountability and political accountability in municipalities whose internal accountability mechanisms have purportedly imploded or failed citizens.<sup>1597</sup> As a fundamental part of municipalities' accountability mechanisms, the AGSA is responsible for the auditing of financial statements, reporting on accounts, and financial oversight of municipalities.<sup>1598</sup> West and Berman confirm the importance of external audits, as government audits seek to promote accountability.<sup>1599</sup> External audits conform to the required notion of local government accountability mechanisms, whereby accountability is extracted through oversight by means of the exercise of a higher power to prevent corruption and improve citizens' confidence in government.<sup>1600</sup> Prior to 2018 the AGSA

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<sup>1594</sup> Sections 152(1)(b) and (d) of the Constitution.

<sup>1595</sup> Mbiada 2017 *PER / PELJ* 2.

<sup>1596</sup> Section 32 of the MFMA.

<sup>1597</sup> AGSA

2019

<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 21.

<sup>1598</sup> Section 188(1)(b) of the Constitution.

<sup>1599</sup> West and Berman 2003 *International Journal of Public Administration* 331.

<sup>1600</sup> Ardigo 2019 <https://www.u4.no/publications/local-government-accountability-mechanisms.pdf> 3.

had limited powers to hold municipalities accountable.<sup>1601</sup> During the last full audit of municipalities in the 2017/2018 financial year, the AG audited 257 municipalities, of which 63 had regressed and only 22 had improved.<sup>1602</sup> Also confirmed were the growing occurrence of unauthorised, irregular and wasteful expenditure, which amounted to R122 billion in the 2017/2018 financial year.<sup>1603</sup> This indicates the necessity to enhance the accountability of municipalities.<sup>1604</sup> Both collective and individual liability for irregular expenditure were absent.<sup>1605</sup> It is suggested that although the AGSA previously reported and qualified irregular expenditure in external audits, the information "would go nowhere".<sup>1606</sup>

It is anticipated, however, that under the new *Public Audit Amendment Act*<sup>1607</sup> both responsibility and liability will be rigidly apportioned, based on purported "material irregularities" arising from external municipal audits performed in the ensuing financial years.<sup>1608</sup> Consequently, the previously inadequate powers of the AGSA have now been supplemented to enforce the consequences of liability. This "consequence management" is to be applied under the *Public Audit Amendment Act* and seeks the necessary remedial action to enforce probable material irregularities. The AG is permitted further to usurp powers to facilitate the recovery of losses in the absence of the accounting officer or the accounting authority's holding a responsible person to task.<sup>1609</sup> It needs be noted that whilst the AGSA is sufficiently reporting on accountability issues in municipalities, to date the AG as an accountability measure has lacked the liability outcomes needed to turn the

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<sup>1601</sup> AGSA 2019  
<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 4.

<sup>1602</sup> AGSA 2019  
<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 4.

<sup>1603</sup> Maeko *Mail and Guardian* 2.

<sup>1604</sup> AGSA 2019  
<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 6.

<sup>1605</sup> Section 1 of the MFMA, for the definition of "irregular expenditure".

<sup>1606</sup> Maeko *Mail and Guardian* 2.

<sup>1607</sup> *Public Audit Amendment Act* 5 of 2018 (hereafter the PAAA).

<sup>1608</sup> Preamble of the PAAA.

<sup>1609</sup> Sections 5(1A) and (1B) of the PAAA.



tide on defiant, unethical financial behaviour in municipalities, which amounts to the desertion of the last line of defence. As a result of the unresponsive conduct of municipalities,<sup>1610</sup> accountability shortcomings in local governance have seen the local government domain becoming the theatre for many other chapter 9 institutional accountability interventions.

#### 4.4.6.3 South African Human Rights Commission

Due to their close proximity, municipalities render basic services to their citizens on an everyday basis and are therefore the indirect preserver or *de facto* custodians of basic rights as contained in the Constitution.<sup>1611</sup> As they encounter daily local rights issues for example housing, water, sanitation, electricity, the environment and health, their conduct can either improve or aggravate living conditions and the basic rights owed towards its citizenry.<sup>1612</sup> The accountability link between basic human rights and municipalities is therefore irrefutable, an example hereof being the South African Human Rights Commission's recent inquiry and findings in terms of reported raw effluent discharge into natural water sources in the jurisdiction of the ELM.<sup>1613</sup> The South African Human Rights Commission (hereafter the SAHRC), as perceived from a constitutional perspective, is an important accountability mechanism for municipalities. It promotes the protection of human rights and guards against the probable human rights transgressions thereof. Based on purported contraventions of alleged human rights, the Commission serves to investigate not only specific violations thereto but also to advise importantly on the necessary remedies thereto. For example, as part of the SAHRC's investigation of alleged environmental pollution in terms of the ELM's raw sewage spillage from its Rietspruit Waste Water Treatment Plant, the Leeuwkuil Waste Water Treatment Plant and its

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<sup>1610</sup> AGSA 2019  
<https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf> 5.

<sup>1611</sup> UN *Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee* UN Doc A/HRC/30/49 (2015) 7.

<sup>1612</sup> UN *Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee* UN Doc A/HRC/30/49 (2015) 7.

<sup>1613</sup> SAHRC *Final Report of the Gauteng Provincial Inquiry* 1.

operational distress at its Sebokeng Waste Water Treatment Plant, the SAHRC sought to devise necessary accountability remedies thereto.<sup>1614</sup> But primary to the objective of the SAHRC investigation as accountability mechanism was to realise "the various accountability, disciplinary and / or prosecution mechanisms which can be implemented against persons and/or entities responsible".<sup>1615</sup>

A direct illustration of the frequency of the contraventions of human rights legislation by local government is the frequency with which such matters are brought to court. Examples are the *Unemployed Peoples Movement v The Premier of the Eastern Cape*,<sup>1616</sup> *Joseph v City of Johannesburg*,<sup>1617</sup> and *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*.<sup>1618</sup> Bekink emphasises the importance of the role of the Commission, based on South Africa's "allover reconstruction and development".<sup>1619</sup> This statement could be applied equally to the developmental nature of municipalities, which confirms local government's role as the *de facto* custodian of basic human dignity in terms of the rendering of basic services to its community.

Notwithstanding the checks and balances pertaining to the delivery of basic services which could impede human rights in the local government domain, probable eviction applications in terms of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 and *Extension of Security of Tenure Act* 62 of 1997 can also become the topic of human rights violations. Such violations can occur with the forceful removal of destitute occupiers of designated land. Such violations can ensue based on the unlawful removal, or when statute is contravened further to the degree of force used, or when the removal is facilitated without obtaining the necessary high court order. The role of the SAHRC as an accountability regulator in the local government domain is particularly important in

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<sup>1614</sup> SAHRC *Final Report of the Gauteng Provincial Inquiry* 1.

<sup>1615</sup> SAHRC *Final Report of the Gauteng Provincial Inquiry* 1.

<sup>1616</sup> *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape* (553/2019) [2020] ZAECGHC 47 (21 May 2020).

<sup>1617</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).

<sup>1618</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).

<sup>1619</sup> Bekink *Principles of South African Constitutional Law* 585.

"the South African context of extreme poverty, underdevelopment, governmental inefficiency, poor service delivery to the poor and harsh environmental conditions".<sup>1620</sup>

#### 4.4.6.4 The Independent Electoral Commission

The cornerstone of any modern democracy is free and fair elections. In South African local government, the Independent Electoral Commission is responsible as an accountability mechanism for providing and facilitating an electoral system<sup>1621</sup> that provides inclusivity, representivity, accountability and responsiveness.<sup>1622</sup> The importance hereof was highlighted in *Kham v Electoral Commission*,<sup>1623</sup> where the Constitutional Court in the aforesaid matter set aside by-elections in Tlokwe based on the contention that the elections were not conducted on a free and fair basis. The citizenry's expressing its electoral right is the most basic form of exercising oversight over political accountability. Inherent to political accountability is the "willingness to account for one's decisions".<sup>1624</sup> Democratic elections in municipalities are therefore the principal method of allowing political leadership to account to constituents. Good political leadership mirrors the aspirations of the citizenry.<sup>1625</sup>

To ensure fair and free elections, the electoral system needs to harness accountability. In terms of the present electoral system, local government elections consist of proportional representation and direct representation, which comprises of the election of a ward representative. The White Paper suggests that while proportional representation is better for representivity in terms of gender equality and minority representation, the ward component of local government elections provides an additional accountability component with elected ward councillors being directly accountable and responsive to the citizens

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<sup>1620</sup> Couzens 2015 *PER / PELJ* 1181.

<sup>1621</sup> See the Founding Provisions, s 1(d) of the Constitution, whereby South Africa as democratic state is founded on "universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

<sup>1622</sup> IEC "Reflections of the State of Electoral Democracy" 22.

<sup>1623</sup> *Kham v Electoral Commission* 2016 2 SA 338 (CC).

<sup>1624</sup> Section E, para 1 of the White Paper 141.

<sup>1625</sup> Section E, para 1 of the White Paper 141.

within a specific ward.<sup>1626</sup> Accountable representation in an electoral system further provides citizens with the prospect of being actively represented in decision-making processes at all levels.<sup>1627</sup> In contrast, however, "participation" needs to be distinguished from "representation". "Participation" is found in the "governing others" dimension. "Participation" accountability measures include the broader participation processes, platforms and procedure available to local communities (above and beyond elections), which will be discussed as accountability mechanisms available to the local community.

In conclusion, it is submitted that chapter 9 institutions are important as accountability mechanisms not only from a municipal oversight perspective, but also from an environmental perspective. As sovereign guardians of our constitutional democracy, their ability to strengthen "accountability, responsiveness and openness" could be equally applied to accountability in relation to LEG. Examples hereof might relate to the role of the SAHRC in the investigations and hearings into probable sewage spillages into the Vaal River System. These investigations are forthcoming in relation to the chapter 9 constitutional mandates, which *inter alia* focusses on the right pertaining to clean water and a clean environment. In the matter of the *Public Protector v Mail and Guardian*,<sup>1628</sup> confirmation of the importance of chapter 9 institutions was given by the honourable court, which described the Public Protector's function as being an "indispensable constitutional guarantee", said position bearing reference to any bureaucratic failure, misuse of power or corruption.<sup>1629</sup>

#### **4.5 Conclusion**

The range of accountability measures and mechanisms at the disposal of municipalities is important for the purposes of determining the ambit of local government accountability from an environmental perspective. It is evident that accountability mechanisms are

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<sup>1626</sup> Section E para 3.1 of the White Paper 150.

<sup>1627</sup> IEC "Reflections of the State of Electoral Democracy" 22.

<sup>1628</sup> *Public Protector v Mail and Guardian Ltd* 2011 4 SA 420 (SCA).

<sup>1629</sup> *Public Protector v Mail and Guardian Ltd* 2011 4 SA 420 (SCA) para 6.

different in terms of the various structures of municipal governance and the array of systems applied thereto.

Accountability mechanisms differ, depending on the structure and type of municipality.<sup>1630</sup> Hence, not all municipalities have the same structural alignment to harness the exact degree of accountability in relation to the executive and legislative powers they hold. It follows that the accountability mechanisms available to municipalities depend on the promulgated category of the municipality. For example, metro municipalities are legislatively better resourced structures and can access more accountability mechanisms to attain better accountability from a local government perspective.<sup>1631</sup>

In contrast to metros, local and district municipalities are legislatively inapt based on the fewer accountability mechanisms available and the consequent accountability deficits.<sup>1632</sup> Such deficits are also worsened by financial and geographical challenges and cause overreliance or additional pressure on the intergovernmental accountability dimension. Specific determinations hereto are that accountability measures and mechanisms of municipalities are dependant not only on intra-governmental or external (accountability towards the electorate) mechanisms but are also dependent on how municipalities function in the intergovernmental dimension.

It is also important to bear in mind the variation associated with the accountability characteristics of internal accountability mechanisms,<sup>1633</sup> intergovernmental accountability mechanisms,<sup>1634</sup> and accountability mechanisms at the disposal of the community.<sup>1635</sup>

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<sup>1630</sup> See para 4.2 in Chapter 4 to understand how measures available to municipalities.

<sup>1631</sup> See para 4.2 in Chapter 4 for a discussion of the variation of mechanisms.

<sup>1632</sup> See para 4.2 in Chapter 4 for a discussion of the accountability mechanisms available internally for local environmental governance.

<sup>1633</sup> See para 4.2 in Chapter 4 for a discussion of the accountability mechanisms available internally for local environmental governance.

<sup>1634</sup> See para 4.4 in Chapter 4 for a discussion of the accountability mechanisms available to other organs of state for local environmental governance.

<sup>1635</sup> See para 4.3 in Chapter 4. The community accountability / enforceability measures and mechanisms for a discussion of the accountability mechanisms available to the community. Also see para 4.4.6 in Chapter 4 for a discussion of the accountability mechanisms available in terms of chapter 9 institutions.

Intra-governmental accountability mechanisms are comprised mostly of statutory mechanisms designed to regulate responsibility in terms of the design and internal interface between the administration, the council and its executive. However, based on the internal accountability of both the executive and legislative powers primarily revolving around council, the accountability mechanisms are mostly dependent on robust political accountability and bureaucratic accountability. Further to the municipal administration, the accountability mechanisms are also local government framework related, but do provide for environmental configuration or adaptation.<sup>1636</sup> Hence, in the absence of dedicated accountability mechanisms to ensure local environmental accountability, robust LEG is subjected to the resolve of the council and its political will to drive a strategic environmental agenda. Weak intra-governmental accountability in terms of LEG causes responsibility and liability to be dependent on the adaptation of current local government statute and sectoral statutes to ensure consequent management and answerability.

The intergovernmental accountability mechanisms to enable environmental oversight are more sophisticated because of the interface with the different intergovernmental role-players. Intergovernmental accountability mechanisms are better designed to regulate accountability in terms of LEG and to intervene in terms of sectoral environmental legislation and co-operative governance provisions. In the absence of the competent discharge of local environmental responsibilities, intergovernmental mechanisms can intervene and cause the intergovernmental authority to withdraw municipalities' legislative assignment or to usurp its responsibilities and perform functions on behalf of the municipality. However, the accountability mechanisms are limited to interim oversight and do not enact liability in absence of the execution of responsibility. For example, intergovernmental interventions are implemented on a temporary basis, after which the seized responsibility is returned to the original functionary.

Accountability mechanisms at the disposal of the community are properly configured to safeguard LEG. Mechanisms at the disposal of the electorate are specifically arranged to

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<sup>1636</sup> See para 4.2 in Chapter 4 for a discussion of the accountability mechanisms available internally for local environmental governance.

maximise LEG. The range of mechanisms is superior to both the intra-governmental and intergovernmental accountability mechanisms. Dissimilar to the accountability mechanisms of the other two dimensions, the mechanisms at the disposal of the electorate advance liability in the absence of the exercise of the necessary degree of responsibility. Mechanisms like civil mobilisation, petitions, public hearings, and civil and criminal litigation are however more liability orientated and are weak from a preventative perspective.

It is suggested that the more balanced and diverse the range of accountability mechanisms applied in the three dimensions, the more effective they will be to ensure accountability in LEG. Diverse accountability mechanisms can be deployed to understand municipalities' accountability in relation to the environment. The conclusions drawn from this examination indicate that although not all accountability mechanisms are specifically intended to be used as accountability mechanisms in terms of LEG, the design of the existing accountability mechanisms allows for their adaptation to assist from an LEG perspective.

Based on a consideration of the structural and systematic composition of how accountability measures and mechanisms function in municipalities, a further determination of accountability can best be contextualised with reference to a desktop study of the CoJ.<sup>1637</sup> Important factors in the study will include the oversight of the CoJ Integrated Development Framework, relevant environmental policies, by-laws, the organogram, oversight reports, audit findings and the AR, which will be considered against the Chapter 4 analysis and understanding of local accountability in relation to the context of LEG.<sup>1638</sup> It should also be noted that the accountability study of the CoJ will be unique, being based on the specific accountability mechanisms utilised by the CoJ. The purpose

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<sup>1637</sup> See Chapter 5 for the application of the accountability mechanisms configured in Chapter 4 of the study.

<sup>1638</sup> See para 5.4 in Chapter 5 for the accountability mechanisms utilised in the context of local environmental governance in the City of Johannesburg.

of performing the study is merely to conduct an appraisal of how local government accountability plays out in South Africa's local government context in terms of LEG.



## CHAPTER 5

### THE CASE OF THE CITY OF JOHANNESBURG

#### *5.1 Introduction*

Celebrated as the economic heart of South Africa's wealthiest province, the CoJ is credited with having the largest economy of any metropolitan region in sub-Saharan Africa.<sup>1639</sup> In the context of South African municipalities the CoJ is classified as a Category A municipality.<sup>1640</sup> It has an executive mayoral system together with electorate participatory arrangements, i.e. a ward committee system.<sup>1641</sup> The CoJ saw the emergence of an coalition government led by the Democratic Alliance that included the Inkatha Freedom Party, the African Christian Democratic Party, the Congress of the People, the United Democratic Movement, the Freedom Front Plus and Al Jama-ah during the period August 2016 to October 2019.<sup>1642</sup> It is also amongst the 40 largest metropolitan jurisdictions in the world and is recognised as the largest city in the world not bordered by water resources such as lakes, rivers or coastlines.<sup>1643</sup> By 2019 the city had 5.5 million residents, which makes it the biggest metropolitan municipality in South Africa.<sup>1644</sup>

To give life to the mostly theoretical analysis in the previous four chapters, this chapter is devoted to a critical reflection on the environmental accountability of the CoJ which is appraised by means of the mechanisms configured in Chapter 4. The outcome of this evaluation should help to understand the state of the CoJ's environmental accountability and serve as a basis for identifying the real-life difficulties in local government, as opposed to the vision projected in South African law.

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<sup>1639</sup> CDP *Cities 2014 Report - City of Johannesburg* 8.

<sup>1640</sup> Section 2 of the *Structures Act*.

<sup>1641</sup> Sections 7(b), (d) and (e) of the *Structures Act*.

<sup>1642</sup> The state of financial management and governance in municipalities with coalition government: a case for constructive coalition governance presentation made by the Executive Mayor of the CoJ during the national council of provinces local government week, Thursday, 10 September 2020.

<sup>1643</sup> CDP *Cities 2014 Report - City of Johannesburg* 8.

<sup>1644</sup> CoJ *Integrated Annual Report 2018/2019* 23.

Due to the impact of the Covid-19 pandemic and other constraints, this research could not involve an empirical component. The case study is confined to a desktop analysis of the documentation and information on the CoJ that is open access and available online. The structure of this chapter is as follows.

The first part considers the internal governance structures of the CoJ to enable an understanding of both the political and the structural design of the metropolitan municipality. The second part analyses the internal mechanisms and structures of the CoJ to compare the current internal accountability mechanisms with the internal mechanisms presented in Chapter 4. The accountability mechanisms in the CoJ will be benchmarked against the accountability mechanisms proposed in law and literature.

Finally, consideration will be given to the CoJ structures and mechanisms in terms of their accountability towards the electorate. The electorate component will show how accountability functions in practice on the ground in the CoJ. Information will be presented on how the CoJ electorate mechanisms perform in practice in terms of their mechanisms (public participation, access to information, complaint procedures, etc.) that enable such accountability.

### *5.1.1 Administrative structures*

Senior administrative decision-makers include the most senior officer in the CoJ administration, who is the City Manager. Augmenting environmental governance in the Office of the City Manager is the responsibility of the Executive Management Team, which includes executive heads, group heads, managing directors, chief executive officers, city departments such as the Environment and Infrastructure Services Department (hereafter EISD) and MOE.<sup>1645</sup> These senior managers are mostly section 56 employees who are appointed by the Council and account for the performance of their required senior management responsibilities.<sup>1646</sup> The section 56 employees are the City Manager

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<sup>1645</sup> CoJ *Integrated Annual Report 2018/2019* 45.

<sup>1646</sup> Section 56 of the *Systems Act*.

(hereafter the CM), the heads of departments, the managing directors and chief executive officers of entities, and those reporting directly to the CM.<sup>1647</sup>

Differentiation is made between group functions, departmental directorates and municipal entities which form the link between LEG and accountability in the City.<sup>1648</sup> Group functions ensure "consistency and alignment" of the City's strategy and the proper implementation thereof by departments and municipal entities alike.<sup>1649</sup> The high-level co-ordination of group functions therefore ensures that the administrative execution of responsibilities is not limited to service delivery in relation to core departments but is flexible enough to direct municipal entities. These can include the administration and monitoring of the probable linkage of an environmental authorisation matter to both departments and municipal entities. An example hereof is the City's Growth and Development Strategy 2040, where the Development Planning and the Transportation Departments are coordinated with city entities like Johannesburg Water, Pikitup and City Power.<sup>1650</sup>

Group Corporate and Shared Services is responsible for environmental matters, which include occupational health, safety and the environment as functions monitored under the aforementioned group functions. Cascading further down from the Executive Management Team (EMT) is the operation and executive management of individual departments and municipal entities.<sup>1651</sup>

From a departmental directorate perspective, the Department of Environment and Infrastructure Services is responsible for environmental management in the City.<sup>1652</sup> The head of the relevant department is the Executive Director: Environment and Infrastructure Services (hereafter the ED: EIS) responsible for the environmental portfolio.<sup>1653</sup> Included

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<sup>1647</sup> CoJ *Integrated Annual Report 2018/2019* 307.

