

An environmental justice perspective on the role of local government in realising the right to sanitation

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Abstract

The provision of adequate sanitation is an essential service. In terms of schedule 4B of the *Constitution of the Republic of South Africa*, 108 of 1996 (the Constitution), such provision is a function of local government. It falls within the developmental mandate of local government in that it is a basic service that contributes to the quality of people's lives. However, the lack of access to adequate sanitation is a problem in South Africa, as roughly 17 million people are still without access to improved sanitation. This lack has a detrimental impact on people's lives and merits an enquiry into the role of local government in providing such services.

In this study, the legal mandate of local government in relation to sanitation is explored from an environmental justice perspective, as access to sanitation is an environmental issue. Although there is no explicit constitutional right to sanitation, it is argued that such a right is implicitly recognised by means of the provision of other rights in the Constitution, legislation and policy documents. The study further unpacks the mechanisms and instruments available to municipalities to enable them to achieve the objectives of environmental justice when providing sanitation services.

The urban and rural landscape in South Africa have different features, and the people who live in them have different needs. For this reason the features and challenges of urban and rural municipalities are discussed separately, thus establishing the different approaches that urban and rural municipalities might have to follow in the provision of sanitation services.

The study concludes with recommendations and the identification of the various governance tools that municipalities may use in order to realise the right to sanitation whilst achieving the objectives of environmental justice.

Keywords: sanitation, environmental justice, local government, basic services.

Opsomming

Die voorsiening van voldoende sanitasie is 'n noodsaaklike diens. In terme van skedule 4B van die *Grondwet van die Republiek van Suid-Afrika* 108 of 1996 (die Grondwet) is sanitasiedienste 'n funksie van plaaslike regering. Die voorsiening van hierdie dienste val binne die ontwikkelingsmandaat van plaaslike regering in die sin dat dit 'n basiese diens is wat bydra tot die kwaliteit van mense se lewens. Die gebrek aan toegang tot voldoende sanitasie is 'n probleem in Suid-Afrika met ongeveer 17miljoen mense wat steeds geen toegang tot verbeterde sanitasie het nie. Die gebrek aan toegang tot sanitasie het 'n nadelige uitwerking op mense se lewens en regverdig 'n ondersoek na die rol wat plaaslike regering in die verskaffing van sodanige dienste speel.

Volgens hierdie studie word die grondwetlike mandaat van plaaslike regering in verhouding tot verpligtinge ten aansien van sanitasie ondersoek vanuit 'n omgewingsgeregtigheid-perspektief omdat toegang tot sanitasie as 'n omgewingskwessie beskou kan word. Hoewel daar geen eksplisiete grondwetlike reg op sanitasie is nie, word daar in hierdie studie aangevoer dat so 'n reg implisiet erken word deur middel van ander regte in die Grondwet, wetgewing en beleidsdokumente. Hierdie studie sit verder die meganismes en instrumente beskikbaar tot munisipaliteite uiteen om die doelwitte van omgewingsgeregtigheid te bereik, deur die verskaffing van sanitasiedienste.

Suid-Afrika se stedelike en landelike gebiede het verskillende behoeftes en eienskappe. Om hierdie rede word die eienskappe en uitdagings van stedelike en landelike munisipaliteite afsonderlik bespreek. Die bespreking sluit in die verskillende benaderings wat stedelike en landelike munisipaliteite kan volg om sanitasie dienste te voorsien.

Die studie word afgesluit met aanbevelings en 'n bespreking van verskeie bestuursinstrumente wat munisipaliteite kan gebruik ten einde die reg tot sanitasie te realiseer en terselfertyd die doelwitte van omgewingsgeregtigheid te bereik.

Sleutelwoorde; sanitasie, omgewingsgeregtigheid, plaaslike regering, basiese dienste.