<sup>1648</sup> See para 5.2 in Chapter 5.

<sup>1649</sup> CoJ *Integrated Annual Report 2018/2019* 45.

<sup>1650</sup> CoJ *Integrated Annual Report 2018/2019* 264.

<sup>1651</sup> CoJ *Integrated Annual Report 2018/2019* 45.

<sup>1652</sup> CoJ *Integrated Annual Report 2018/2019* 47.

<sup>1653</sup> CoJ *Integrated Annual Report 2018/2019* 44.

in the environmental portfolio are the following business units: Air Quality and Climate Change, Impact Management and Compliance Monitoring, Infrastructure Planning and Co-ordination, Water Resources and Biodiversity, and finally Waste Management and Regulation.<sup>1654</sup> Other departmental directorates which share quasi-environmental responsibilities include Development Planning, Health and Transport.<sup>1655</sup> In contrast to departmental directorates in the CoJ, MOEs in the CoJ are independent or ring-fenced entities and are governed by a board of directors.

### *5.1.2 Municipal entities*

Entities in the CoJ are established in terms of section 80 of the *Systems Act* to provide service delivery to the City in relation to specific portfolios.<sup>1656</sup> Entities in the city governance structure, more specifically the LEG structure, include Joburg Water (SOC) Ltd, City Power (SOC) Ltd, Pikitup (SOC) Ltd and Johannesburg City Parks and Zoo (SOC) Ltd (hereafter JCPZ).<sup>1657</sup>

These are entities directly aligned to the provision of environment-related services to the CoJ citizens. They are required to observe their developmental role in terms of environmental governance and limit their impact on the environment.<sup>1658</sup> There are currently twelve entities operating in the city structures. These are City Power (SOC) Ltd, Joburg Market (SOC) Ltd, Joburg City Theatres (SOC) Ltd, JCPZ (SOC) Ltd, Johannesburg Development Agency (SOC) Ltd (hereafter JDA), Johannesburg Property Company (SOC) Ltd, Johannesburg Roads Agency (SOC) Ltd (hereafter JRA), Johannesburg Social Housing (SOC) Ltd, Johannesburg Water (SOC) Ltd, Metrobus (SOC) Ltd, Metropolitan Trading Company and Pikitup (SOC) Ltd.<sup>1659</sup>

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<sup>1654</sup> CoJ *Integrated Annual Report 2018/2019* 262.

<sup>1655</sup> CoJ *Integrated Annual Report 2018/2019* 45.

<sup>1656</sup> Section 80(1)(a) of the *Systems Act*.

<sup>1657</sup> CoJ *Integrated Annual Report 2018/2019* -49.

<sup>1658</sup> DEAT *Overview of Integrated Environmental Management* 6.

<sup>1659</sup> CoJ *IDP 2019/20 Review* 120.

These entities are independent companies operated in the framework of state-owned companies which render services in terms of the mandate set out by the City. They are best categorised as implementation arms of the City, which deliver non-bureaucratic and specialised services to the citizenry.<sup>1660</sup> Their mandates are derived from the fact that the City is their only shareholder, with the citizens of the City considered direct stakeholders of the services to be rendered by the different entities. Governance in the different entities is executed by boards of directors which consist of Executive and Non-executive Directors. Moreover, senior officials on the board, such as the Managing Directors and Chief Executive Officers, are part of the Executive Management Team of CoJ and account to the CM.<sup>1661</sup>

## ***5.2 Internal accountability structures and mechanisms***

### *5.2.1 System of delegations*

The functionality of the different structures in the city depends on the accountability actors in the different structures and the responsibilities as configured in terms of the CoJ System of Delegations.<sup>1662</sup> Environmental actors are differentiated between two organisational work streams: council and the administration.<sup>1663</sup> The different accountability actors can therefore be defined as executive actors providing political leadership and governance and senior management and departmental actors ensuring the implementation of environmental policy.

The delegated role of senior managers as accountability actors to implement LEG in the CoJ is essential. They are required to act as drivers of CoJ's implementation of strategic objectives and the IDP.<sup>1664</sup> Included in the range of senior administrative actors who ensure environmental compliance are the CM, the ED: EIS, boards of city entities and managing directors of the city entities. The division of duties and responsibilities among

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<sup>1660</sup> CoJ *Integrated Annual Report 2018/2019* 35.

<sup>1661</sup> CoJ *Integrated Annual Report 2018/2019* 45.

<sup>1662</sup> CoJ *Conditions of Delegations* Schedule A.

<sup>1663</sup> DEAT *Overview of Integrated Environmental Management* 32.

<sup>1664</sup> CoJ *IDP 2019/20 Review* 118.

CoJ office holders and municipal committees are discussed below to properly understand these accountability structures and mechanisms.

Political structures as elected by the citizenry are principally embodied in the municipal council. The council has legislative and executive authority. Still, as part of a pilot project the City introduced clear differentiation between its legislative and executive powers in 2006.<sup>1665</sup> The city council maintains legislative functions to execute its constituents' mandate, which includes environmental matters, some of which the council can delegate to the Executive Mayor. Consequently, structures associated with the legislative powers include the city council, the Speaker,<sup>1666</sup> the Chairperson of Committees, the section 79 committees,<sup>1667</sup> the Chief Whip of Council<sup>1668</sup> and other committees of council.

### *5.2.2 Division of duties and responsibilities among office holders and municipal committees*

#### 5.2.2.1 Council

As mentioned previously, the CoJ is characterised by its separation of legislative and executive powers. Council therefore represents the legislative arm, which provides for "oversight, public participation and better accountability".<sup>1669</sup> Hence it is stated in the CoJ integrated environmental management policy that the council is required to be "mindful of the need to ensure that the needs of the present generation are addressed without compromising the ability of future generations to meet their own needs". Therefore, proper accountability in relation to local environmental management cannot be attained without council. The council of the CoJ dictates the degree of environmental consciousness and responsiveness in the City. It follows that the strong emphasis and policy direction in relation to environmental governance results in resilient and robust

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<sup>1665</sup> City of Tshwane *Enhancing Efficiency, Accountability and Responsiveness 2*.

<sup>1666</sup> See para 5.2.2.6 in Chapter 5.

<sup>1667</sup> See para 5.2.2.7 in Chapter 5.

<sup>1668</sup> See para 5.2.2.5 in Chapter 5.

<sup>1669</sup> CoJ *Integrated Annual Report 2018/2019* 35.

environmental legacies which in turn create strong and environmentally orientated internal institutional consciousness.

At the time of writing, the Council comprised of 270 councillors, being 135 members directly elected and 135 members proportionally or indirectly elected.<sup>1670</sup> As mentioned during the introduction of this Chapter,<sup>1671</sup> the CoJ council was governed by a coalition government and although it is anticipated that coalition governments will influence accountability from a governance (both democratic accountability and political accountability)<sup>1672</sup> perspective in the CoJ, no pronouncements was made in this regard due to the confidential nature of the coalition agreement made between the parties. Ward committees are operational in all 135 wards of the CoJ. There are 10 members per ward committee, and the ward councillor is the chairperson. Based on CoJ's ward participatory system, the environmental, infrastructure and services portfolio is recognised as a dedicated portfolio in the ward committee system, so that the ward committees provide extensive environment-related participatory mechanisms to citizenry.<sup>1673</sup> Although the City is progressive in its attempts to broaden participatory governance, it does not have sub-councils to further broaden its participatory structures and stimulate effective and efficient services.

Notwithstanding the absence of sub-councils, the CoJ is divided into seven regions. These regions are primary to providing the CM with local urban governance centres.<sup>1674</sup> From an administrative perspective they serve to co-ordinate and effectively monitor service delivery in a decentralised way.<sup>1675</sup>

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<sup>1670</sup> CoJ *IDP 2019/20 Review* 120.

<sup>1671</sup> See para 5.1 in Chapter 5.

<sup>1672</sup> See the detailed discussion of both democratic accountability and political accountability in para 2.2.2 in Chapter 2.

<sup>1673</sup> CoJ *Integrated Annual Report 2018/2019* 56.

<sup>1674</sup> CoJ *IDP 2019/20 Review* 126.

<sup>1675</sup> CoJ *IDP 2019/20 Review* 126.

### 5.2.2.2 The accounting officer and senior management

As a delegated accountability functionary, the CM as Head of the Administrative Function of the CoJ is primary responsible for administrative performance in the various group functions, departments and city entities.<sup>1676</sup> The accountability of the CM is assessed on criteria included in the performance agreement entered into by the CM and the Executive Mayor of the CoJ.<sup>1677</sup> The achievement of the CM is measured against KPIs as derived from the Local Government: Municipal Performance Regulations for the Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006.<sup>1678</sup> Although the KPIs of the CM make provision for basic service delivery, the said contracts omit reference to direct responsibility for LEG.<sup>1679</sup>

Therefore, no direct accountability in relation to environmental governance can be ascertained in the CoJ high-level performance requirements of the CM. Notwithstanding the absence of measures for accountability, the Office of the City Manager serves as an accountability functionary to coordinate and implement policy directives as contained in accountability mechanisms to ensure environmental governance.<sup>1680</sup> The Group: Strategy, Policy Co-Ordination and Relations, through the Office of the Municipal Manager, coordinates and monitors the City's IDP, Budget Monitoring, and Evaluation and Reporting Process Plans. These *inter alia* include meeting legislative timelines, the assessment of past performance, policy, political and environmental changes.<sup>1681</sup> The Office of the City Manager is therefore accountable based on the assessment, monitoring, adjustment and consequential corrective action in terms of environmental planning and the prioritisation thereof. Evidence of the aforementioned can further be solicited in terms of the performance criteria established in the performance agreement between the CM and the ED: EIS.<sup>1682</sup> Therefore the CM as the administrative head of the implementation arm

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<sup>1676</sup> CoJ *Integrated Annual Report 2018/2019* 34.

<sup>1677</sup> CoJ *Performance Agreement Between Executive Mayor and City Manager*.

<sup>1678</sup> Regulations 26 and 27 of the Performance Regulations.

<sup>1679</sup> CoJ *Performance Agreement Between Executive Mayor and City Manager Annexure A*.

<sup>1680</sup> CoJ *Tabling of 2020/2021 IDP, Budget, Monitoring, Evaluation and Reporting Process Plan 1*.

<sup>1681</sup> CoJ *Tabling of 2020/2021 IDP, Budget, Monitoring, Evaluation and Reporting Process Plan 1*.

<sup>1682</sup> CoJ *Performance Agreement Between City Manager and ED: EIS*.



(service delivery) of the City remains accountable in terms of environmental governance as performed by the ED: EIS, reporting directly to the CM.

Senior management, more specifically the ED: EIS, is directly accountable to the CM as the senior accountability functionary for environmental affairs in the CoJ. Evident hereto is the responsibility of the ED: EIS, including the responsibility for resource sustainability, policy development, planning and regulation.<sup>1683</sup> Other responsibilities as senior functionary relate to integrated infrastructure planning, monitoring, compliance, enforcement and environmental awareness.<sup>1684</sup> Primary to the specific outcome associated with the relevant functionary is the attainment of the Growth and Development Strategy (hereafter the GDS) goal number 2; namely to "To provide a resilient, liveable, sustainable urban environment underpinned by infrastructure supportive of a low carbon economy".<sup>1685</sup> The GDS outcome therefore encapsulates the requirement of an environmentally sustainable city, which includes as the secondary outcomes of a protected natural environment reduced resource consumption, minimised pollution, reduced carbon emissions and adequate engineering services.<sup>1686</sup>

Captured in the strategic performance objectives<sup>1687</sup> of the ED: EIS are KPAs, against which the accountability of the functionary is recorded.<sup>1688</sup> Included under the KPAs of the senior environmental functionary are minimising pollution from waste and air quality management,<sup>1689</sup> responding to climate change impacts<sup>1690</sup> and air quality management,

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<sup>1683</sup> CoJ *Performance Agreement Between City Manager and ED: EIS*.

<sup>1684</sup> CoJ *Performance Agreement Between City Manager and ED: EIS*.

<sup>1685</sup> Annexure A Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 1*.

<sup>1686</sup> Annexure A Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 1*.

<sup>1687</sup> See para 4.3 above - *Internal mandatory structures and mechanisms for accountability - Internal accountability* for a discussion of the availability of performance management systems as accountability mechanisms.

<sup>1688</sup> Annexure A Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 3*.

<sup>1689</sup> KPA 1 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 3*.

<sup>1690</sup> KPA 2 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 3*.

*inter alia*.<sup>1691</sup> It follows that these KPAs bear direct reference to the functionary's responsibility and pursuant accountability in relation to specific environmental obligations in the City. The environmental KPAs represent the responsibilities of the accountability actor, of which the baseline of KPIs, targets and means of verification thereof will constitute the criteria by which the environmental governance is assessed.

The actual multi-disciplinary environmental assessment responsibilities of the ED: EIS include the diversion of waste,<sup>1692</sup> the compilation of strategic climate action plans,<sup>1693</sup> the compilation of a climate risk vulnerability map,<sup>1694</sup> and the processed data assessment of air quality monitoring stations.<sup>1695</sup> Other compliance and enforcement responsibilities to be discharged by the ED: EIS as an accountability actor include monitoring the percentage of atmospheric emission applications captured,<sup>1696</sup> the percentage of atmospheric emissions licences processed,<sup>1697</sup> and the number of atmospheric emission licence compliance inspections conducted.<sup>1698</sup>

Holistically speaking, corporate citizens such as boards of entities are also required to ensure that the entities discharge their environmental responsibilities to protect the CoJ natural environment.<sup>1699</sup> Based on the provision of environmentally sensitive services, boards of city entities and managing directors of cities entities are accountable to the shareholder, being the CoJ. The chairperson of the board, as the accountability actor, is

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<sup>1691</sup> KPA 3 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 4*.

<sup>1692</sup> KPI 1.1 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 3*.

<sup>1693</sup> KPI 2.1 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 3*.

<sup>1694</sup> KPI 2.2 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 3*.

<sup>1695</sup> KPI 3.2 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 4*.

<sup>1696</sup> KPI 3.3 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 5*.

<sup>1697</sup> KPI 3.1 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 4*.

<sup>1698</sup> KPI 3.4 of Annexure A Strategic Performance Objectives Performance Score Card-Section 57 Employee as included in the CoJ *Performance Agreement Between City Manager and ED: EIS 6*.

<sup>1699</sup> JCPZ *Annual Report 2017/18 23*.

the "point of contact" in dealing with the shareholder, the CoJ.<sup>1700</sup> Together with the board of directors the chairperson manages the affairs of the company in line with the shareholder's directions and compliance in terms of its legal framework. An example of the structure of an entity's accountability matrix can be seen from the JCPZ perspective, where it is envisaged that the executive committee is accountable to various stakeholder groups including the Member of the Mayoral Committee (hereafter MMC): Environment and Infrastructure Services, the Board, the CM, the section 79 committee and the AGSA.<sup>1701</sup>

The diverse entities' different environmental compliance and legislative frameworks will be applicable to the various entities, their boards and consequential managing directors serving in the dissimilar environmental legislative environments. For example, Joburg Water (SOC) Ltd will have different responsibilities in relation to Pikitup (SOC) Ltd. Therefore, senior management accountability actors for example the board members of the various entities also have to ensure the statutory and environmental compliance of the entities in relation to both the suites of national environmental legislation and local government legislation.<sup>1702</sup> The boards of entities therefore report quarterly and annually to their shareholder on the entities' performance and in relation to service delivery.<sup>1703</sup>

When considering the departmental and entities' accountability functionalities, the Sustainable Services Cluster plays a vital role. Distributed between two branches of environmental functionalities, the accountability functionalities are representative of the EISD and municipal entities executing environmental governance roles such as JCPZ (SOC) Ltd, JDA (SOC) Ltd and Johannesburg Water (SOC) Ltd.

The EISD in the CoJ is the primary administrative accountability actor from an environmental policy implementation and governance perspective. The EISD was established in 2012 and provides oversight of the CoJ's ability to "create sustainable

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<sup>1700</sup> JCPZ *Integrated Report 2018/19* 54.

<sup>1701</sup> JCPZ *Annual Report 2017/18* 38.

<sup>1702</sup> CoJ *Integrated Annual Report 2018/2019* 54.

<sup>1703</sup> Johannesburg Water *Integrated Annual Report 2018/19* 44.

human environments" whilst reducing the "ecological footprint" of the City.<sup>1704</sup> Prior to the establishment of the EISD, the environmental custodian consisted of the Department: Development Planning Transportation and Environment, of which the Environmental Planning and Management Unit in the Department was responsible for facilitating and implementing environmental policy in the City.<sup>1705</sup> Therefore, as the departmental actor, the EISD is important as an accountability actor towards ensuring proper local government accountability in terms of environmental law.

The importance of the EISD is demonstrated in the key functions and critical performance areas it holds. The department is the key custodian responsible for the management and oversight of accountability in terms of environmental law in the CoJ. These functional environmental areas include urban water management, biodiversity protection, air quality management, climate change, waste management, waste minimisation, infrastructure planning and environmental education.<sup>1706</sup>

The department also houses other environmental sub-functionaries like the Impact Management Sub-unit.<sup>1707</sup> The sub-unit functioning in the EISD is responsible for auxiliary environmental duties such as the review of land use management and similar environmental applications in the context of the CoJ SDF.<sup>1708</sup>

Johannesburg Metropolitan Police Department (hereafter JMPD) entities in the CoJ grid act as service delivery agents to departmental accountability actors, which similarly causes entities to acquire responsibility as accountability functionaries to ensure environmental governance. Further regulated by a multitude of statutes which provide compliance prescripts as determined by the type of entity, entities as accountability functionaries are important to ensuring environmental governance.

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<sup>1704</sup> CoJ *Environmental Sustainability Strategy* 6.

<sup>1705</sup> CoJ *Integrated Environmental Management Policy* 32.

<sup>1706</sup> CoJ *Integrated Annual Report 2018/2019* 62.

<sup>1707</sup> CoJ *Spatial Development Framework 2040* 91.

<sup>1708</sup> CoJ *Spatial Development Framework 2040* 91.

Similar to other local government actors, entities are also important to achieving the environmental outcomes as delegated by Council and mandated by the City shareholder.

### 5.2.2.3 Senior political executives

As part of the municipality's executive, the Executive Mayor should monitor accountability.<sup>1709</sup> The Executive Mayor plays an important strategic lead as the executive head of the City<sup>1710</sup> and enjoys executive powers as delegated by council.<sup>1711</sup> The MMC responsible for Environment and Infrastructure Services is accountable for the political and policy directives governing environmental affairs in the City. Reports by the EISD are referred to the MMC: Environment and Infrastructure Services to be disposed of by delegated powers. In the absence of proper delegations, the reports are referred to the Executive Mayor to dispose of in terms of delegated powers.<sup>1712</sup> Usually the Leader of Executive Business (hereafter the LoEB) would also be strategically positioned in the office of the Executive Mayor, but at the time of writing the LoEB is a Member of the MAYCO used as a conduit to cause the processing of executive directives to council.<sup>1713</sup> The LoEB facilitates alignment between the executive and the legislature (the city council),<sup>1714</sup> and hence plays an important role in addressing matters received from the executive, more specifically matters pertaining to sustainability and environmental matters affecting the City. It is suggested that based on the original powers associated with the LoEB, the LoEB in the CoJ has the potential to define the environmental agenda of the CoJ, including its accountability for LEG. Notwithstanding the potential of the LoEB, the Executive Mayor, duly represented by his or her Member of the MAYCO for Environment and Infrastructure Services, accounts for proper environmental governance in the City.<sup>1715</sup> The Executive Mayor serves to lead priority programmes like water and sanitation projects whereby the

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<sup>1709</sup> See para 4.2.2.3 in Chapter 4 in terms of which the executive mayor is responsible for the execution of specific executive duties and oversight in terms of Council's system of delegations and the service delivery mandate.

<sup>1710</sup> CoJ *IDP 2019/20 Review* 117.

<sup>1711</sup> CoJ *IDP 2019/20 Review* 121.

<sup>1712</sup> City of Tshwane *Enhancing Efficiency, Accountability and Responsiveness* 5.

<sup>1713</sup> CoJ *Integrated Annual Report 2018/2019* 43.

<sup>1714</sup> City of Tshwane *Enhancing Efficiency, Accountability and Responsiveness* 16.

<sup>1715</sup> CoJ *Integrated Annual Report 2018/2019* 44.

CoJ seeks to improve water and wastewater infrastructure, which reduces sewer blockages and spillages.<sup>1716</sup> Among the priority programmes, the Executive Mayor chairs the Visible Service Delivery Committee and oversees service delivery challenges, eradicates infrastructure backlogs and ensures proper co-ordination between departments, entities and regions.<sup>1717</sup> The importance of the role that the Executive Mayor plays in the municipality's accountability is also evident from his or her duties in relation to other sustainable outcomes which are supported in terms of the mayoral priorities, including the "preservation of resources for future generations".<sup>1718</sup> Further included as a driver or KPI hereto is the percentage of waste diverted from landfill sites.<sup>1719</sup> Examples of official executive governance initiatives include executive mayoral projects creating awareness and cleaning campaigns in conjunction with city entities such as Pikitup (SOC) Ltd.<sup>1720</sup> The Executive Mayor is central to attaining accountability in LEG in CoJ.

#### 5.2.2.4 Mayoral Committee

The office of the Executive Mayor represents the executive authority in the City. Included in the executive structure are the MAYCO and the LoEB. The Executive Mayor appoints MAYCO, to which specific powers can be delegated as discussed in the previous chapters. The portfolio of environment is the preserve of the member of the MAYCO responsible for Environment and Infrastructure Services. The MMC is crucial for the expedient formulation and implementation of environmental policy in the CoJ.<sup>1721</sup>

Although the executive environmental mandate is primarily governed from an EISD portfolio perspective, accountability can also be regionally accounted for. Examples hereto include the facilitation of services coordinated from regional governance structures in the

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<sup>1716</sup> CoJ *IDP 2019/20 Review* 72.

<sup>1717</sup> CoJ *IDP 2019/20 Review* 72.

<sup>1718</sup> CoJ *IDP 2019/20 Review* 110.

<sup>1719</sup> CoJ *IDP 2019/20 Review* 110.

<sup>1720</sup> CoJ *Integrated Waste Management Plan* 38.

<sup>1721</sup> CoJ *IDP 2019/20 Review* 121.

CoJ. Members of MAYCO are also allocated regions to provide regional oversight of the implementation of service delivery.<sup>1722</sup>

#### 5.2.2.5 Chief Whip of Council

As stated in the AR of the CoJ,<sup>1723</sup> the Chief Whip in the CoJ is responsible for maintaining proper cohesion in the governing party. At the time of writing, the Chief Whip of council is also the Chief Whip of the ruling party in the CoJ. The Chief Whip also plays a role in political accountability towards the electorate.<sup>1724</sup> Additional to ensuring political accountability in its own party, the Chief Whip of council in the CoJ also monitors adherence to democratic accountability, in that all other political parties are proportionally represented on the various committees in council.<sup>1725</sup> While the Speaker is typically responsible for the oversight of the legislative and participatory mechanisms in the CoJ, as will be clarified below, the Chief Whip is responsible for the enforcement of the answerability of councillors in terms of non-compliance with the code of conduct<sup>1726</sup> and non-payment of rates and taxes by councillors, for example.<sup>1727</sup>

#### 5.2.2.6 Speaker

As explained in Chapter 4, the Speaker of the council is also the custodian of oversight and accountability in the CoJ. The assembly and legislative functions of council are synchronised by the elected Speaker of council, while the Executive Mayor represents the executive arm in the elected governance structure of the City.<sup>1728</sup> Central to the preservation of participatory mechanisms in the CoJ, the Speaker is also responsible for the effective functioning of ward committees, which directly contributes to community participation.<sup>1729</sup> Hereto the Speaker also manages legislative processes to enable public

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<sup>1722</sup> CoJ *IDP 2019/20 Review* 126.

<sup>1723</sup> See para 5.2.2.3 in Chapter 5.

<sup>1724</sup> CoJ *Integrated Annual Report 2018/2019* 41.

<sup>1725</sup> CoJ *Integrated Annual Report 2018/2019* 41.

<sup>1726</sup> CoJ *2020/21 SDBIP Deviation Report* 4.

<sup>1727</sup> CoJ *2020/21 SDBIP Deviation Report* 6.

<sup>1728</sup> CoJ *IDP 2019/20 Review* 121.

<sup>1729</sup> CoJ *Integrated Annual Report 2018/2019* 56.

participation before the tabling of statutory reports like the AR of the CoJ.<sup>1730</sup> The Speaker is responsible for the oversight of the section 79 committees and the City's Advisory Committees.<sup>1731</sup>

#### 5.2.2.7 Section 79 and 80 committees

As part of the council's legislative environmental mandate, the council must approve the City's IDP,<sup>1732</sup> environmental tariffs and budget, and appoint enforcement officers such as building control officers. The section 79 committee<sup>1733</sup> responsible for the environment and infrastructure services develops environmental policies and reports to council, which adopts the report.<sup>1734</sup> CoJ section 79 committees also provide oversight of the executive, provide for public participation, and provide for necessary investigations.<sup>1735</sup> The environment and infrastructure services section 79 committee in the CoJ is configured as an oversight committee which provides oversight in relation to the executive's environmental decisions. Similarly, in regard to its oversight function, the environmental section 79 committee is chaired by an ordinary councillor and not the MMC: Environment and Infrastructure Services. The CoJ section 79 committee is elected by council and makes recommendations to council in observance of its legislative, participatory and oversight roles in the environmental portfolio.<sup>1736</sup> Based on the extensive responsibility of the section 79 committee, it has vast potential in driving the adoption of environmental by-laws, checking environmental law compliance in and by the municipality, etc.

The CoJ further boasts with an Environmental Coordinating Committee that services as subcommittee to screen and avoid probable environment resource efficiencies, prior to environment matters being considered by other committees. An example of the

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<sup>1730</sup> CoJ *Integrated Annual Report 2018/2019* 31.

<sup>1731</sup> CoJ *Integrated Annual Report 2018/2019* 21.

<sup>1732</sup> See para 3.5.6 in Chapter 3 for a discussion in terms of framework local government law.

<sup>1733</sup> See para 4.2.2.7 in Chapter 4 for detailed information in relation to the functionality of the related committees.

<sup>1734</sup> DEAT *Overview of Integrated Environmental Management* 32.

<sup>1735</sup> CoJ *Integrated Annual Report 2018/2019* 42. Also see above para 4.2.2.7 in Chapter 4 for a discussion of Section 79 and 80 Committees as Internal mandatory structures and mechanisms for accountability - internal accountability.

<sup>1736</sup> CoJ *IDP 2019/20 Review* 116.



importance of council as the environmental governance functionary is seen in the adoption of the City's Growth and Development Outcomes Plan, which *inter alia* includes Priority Number Three, the enhancement of quality services and a sustainable environment.<sup>1737</sup> Typical policy instruments developed and adopted by council also include the Integrated Environmental Management Policy, which co-ordinates and integrates environmental policy.

### *5.2.3 Reporting processes*

Different accountability instruments culminate in the adoption of the CoJ AR that reports on the environmental responsibilities performed by the different accountability actors in the COJ.

It follows that probably the most important internal accountability management mechanism of the CoJ is its AR.<sup>1738</sup> The AR serves the function of reporting on city planning and performance outcomes and is therefore key for ensuring accountability in relation to the municipality's environmental duties and objectives.

For the purposes of this study, the 2018/2019 AR was scrutinised to evaluate the performance and achievements of the CoJ during the 2018/2019 financial year. The mandate and achievements of the EISD are reflected under the various KPI's contained in the AR. The environmental performance objectives directed under Mayoral Priority Number 9 include the following outcomes.

The accountability assessment had to do with the diversion of waste from CoJ Landfill Sites. Here the EISD has underperformed for the previous three financial years. In the 2018/2019 financial year the EISD achieved only 15,7% of the projected 18% waste diversion from CoJ landfill sites.<sup>1739</sup>

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<sup>1737</sup> CoJ *End of Term Report 7*.

<sup>1738</sup> See para 4.2.3 in Chapter 4. Annual Reports as Internal mandatory structures and mechanisms for accountability - internal accountability.

<sup>1739</sup> CoJ *Integrated Annual Report 2018/2019* 269.

Further to the performance of a reduction of CO<sup>2</sup> in greenhouse gas (hereafter GHG) emissions, the performance is categorised under the energy sector, waste projects and transport projects. Pursuant to the energy sector, the target was 24 000 tons offset in GHG emissions, and an overachievement was recorded in terms of 28 334, 7 tCO<sub>2</sub>e. Under the waste projects, 3200 tons offset in GHG emissions was projected, and the actual tonnage recorded was 16 612, 63tCO<sub>2</sub>e.<sup>1740</sup> Finally, under the transport sector, 40 000 tons offset in GHG emissions was projected, and an overachievement of 40 137, 28tCO<sub>2</sub>e in GHG was recorded.<sup>1741</sup> Notwithstanding the achievement pertaining to the offset of GHG emissions, the EISD was non-compliant in terms of monitoring stations providing adequate data annually, with only 5 of the 9 Air Quality Stations recording adequate data.<sup>1742</sup> Hence, the data obtained in terms of the IDP environmental deliverables indicated some areas of non-compliant behaviour. Further aspects pertaining to the consideration of EISD accountability which were considered in the AR included financial performance, capacity in terms of vacancies filled, and capital expenditure on environmental infrastructure. Here the AR showed that EISD under-expended in terms of the budget. The departmental organogram was only 49% capacitated, based on current vacancies, and also under-expended and unfunded in terms of its capital projects.<sup>1743</sup> Some of the critical unfunded mandate projects included the Mshenguville Wetland Rehabilitation Project, the Far Eastbank New Ecological Infrastructure, the Bosmontspruit Rehabilitation Renewal Project, the Kaalspruit Rehabilitation Programme, the Diepsloot East River Side Park New Ecological Infrastructure, the Kelland/Fairlands River and Wetland Rehabilitation, and finally the Green Energy Initiative Project and New Green Infrastructure.<sup>1744</sup>

Environmental capital projects which were under-expended included the rehabilitation of the Ivory Park Water Management Unit, the rehabilitation of the Braamfonteinspruit,

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<sup>1740</sup> CoJ *Integrated Annual Report 2018/2019* 269.

<sup>1741</sup> CoJ *Integrated Annual Report 2018/2019* 270.

<sup>1742</sup> CoJ *Integrated Annual Report 2018/2019* 271.

<sup>1743</sup> CoJ *Integrated Annual Report 2018/2019* 272-276.

<sup>1744</sup> CoJ *Integrated Annual Report 2018/2019* 273-276.

exploration for ground water by drilling boreholes, the Lombardy East New Ecological Infrastructure, the catchment rehabilitation of the Jukskei New Ecological Infrastructure, the Pampospruit Catchment Rehabilitation New Ecological Infrastructure, and finally the Jukskei Alexandra Water Management Unit New Ecological Infrastructure.<sup>1745</sup> In the CoJ AR 2018/2019, various shortcomings were observed in terms of actual performance in relation to the environmental KPI's, workforce deficiencies in the EISD and environmental infrastructural deficiencies due to under-expenditure of the City's budgets and unfunded environmental infrastructural mandates. As projected in the information reported in the AR, accountability for environmental governance must be understood in the context of the expectations and commands of law and policy but also with reference to the state of affairs as captured in a municipality's AR. Although not conclusive by nature, the CoJ AR is also supplemented by environmental findings in the ARs of the environmental municipally-owned entities as accountability actors in the CoJ. The MOE ARs serve a valuable purpose for keeping MOEs to account. The ARs<sup>1746</sup> of MOEs, specifically, are important in that they consider portfolio-related performance and have the potential to ring-fence portfolio-related diagnoses of accountability deficiencies to sufficiently address environmental performance.

The assessment in terms of local environmental accountability from an MOE perspective is based on the Johannesburg Water (SOC) Ltd's Strategic Goal Number 2, to "Deliver water and sanitation service of good quality that is accessible, reliable and efficient in an environmentally responsible/sustainable way".<sup>1747</sup> This indicates the entity's accountability in relation to drinking water standards, access to water and sanitation, and effluent compliance in waste water treatment plants.

Aligned to the environmental infrastructural programme shortcomings as depicted in the CoJ AR, the Johannesburg Water Integrated AR 2018/2019 highlighted CoJ unaccountable

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<sup>1745</sup> CoJ *Integrated Annual Report 2018/2019* 273-276.

<sup>1746</sup> See para 4.2.3 in Chapter 4 - *Annual Reports under Internal mandatory structures and mechanisms for accountability - Internal accountability*.

<sup>1747</sup> Johannesburg Water *Integrated Annual Report 2018/19* 55.

behaviour in terms of the final effluent compliance in all Waste Water Treatment Works in the CoJ.<sup>1748</sup> It seems that the MOE failed to achieve the environmental outcomes projected in its AR. This would consequently negatively affect the CoJ's IDP and GDS 2040 Projections.

Other accountability concerns derived from the MOE entities' ARs were environmental deficiencies highlighted in terms of waste, emissions and other portfolios. In terms of the Pikitup AR 2018/2019, only three of the eleven service standards required by the CoJ shareholder were achieved.<sup>1749</sup> The MOE met only 42% of the projected departmental performance targets.<sup>1750</sup> Specific environmental answerability issues raised included the collection of domestic, commercial and putrescible waste.<sup>1751</sup>

The Pikitup AR serves as an accountability mechanism in both assessments of environmental responsibilities and corrective action in the event of the accountability level not being achieved.<sup>1752</sup> The above lack of accountability of the MOE *inter alia* relates to organisational, personnel, plant and machinery, and resource issues.

Inadequate performance is more often directly correlated with the availability of resources and inadequate infrastructural maintenance.<sup>1753</sup> Hence, accountability is not only about creating purported drivers in the City context to achieve accountability in LEG, but also about how the City maintains infrastructure to mitigate environmental consequences. Examples of inadequate infrastructural maintenance include the inadequate rehabilitation of open storm water channels, catchment programmes and kerb inlets, which is required to mitigate flooding and other environmental phenomena created by changing weather conditions.<sup>1754</sup> Hence, as derived from the JRA Integrated AR 2017/18 it is evident that severe risk is currently associated with environmental disasters in observance of the

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<sup>1748</sup> Johannesburg Water *Integrated Annual Report 2018/19* 60.

<sup>1749</sup> Pikitup *Integrated Annual Report 2018/19* 66.

<sup>1750</sup> Pikitup *Integrated Annual Report 2018/19* 70.

<sup>1751</sup> Pikitup *Integrated Annual Report 2018/19* 66.

<sup>1752</sup> Pikitup *Integrated Annual Report 2018/19* 115.

<sup>1753</sup> JRA *Integrated Annual Report 2017/18* 45.

<sup>1754</sup> JRA *Integrated Annual Report 2017/18* 18, 60.

inadequate progress pertaining to KPI Number 13<sup>1755</sup> and Number 15<sup>1756</sup> of the JRA. Specific to the aforementioned performance indicator, JRA suggests the overtopping of specific bridges due to prevailing weather conditions, of which no consequent reasons are submitted based on the underperformance thereof. Indicator Number 15, which anticipates an integrated roads and storm water master plan which is needed to determine flood lines, roads and storm water planning, was abandoned due to budget reprioritisation, notwithstanding the abovementioned environmental risk.<sup>1757</sup> Inadequate expenditure on infrastructure was also highlighted in the JDA: Integrated Annual Report 2018/19, where the Agency also only partially obtained its objective to focus "on driving up capital expenditure investment in infrastructure".<sup>1758</sup> In oversight of the JDA Integrated Annual Report 2018/19 as an accountability mechanism, the JDA achieved only 85% of the Agency's predetermined accountability outcomes.<sup>1759</sup>

The ARs of entities are not only helpful in determining accountability by means of the assessment of responsibilities, but can also identify accountability flaws in relation to other environmental accountability mechanisms. Examples hereof are seen in the identification of risks or environmental interventions and the subsequent failure to register positive planning in business plans. Failure to properly provide the necessary drivers in accountability mechanisms causes sustained reporting of environmental risks without the necessary redress depicted in ARs.

Examples hereof were found in the JCPZ: Integrated Report 2018/19, where although the MOE is aligned with prevent biodiversity loss and ecosystem collapses in the CoJ, limited reporting on the performance pertaining to the responsibility was found in the AR.<sup>1760</sup> Although extensive reporting was done in terms of service delivery performance, no actual performance was reported and the actual challenges were addressed with computed

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<sup>1755</sup> JRA *Integrated Annual Report 2017/18* 76.

<sup>1756</sup> JRA *Integrated Annual Report 2017/18* 77.

<sup>1757</sup> JRA *Integrated Annual Report 2017/18* 77.

<sup>1758</sup> JDA *Annual Integrated Report 2018/19* 86.

<sup>1759</sup> JDA *Annual Integrated Report 2018/19* 90.

<sup>1760</sup> JCPZ *Annual Report 2017/18* 55.

mitigation action thereto.<sup>1761</sup> An example hereof was the biodiversity risk to the CoJ's manmade forest in relation to the infestation of the Polyphagous Shothole Borer, which was listed as an environmental service delivery threat, but the risk was not properly classified and performance was not reported in terms of an MOE priority.<sup>1762</sup>

Notwithstanding its specific shortcomings, the JCPZ AR was progressive in terms of performance assessed with regard to the "percentage compliance with bio-diversity and ecosystem management requirements".<sup>1763</sup> Under the specific responsibility assessment, the required interventions made provision for the removal of alien vegetation, the removal of water-based invasive plants, wetland rehabilitation and the cleaning of natural water bodies.<sup>1764</sup> Based on the annual target of 100%, the MOE achieved 131% in terms of biodiversity and ecosystem compliance.<sup>1765</sup>

In regard to another MOE's performance in terms of environmental responsibility, the AR of the MOE had not been filed in terms of the statutory requirements; hence assessment was captured in terms of the Metrobus 1<sup>st</sup> Quarter Assessment Report for the 2018/2019 financial year. The accountability mechanism confirms the achievement of only 15 of the 21 KPIs.<sup>1766</sup> Calculated on the performance success ratio of obtaining key priorities, the Metrobus MOE accountability ratio projected only a 71% success ratio.<sup>1767</sup> Although projected from only a 1<sup>st</sup> quarter perspective, Metrobus achieved an important emission performance in terms of contributions to a greener economy.<sup>1768</sup> The MOE objective which seeks to stimulate "consciousness and reducing the Entity's carbon footprint" was achieved by means of restraining emissions to 30% from the initial baseline of 41,5%.<sup>1769</sup> Emissions in the City emanate not only from Metrobus but include other energy generating entities like City Power. As mentioned previously, City Power is required to create a

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<sup>1761</sup> JCPZ *Annual Report 2017/18* 74.

<sup>1762</sup> JCPZ *Annual Report 2017/18* 74.

<sup>1763</sup> JCPZ *Annual Report 2017/18* 84.

<sup>1764</sup> JCPZ *Annual Report 2017/18* 84.

<sup>1765</sup> JCPZ *Annual Report 2017/18* 84.

<sup>1766</sup> Johannesburg Metrobus *2018/19 First Quarter Performance Assessment Report* 41.

<sup>1767</sup> Johannesburg Metrobus *2018/19 First Quarter Performance Assessment Report* 41.

<sup>1768</sup> Johannesburg Metrobus *2018/19 First Quarter Performance Assessment Report* 65.

<sup>1769</sup> Johannesburg Metrobus *2018/19 First Quarter Performance Assessment Report* 65.

sustainable energy mix to reduce the production of GHG. In this regard the AR of the Power Utility reported the achievement of its accountability outcome or priority with an offsetting of 28 334.7 tons of CO<sub>2</sub> GHG emissions for the year,<sup>1770</sup> the same being projected against the annual target of 24205, 7 tons of CO<sub>2</sub> offset in GHG emissions as per the performance scorecard.<sup>1771</sup>

The City Power Integrated AR 2018/19 represents accountable local environmental management from sustainable practice and environmental development perspectives. In this regard the entity submitted that GHG emission targets were exceeded and that the replacement of high-pressure sodium lights with LED lights was ongoing.<sup>1772</sup> Probable environmental liability issues were also recorded, with oil spillages due to a fire recorded at the Eikenhof sub-station. The City Power AR confirmed the necessary mitigating action with the cleaning of spillages and wetlands rehabilitation, and the Gauteng Department of Agriculture and Rural Development (hereafter GDARD) was also informed of the incident.<sup>1773</sup> Other related environmental compliance issues will be addressed under the legal compliance mechanisms of the CoJ as mechanisms to ensure environmental accountability.<sup>1774</sup>

#### *5.2.4 Performance management system*

Performance indicators were also developed in observance of the GDS 2040 Outcome and mayoral strategic priority thereto. The CoJ performance management systems include a high-level Service Delivery Budget Implementation Plan, more detailed departmental action plans and MOEs' business plans. The three different performance management systems will consequently be discussed.

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<sup>1770</sup> City Power *2018/19 Integrated Annual Report* 112.

<sup>1771</sup> City Power *2018/19 Integrated Annual Report* 115.

<sup>1772</sup> City Power *2018/19 Integrated Annual Report* 89.

<sup>1773</sup> City Power *2018/19 Integrated Annual Report* 89.

<sup>1774</sup> See para 5.3.9 in Chapter 5 for a discussion in relation to environmental compliance mechanisms as configured under accountability measures involving the electorate in the CoJ.