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List of abbreviations

CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRD	Convention on the Rights of the Disabled
DWA	Department of Water Affairs
EMCA	Environmental management co-operation agreement
FBS	Free Basic Sanitation
ICESCR	International Covenant on Economic, Social and Cultural Rights
MDGs	Millenium Development Goals
MIG	Municipal Infrastructure Grant
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
NEMA	National Environmental Management Act 107 of 1998
PMS	Performance Management System
IDP	Integrated development plan
SAHRC	South African Human Rights Commission
SAPL	South African Public Law
SALJ	South African Law Journal
SAYIL	South Afrcan Yearbook of International Law
SAJPL	South African Journal of Public Law
SAJHR	South African Journal of Human Rights
TSAR	Tydskrif vir Suid-Afrikaanse Reg
WPLG	White Paper on Local Government
UN	United Nations

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Chapter 1

Introduction

The adoption of the *Constitution of the Republic of South Africa, 1996* (the Constitution) was significant in that it created a new constitutional dispensation which continues to facilitate social transformation.¹ The Constitution created a democratic legal order premised on constitutional supremacy² (as opposed to the historical legal order based on parliamentary sovereignty and racial discrimination) founded on the values *inter alia* of human dignity, equality and freedom.³ Pursuant to the democratic legal order the Constitution entrenches various constitutional rights in chapter 2 (the Bill of Rights), and creates three spheres of government, namely local, provincial and national authorities, each with its different line functions.⁴

The local sphere of government, in particular, has been endowed since 1996 with extensive constitutionally entrenched functions and powers. Within the context that section 152 of the Constitution provides for the three spheres of government to be independent, interrelated and distinctive, the local sphere (municipalities) is endowed with more autonomy today than it used to have.⁵ The broader scope of local government autonomy is complemented by the principle of subsidiarity⁶ established by section 156(4) of the Constitution, which states that national and provincial government must assign to a municipality, by agreement and subject to any conditions, the

1 Bekink *Local Government Law* 1.

2 Section 2 of the Constitution.

3 Section 1 of the Constitution.

4 Section 40(1) of the Constitution.

5 Although there is considerable overlap between the three spheres of government, local government functions and powers are directly derived from the Constitution and not from the provincial governments. In contrast, prior to 1996 municipalities received their authority from the provinces. See *In re: Certification of the Constitution of South Africa, 1996* at 905-906.

6 On the principle of subsidiarity see generally De Visser 2010 *Stellenbosch Law Review* 90-115; De Visser 2008 *Local Government Bulletin* 16-17; Du Plessis 2006 *Stellenbosch Law Review* 207 – 231; Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 106-108.

administration of a matter listed in Schedule 4A and 5A⁷ of the Constitution which necessarily relates to local government, if that matter would most effectively be administered locally and the municipality has the capacity to administer it.

The authorities situated in the three spheres of government have specific constitutional obligations. One specific duty that falls on all three government spheres in terms of section 7(2) of the Constitution is to respect, protect, promote, and fulfil the rights entrenched in the Bill of Rights. These rights include, amongst others, the right to have one's dignity protected and respected (section 10), the right to access to adequate housing (section 26) and the right of access to sufficient water (section 27(1)(b)).

The objectives, powers and duties of *local* government should be understood against the background of South Africa's post-apartheid constitutional and socio-economic make-up. In this respect it is significant that the country is described as a developmental state.⁸ This requires the government to set specific social and economic goals and as a corollary to intervene in economic affairs, for example.⁹ It is within the objectives of local government to co-implement such development.¹⁰ These objectives include the provision of services to communities in a sustainable manner, the promotion of social and economic development, and the promotion of a safe and healthy environment.¹¹ There is furthermore a developmental duty on local government in terms of section 153 of the Constitution, which provides that a municipality must structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community and to promote social and economic development. This has culminated *inter alia* in the adoption of the notion of 'developmental local government' in the White

7 Schedule 4A deals with the functional areas of concurrent national and provincial legislative competence, whereas Schedule 5A deals with functional areas of exclusive provincial legislative competence.

8 With regard to the developmental state also see Nkuna 2011 *The Journal of Public Administration* 623; Coetzee 2010 *Town and Regional Planning* 19. For further reading on the South African developmental state see Maserumule 2007 *The Journal of Public Administration*; Dassah 2011 *The Journal of Public Administration*; Okoth 2009 *Africa Insight*; Maserumule 2012 *The Journal of Public Administration*; Tshishonga and Maphunye 2011 *The Journal of Public Administration*.