#### 5.2.4.1 Service Delivery Budget Implementation Plan

Although the IDP of the City is considered to be the Municipality's Plan of Action, the CoJ SDBIP<sup>1775</sup> creates a link between planned activities and the actual assessment as to the implementation of the IDP.<sup>1776</sup> Important to the SDBIPs are the two stages associated therewith, namely implementation and monitoring. KPI's are developed in observance of the necessary baseline and a projected target associated with the KPI, after which they are finally apportioned to quarterly targets to allow for a breakdown of the annual achievement of the original KPI. During the monitoring phase, importance also needs to be attached to the aspect of a funded mandate. A SDBIP has no legal standing or projection without the necessary budget attached to it.

Examples of CoJ SDBIPs used to project the attainment of environmental governance targets were captured in the CoJ 2019/2020 SDBIP. Based on the requirement of a funded mandate, in the CoJ 2019/2020 financial year the City projected the collection of about R57.5 billion, which excluded capital grants and internal transfers.<sup>1777</sup> About 24.9% of the expected revenue would come from environment-related services, being refuse removal, water and sewage, billing 3% and 24.9% of income individually.<sup>1778</sup> Further hereto the City projected R8.2 billion from a capital budget perspective for the 2019/2020 financial year, which funding would include loans, cash surpluses, public contributions and grants.<sup>1779</sup> Notwithstanding the clear mayoral priorities, environmental KPI's are infrequent in the CoJ 2019/2020 SDBIP. Although clear priorities were stated under the GDS 2040 and CoJ IDP, more environment-centered KPI's were necessary to allow the GDS and IDP outcomes to translate into actual grassroots implementation and environmental accountability.

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<sup>1775</sup> See para 4.2.4 in Chapter 4 for a discussion in relation to performance management systems which include SDBIPS as configured under internal mandatory structures and mechanisms for accountability.

<sup>1776</sup> National Treasury *MFMA Circular No 13 of 2005*.

<sup>1777</sup> CoJ *2019/20 SDBIP* 12.

<sup>1778</sup> CoJ *2019/20 SDBIP* 12.

<sup>1779</sup> CoJ *2019/20 SDBIP* 12.



In the CoJ 2019/2020 SDBIP, limited emphasis was placed on real environmental outcomes, and only KPI's number 6, 7, 9<sup>1780</sup> and 36<sup>1781</sup> had material projected environmental outcomes. Other probable environmental outcomes under collaborative departmental and agency operations include KPI's under numbers 18 and 24, which had limited projected environmental outcomes.<sup>1782</sup>

Under KPI's number 6 and 9, the 2019/2020 target was the provision of access to basic water to 10933 households and access to basic sanitation to 4285 households in informal settlements; of which the lead entity hereto was Johannesburg Water.<sup>1783</sup> It was also projected that 100% of all City-recognised informal settlements would be provided with integrated waste management services.<sup>1784</sup> The only environmental outcome under Mayoral Priority Number 9 that referred to preserving our resources for future generations mandated that 15% of waste be diverted from landfill sites in terms of KPI number 36.<sup>1785</sup> Hereto the lead department was the EISD, which provides for sustained modes of disposal such as recycling and generating energy from waste initiatives. Notwithstanding the imperfection of the planning provisions to obtain the desired environmental outcomes, the municipal entities responsible for related environmental portfolios were also considered in order to evaluate their individual SDBIP's as accountability mechanisms in the CoJ. Examples included Pikitup's responsibility to provide integrated waste handling services in informal settlements<sup>1786</sup> and Johannesburg Water's responsibility to provide basic water and sanitation.<sup>1787</sup>

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<sup>1780</sup> CoJ 2019/20 SDBIP 24.

<sup>1781</sup> CoJ 2019/20 SDBIP 28.

<sup>1782</sup> CoJ 2019/20 SDBIP 26.

<sup>1783</sup> KPI Number 6 and 7 of the CoJ 2019/20 SDBIP.

<sup>1784</sup> KPI Number 9 of the CoJ 2019/20 SDBIP 24.

<sup>1785</sup> KPI Number 36 of the CoJ 2019/20 SDBIP 28.

<sup>1786</sup> CoJ 2019/20 SDBIP 42.

<sup>1787</sup> CoJ 2019/20 SDBIP 47.

#### 5.2.4.2 Departmental action plans

Departmental action plans and entities' business plans are also key for environmental accountability.<sup>1788</sup> In the CoJ accountability hierarchy, the GDS 2040 and the IDP objectives are linked with and cascaded down to other accountability instruments like departmental action plans. In addition, the business plans of the municipal entities are again aligned with the operation of the CoJ GDS 2040 and the IDP Priorities.

Other performance management instruments include the environmental sustainability strategy (hereafter ESS) of the EISD and the business plans of municipal entities as mechanisms to ensure environmental accountability. Based on the strategic importance of the EISD in relation to environmental governance in the CoJ, the EISD is also essential for environmental accountability in the CoJ. Besides the environmental design responsibilities inherited from the GDS 2040 and IDP based on the department's role as the primary environmental accountability actor in the CoJ, the EISD is also the custodian of the CoJ ESS.<sup>1789</sup> The environmental strategy seeks to provide a single environmental planning mechanism to integrate all environmental priorities and objectives across all city operations.<sup>1790</sup>

As an accountability mechanism ESS therefore institutionalises "environmental sustainability as a collective responsibility across all municipal mandates" and provides key environmental sustainability issues in terms of the institution.<sup>1791</sup> Key priorities and responses are further established in terms of the ESS to ensure the linkage with other accountability mechanisms such as the GDS 2040 and the CoJ IDP. It is further suggested that the ESS consequently links not only with other accountability mechanisms but also

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<sup>1788</sup> See para 4.2.6 in Chapter 4. CoJ MOE business plans are planning mechanisms and feed into the City's IDP for planning purposes. MOEs do not use IDPs as planning mechanisms, but use business plans to map planning and performance. The equivalent of IDPs on MOE level are business plan which are utilised in this study.

<sup>1789</sup> CoJ *Environmental Sustainability Strategy* 6.

<sup>1790</sup> CoJ *Environmental Sustainability Strategy* 6.

<sup>1791</sup> CoJ *Environmental Sustainability Strategy* 7.

fills purported gaps as defined in the GDS 2040 in addressing the city's environmental sustainability challenges.<sup>1792</sup>

The ESS defines "key environmental strategic indicators, strategic responses and responsibilities" as part of its role as a forward planning accountability mechanism.<sup>1793</sup> Similar to the SDBIP as a dual accountability mechanism, the ESS allows for the establishment of local environmental responsibilities and an action plan for evaluation purposes. Hence, the action plan will be discussed below in the light of its being an accountability mechanism to evaluate environmental performance under the performance mechanisms.

The ESS model augments LEG in that the CoJ strategy is not conceived only from a local environmental point of view but is comprehensive in that global environmental perspectives pertaining to urban sustainability are also integrated. Sources of information on the global environmental agenda include the New Urban Agenda, the 2030 Agenda for Sustainable Development, more specifically Goal 11, and the World Bank Environmental and Social Framework.<sup>1794</sup> As explained previously, the ESS as an accountability mechanism assigns environmental agenda responsibilities by means of environmental sustainability issues with the aim of creating a sustainable city.<sup>1795</sup> The ESS as an accountability mechanism also targets interventions to consequently achieve the Environmental Sustainable Issues (hereafter ESIs).

Targeted interventions as configured under the various environmental sustainability issues are portfolio based. In terms of key planned responsibilities exact portfolio-related outcomes are set. The ESI's are arranged under climate change, solid waste, open space planning, water-linked outcomes, biodiversity and finally stakeholder environmental accountability-orientated outcomes. The responsibilities of the accountability mechanism are directly linked to portfolio-related objectives. Based on the CoJ ESS from an

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<sup>1792</sup> CoJ *Environmental Sustainability Strategy* 8.

<sup>1793</sup> CoJ *Environmental Sustainability Strategy* 8.

<sup>1794</sup> CoJ *Environmental Sustainability Strategy* 11.

<sup>1795</sup> CoJ *Environmental Sustainability Strategy* 20.

environmental accountability perspective, it is therefore suggested that every ESI represents an environmental accountability driver and every related objective represents an ESS responsibility. Finally, the desired state of the ESS is based on the desired accountability outcome as configured in the action plan.

An example hereof is to be found under ESI Number 2, which requires the reduction of the CoJ GHG's and an increase of the City's adaptive capacity.<sup>1796</sup> The desired state of accountability in this instance will relate to being a carbon neutral and resilient city. Another responsibility under waste management is linked to ESI Number 3.<sup>1797</sup> Responsibilities under the aforementioned category of the accountability mechanism include the reduction of landfill waste, increased recycling, addressing compliance and taking action against polluters.<sup>1798</sup>

Evident in the ESS is the importance of the accountability mechanism to link and bridge the gaps between various departmental and administrative structures in the CoJ. Further to the ESS filling the gaps in environmental governance across different sectors in the CoJ, the municipal entities as independent legal personae are accountable to the CoJ as shareholders.

#### 5.2.4.3 Municipal-owned entities' business plans

The different business plans of the municipal entities consequently serve as their accountability mechanisms from a planning perspective.<sup>1799</sup> Business plans<sup>1800</sup> are accountability mechanisms for municipal entities, regulating their own internal conduct and behaviour in order to cause the shareholder to attain accountability from an environmental law perspective. Examples hereof include the various business plans originating from the various municipal entities. From an environmental planning

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<sup>1796</sup> CoJ *Environmental Sustainability Strategy* 24.

<sup>1797</sup> CoJ *Environmental Sustainability Strategy* 25.

<sup>1798</sup> CoJ *Environmental Sustainability Strategy* 25.

<sup>1799</sup> See para 4.2.6 in Chapter 4. Just as integrated development plans are used in the context of planning mechanisms for municipalities, business plans are used as planning or rather accountability mechanisms in the context of MOEs.

<sup>1800</sup> See para 4.2.6 in Chapter 4.

perspective, municipal entities' business plans are aligned with the operation of the CoJ GDS 2040 and IDP Priority Number 9. Hence, the CoJ municipal entities' business plans will be discussed in the next section, with an emphasis on the environmental planning aspect thereof.

The Pikitup business plan describes five key objectives of which two are environmental in nature. Goal 1 emphasises a shift to integrated waste management and waste minimisation and Goal 3 pursues the effective delivery of waste services.<sup>1801</sup>

Goal 1 aims to ensure that landfill sites are minimised and that appropriate infrastructure is available to dispose of waste in a sustainable manner.<sup>1802</sup> Breaking down the matter of disposing of waste in a sustainable manner, the business plan requires the identification of alternative energy sources to reduce GHG emissions, grow green economic activities, and establish a shift in the CoJ economies to cleaner industries.<sup>1803</sup> The business plan hence seeks to operationalise environmental objectives as contained in the GDS 2040 and IDP through specific planning.

KPAs in terms of the projected interventions to Goal 1 include recyclables, green waste, food waste, builders' rubble, waste technologies and integrated waste management facilities.<sup>1804</sup> Specific green waste targets include the diversion of garden waste and building rubble from landfill sites, recycling from domestic waste and reducing illegal dumping.<sup>1805</sup> Other targets include the conversion and establishment of integrated waste management facilities and separation-at-source strategies.<sup>1806</sup>

Based on the Pikitup business plan, the separation-at-source strategy is founded on the overall adaptation of stakeholder behaviour, the reduction of waste to landfills, and stimulating a local recycling economy.<sup>1807</sup> The plan for the 2018/2019 annual cycle was

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<sup>1801</sup> Pikitup *2018/19 Business Plan* 12.

<sup>1802</sup> Pikitup *2018/19 Business Plan* 21.

<sup>1803</sup> Pikitup *2018/19 Business Plan* 21.

<sup>1804</sup> Pikitup *2018/19 Business Plan* 23.

<sup>1805</sup> Pikitup *2018/19 Business Plan* 23.

<sup>1806</sup> Pikitup *2018/19 Business Plan* 26.

<sup>1807</sup> Pikitup *2018/19 Business Plan* 26.

120 tons of dry recyclables and the plan for the 2019/2020 annual cycle was 55 tons of dry recyclables based on current resources.<sup>1808</sup> Lastly, the Pikitup business plan is also used to plan and monitor efficiency, as described in the Pikitup Strategic Goal Number 3, which seeks to develop an integrated ward-based operational plan.<sup>1809</sup>

Like other municipal entities in the City, Johannesburg Water's business plan is also strongly aligned to GDS 2040, the environmental priorities contained in the IDP, and the SDGs. The business plan contains seven of the 17 SDGs, amongst which are Goal 6 (clear water and sanitation - SDG 11 in terms of sustainable communities and cities) and Goal 13 (climate change).<sup>1810</sup>

The Johannesburg Water (SOC) Ltd Business Plan identifies key environmental priorities, which emphasises the importance of the business plan as an accountability mechanism. It details two objectives in the environmental planning context. Goal 1 is to obtain the necessary infrastructure delivery<sup>1811</sup> and Goal 2 is to achieve the "delivery of water and sanitation services of good quality that is accessible, reliable and efficient in an environmentally responsible/sustainable way".<sup>1812</sup>

Service delivery in terms of water and wastewater infrastructure contributes to a sustainable environment in the CoJ. Programmes contributing to this are the Infrastructure Investment Plan, the Wastewater Treatment Works Programme, the Pipe Replacement Programme, Storage Infrastructure, Economic Development Nodes, the Inner-City Programme, and finally Repairs and Maintenance. These are key accountability drivers in the Johannesburg Water (SOC) Ltd Business Plan. It follows that delayed planning or implementation of infrastructure projects can severely influence environmental outcomes in terms of environmental spillages, etc.

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<sup>1808</sup> Pikitup *2018/19 Business Plan* 26.

<sup>1809</sup> Pikitup *2018/19 Business Plan* 29.

<sup>1810</sup> Johannesburg Water *Business Plan 2018/19* 50.

<sup>1811</sup> Strategic Goal 1 of the Johannesburg Water *Business Plan 2018/19* 14.

<sup>1812</sup> Strategic Goal 2 of the Johannesburg Water *Business Plan 2018/19* 14.

Consequently, the business plan accommodates planning for both potable water infrastructure and waste water treatment infrastructure. An example is the planning of the Lanseria (50MI) Waste Water Treatment Works (hereafter WWTW), which is expected to expand on the current infrastructure capacity in order to accommodate the CoJ's development needs.<sup>1813</sup> The Lanseria project will ease pressure on the Northern WWTW, will in future mitigate environmental spillages, and will create capacity for sustainable development.<sup>1814</sup> Other key planned sanitation programmes highlighted by the business plan as an accountability mechanism include the replacement of sewer pipes in regions experiencing frequent blockages. The plan anticipates the replacement of 53 km pipes per annum.<sup>1815</sup>

Also important to the Johannesburg Water (SOC) Ltd business plan as an accountability mechanism is the planning responsibility highlighted in Goal 2 of the Johannesburg Water Objectives: the "delivery of water and sanitation services of good quality that is accessible, reliable and efficient in an environmentally responsible/sustainable way".<sup>1816</sup> This goal aligns with Mayoral Priority Number 9 - to preserve resources for future generations.

As incorporated in the high-level objectives of the IDP, the business plan provides for the provision of basic services in relation to water and sanitation in informal settlements. The planning schedule projects that by the end of the 2020/2021 financial year the municipal entity will provide 183 895 households with access to water and 45,77% of households with basic sanitation.<sup>1817</sup> Citywide, the target of households with access to sanitation by the end of 2019/2020 is projected to be 93,25% of households having access to basic sanitation.<sup>1818</sup>

Also included in the troika of basic service entities is the City Power (SOC) Ltd entity. Although City Power (SOC) Ltd is not a core functionary of environmental governance,

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<sup>1813</sup> Johannesburg Water *Business Plan 2018/19* 17.

<sup>1814</sup> Johannesburg Water *Business Plan 2018/19* 17.

<sup>1815</sup> Johannesburg Water *Business Plan 2018/19* 20.

<sup>1816</sup> Johannesburg Water *Business Plan 2018/19* 27.

<sup>1817</sup> Johannesburg Water *Business Plan 2018/19* 27.

<sup>1818</sup> Johannesburg Water *Business Plan 2018/19* 29.

energy generation is significant in terms of global environmental well-being, and the municipal entity's business plans are therefore used as environmental accountability mechanisms. In the City Power Johannesburg (SOC) Ltd 2019/2020 business plan, environmental issues are highlighted as external features that create external risks to the municipal entity.<sup>1819</sup> These risks are associated with the environmental pressure to reduce the City's energy footprint, which is currently worsened by the intensive use of coal-fired operations, the pressure to reduce carbon emissions based on the risk of global warming, and the pressure to increase the use of renewable energy.<sup>1820</sup> Based on the entity's sustainability obligations as projected in the CoJ GDS and IDP, City Power's strategic plan requires the entity to address environmental pressure and emission concerns through the reduction of the generation and use of dirty energy.<sup>1821</sup> CoJ has one coal-fired power station, Kelvin Power Station, which currently actively contributes to the City's emissions.<sup>1822</sup> As it stands, City Power's 20-year Power Purchase Agreement will expire in 2021, which gives the City time in which to reconsider its use of the Kelvin Power Station.<sup>1823</sup> City Power's strategic plans contain the use of a viable energy mix consisting of renewable energy to mitigate emissions and environmental damage.<sup>1824</sup> Also essential to the mitigation of environmental degradation, under KPI Number 42 the City Power business plan envisages offsetting 41355.5 tons of CO<sup>2</sup> in GHG emissions.<sup>1825</sup>

Parallel to City Power's business plan prioritising the mitigation of emissions in the agency, Metrobus (SOC) Ltd as part of its business plan also prioritises emission measures in its operations. As an accountability mechanism, the Metrobus (SOC) Ltd business plan accommodates environmental issues like placing more focus on a green economy, and a GHG emissions programme.<sup>1826</sup> Similar to the other entities, the Metrobus accountability mechanism aligns with strategic environmental and sustainability priorities configured in

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<sup>1819</sup> City Power *Business Plan (July 2019 – June 2020)* 19.

<sup>1820</sup> City Power *Business Plan (July 2019 – June 2020)* 19.

<sup>1821</sup> City Power *Business Plan (July 2019 – June 2020)* 20.

<sup>1822</sup> City Power *Business Plan (July 2019 – June 2020)* 67.

<sup>1823</sup> City Power *Business Plan (July 2019 – June 2020)* 67.

<sup>1824</sup> City Power *Business Plan (July 2019 – June 2020)* 20.

<sup>1825</sup> City Power *Business Plan (July 2019 – June 2020)* 93.

<sup>1826</sup> Johannesburg Metrobus *2018/19 Business Plan* 15.



the NDP and the GDS outcomes.<sup>1827</sup> Metrobus consequently prioritises environmental consciousness and a decreased carbon footprint through its carbon emissions programme, which endorses GDS Outcome number 2 and the IDP Priority Number 9.<sup>1828</sup> Identified under the risk assessment contained in the business plan, Metrobus has recognised a strategic objective to "attain sustainability and affordability of green technologies", which supports the City's green agenda.<sup>1829</sup> Evidence hereto is the City's initiative to replace its older fleet with cleaner buses using alternative fuel. This is projected to reduce CO<sup>2</sup> emissions by 1.6 million tons by 2020.<sup>1830</sup>

A supplementary KPI from another entity also aligned to prevent environmental impairment is KPI Number 61 of the JRA, which requires remedial actions pertaining to GDARD non-compliance matters, such as an environmental impact assessment, etc.<sup>1831</sup> As in the previous entities' business plans, the JRA business plan is properly aligned with the IDP. More specifically, Mayoral Priority Number 9 anticipates the implementation of sustainable work processes.<sup>1832</sup> An example hereof is the adoption of environmental authorisation as one of the Agency's core processes and part of its planning support services.<sup>1833</sup> Unlike other MOE's, the Johannesburg Property Company (SOC) Ltd does not specifically endorse environmental outcomes as per the GDS and the IDP of the City. Isolated identification of environmental issues is found under the Johannesburg Property Company PESTLE assessment, but no further environmental objectives are described to achieve the GDS and IDP outcomes listed in the business plan.<sup>1834</sup>

Like other MOEs' accountability mechanisms, the business plan of the JCPZ is also aligned with sustainable practices as prescribed by its solitary shareholder. Informed by GDS Outcome Number 2, JCPZ is mandated to provide "quality horticultural, conservation

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<sup>1827</sup> Johannesburg Metrobus *2018/19 Business Plan* 15.

<sup>1828</sup> Johannesburg Metrobus *2018/19 Business Plan* 30.

<sup>1829</sup> Johannesburg Metrobus *2018/19 Business Plan* 50.

<sup>1830</sup> Alslund-Lanthen *Cities100* 141.

<sup>1831</sup> JRA *Business Plan 2018/19* 46.

<sup>1832</sup> JRA *Business Plan 2018/19* 9.

<sup>1833</sup> JRA *Business Plan 2018/19* 27.

<sup>1834</sup> City of Joburg Property Company *2018/19 Business Plan* 8.

services and environmental practices".<sup>1835</sup> Assumed as an accountability mechanism, the business plan anticipates a proper analysis of its environmental mandate to describe the planned priorities annually.

Consequently, the accountability mechanism identifies the environmental risks facing the JCPZ and provides the necessary mitigation actions planned to avert adverse environmental consequences thereof. The environmental issues identified in the plan are climate change mitigation measures, environmental degradation, the reduction of waste, and environmental education.<sup>1836</sup> Configured under Priority Number 9 of the CoJ IDP, the JCPZ business plan is informed by scheduled or planned strategic objectives, namely environmental compliance, biodiversity, conservation, climate change mitigation and resilience.<sup>1837</sup> KPI's aligned to achieve environmental IDP Priority Number 9 include compliance with horticulture and arboriculture maintenance cycles, compliance with biodiversity and ecosystem management requirements, and the development of ecotourism plans for JCPZ.

In past years, JCPZ business plans captured strategic objectives such as the protection of ecosystems and diversity, which led to KPI's which addressed the rehabilitation of wetlands as part of the CoJ's environmental mandate.<sup>1838</sup> The Wetlands Audit projects the rehabilitation and the conservation of wetlands, whilst maintaining a failing infrastructure to prevent sewage fallouts.<sup>1839</sup>

Presently the JCPZ business plan is also utilised to coordinate horticultural and conservation services in the CoJ. In this regard the development of a master plan is currently underway for the provision of horticultural and conservation services.<sup>1840</sup> The KPI's and outcomes attached hereto are the creation of a safe, clean and green environment at CoJ service delivery centres, the maintenance of municipal open spaces,

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<sup>1835</sup> JCPZ *Business Plan for the Financial Year 2018/19* 17.

<sup>1836</sup> JCPZ *Business Plan for the Financial Year 2018/19* 13.

<sup>1837</sup> JCPZ *Business Plan for the Financial Year 2018/19* 20.

<sup>1838</sup> JCPZ *Business Plan for the Financial Year 2018/19* 30.

<sup>1839</sup> CoJ *Biodiversity Strategy and Action Plan* 9.

<sup>1840</sup> JCPZ *Business Plan for the Financial Year 2018/19* 32.

and "ensuring an environmentally sustainable, liveable, socially inclusive and equitable city".<sup>1841</sup>

The concern with environmental accountability also extends to other entities like the JDA. Examples hereof include the inner-city revitalisation project, one of the projects of which envisages a synergy between the CoJ as the shareholder of the JCPZ and citizens as stakeholders in the inner-city project.<sup>1842</sup> In the inner-city project the JDA has shifted its objective from the triple bottom line outcomes, namely economic, social and environmental outcomes, to one which places more emphasis on a "resilient, sustainable, liveable urban area".<sup>1843</sup> Although it should be the catalyst of sustainable development in the CoJ, the JDA subscribes only to the GDS 2040, the CoJ IDP through its Mayoral Priorities,<sup>1844</sup> and the CoJ SDF 2040, but fails to realise its business plan as an accountability mechanism, and consequently fails to pursue accountability from a CoJ LEG perspective. Notwithstanding the same, it is anticipated that the CoJ SDF will remedy the insufficient environmental insight and the accountability lacked by the JDA business plan.

Notwithstanding the important performance management role of both the CoJ AR and the MOE's ARs, the concluding accountability mechanism relates to the CoJ SDBIP mechanisms used to monitor performance and evaluate service delivery outcomes.<sup>1845</sup> Although previously discussed as a planning instrument in terms of environmental accountability, the SDBIP can also be utilised in oversight of environmental outcomes achieved.<sup>1846</sup> Hence, the CoJ SDBIP, as an accountability mechanism,<sup>1847</sup> integrates the executive, council and the administration in oversight of the accountability of the local environmental management of the CoJ.<sup>1848</sup> The CoJ SDBIP's are utilised during midyear

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<sup>1841</sup> JCPZ *Business Plan for the Financial Year 2018/19* 32.

<sup>1842</sup> JCPZ *Business Plan for the Financial Year 2018/19* 33.

<sup>1843</sup> JDA *2019/20 Business Plan Fourth Submission* 8.

<sup>1844</sup> JDA *2019/20 Business Plan Fourth Submission* 10.

<sup>1845</sup> CoJ *2019/20 SDBIP* 6.

<sup>1846</sup> See para 4.2.4 in Chapter 4 for a discussion in relation to performance management systems which include SDBIPS as configured under internal mandatory structures and mechanisms for accountability.

<sup>1847</sup> See para 4.2.4 in Chapter 4 for a discussion in relation to performance management systems which include SDBIPS as configured under internal mandatory structures and mechanisms for accountability.

<sup>1848</sup> CoJ *2019/20 SDBIP* 6.

and yearend intervals. Similarly, MOE's also consider their performance twice annually in terms of SDBIP's captured in their midyear review of MOE business plans and final SDBIP reports. Another accountability mechanism utilised by the CoJ is the audit mechanism. Similar to the SDBIP mechanisms, the audit mechanism also advises the CoJ Council, MAYCO, Accounting Officer and Senior Management on governance, risk and internal control.<sup>1849</sup> Oversight in relation to the audit function consequently includes environmental accountability in the City.

### *5.2.5 Materiality frameworks and compliance management systems*

Section 24 of the Constitution is referred to in the City's *Environmental Sustainability Strategy and Action Plan for the City of Johannesburg* as the pillar to ensure that the inhabitants of the CoJ have access to an environment that is not harmful to their health and wellbeing.<sup>1850</sup> Subordinate to this constitutional right there is specific national legislation configured as an accountability mechanism in the form of a CoJ compliance framework or a compliance management system.<sup>1851</sup> The materiality framework or compliance management system will *inter alia* include the *Systems Act*, the environmental suite of national environmental legislation,<sup>1852</sup> the NWA, the WSA, the NHA and the *Health Act 63 of 1973*.<sup>1853</sup> Also apportioned to the different MOE's in the CoJ is the suite of environmental legislation, as mentioned previously.<sup>1854</sup>

Compliance by the CoJ and its MOE's is regulated by internal compliance registers. These compliance registers are designed to report on legal obligations associated with specific departments and entities. The registers do not only include policies, but report on compliance issues under provincial and national legislation. Environmental compliance matters are clustered to fit the environmental governance design of the CoJ. Hence, the

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<sup>1849</sup> CoJ *Integrated Annual Report 2018/2019* 370.

<sup>1850</sup> CoJ *Integrated Environmental Management Policy* 12. Also see CoJ *Environmental Sustainability Strategy* 31.

<sup>1851</sup> See para 4.2.5 in Chapter 4 - *Materiality frameworks and compliance management systems as accountability mechanism in terms of internal accountability*.

<sup>1852</sup> NEMA.

<sup>1853</sup> CoJ *Integrated Environmental Management Policy* 12-14.

<sup>1854</sup> See para 5.1.2 Municipal entities in Chapter 5.

articulation of the various environmental policies is framed in relation to those prevalent from a CoJ and related MOE context.

The CoJ has numerous policies and by-laws<sup>1855</sup> configured as mechanisms to help ensure environmental accountability. The CoJ Integrated Environmental Management Policy provides an environmental framework for the creation of sectoral policies, programmes and regulatory mechanisms.<sup>1856</sup> Identified as guiding environmental management policy, the Integrated Environmental Management Policy Framework adopts key environmental principles derived from the NEMA, for example the "cradle to grave principle", "accountability" and the "polluter pays principle", the "precautionary principle" and the "duty of care principle", to mention but a few.<sup>1857</sup> The Integrated Environmental Management Policy Framework *inter alia* envisages the following sectoral environmental management determinations: air quality management, energy management, waste management, water services and resource conservation, sanitation, land and open space management, biodiversity management and development planning.<sup>1858</sup> The CoJ annually reports on compliance in terms of a plethora of compliance mechanisms utilised. These mechanisms will be discussed from an internal compliance perspective to understand the ambit of environmental compliance by the City.

Planning and land-use policies and instruments relevant to LEG include the CoJ Catchment Management Policy (2008), the Wetland Audit Layers 1 and 2, which is part of the City's GIS System, the Sustainable Urban Drainage System, the Johannesburg Metropolitan Open Space System, and finally the CoJ Biodiversity Sector Plan.<sup>1859</sup> Other important policies and frameworks in relation to open space planning include: the Open Space Management Framework 2008, the Johannesburg Metropolitan Open Space Strategy (hereafter JMOSS) Management Strategy, the JMOSS I Report, the JMOSS II Policy, the

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<sup>1855</sup> See para 4.3.9 in Chapter 4 for a discussion on law enforcement as an accountability mechanism under Accountability towards the local electorate. Also see para 5.3.9 in Chapter 5 for a detailed discussion of by-laws as part of accountability mechanisms involving the electorate in the City of Johannesburg.

<sup>1856</sup> CoJ *Integrated Environmental Management Policy* 15.

<sup>1857</sup> CoJ *Integrated Environmental Management Policy* 16-17.

<sup>1858</sup> CoJ *Integrated Environmental Management Policy* 19.

<sup>1859</sup> CoJ *Spatial Development Framework 2040* 91.

JMOSS Management Strategy, the Open Space Plan for Lanseria, and the Regional Attenuation Feasibility Study.<sup>1860</sup> Other related land-use policies include the Green Servitudes Tool, the Green Infrastructure Strategy 2018, the Stormwater Design Manual and the Stormwater Management By-laws.<sup>1861</sup> Other policies and reports which are aligned to address biodiversity include the Catchment Policy, the Wetlands Audit, the Gauteng Ridges Policy and the State of the Environment Report for the CoJ.<sup>1862</sup>

In the CoJ energy demand domain, the compliance mechanisms include a medley of energy demand policies, climate change and air quality management policies, and related by-laws. Departmental- and entity-related custodianship of the mechanisms is facilitated by the EISD and City Power (SOC) Ltd. Closely associated with the mitigation of emissions in the energy demand sector are compliance directives issued under the auspices of City Power (SOC) Ltd, which include the Design Guidelines for Energy Efficient Buildings in the CoJ, the CoJ Energy and Climate Change Strategy and Action Plan 2012, the CoJ Energy plan, 2015 and the CoJ Electricity By-laws, which are currently under review.<sup>1863</sup>

Climate change and air quality management policies under the auspices of the EISD include: the CoJ Climate Change Adaptation Plan 2009 and the Air Quality Management Plan 2003, which is under review; also the Climate Adaptation Framework 2018, the Climate Change Strategic Framework (hereafter the CCSF) 2015, the Air Quality Monitoring Norms and Standards Manual, and finally the Air Pollution Control By-laws, 2011.<sup>1864</sup>

The waste sector in the CoJ is regulated by various internal policies and strategic directives which include the Solid Waste by-law,<sup>1865</sup> the CoJ Integrated Waste Management Plan,

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<sup>1860</sup> CoJ *Environmental Sustainability Strategy* 36. Also see CoJ *Biodiversity Strategy and Action Plan* 11.

<sup>1861</sup> CoJ *Environmental Sustainability Strategy* 36. Also see para 5.4.9 below - *Law enforcement and environmental compliance* further to a detailed discussion of by-laws as among the accountability structures and measures involving the electorate of the City of Johannesburg.

<sup>1862</sup> CoJ *Biodiversity Strategy and Action Plan* 10.

<sup>1863</sup> CoJ *Environmental Sustainability Strategy* 36.

<sup>1864</sup> See para 5.3.9 in Chapter 5 for a detailed discussion of by-laws among the accountability structures and measures involving the electorate of the City of Johannesburg.

<sup>1865</sup> Pikitup *Integrated Annual Report 2018/19* 46.

the CoJ Integrated Waste Management Guide for Events, the CoJ Integrated Waste Management Policy, and the CoJ Waste Management By-law 2013, which is currently under review.<sup>1866</sup> As the custodian of the waste sector in the CoJ, Pikitup (SOC) Ltd reported a 6% overall reduction in compliance pertaining to its overall compliance level, which is projected at 70%,<sup>1867</sup> the aforesaid excluding current anticipated CoJ strategies like the draft Illegal Dumping Strategy and draft Strategy on Waste Pickers.<sup>1868</sup>

The blue stream of internal compliance mechanisms in the CoJ is deconstructed into two streams, namely water resource management and water services. Water resource management anticipates progressive water resource management compliance initiatives and *inter alia* relates to policies and directives which include the Klipriver/Klipspruit ecological and hydrological profile, the CoJ Wetland Audit Report, the CoJ Catchment Management Policy 2008, the Klipspruit Environmental Management Framework and the Alexandra Environmental Management Framework.<sup>1869</sup> Incumbent on the depth of compliance mechanisms in the CoJ, national and provincial legislation is also an integral part of environmental compliance in the City.

Beyond the many pieces of national and provincial legislation, the CoJ compliance management systems also include important regulatory instruments such as international standards to ensure compliance pertaining to broadly approved standards. These international standards are often representative of environmental management standards and address technical accountabilities linked to management and organisational structures.

The CoJ utilises international standards to regulate local environmental responsibilities and consequent environmental conduct.<sup>1870</sup> The international regulatory standards

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<sup>1866</sup> CoJ *Environmental Sustainability Strategy* 36.

<sup>1867</sup> Pikitup *Integrated Annual Report 2018/19* 42.

<sup>1868</sup> CoJ *Environmental Sustainability Strategy* 36.

<sup>1869</sup> CoJ *Environmental Sustainability Strategy* 36.

<sup>1870</sup> See para 4.2.5 in Chapter 4 for a discussion of international standards as accountability mechanism under Materiality frameworks and compliance management systems as a mechanism to ensure environmental accountability.

mechanisms therefore also act as accountability mechanisms to obtain accountability in the context of the environment in the CoJ. Part of the City's target to achieve good environmental governance coincides with the establishment of an Environmental Management System aligned with ISO: 14001 and further envisions 100% compliance pertaining to the future meeting of the aforesaid standard.<sup>1871</sup> Suggestive hereto is that the achievement of the related ISO: 14001 standard not only relates to overall environmental objectives as the key environmental outcome, but also anticipates the use of the ISO: 14001 International Standard as an accountability mechanism in terms of environmental compliance monitoring.<sup>1872</sup>

Emanating from the main accountability mechanism are different international standards associated with the various MOEs in the CoJ. City Power (SOC) Ltd is also an ISO: 14001 2015 certified entity and complies with the necessary environmental management principles.<sup>1873</sup> Contained in the City Power AR 2018/2019 it is suggested that the accountability system, through the various principles associated therewith, contributes to regularising non-compliances like network encroachments and the identification of the required environmental authorisations.<sup>1874</sup>

Another example of the use of international environmental standards is seen in the JCPZ Entity, with the MOE also being observant of the ISO: 14001 Environmental Management System, which assists the entity in compliance matters.<sup>1875</sup> Environmental Management System internal audits and environmental legal compliance audits are consequently completed akin to complying with the EMS requirements.<sup>1876</sup>

Johannesburg Water as an MOE is also regulated by international standards which include SANS 241<sup>1877</sup> in relation to drinking water, ISO: 31000<sup>1878</sup> and more generic standards

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<sup>1871</sup> CoJ *Integrated Environmental Management Policy* 20.

<sup>1872</sup> CoJ *Integrated Environmental Management Policy* 37.

<sup>1873</sup> City Power *2018/19 Integrated Annual Report* 90.

<sup>1874</sup> City Power *2018/19 Integrated Annual Report* 90.

<sup>1875</sup> JCPZ *Integrated Report 2018/19* 68.

<sup>1876</sup> JCPZ *Integrated Report 2018/19* 68.

<sup>1877</sup> Johannesburg Water *Integrated Annual Report 2018/19* 48.

<sup>1878</sup> Johannesburg Water *Integrated Annual Report 2018/19* 39.



like the standards of Generally Recognised Accounting Practice (hereafter GRAP).<sup>1879</sup> It needs to be said, however, that although no further reference will be made to GRAP standards, the associated use thereof is common in the financial practices of both municipalities and MOEs. Importantly, the CoJ regulates water, industrial effluent discharge and aspects pertaining to sewerage<sup>1880</sup> in terms of the specific international standards which *inter alia* include those of the South African Bureau of Standards.<sup>1881</sup>

Other traces of international standards applied in the CoJ entities are seen in the JRA, in that the ISO: 9001 programme is currently utilised as a compliance mechanism in this MOE.<sup>1882</sup> Although no environmental compliance standards information can be found specific to the JRA, its environmental policy does indicate that it is currently pursuing ISO 14001 Accreditation.<sup>1883</sup> Based on the remainder of the sectoral municipally owned entities in terms of the JDA (SOC) Ltd and Metrobus (SOC) Ltd, no suggestions of the use of international standards to achieve environmental accountability are evident. It is apparent in the discussion contained in the entire section of this report that the CoJ uses an array of compliance management systems to achieve accountability in the internal dimension.

### *5.2.6 Integrated Development Plan<sup>1884</sup>*

An example of a medium-term planning mechanism is the IDP<sup>1885</sup> of the CoJ, which is important to accountability in LEG. Evidence of the prioritisation in Outcome 3 of sustainability in relation to the CoJ IDP is found in the categorisation of the mayoral priorities into IDP clusters.<sup>1886</sup> Strategic Priority 9 drives the environmental outcomes of the City in terms of the IDP, which emphasises that the preservation of natural resources

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<sup>1879</sup> Johannesburg Water *Integrated Annual Report 2018/19* 117.

<sup>1880</sup> Section 78 of the CoJ *Water Services By-laws*, 2019.

<sup>1881</sup> Johannesburg Water *Integrated Annual Report 2018/19* 55.

<sup>1882</sup> JRA *Integrated Annual Report 2017/18* 44.

<sup>1883</sup> JRA *Environmental Management Policy*.

<sup>1884</sup> See para 4.2 in Chapter 4 in relation to internal municipal mechanisms and structures for internal accountability.

<sup>1885</sup> See para 4.2.6 in Chapter 4 - *Integrated development plans as among the internal mandatory structures and mechanisms for accountability - Internal accountability*.

<sup>1886</sup> CoJ *IDP 2019/20 Review* 32.

will foster growth, economic and social development.<sup>1887</sup> Hereto the CoJ priorities, more specifically Strategic Priority Number 9, embody the preservation and protection of the natural environment for the wellbeing of current and future generations,<sup>1888</sup> which allows for the implementation of environmental strategies including the ESS and the CCSF.<sup>1889</sup>

The CoJ IDP not only stimulates the linkage of intra-governmental CoJ accountability mechanisms of LEG as presented above, but also creates external positive links between provincial and national long-term planning mechanisms. It follows that local IDPs must feed into provincial and national development.<sup>1890</sup> An example hereof is the linkage of the CoJ IDP, the Gauteng Provincial Transformation, Modernisation and Re-industrialisation Planning Strategy (hereafter TMR) and the NDP.<sup>1891</sup> The linkage creates a formal association between the environmental sustainability objectives in Chapter 5 of the NDP, sustainable and social coherence as contained in the Gauteng TMR, and the CoJ IDP. The intergovernmental and stakeholder linkage further represents the dimensions of accountability as discussed in the previous chapters.

The IDP as an accountability mechanism also exhibits proper development planning in relation to performing proper accountability in terms of environmental law. The limited resources of the CoJ mean that more has to be done with less. For example, focussing on Priority 3.1 of the IDP, reference is made to the prevention of unplanned water interruptions, illegal dumping and the CoJ's crumbling infrastructure. Although Priority 3.1 is to improve service delivery, environmental outcomes are addressed in the sub-priority programmes thereto. The sub-priority programmes address water and sanitation, electricity, waste management and transport.<sup>1892</sup>

Programme 3.1.1 requires that expenditure be directed to repair and refurbish water and sanitation infrastructure. It is anticipated that improved water and sanitation

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<sup>1887</sup> CoJ *IDP 2019/20 Review* 35.

<sup>1888</sup> CoJ *IDP 2019/20 Review* 32.

<sup>1889</sup> CoJ *IDP 2019/20 Review* 43.

<sup>1890</sup> Section 24(1) of the *Systems Act*.

<sup>1891</sup> CoJ *IDP 2019/20 Review* 37.

<sup>1892</sup> CoJ *IDP 2019/20 Review* 73.

infrastructure will reduce sewer blockages, reduce the frequency of sewer spillages at waste water treatment plants, and reduce the loss of water.<sup>1893</sup> The sub-priority will contribute to sustainable practices and reduce the amount of environmental damage caused by waste water and sewer spillages. Parallel to the environmental agenda is social redress, which also needs to be achieved, in terms of which the City must provide bulk services to its forgotten residents in informal townships. Real outcomes can be achieved only through prioritising the provision of water and sanitation to the City's vulnerable communities.<sup>1894</sup>

Other challenges associated with sub-Priority Programme 3.1.2 include an aging electrical infrastructure which hinders the supply of sustainable energy by the City. As one of its electricity sub-priorities, the City anticipates the continued installation of solar water heaters, the use of alternative energy through inter-cluster partnerships, and the installation of rooftop photovoltaic and utility scale battery backups.<sup>1895</sup> Finally, the eradication of illegal dumping sites is prioritised under the Waste Management Priority Programme 3.1.3 and the replacement of metro buses with "green buses" to expand the City's sustainable metropolitan transportation system is captured under Priority Programme 3.1.4.<sup>1896</sup>

Predominantly environmentally orientated, the IDP expands on Priority 3.3, which projects the preservation of resources for future generations. The City views natural resources as important owing to their fragility, and acknowledges that they need to be used sparingly. In the context of the growth of the City's population, the City is responsible for the sustainable management of its natural resources and for preventing their diminution.<sup>1897</sup> It has therefore implemented its environmental priorities under two programmes.

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<sup>1893</sup> CoJ *IDP 2019/20 Review 72.*

<sup>1894</sup> CoJ *IDP 2019/20 Review 72.*

<sup>1895</sup> CoJ *IDP 2019/20 Review 73.*

<sup>1896</sup> CoJ *IDP 2019/20 Review 73.*

<sup>1897</sup> CoJ *IDP 2019/20 Review 75.*

Programme 3.3.1 focusses on environmental sustainability, and Programme 3.3.2 is known as "A Re Sebetseng" City Wide Cleaning Campaign.

Key drivers of the Environmental Sustainability Priority Programme 3.3.1 are protecting the natural environment, reducing resource consumption, minimising environmental pollution and reducing carbon emissions.<sup>1898</sup> The portfolios organised under the four drivers are as follows. Under "protecting the natural environment" is included the protection of "blue and green" resources based on their ecological integrity, including water bodies, biodiversity areas and open spaces.<sup>1899</sup> Under "reducing resource consumption", the focus is on reduced resource consumption, especially of water and energy. The third driver focusses on the mitigation of environmental pollution, specifically "air, water, soil, noise and light pollution", most particularly air, water and waste pollution.<sup>1900</sup> Finally, the "carbon emissions" driver focusses on activities associated with "transportation, industrial processes (such as wastewater works and incineration), energy and waste generation".

Based on the key drivers, the focal areas of the CoJ in relation to local environmental responsibility are climate change, integrated waste management, air quality, water resources, energy and water demand, biodiversity conservation and open space management.<sup>1901</sup> The desired environmental consequences in relation to the priority programmes are therefore based on the related key drivers associated with the individual focus areas. Notwithstanding the desired state of the programme being projected against GDS 2040, the current state of accountability will be assessed under the evaluation of key CoJ portfolios in the last section of this chapter.

The second programme under Priority 3.3 is identified under Programme 3.3.2, which is known as "A Re Sebetseng" City Wide Cleaning Campaign. The objective of the programme is to have CoJ communities take ownership of the City. The object is that CoJ,

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<sup>1898</sup> CoJ *IDP 2019/20 Review 75*.

<sup>1899</sup> CoJ *IDP 2019/20 Review 75*.

<sup>1900</sup> CoJ *IDP 2019/20 Review 75*.

<sup>1901</sup> CoJ *IDP 2019/20 Review 75*.

community stakeholders and business should jointly strive to keep the City clean.<sup>1902</sup> Primary to "A Re Sebetseng" City Wide Cleaning Campaign, the campaign serves to motivate residents to become environmentally oriented in the way they live and do business, by advocating against littering, illegal dumping and trashing open spaces.<sup>1903</sup> The campaign also seeks to promote a culture of recycling, reusing and reducing waste. Parallel to the City-Wide Cleaning Campaign, other health campaigns are also managed under the "A Re Sebetseng" schools and the "A Re Sebetseng" health programmes.<sup>1904</sup>

Another outcome that reinforces environmental governance is Outcome Number 4 of the IDP. Captured in the outcome is the requisite of "caring, safe and secure communities".<sup>1905</sup> Although not predominantly environmentally positioned, the outcome highlights the City's law enforcement mandates. Further to the enforcement obligations, the JMPD fulfils the City's law enforcement mandate. The JMPD ensures the environmental enforcement of statute and the CoJ's by-laws in terms of the preservation of public open spaces, initiatives to combat illegal dumping, and guarding against unsafe environmental practices.<sup>1906</sup> In addition, the JMPD not only enforces environmental outcomes, but also includes disaster management risk reduction from an environmental perspective.<sup>1907</sup>

The implementation of the outcome is captured in two strategies, namely the Joburg City Safety Strategy (hereafter JCSS) and the Disaster and Risk Management Strategy.<sup>1908</sup> Due to the increased occurrence of environmental anomalies such as changing weather conditions, the importance of disaster and risk management is emphasised in the City IDP. The risk management strategy is central where vulnerable communities live in impoverished areas, as they are the people mostly affected by these weather changes, prompting urgent City intervention through the insurance of a safe and healthy

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<sup>1902</sup> CoJ *IDP 2019/20 Review 77*.

<sup>1903</sup> CoJ *IDP 2019/20 Review 77*.

<sup>1904</sup> CoJ *IDP 2019/20 Review 77*.

<sup>1905</sup> CoJ *IDP 2019/20 Review 77*.

<sup>1906</sup> CoJ *IDP 2019/20 Review 78*.

<sup>1907</sup> CoJ *IDP 2019/20 Review 78*.

<sup>1908</sup> CoJ *IDP 2019/20 Review 78*.

environment.<sup>1909</sup> Prevalent environmental anomalies include tornados, flooding and diverse weather patterns. As a signatory to the Sendai Risk Reduction Conference (2015), the CoJ must respond to such social and environmental abnormalities.

Underpinned in the JCSS are three JCSS outcomes. JCSS Outcome Number 2 mandates the "achievement of a safe and secure urban environment and public open spaces".<sup>1910</sup> The JCSS harnesses the inter-collaboration of City services and infrastructure to achieve a safe and secure urban environment.<sup>1911</sup> Multi-agency partnerships are therefore used to achieve JCSS Outcome Number 2. An example of this may be seen in the Crime Prevention through Environmental Design.<sup>1912</sup>

The actual reference of the JCSS Outcome 2: Safe and secure urban environment and public spaces objectives, however, is found in the priority programmes associated herewith. Programme 4.1.2: Safe and secure urban environment and public spaces identifies key focus areas to attain "desired outcomes" by means of undertaking specific activities thereto. An example of this is the first key focus area, which includes "growing a safe urban environment through situational crime prevention and social interventions".<sup>1913</sup> Activities associated with Programme 4.1.2 include the community safety audits and the implementation of crime prevention through improved environmental design initiatives i.e. Crime Prevention through Environmental Design.<sup>1914</sup>

The final Priority Programme captured under Programme 4.1.5: Operation Buya Mthetho is an initiative by the City to restore the rule of law in the City. Similar to other collaborative departmental and agency operations under Outcome 4, the operations include different departments such as the Disaster Management Department, the Legal Department, the Infrastructure Services Department, the Social Development Department, the

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<sup>1909</sup> CoJ *IDP 2019/20 Review* 80.

<sup>1910</sup> CoJ *IDP 2019/20 Review* 79.

<sup>1911</sup> CoJ *IDP 2019/20 Review* 79.

<sup>1912</sup> CoJ *IDP 2019/20 Review* 79.

<sup>1913</sup> CoJ *IDP 2019/20 Review* 84.

<sup>1914</sup> CoJ *IDP 2019/20 Review* 84.

Development Planning Department and the Environmental Health Department.<sup>1915</sup> Based on the above consideration of the City's accountability mechanism, it is evident from the CoJ planning initiatives, as described in the CoJ IDP, that the City's forward planning actions advance environmental governance in CoJ. Environmental planning in the City is multifaceted and collaborative in nature, and employs a plethora of environmental governance strategies to achieve its environmental outcomes.

### *5.2.7 Internal audit and audit committees*

The importance of the audit mechanisms<sup>1916</sup> of the CoJ lies in the fact that they complete the accountability chain in the City and consequently achieve accountability as an environmental outcome in the CoJ. Accountability mechanisms are structured to first create responsibility through the City's accountability planning mechanisms, then they are monitored and evaluated in terms of the accountability outcomes, and then audited in terms of performance, the authenticity thereof being verified by means of oversight.

The audit function in the CoJ has been developed into two mandatory audit functions, namely the internal audit function and the external audit function. The internal audit function<sup>1917</sup> of the City is situated in the Group Audit Committee, which relates to the intra-governmental accountability dimension of CoJ. The three branches of the audit group are the Group Audit Committee, the Group Risk Governance Committee and finally the Group Performance Audit Committee. Central to the objectivity and independence of the CoJ audit structures are the members of the various committees, being representative of professionals including internal auditors, external auditors and members with adequate qualifications and experience.<sup>1918</sup> Additional to the CoJ group audit structures, MOEs as

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<sup>1915</sup> CoJ *IDP 2019/20 Review* 84.

<sup>1916</sup> Audit mechanisms as accountability mechanisms can be from an internal accountability dimension; see para 4.2.7 in Chapter 4 for Internal Auditing and Audit Committee; or from a chapter 9 institutions perspective see para 4.4.6.2 Auditor-General.

<sup>1917</sup> See para 4.2.7 in Chapter 4 for a discussion of internal audit committees as internal accountability mechanism.

<sup>1918</sup> CoJ *Integrated Annual Report 2018/2019* 371.

independent municipal entities have independent internal audit functions and committees as directed by statute.

Contained in the Group Audit Committee Report are CoJ Group Audit pronouncements on oversight and accountability in the CoJ. The 2018/2019 Group Audit Committee Report raises concerns about the lack of an "overall control environment".<sup>1919</sup> Examples of the lack of internal control include water and electricity losses,<sup>1920</sup> which raise concerns about accountability specific to scarce resources and carbon emissions associated with energy generation. Material electricity losses associated with energy generation amount to R2 893 632 000, which represents approximately 27% of the electricity purchased.<sup>1921</sup> In addition, further non-technical losses amounted to R1 864 313 000 during the 2018/2019 year. It is submitted that "energy forgone" stimulates the use of contemporary dirty energy and consequently the generation of GHG, and impacts not only on revenue generation in the City. Other concerns raised by the Group Audit Committee include the strategic risks identified and slow progress made in relation to the mitigation of the CoJ top strategic risks with specific actions and risk treatment plans, *inter alia* the lack of progress and failure to implement the CoJ Disaster Recovery Plan.<sup>1922</sup>

The single accountability mechanism which evaluates the accountability of both the City and the MOEs *in toto* is the related annual financial statements used by the auditing structures. It is submitted that regardless of any accountability chain, the financial statements of the City and MOEs are conclusive in relation to the determination of environmental accountability. It is submitted that accountability in terms of environmental law cannot be achieved without actual environmental interventions. Accountability outcomes are often expressed through infrastructural development and green infrastructure deliverables like renewable energy. Provisional expenditure thereto is captured in terms of budgetary accountability instruments such as SDBIP's and intended

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<sup>1919</sup> CoJ *Integrated Annual Report 2018/2019* 372.

<sup>1920</sup> CoJ *Integrated Annual Report 2018/2019* 373. Also see Johannesburg Water *Integrated Annual Report 2018/19* 122.

<sup>1921</sup> City Power *2018/19 Integrated Annual Report* 178.

<sup>1922</sup> CoJ *Integrated Annual Report 2018/2019* 374.



construction in planning accountability mechanisms like the CoJ IDP, but actual performance and oversight of infrastructure development are captured in the Annual Financial Statements of the City and its MOE's.

Financial statements are used by the auditing function to ensure accountability in environmental governance. They can monitor actual performance based on actual expenditure and delays in environmental capital projects and infrastructure.<sup>1923</sup> Delays in terms of infrastructural development can disrupt local environmental service delivery without triggering planning and monitoring accountability mechanisms. Thus environmental planning and infrastructure may be included in IDPs and business plans for many years while their actual performance is delayed due to budgetary constraints,<sup>1924</sup> the reprioritisation of funding, budget amendments, unfunded mandates, and external environments such as protests,<sup>1925</sup> fraud, litigation, design problems,<sup>1926</sup> contractor liquidations<sup>1927</sup> and contractor non-performance.<sup>1928</sup> This is why accountability mechanisms should not be restricted to monitoring and oversight like the aforementioned mechanisms, but should include mechanisms which enforce specific behaviour from environmental actors to ensure accountability. Only once the accountability mechanisms have been exhausted, and in the absence of accountability, can the consequence of liability be executed in line with other accountability mechanisms.

### *5.2.8 Disciplinary Board*

The disciplinary board is an important accountability mechanism in the context of liability to solicit consequence management in the absence of accountability.<sup>1929</sup> The MPAC of the CoJ acknowledges the importance of the disciplinary board and highlights the fact that after six years, the CoJ is yet to establish this important internal accountability

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<sup>1923</sup> Johannesburg Water *Integrated Annual Report 2018/19* 152.

<sup>1924</sup> Johannesburg Water *Integrated Annual Report 2018/19* 153.

<sup>1925</sup> Johannesburg Water *Integrated Annual Report 2018/19* 154.

<sup>1926</sup> Johannesburg Water *Integrated Annual Report 2018/19* 155.

<sup>1927</sup> Johannesburg Water *Integrated Annual Report 2018/19* 154.

<sup>1928</sup> Johannesburg Water *Integrated Annual Report 2018/19* 154.

<sup>1929</sup> See para 4.2.8 in Chapter 4 for a discussion of disciplinary boards as an internal accountability mechanism.

mechanism.<sup>1930</sup> Emphasised in addition is the fact that the CoJ is not able to investigate financial misconduct as mandated to this important internal accountability mechanism. The CoJ acknowledges that the void created by the absence of the mechanism severely constrains the investigation into financial misconduct and further suppresses liability in terms of the recovery of funds financially misappropriated.<sup>1931</sup> The CoJ does not have a disciplinary board.

### *5.2.9 Internal Ombudsman*

The CoJ Office of the Ombudsman is an important internal accountability mechanism to investigate internal aspects of maladministration by city officials.<sup>1932</sup> The CoJ Ombudsman does not only relate to the intra-governmental dimension of the city administration, but also serves the constituency of the CoJ to investigate where the alleged injustice suffered due to maladministration infringes on the constitutional rights of individual constituents.<sup>1933</sup>

## **5.3 Structures and measures for accountability towards the electorate**

### *5.3.1 Local participatory measures*

The local participation mechanisms of the CoJ are designed to entrench good governance and accountability.<sup>1934</sup> The CoJ executive is separated from the legislative arm to ensure proper oversight, accountability and public participation and to echo the national and provincial model.<sup>1935</sup> The local participation mechanisms in the CoJ *inter alia* include section 79 proceedings, more specifically the MPAC, which solicits participation and public comments in terms of the oversight role provided to Council.<sup>1936</sup> An example hereof is the extension of invitations to stakeholders via newspapers and radio adverts to join

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<sup>1930</sup> CoJ *Oversight Report on the 2018/19 Annual Report* 2.

<sup>1931</sup> CoJ *Oversight Report on the 2018/19 Annual Report* 44.

<sup>1932</sup> Section 4(a) of the CoJ *Ombudsman By-law*, 2014.

<sup>1933</sup> Section 4(a) of the CoJ *Ombudsman By-law*, 2014.

<sup>1934</sup> CoJ *Integrated Annual Report 2018/2019* 35.

<sup>1935</sup> CoJ *Integrated Annual Report 2018/2019* 35.

<sup>1936</sup> CoJ *Oversight Report on the 2018/19 Annual Report* 43.

roundtable discussions and participatory proceedings of the MPAC.<sup>1937</sup> The CoJ website is also a valuable tool as one of the mechanisms to enhance participation in its governance.<sup>1938</sup>

The CoJ IDP meetings,<sup>1939</sup> the participatory budget meetings,<sup>1940</sup> and the ward committees' meetings are further good examples of participatory initiatives in the CoJ.<sup>1941</sup> These mechanisms are therefore also considered to be accountability mechanisms at the disposal of the local community. Public participation is not only essential for service delivery and accountability,<sup>1942</sup> but also for consultation with communities in terms of local government competencies such as municipal planning. Central to spatial and municipal planning is the SDF, which incorporates local participatory measures in the ongoing development of the spatial framework. The CoJ SDF is a socially transformative and spatial planning orientated document that provides for structured consultation *inter-alia* of environmental interest groups and consultation with the broader community.<sup>1943</sup> Participatory mechanisms in the context of the CoJ SDF include regulatory SPLUMA processes like the gazetting of draft SDF documents for regulated periods for public comment.<sup>1944</sup>

### *5.3.2 Access to information*

The CoJ safeguards access to information. The It adheres to section 14 of the PAIA and has a PAIA Manual to allow the electorate to access its information.<sup>1945</sup> The CoJ PAIA Manual allows the electorate to access information about environmental hazards or serious violations of the law, for example.<sup>1946</sup> The CoJ PAIA Manual, however, applies only to city structures, as the different MOEs also have individual access to information

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<sup>1937</sup> CoJ *Oversight Report on the 2018/19 Annual Report* 43.

<sup>1938</sup> CoJ *Integrated Annual Report 2018/2019* 61.

<sup>1939</sup> CoJ *IDP 2019/20 Review* 61. Also see CoJ *Integrated Annual Report 2018/2019* 56.

<sup>1940</sup> CoJ *Integrated Annual Report 2018/2019* 56.

<sup>1941</sup> CoJ *Integrated Annual Report 2018/2019* 56.

<sup>1942</sup> CoJ *Integrated Annual Report 2018/2019* 35.

<sup>1943</sup> CoJ *Spatial Development Framework 2040* 30

<sup>1944</sup> CoJ *Spatial Development Framework 2040* 30

<sup>1945</sup> CoJ *PAIA Manual*.

<sup>1946</sup> Section 8.3 of the CoJ *PAIA Manual*.

mechanisms in order for the electorate to access the entities' information.<sup>1947</sup> Access to information as a CoJ accountability mechanism not only guarantees access to information but also guarantees transparency in terms of local participatory processes and enhances the electorate mechanisms.

### *5.3.3 Community complaint processes*

Like the participatory mechanisms discussed previously, the CoJ petitions, complaints and public hearings mechanisms mirror accountability outcomes in the electorate dimension. These mechanisms are designed, however, to ensure accountability with the specific objective of dealing with disputes and residents' discontent, whereas the participatory mechanisms enhance participatory governance, an example being the CoJ Petitions Committee, which forms part of the section 79 committee system and actively deals with petitions received in the electorate dimension.<sup>1948</sup> Other hearings to actively resolve disputes include MPT hearings to facilitate objections in the course of land use applications, but it is among the CoJ quasi-judicial mechanisms.<sup>1949</sup> Examples of public hearings include EISD section 79 committee hearings to consider proposed CoJ environmental by-laws such as the Draft Air Pollution Control and Air Quality Control Management By-laws.<sup>1950</sup>

While evidence of the functionality and performance of the community complaint mechanisms is documented in the literature referred to above, no digital platforms are functional that confirm present petitions to the CoJ or enable the electronic or manual submission thereof.

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<sup>1947</sup> Section 2 of the CoJ *PAIA Manual*.

<sup>1948</sup> CoJ *Integrated Annual Report 2018/2019* 42.

<sup>1949</sup> See para 5.3.10 in Chapter 5 for other mechanisms among the accountability structures and measures involving the electorate of the City of Johannesburg.

<sup>1950</sup> CoJ *EISD Section 79 Committee By-law Hearings*.

### 5.3.4 Right to protest

Civil mobilisation in the CoJ as an accountability mechanism is frequently embarked upon by the citizenry by way of the electorate dimension and includes the right to protest. Service delivery protests in the CoJ are not uncommon and are as often as not caused by the prevalent socio-economic circumstances and service delivery problems in the City.<sup>1951</sup> The CoJ service delivery problems that give rise protests include lack of access to water, and sanitation and infrastructure-related problems.<sup>1952</sup>

Specific from a sustainability perspective, the CoJ is considered a protest hotspot from the viewpoint of the delivery of water services.<sup>1953</sup> Ironically, the protests in the CoJ also disrupt service delivery,<sup>1954</sup> an example of this being the disruption of transport services due to civil protests which causes lower passenger numbers and adversely affect the City.<sup>1955</sup> The aftermath of protests also frequently coincides with damage to property, a reallocation of manpower, a loss of productivity, and the need to clean up and replace infrastructure.<sup>1956</sup> Protests in the CoJ, based on the circumstances presented, can therefore be seen as symptoms or consequences of unaccountability and social dissatisfaction in the City. It follows that grievances could be better addressed via other accountability mechanisms like petitions and public hearings.<sup>1957</sup> The better utilisation of such mechanisms by the CoJ, even after the event, to understand the motives behind the protests, would result in the existing accountability mechanisms' better contributing to the monitoring and control of unacceptable behaviour. The CoJ needs to invite the communities and NGOs in the City to engage in partnerships with it in formal initiatives designed to render such protests unnecessary.<sup>1958</sup>

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<sup>1951</sup> Tapela, Ntwana and Sibanda *Social Protests and Water Service Delivery* 121.

<sup>1952</sup> Tapela, Ntwana and Sibanda *Social Protests and Water Service Delivery* 121.

<sup>1953</sup> Tapela, Ntwana and Sibanda *Social Protests and Water Service Delivery* 67.

<sup>1954</sup> SALGA *Community Protest* 41.

<sup>1955</sup> CoJ *Integrated Annual Report 2018/2019* 288.

<sup>1956</sup> SALGA *Community Protest* 42.

<sup>1957</sup> See para 5.3.3 in Chapter 5 for a detailed discussion of petitions, complaints and public hearings as part of accountability mechanisms involving the electorate in the City of Johannesburg.

<sup>1958</sup> CoJ *Environmental Sustainability Strategy* 32.

### *5.3.5 Non-governmental action*

NGOs in the CoJ are active contributors to accountability from an environmental perspective. To substantiate this statement, the CoJ includes NGOs as part of its strategy to support the City's attempts to promote environmental sustainability and the residents responsibility for caring for their environment, for example in waste reduction.<sup>1959</sup> The CoJ ensures that its NGO databases are up to date and mechanisms to communicate externally are fully utilised.<sup>1960</sup> The CoJ therefore focusses on the establishment and maintenance of good relationships with NGOs to fill any gaps in its own expertise and to advise in times of crisis.<sup>1961</sup> There are many environmental NGOs in the CoJ and they actively contribute towards accountability in the electorate dimension. EarthLife Africa and the Centre for Environmental Rights are examples of NGOs which serve as custodians of environmental rights in the environmental litigation and environmental activism domain.

### *5.3.6 Section 62 appeals*

Generally, internal procedure such as the section 62 procedure first need to be exhausted before resort is taken to external remedies. The basic appeal mechanisms specifically available to the electorate in the CoJ are section 62 appeals, where residents may appeal the decisions of both administrative and political functionaries.<sup>1962</sup> Included in CoJ and MOE policy documents such as the CoJ Security Access Restrictions Policy is the provision that any person whose rights are affected negatively may appeal a decision of Council hereto.<sup>1963</sup> The appeal mechanism will typically provide recourse where the rights of CoJ residents are negatively affected in terms of road closures and the restriction of access to public places. Other disputes resolved through the section 62 procedure include billing disputes, which are subject to the appeal procedure when all remedies in the CoJ Revenue Department have been exhausted.<sup>1964</sup> Building control appeals are exceptions to the rule.

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<sup>1959</sup> CoJ *Climate Action Plan* 80.

<sup>1960</sup> CoJ *Environmental Sustainability Strategy* 49.

<sup>1961</sup> CoJ *Environmental Sustainability Strategy* 49.

<sup>1962</sup> See para 4.3.6 in Chapter 4 for a detailed discussion of Section 62 appeals.

<sup>1963</sup> See para 9.7 of the CoJ *Security Access Restrictions Policy*.

<sup>1964</sup> Section 34.2 of the CoJ *Credit Control and Debt Collection Policy*.

Until recently they were considered by the Review Board under the provisions of section 9 of the NBRBSA. This practice was halted, however, because of the invalidation of section 9 of the National Building Regulations and the Building Standards Act in the judgment of *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Review Board* due to its inconsistency in the light of municipalities original constitutional powers pertaining to municipal planning and building control.<sup>1965</sup> In reflecting on the appropriate appeal mechanism, the court expressed doubt that using the section 62 appeal procedure in pending building control applications in the CoJ was appropriate.<sup>1966</sup> In the light of this finding, Raboshakga and Fuo accurately contend that the establishment of a specialist quasi-judicial forum or appeal forum might be the most suitable step to take for the purposes of building application appeals.<sup>1967</sup> The suggested specialist quasi-judicial forum might in future be another accountability mechanism in the local environmental accountability domain.

### 5.3.7 Bid committees

The CoJ bid committees functioning in the electorate dimension are responsible for environmental outcomes in the City. For example, the bid evaluation committee in the appointment of external environmental consultants evaluates prospective bidders in terms of criteria like environmental compliance and monitoring, environmental impact management, environmental awareness and education.<sup>1968</sup> Other evaluation criteria include environmental pollution control, integrated waste management and water quality management.<sup>1969</sup> The adjudication committee will then consider the appointment of service providers based on the environmental specifications as evaluated by the evaluation committee. The SCMP regulates all supply chain activities in the CoJ. Among the desired outcomes of this policy is maintenance of an environmentally friendly

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<sup>1965</sup> *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board* 2018 5 SA 1 (CC).

<sup>1966</sup> *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board* 2018 5 SA 1 (CC) para 41.

<sup>1967</sup> Raboshakga and Fuo 2020 *PER / PELJ* 30.

<sup>1968</sup> CoJ A864 Tender Document 42.

<sup>1969</sup> CoJ A864 Tender Document 42.

approach in terms of procurement.<sup>1970</sup> The practice is that procurement in the CoJ must enable resource efficiency and cause the reduction of negative environmental impacts in terms of its daily procurement operations.<sup>1971</sup> The SCMP also requires that any cost assessment of products purchased is to include cost of the disposal of the said product in an environmentally friendly and safe manner.<sup>1972</sup> All CoJ bid committees must work within the prescriptive confines of the SCMP and promote environmentally sustainable practices as accountability mechanisms in the execution of their responsibilities.

### *5.3.8 Criminal and civil litigation*

Litigation as an accountability mechanism has over the past decades contributed to accountability in the context of the CoJ. Some of the more famed pronouncements from the bench have been conceived with the CoJ as a litigious party thereto. Pieterse explains that not only is the CoJ privy to many NGOs and public interest organisations engaged in rights-based activism, but CoJ residents also have direct access to litigious proceedings and hence can assert their rights more easily than constituents from other regions.<sup>1973</sup> Pieterse explains that the statement about residents having direct access to litigious proceedings has to do with the fact that the Johannesburg High Court is nestled in the middle of the Johannesburg Central Business District and more often than not serves as a court of the first instance.<sup>1974</sup>

Not only is the CoJ ground zero, given the many initial litigious battles fought in the Johannesburg High Court in the preservation of constitutional rights, but it also hosts the constitutional seat of the Constitutional Court of South Africa.<sup>1975</sup> Some of the more prominent judgments involving the CoJ include the *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Review Board*,<sup>1976</sup> *City of Johannesburg*

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<sup>1970</sup> CoJ *SCM Policy* 12.

<sup>1971</sup> CoJ *SCM Policy* 12.

<sup>1972</sup> CoJ *SCM Policy* 24.

<sup>1973</sup> Pieterse *Rights-based Litigation, Urban Governance and Social Justice* 20.

<sup>1974</sup> Pieterse *Rights-based Litigation, Urban Governance and Social Justice* 20.

<sup>1975</sup> Pieterse *Rights-based Litigation, Urban Governance and Social Justice* 20.

<sup>1976</sup> *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board* 2018 5 SA 1 (CC)



*Metropolitan Municipality v Gauteng Development Tribunal*,<sup>1977</sup> and *Mazibuko v City of Johannesburg*.<sup>1978</sup> These judgments have not only meaningfully contributed to the concept of LEG in recent years, but have also placed extensive emphasis on local environmental responsibilities in the CoJ and beyond.

In relation to criminal prosecution in the CoJ municipal courts system, the City has five municipal courts in the city's jurisdiction and is planning another three municipal courts in Alexandra, Protea Glen and Orange Farm.<sup>1979</sup> Criminal prosecution is important to hold the citizenry accountable. Since January 2018 about 8000 arrests were made to curb illegal waste dumping and other related by-law transgressions.<sup>1980</sup> Specific to the enforcement of its by-laws, CoJ municipal courts are jurisdictional extensions to magistrates' courts, which assist with the enforcement of by-laws.<sup>1981</sup>

### 5.3.9 *Law enforcement and environmental compliance*

The enforcement of environmental compliance is mostly done through administrative systems and the imposition of fines which are promulgated in terms of CoJ by-laws.<sup>1982</sup> For example, non-compliant behaviour in terms of air quality compliance is enforced with the provision of fines in terms of the CoJ Air Pollution Control By-laws.<sup>1983</sup> These by-laws are enforced by the CoJ Metropolitan Police and the prosecution is done by the CoJ Municipal Courts. Law enforcement and the operation of municipal courts are among the electorate environmental compliance mechanisms.<sup>1984</sup> The CoJ developed and published numerous environmental by-laws in 2018/2019. Some of these include Air Pollution

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<sup>1977</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).

<sup>1978</sup> The *Mazibuko* case.

<sup>1979</sup> CoJ *Ensuring the Smooth Running of the City* 11.

<sup>1980</sup> CoJ *Ensuring the Smooth Running of the City* 13.

<sup>1981</sup> CoJ *Ensuring the Smooth Running of the City* 11. Also see para 5.3.9 in Chapter 5 for a detailed discussion of compliance mechanisms among the accountability mechanisms involving the electorate in the City of Johannesburg.

<sup>1982</sup> See para 5.3.9 in Chapter 5 for a detailed discussion of by-laws as among the accountability mechanisms involving the electorate in the City of Johannesburg.

<sup>1983</sup> CoJ *Air Pollution Control By-laws*, 2011.

<sup>1984</sup> CoJ *Ensuring the Smooth Running of the City* 12.

Control By-laws, an Air Quality Management Plan and Water Services By-laws.<sup>1985</sup> Enforcement of the by-laws is done by the JMPD. Therefore, this also serves as a CoJ compliance mechanism.<sup>1986</sup>

The CoJ compliance mechanisms were established to enforce specific types of behaviour in relation to the local environment, and consequently link non-conformance or purported liability to specific sanctions in the absence of accountability.<sup>1987</sup> Included in the 2018/19 financial year, the CoJ rated purported non-compliance pertaining to regulatory requirements as among its top 18 City-wide strategic risks.<sup>1988</sup> In related assessments of the environmental portfolios in its Draft Environmental Sustainability Strategy and Action Plan, it is apparent that an emphasis on legal compliance is one of the strategic responses to the need to achieve the CoJ's environmental objectives.<sup>1989</sup> It is submitted that these legal compliance mechanisms can be categorised under three categories, namely by-laws<sup>1990</sup> and policies,<sup>1991</sup> provincial and national legislation, and international regulatory and soft law instruments. All of these accountability mechanisms are in the electorate dimension, except for intra-governmental policies, which are in the internal dimension.<sup>1992</sup>

The CoJ's mainstream environmental management and compliance are therefore divided *inter alia* into sectoral environmental legislation such as the NEM: WA, the NEM: AQA, the NEM: BA and the NEM: PAA. It follows that the CoJ as the responsible authority becomes

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<sup>1985</sup> CoJ *Integrated Annual Report 2018/2019* 60.

<sup>1986</sup> CoJ *Integrated Annual Report 2018/2019* 277.

<sup>1987</sup> See para 4.3.9 in Chapter 4 for law enforcement and environmental compliance from the point of view of accountability towards the local electorate.

<sup>1988</sup> CoJ *Integrated Annual Report 2018/2019* 59.

<sup>1989</sup> CoJ *Environmental Sustainability Strategy* 27.

<sup>1990</sup> See para 5.3.9 in Chapter 4 on law enforcement and environmental compliance for a detailed discussion of by-laws as among the accountability mechanisms involving the electorate in the City of Johannesburg.

<sup>1991</sup> See para 5.2.5 in Chapter 5 for a detailed discussion of policies in relation to materiality frameworks and compliance management systems as part of internal accountability mechanisms in the CoJ.

<sup>1992</sup> See para 5.3.9 in Chapter 5 on law enforcement and environmental compliance, for a detailed discussion of by-laws as among the accountability mechanisms involving the electorate in the City of Johannesburg.

accountable to enforce specific compliance from the electorate based on its statutory obligations thereto.

### 5.3.10 *Other mechanisms*

The CoJ has several other mechanisms in operation for environmental accountability. These include *inter alia* the CoJ MPT, the CoJ Appeal Authority and the CoJ VAB.

#### 5.3.10.1 Municipal Planning Tribunal

The establishment of the MPT as an accountability mechanism finds its origins in the CoJ Municipal Planning By-Law.<sup>1993</sup> Represented in the MPT are senior employees of the EISD, who provide environmental oversight in the functioning and decision making of the MPT as accountability mechanism.<sup>1994</sup>

#### 5.3.10.2 The Appeal Authority

The CoJ Appeal Authority is also one of the CoJ's quasi-judicial accountability mechanisms. It was established in 2016 under section 49 of the CoJ Municipal Planning By-law.<sup>1995</sup> Appeals can be lodged against decisions of the CoJ MPT where the rights of any affected parties may be adversely affected.<sup>1996</sup> For example an appeal can be lodged in circumstances where a Record of Decision in terms of an environmental impact study was not processed as part of the application.<sup>1997</sup> It follows that the CoJ Appeals Authority as a quasi-judicial mechanism also supports accountability from an environmental perspective.

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<sup>1993</sup> Section 13 of the CoJ *Municipal Planning By-law*, 2016.

<sup>1994</sup> LAN 1241 in PG 255 of 3 August 2016 (Gauteng).

<sup>1995</sup> CoJ *Municipal Planning By-law*, 2016.

<sup>1996</sup> Section 49(1) of the CoJ *Municipal Planning By-law*, 2016 and LAN 1241 in PG 255 of 3 August 2016 (Gauteng). Also see CoJ *Appeal Process 2*.

<sup>1997</sup> Section 4(15) of the CoJ *Municipal Planning By-law*, 2016 and LAN 1241 in PG 255 of 3 August 2016 (Gauteng).

### 5.3.10.3 Valuation Appeal Boards

The CoJ VAB is another quasi-judicial mechanism that facilitates accountability towards the electorate. At the time of writing the CoJ had three VABs, of which two assist with appeals from the 2013 General Valuation Roll and one with appeals from the 2018 General Valuation Roll.<sup>1998</sup> Nevertheless, concern has been raised that there are ongoing failures to complete the appeal processes timeously, which undermines accountability towards the electorate.<sup>1999</sup>

## **5.4 Concluding remarks**

This chapter aimed to focus on the CoJ as a case study to illustrate the complexity of the City's internal structures and functionaries relevant to environmental accountability, with a view to understanding the complexities in context. As a metropolitan city the CoJ is strategically positioned to serve as an illustration of a self-regulating municipality in the local government sphere with specific environmental obligations provided under both the Constitution and statute. It possesses numerous mechanisms to stimulate the necessary accountability process, both in terms of intergovernmental accountability and in accountability towards the electorate, in the environmental law context. As previously mentioned, accountability in the context of the coalition government was not considered (no findings are made) because the coalition agreement and the terms of reference thereof being confidential. It is suggested that the terms of reference, as agreed between the parties, have the potential to influence the responsibility and answerability of the parties in the context of accountability. It is anticipated that coalition agreements are potentially accountability mechanisms to ensure accountability, not only in the CoJ, but also in other municipalities governed by coalition agreements. Currently coalition agreements in South Africa are synonymous to the exercise of opaque power and does not allow for transparency to adequately be utilised as accountability mechanism.<sup>2000</sup>

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<sup>1998</sup> Item 5 of the CoJ *Draft Property Rates Policy and Rates By-law*, 2020/2021 8.

<sup>1999</sup> CoJ *Final IDP 2020/21* 144.

<sup>2000</sup> See para 2.2.2 in Chapter 2.

It was found that the intra-governmental accountability of the CoJ *inter alia* displays planning, performance, audit and compliance aspects.<sup>2001</sup> Inherent complexities in the CoJ include the inefficiency of the accountability mechanisms to advance external environmental objectives. For example, although environmental aspects are contained in CoJ accountability mechanisms like the IDP and the SDG 2040 Objectives, the primary environmental objectives do not always cascade down into KPIs.<sup>2002</sup> Other internal complications in terms of environmental accountability include the absence of specific environmental KPIs in the CoJ. This may weaken the attainment of key environmental sustainability outcomes such as those prioritised in the CoJ central environmental planning documents.<sup>2003</sup>

The poor execution of environmental planning objectives may also be inherent in the CoJ accountability domain. Implementation weaknesses in terms of the CoJ's administration of accountability are related to the non-implementation of the environmental planning objectives. Unrevised annual projections contained in the intergovernmental dimension may result in the unproductive yearly repetition of projected environmental outcomes, without any provision for proper monitoring and reviewing to afford a decisive roadmap on how these objectives are to be achieved.<sup>2004</sup> In terms of the mechanisms to attain internal accountability, the CoJ neglects to make provision for any future remedial action in terms of the non-attainment of environmental objectives.<sup>2005</sup> This could be attributed to the CoJ's not having a disciplinary board as required by statute.<sup>2006</sup>

The findings in the context of the electorate indicate that environmental accountability mechanisms towards its constituents are well-oriented and developed, which affords the

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<sup>2001</sup> See para 5.2 in Chapter 5 for CoJ's internal mechanisms and structures - The City of Johannesburg as a Category A Metropolitan Municipality.

<sup>2002</sup> See para 5.2.4.1 in Chapter 5 - Service Delivery Budget Implementation Plan as among the internal accountability structures and mechanisms in the City of Johannesburg.

<sup>2003</sup> See para 5.2.6 in Chapter 5 - IDP of the City of Johannesburg as among the internal accountability structures and mechanisms in the City of Johannesburg.

<sup>2004</sup> See para 5.2.4 in Chapter 5 - Performance Management System as among the internal accountability structures and mechanisms in the City of Johannesburg.

<sup>2005</sup> See para 5.2.4 in Chapter 5 - Performance Management System as among the internal accountability structures and mechanisms in the City of Johannesburg.

<sup>2006</sup> See para 5.2.8 in Chapter 5 - Disciplinary Board.

electorate sufficient insight into and participation in the CoJ's environmental governance.<sup>2007</sup> The accountability mechanisms include the generally recognised community participatory structures and other community-related accountability mechanisms; e.g. structured complaint procedure such as petitions, public hearings, measured appeal procedures, etc.<sup>2008</sup> The CoJ accountability mechanisms require transparency in aspects such as CoJ quasi-judicial proceedings, access to information and insight into related processes like CoJ bid committees.<sup>2009</sup> The electorate accountability mechanisms not only include formal processes, but find expression in vibrant and passionate community participation through civil mobilisation<sup>2010</sup> and the formation of NGOs.<sup>2011</sup>

One can therefore draw the conclusion that the CoJ case study has been useful to illuminate some of the strengths and weaknesses of the typical accountability measures at the disposal of (metro) municipalities in South Africa. The assessment of its accountability mechanisms has served as an indicator of the shortcomings and achievements pertaining to the CoJ's discharge of its environmental responsibilities. The Chapter has helped in the understanding of the accountability mechanisms relevant in the South African local government and environmental law context. Actual accountability in terms of the different portfolios did not form part of the case study, and no actual accountability baseline exists against which to gauge regressive or progressive environmental accountability in the City. The aim in terms of the study of the CoJ was merely to understand the manner in which local government accountability in terms of environmental law plays out in a South African context and understanding the complexity thereof.

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<sup>2007</sup> See para 5.3 in Chapter 5 - Structures and measures for accountability towards the electorate of the City of Johannesburg.

<sup>2008</sup> See para 5.3 in Chapter 5.

<sup>2009</sup> See para 5.3 in Chapter 5.

<sup>2010</sup> See para 5.3.4 in Chapter 5 on the right to protest as among the accountability structures and measures involving the electorate of the City of Johannesburg.

<sup>2011</sup> See para 5.3.5 in Chapter 5 on non-governmental action as among the accountability structures and measures involving the electorate of the City of Johannesburg.

## CHAPTER 6

### CONCLUSION

#### *6.1 Background and scope of the study*

The practice of accountability is imperative to improve and redeem otherwise irredeemable failures of governance.<sup>2012</sup> Municipalities are important for local level governance aimed at environmental, social and economic (financial) sustainability.<sup>2013</sup> In South Africa, local government has a constitutionally entrenched environmental governance mandate. The importance of this mandate can be seen from a mix of the real-life deterioration of natural habitats, biodiversity and the quality of water in South Africa and beyond, as well as from the international recognition of the role of cities (local authorities) in transitioning to an environmentally safe and healthy state for present and future generations. While various academic proponents have explored the concept of local environmental governance, little work has been done on understanding its intersection with public accountability in South Africa.<sup>2014</sup>

The research conducted in this study first considered the notion of public accountability. The theory on accountability per se was subsequently used to inform the understanding of local government accountability in general, and more specifically in relation to environmental duties and obligations.<sup>2015</sup> Local accountability was conceptualised and analysed through the lens of South African environmental law in combination with local government framework legislation, sectoral environmental legislation and other relevant national statutes. The discussion focussed on the structures and mechanisms aimed at accountability that are provided for in law.<sup>2016</sup>

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<sup>2012</sup> See para 2.5 in Chapter 2.

<sup>2013</sup> See para 3.4 in Chapter 3.

<sup>2014</sup> See para 3.4 in Chapter 3.

<sup>2015</sup> See para 3.5 in Chapter 3.

<sup>2016</sup> Chapter 4.

While much could be said about the failures of local government in South Africa, this study was confined to an exploration of what municipalities can and should account for in the execution (or failure of execution) of their environmental obligations in terms of law. Based on the findings, the study culminates a number of recommendations on how municipalities can improve on accountability for local environmental governance.

## ***6.2 Research question and objectives***

This study is based on the premise that the structures and functionaries of developmental local government in South Africa are together and separately accountable for the development, implementation, enforcement of and adherence to environmental law.<sup>2017</sup> The primary objective of the study was to critically consider the ambit and degree of the accountability of local government structures and functionaries in terms of South African environmental law.

The following secondary objectives were set:

1. To offer a theoretical perspective on the meaning and role of (local) government accountability in democratic government systems;
2. To develop a theoretical perspective on the role of local government towards environmental accountability, given the design and objectives of South African framework and sector-specific environmental law;
3. To critically analyse and discuss the mechanisms created by law to facilitate the accountability of different structures and functionaries in local government in relation to environmental duties and functions;
4. To explore the complexity of the City of Johannesburg's internal structures and functionaries relevant for environmental accountability, with a view to understanding the complexities in context; and

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<sup>2017</sup> See para 3.1 of Chapter 1 - Primary Objective.



5. To conclude and make recommendations on the optimisation of local government accountability in terms of South African environmental law.<sup>2018</sup>

### **6.3 Structure and outline of research**

Chapter 2 of this study offered a theoretical interpretation of the notion of accountability. Accountability was analysed in the context of government systems and governance practice. The chapter sought to offer a theoretical perspective on the meaning and role of (local) government accountability in democratic government systems.<sup>2019</sup>

Chapter 3 provided a theoretical perspective on the role of local government in relation to environmental governance in South Africa. Understanding the environmental responsibilities and functions of local government were deemed important to establishing the scope of local government's accountability.<sup>2020</sup>

Chapter 4 examined the nature and scope of the mechanisms and structures in law, aimed at environmental accountability in local government in the South African context. These mechanisms were discussed in some detail to understand how accountability and more specifically responsibility is (or could be) enforced.<sup>2021</sup>

Chapter 5 critically reflected on the mechanisms for environmental accountability and the accompanying complexities in the City of Johannesburg. This was done by looking at the mechanisms configured in Chapter 4 in relation to the environmental duties and functions of this metropolitan municipality.

### **6.4 Main findings**

The main findings in response to the research question in this study are as follows:

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<sup>2018</sup> See para 3.2 of Chapter 1 - Secondary Objectives.

<sup>2019</sup> Chapter 2 - Meaning and role of (local) government accountability in democratic systems.

<sup>2020</sup> Chapter 3 - Local government in environmental governance in South Africa.

<sup>2021</sup> Chapter 4 - Mechanisms and structures for environmental accountability in local government.

#### 6.4.1 *The concept of local government accountability is not fully understood*

The concept of public accountability is well-documented.<sup>2022</sup> However, limited and divergent interpretations appropriate to the complex environment in which local government operates are offered. The research revealed that accountability in the context of local government is often used as or referred to as a generic barometer of all the responsibilities of municipalities.<sup>2023</sup> However, this barometer lacks detail in relation to accountability for specific sectors of local governance, such as environmental governance.

For the purposes of this thesis, it was subsequently argued that:

Accountability speaks to the relationship between public (government) actors in the three spheres and three branches of government as far as it concerns their obligations and answerability towards each other as well as towards the citizenry (society). Absent answerability triggers liability.<sup>2024</sup>

The research further led to the reconfiguration of an existing (generic) model on local environmental governance in the South African context. The "Local Government Accountability Model" developed in Chapter 2 drew on Nel and Du Plessis' "Model for Local Government Action" in local environmental governance.<sup>2025</sup>

Based on the three dimensions of accountability as established in Chapter 2, namely intergovernmental accountability, intra-governmental accountability and accountability towards the electorate,<sup>2026</sup> the reconfigured model explained a categorical interpretation of accountability:

- *Intergovernmental accountability* that includes legal accountability, and decentralised accountability (which consists of devolution accountability and deconcentrated accountability).<sup>2027</sup>

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<sup>2022</sup> See para 2.2.2 in Chapter 2.

<sup>2023</sup> See para 2.6 in Chapter 2.

<sup>2024</sup> See para 2.3 in Chapter 2.

<sup>2025</sup> See para 2.3 in Chapter 2.

<sup>2026</sup> See para 2.5.3 in Chapter 2.

<sup>2027</sup> See para 3.6.4.1 in Chapter 3 - LEG and local government accountability towards other organs of state and chapter 9 institutions.

- *Accountability towards the electorate* that includes political accountability, democratic accountability, social accountability, moral accountability, legal accountability and subsidiarity accountability.<sup>2028</sup>
- *Intra-governmental accountability* that includes bureaucratic accountability, administrative accountability (vertical), professional accountability, ethical accountability and delegation accountability.<sup>2029</sup>

#### *6.4.2 Accountability is absent in the context of local environmental governance*

Public entities must conduct their governance functions in such a manner as to exhibit answerability thereto. Inferences derived from the research also suggest that the same rationale must be applied in terms of local environmental governance, in that municipalities must be accountable in terms of their environmental mandate as captured in law. It is however agreed that in South Africa the challenge lies therein that the constitutional division of authority (in terms of sectors such as health and the environment) between the three spheres of government tend to be blurry.

The research showed that the existing definition of local environmental governance does not explicitly highlight accountability.<sup>2030</sup> This omission impacts on understanding the fit of accountability in local environmental governance and in understanding why, in principle, despite a remarkable environmental (and local government) law framework, municipalities struggle to meet their environmental law objectives and duties in South Africa.

#### *6.4.3 Standards for uniform environmental responsibilities and consequence management for local government are not codified*

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<sup>2028</sup> See para 3.6.4.2 in Chapter 3 - LEG and local government accountability to the citizenry and the ratepayers.

<sup>2029</sup> See para 3.6.4.3 in Chapter 3 - LEG and intra-governmental accountability towards Council and management.

<sup>2030</sup> See para 3.4 in Chapter 3 - Local environmental governance defined.

The novelty of local environmental accountability brings new prospects to enhance current LEG. Currently municipalities do not have a codified local environmental accountability framework or a uniform national protocol applicable across local government, due to the newness thereof. Local environmental responsibilities may be erratically executed by municipalities in terms of the framework and sectoral environmental responsibilities or obligations. For example, without a codified framework, municipalities' performance in terms of framework and sectoral environmental governance may not be attentive to the full range of responsibilities that would be organised in a codified environmental compendium of responsibilities that brings together all local environmental responsibilities. Hence local environmental accountability,<sup>2031</sup> as presented, may be executed incoherently and also perhaps implemented in the same fragmented manner. This finding is based on the fact that the legislative framework is extensive. Hence it is difficult for municipalities to appreciate all of their environmental duties and responsibilities.

#### *6.4.4 LEG structures and mechanisms are required to ensure accountability in local government*

LEG mechanisms and structures are utilised to induce local environmental accountability in terms of municipalities' responsibilities.<sup>2032</sup> The performance of the environmental responsibilities of municipalities (pursuant from a constitutional, framework and sectoral environmental law perspective)<sup>2033</sup> can be supervised in terms of existing LEG mechanisms.<sup>2034</sup> These mechanisms therefore mirror local government accountability in terms of environmental law. They serve not only as LEG mechanisms but also as mechanisms to enforce local environmental accountability.

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<sup>2031</sup> See para 3.6.1 in Chapter 3 - Features of accountability complementing local environmental governance for the definition of local environmental accountability.

<sup>2032</sup> See para 3.6 in Chapter 3 - Provision for accountability measures in local environmental governance.

<sup>2033</sup> See para 3.5 in Chapter 3 - Local government for local environmental governance in the South African context.

<sup>2034</sup> Chapter 4 - Mechanisms and structures in law towards environmental accountability in local government.

#### *6.4.5 Accountability mechanisms are different, yet mutually reinforcing*

While accountability mechanisms differ in the context of intra-governmental accountability, electorate accountability and intergovernmental accountability, these mechanisms are mutually reinforcing to ensure local environmental accountability.

Accountability in the intra-governmental dimension eases pressure on local environmental accountability mechanisms in the electorate dimension as was explained in Chapter 2.<sup>2035</sup> Accountability in the intra-governmental dimension is preventative in nature and therefore must foil unaccountable behaviour spilling over into the electorate dimension. The inclusion of detailed environmental objectives in local accountability mechanisms like the IDP and the continuous monitoring of the discharge of responsibilities in terms of performance management systems and auditing structures must ensure better accountability results in the intra-governmental dimension, for example.<sup>2036</sup>

The available mechanisms in the electorate dimension are remedial in nature and are mostly geared towards mechanisms of last resort to remedy purported unaccountable behaviour. Examples include litigious measures, e.g. civil and criminal proceedings, law enforcement, community complaint processes, the right to protest, and local participatory measures.<sup>2037</sup> Arguably, the electorate or civil society is the accountability dimension of final instance. The electorate must hold (local) government accountable when a municipality does not account to itself (intra-governmental) or to other government structures (intergovernmental).

Accountability mechanisms in the intergovernmental dimension are reactionary in nature and serve as temporary interveners. These mechanisms serve as corrective measures and provisionally usurp a municipality's responsibilities to correct its unaccountable behaviour.

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<sup>2035</sup> See para 2.5.3 in Chapter 2 - Accountability interphasing to advance (local) government accountability.

<sup>2036</sup> See para 4.2 in Chapter 4 - Internal mechanisms and structures.

<sup>2037</sup> See para 4.3 in Chapter 4 - Mechanisms and structures involving the electorate.

These measures include national and provincial government interventions in the provision of water, sanitation and environmentally sensitive services.

#### *6.4.6 Improved integration of environmental responsibilities and accountability needed*

The case of the CoJ illustrated the limited integration of accountability in local environmental governance. Although the accountability mechanisms in the CoJ represent an extensive selection of the local accountability mechanisms available, most of CoJ mechanisms are utilised in their basic format and local environmental responsibilities are not comprehensively integrated.

The CoJ case demonstrates the need for municipalities to integrate a comprehensive internal local environmental accountability matrix (as explained in Chapter 5) or to codify its specific environmental responsibilities. Better integration and understanding of local environmental responsibilities will cause improved monitoring and implementation of local environmental responsibilities. Environmental responsibilities must be embedded in CoJ governance structures from an intra-governmental perspective and fixed in the different mechanisms. For example, sectoral environmental legislation is not expressly incorporated in the CoJ municipal system of delegations to inform Council and the different internal actors of the range of their sectoral environmental responsibilities. Examples of other framework legislation incorporated into municipalities' system of delegations include the National Treasury's MFMA financial delegation or the responsibilities that have been included as separate sub-delegations in the standard system of delegations.<sup>2038</sup> Another example includes SPLUMA planning delegations and responsibilities, that can be developed as a separate sub-delegation into the standard CoJ system of delegations.<sup>2039</sup>

Increased awareness of local government accountability in environmental law must also be settled in local accountability mechanisms such as the CoJ internal auditing departments and external auditing functionaries like the AG.

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<sup>2038</sup> See para 5.2.1 in Chapter 5 - System of delegations.

<sup>2039</sup> See para 5.2.1 in Chapter 5 - System of delegations.

## **6.5 Recommendations**

Based on the research in this study and the findings above, the following recommendations are made:

### *6.5.1 A uniform local accountability protocol should be developed for environmental law responsibilities*

Framework and sectoral environmental law are instrumental in framing local environmental accountability.<sup>2040</sup> Organised local government, in the light of the developmental nature and environmental responsibilities of local government, must develop or be assisted by National and Provincial CoGTA to assemble a uniform local environmental accountability protocol or a compendium for local environmental accountability in terms of environmental and local government law. SALGA is advised to develop such a local environmental accountability protocol to promote awareness and implementation of municipalities' environmental responsibilities. The protocol would further have to be aligned with the principle of integration based on the established framework of LEG and the foundation it creates for municipal accountability.

The suggested protocol should ideally advise on local government's accountability in terms of the environmental obligations and liabilities emanating from South African law. The proposed protocol should integrate the framework and sectoral environmental responsibilities or commitments of municipalities to reform the present fragmented local environmental governance approach of municipalities such as the CoJ.<sup>2041</sup>

The proposed local environmental accountability protocol should ideally be rolled out nationally to capacitate municipal environmental inspectorate units and law enforcement sections in municipalities. Environmental inspectorate units should be established in municipalities as environmental specialist units to monitor and enforce local environmental

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<sup>2040</sup> See para 3.5 in Chapter 3 - Local government for local environmental governance in the South African context.

<sup>2041</sup> See para 3.5.3 in Chapter 3 - The constitutional law framework feeding into local environmental governance.

accountability in municipalities. These specialist environmental units should arguably include not only EMIs but also quasi-environmental officials from environmentally sensitive portfolios such as building control, land use management, water and sanitation, to mention but a few. These specialised inspectorate units should ensure the expedient preparation and processing of dockets specific to environmental transgressions, to cause successful enforcement and prosecution.

*6.5.2 Additional auditing terms of reference and a performance matrix specific to local environmental accountability should be developed*

This recommendation is addressed to the Office of the South African Auditor-General. Read with the previous recommendation, the proposed uniform local environmental accountability protocol or compendium of local government environmental responsibilities could be used to generate additional auditing terms of reference specific to evaluating local environmental accountability in terms of environmental law. The recommendation is directed towards enhanced integrated environmental auditing and performance management in terms of local environmental accountability in municipalities. The recommendation has the potential to improve the present informal environmental auditing (as explained in Chapter 4), whereby the understanding of local environmental accountability will broaden the range of auditing in municipalities. The extended terms of reference may improve the internal auditing function of a local municipality particularly in the internal auditing units and performance management units in municipalities.

The suggested additional auditing terms of reference, viewed from the perspective of an external watchdog, could also benefit chapter 9 institutions, and they could utilise this research to appreciate the extensive range of municipalities' environmental obligations. For example, the AG could formalise the external auditing terms of reference to consider local environmental obligations in context of the annual audits conducted by the Office of the South African Auditor-General. The broader oversight would contribute to the realisation of the AG's constitutional mandate enabling good governance and the oversight of accountability. Internally, better vigilance pertaining to local environmental



accountability should be observed by both the internal auditing and performance management units. The comprehensive oversight or amended scope would not only instill local environmental accountability with more vigilance in theory, but also in practice.

Improved environmental vigilance would also guarantee better environmental planning and infrastructure development in terms of the IDP. Expedient construction of environmental facilities like sanitation or waste water treatment plants might be realised with improved monitoring, for example. Improved planning and reporting might in turn reduce the number of incomplete environment-sensitive projects. Ongoing reporting of local environmental planning and audit findings to Council could arguably sensitise local environmental accountability functionaries such as council, accounting officers and officials towards local government's environmental mandate and responsibilities. Other examples of isolated local environment-related performance and awareness-based programmes include the previous Blue Drop and Green Drop certification programmes introduced by the Department of Water and Sanitation.<sup>2042</sup> Performance indicators of safe water and wastewater treatment included the assessment of statutory obligations like the compliance of water supply systems and compliance with the national wastewater treatment standards.

### *6.5.3 Revised statutory planning and reporting should be legislated*

It is recommended that the national sphere of government (Parliament) amend municipalities' environmental reporting in terms of current predetermined sectoral environmental legislation, whereby statutory planning and reporting procedure in terms of the codified municipal framework and sectoral environmental framework must also be legislated. For example, current framework legislation obliges council to consider and approve accountability mechanisms like the IDP of a municipality and then reported to provincial structures. It is recommended that legislative amendments be considered to

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<sup>2042</sup> DWS 2021 <https://www.dws.gov.za/Communications/PressReleases/2021/MS%20-%20DWS%20revises%20its%20Blue%20and%20Green%20Drop%20Certification%20Programme.pdf> 1.

also allow for local environmental planning and performance plans to be approved by council and a copy to be directed to the relevant MEC: CoGTA for comments, in the way that draft IDPs are approved and circulated to the provincial CoGTAs.<sup>2043</sup> The increased prominence of environmental obligations in the local government domain requires improved planning and enhanced reporting to guarantee proper environmental accountability and governance. The large scale of local environmental responsibilities justifies the establishment of the proposed statutory planning and reporting system to enhance municipalities' accountability.

The statutory planning and reporting plans (e.g. the IDP, water services development plans, biodiversity management plans, waste management plans, etc.) must ideally include predetermined scorecards that speak to the specifics of the local environmental accountability dimensions. The proposed scorecards must include predetermined KPIs commensurate with local government's environmental law obligations. The statutory planning and reporting plan must incorporate intergovernmental environmental responsibilities, intra-governmental environmental responsibilities and local environmental liabilities in the electorate domain.

The statutory reports must reflect on municipalities' duties and actual performance in terms of their environmental obligations. The reporting structure must further detail the category and type of municipality and consider the availability of accountability mechanisms in the various types of municipalities to ensure accurate reporting. Assessment must also be conducted specific to the type of statutory obligations to be performed and in instances of non-performance, the reasons for non-performance and the related contingent or current liability thereto. Other progressive reporting initiatives should include annual reporting to council on the state of the environment in the municipality. State of the environment reports in municipalities have the potential to enhance local environmental accountability in municipalities. The recommendation must

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<sup>2043</sup> See s 32 of the *Systems Act* for more information in the way copies of integrated development plans are submitted to the MEC for local government.

however be interpreted in the light of what would be constitutionally permissible and possible in view of Schedules 4 and 5 of the Constitution.

#### *6.5.4 Dedicated local environmental accountability mechanisms should be established*

A recommendation specific to local government is to create additional local environmental accountability mechanisms. Local government is developmental and semi-autonomous by nature and must independently pursue the development of dedicated local accountability mechanisms that fit its environmental mandate. Supplementary local accountability mechanisms to be considered include the local environmental misconduct registers and environmental liability registers, for example.<sup>2044</sup> Environmental non-compliance should be recorded in local environmental misconduct registers to be annually presented to council to consider statutory environmental misconduct and transgressions.

Local environmental misconduct could *inter alia* include pending criminal charges, current investigations by statutory environmental inspectorates, disciplinary processes pendant against responsible environmental functionaries, specific to alleged environmental transgressions in municipalities. Liability should be pursued against accountable officials in terms of environmental misconduct, where responsibilities are placed on the appointed officials to perform positively to prevent environmental degradation.

Current litigation in terms of purported environmental transgressions could also be catalogued in environmental liability registers. These registers could *inter alia* include contingent liabilities and provisions originating from litigation pursuant from purported environmental transgressions or failures to perform environmental duties. Matters related to both the local environmental misconduct register and the environmental liability register should be presented to council on an annual basis. The frequency of the reports presented to council could be adjusted to a quarterly basis grounded on the severity of the current environmental exposure considered.

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<sup>2044</sup> See para 4.2.7 in Chapter 4 - Internal Auditing and Audit Committee.

### *6.5.5 Local environmental misconduct regulations should be promulgated in terms of the NEMA*

The discouragement of delinquency in terms of environmental law is preventative by nature and should be prioritised by national government. The development of local environmental misconduct regulations in terms of the NEMA is a recommendation to national government. The recommendation seeks to address environmental misconduct in the local government domain. The regulations should ideally define offences in terms of classic or common local government environmental transgressions, classify the aforementioned transgressions in terms of scheduled offences, and advise related disciplinary procedure in terms of employees. The proposed local environmental misconduct regulations should go beyond the present criminal prosecution of related environmental offences and also regulate disciplinary procedure against the relevant municipal functionaries. This recommendation should also be interpreted in a manner that is constitutionally permissible and possible in view of Schedules 4 and 5 of the Constitution.

### **6.6 Future research areas**

The full extent of local environmental accountability is daunting and some of the aspects researched in this study should be further researched. It was established in this study that accountability is contingent on the category and type of municipality. Currently, government has established new governance pilot projects in terms of the new district model.<sup>2045</sup> Therefore, the new district model must also be researched to understand how local environmental accountability intersects with the new model and how the mechanisms thereto are influenced. To this extent the new *Structures Amendment Act* was also published in the last quarter of 2021 and must be researched to understand how local environmental accountability filters into the amended local governance types and structures.<sup>2046</sup> In addition to a better understanding of how accountability can be

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<sup>2045</sup> CoGTA 2018/19 Annual Report 6.

<sup>2046</sup> The *Structures Amendment Act*.

influenced by the category and type of municipality, more thought should also be afforded to how coalition governments influence accountability in municipalities. Moreover, research is needed on the risks posed by unstable political coalitions and political volatility in local government.

Liability in the context of accountability is also considered a significant component of governance. While presented in this study as constituent to accountability, liability should be further researched as a separate concept. The additional research should unpack liability as a separate concept to further the understanding of liability specifically in local government. Moreover, additional research would help improve liability outcomes where accountability mechanisms and litigation provide limited or short-term remedial relief. The SLA should be used as an initial point of departure to narrow down the current interpretation of liability from a state perspective to that of local government.

Finally, further research may have to be done to understand how South African local environmental accountability together with our mechanisms and structures compares with foreign local environmental accountability structures and mechanisms. South African local government is part of a broader international community of local government structures, and understanding best practice in other jurisdictions could advance local environmental accountability theory and practice in the South African context.

## ***6.7 Closing comments***

The law regulates behaviour and contributes towards the realisation of democratic governance. Accountability on the other hand serves as a compass to understand the attainment of good and transparent governance in democratic governance structures. Similarly, local environmental accountability as explained and questioned in this study can meaningfully help improve environmental answerability in local government to the ultimate enhancement of the state of the environment in South Africa and beyond.

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