9 Maserumule 2007 *The Journal of Public Administration* 212.

10 Section 152 of the Constitution.

11 Section 152 of the Constitution.

Paper on Local Government of 1998 (WPLG), which has subsequently been unpacked in section 23 of the *Local Government: Municipal Systems Act* 32 of 2000 (Systems Act).¹²

The requirement that local government should play a developmental role means that municipalities must actively work with communities to find sustainable means to meet their different needs.¹³ It also implies that priority should be given to the provision of basic services such as access to water, sanitation and health care.¹⁴ Several other duties and powers of local government are set out in local government framework legislation such as the *Local Government: Municipal Structures Act* 117 of 1998 (the Structures Act), the Systems Act, and the *Local Government: Municipal Finance Management Act* 56 of 2003 (the MFMA).¹⁵

A clear developmental duty of local government is the provision of sanitation as listed in Schedule 4B of the Constitution.¹⁶ This listing suggests that it is a functional area of national and provincial legislative competence. In general, sanitation is a vital component of economic development, as, for example, sanitation-related diseases cost millions to treat annually.¹⁷ A lack of sanitation services could lead to the uncontrollable outbreak of diseases and which might lead to mortality. Thus diarrhoea is currently the third most frequent cause of death in South Africa and is directly linked to poor sanitation.¹⁸ The lack of adequate sanitation services is prevalent in the international arena as well. This statement is borne out by the fact that target 7C of the Millennium

12 Developmental local government is further discussed in chapter 2.

13 Bekink *Local Government Law* 70.

14 Bekink *Local Government Law* 70

15 Other developmental duties include the promotion of a safe and healthy environment. A municipal council furthermore has the general duty in terms of section 4 of the Systems Act to progressively realise, in cooperation with other organs of state, sections 24, 25, 26, 27 and 29 of the Constitution.

16 Schedule 4B provides that a functional area of local government is the provision of water and sanitation services, which are limited to potable water supply systems and domestic waste-water and sewage disposal systems.

17 Ndinda *et al* 2013 *Africanus* 97.

18 Bilchitz 2010 *SALJ* 591.

Development Goals (MDGs)¹⁹ of the United Nations (UN) is to halve the number of the world's population without access to sustainable drinking water and sanitation by 2015. The achievement of target 7C is a precondition for some of the other MDG developmental goals, such as the reduction of the infant and mortality rates.²⁰

Despite the above, there is no uniform legal or other description as to what the provision of sanitation facilities entails. However, various national and international policy documents provide guidance in this regard.²¹ It is trite that 'sanitation' refers not only to waste disposal facilities such as toilets or pit latrines but is broadly understood also to refer to the promotion of hygienic practices and the provision of infrastructure to facilitate such hygienic practices.²²

Internationally, the discourse²³ on sanitation has increasingly received prominence. The World Health Organisation's 2012 Report on Drinking Water and Sanitation reports that globally 2.5 billion people still lack access to improved sanitation.²⁴ As alluded to above, sanitation also appears on the agenda of the MDGs of the UN. The UN General Assembly declared 2008 the International Year of Sanitation, a fact which indicates the importance of the issue of sanitation at the international level.²⁵

The lack of access to sanitation remains a problem in South Africa, with 11 per cent of households still being without any form of sanitation services and a further 26 per cent

19 United Nations Millennium Development Goals
<http://www.undp.org/content/undp/en/home/mdgoverview.html>.

20 Ndinda *et al* 2013 *Africanus* 98.

21 The White Paper on Water Supply and Sanitation Policy (1994) 15 defines adequate sanitation as 'one well-constructed VIP toilet (in various forms, to agreed standards) per household'. The National Sanitation Policy (1996) 3 defines sanitation as 'the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact upon users, operators and the environment.'

22 Regulation 2 of the Compulsory National Standards for the Conservation of Water. White Paper on Basic Household Sanitation (2001) 5. See also the National Sanitation Policy (1996) 3.

23 The discourse on sanitation centres *inter alia* upon its recognition as a human right, and on access to sanitation facilities.

24 Progress on Drinking Water and Sanitation 2012 Update
<http://www.unicef.org/media/files/JMPReport2012.pdf>.

25 UN General Assembly Resolution A/C.2/61/L.16/Rev.1.

having access only to inadequate sanitation services.²⁶ There seems to be a number of widely acknowledged reasons for this situation, including the lack of governmental focus on the operation and maintenance of sanitation facilities and infrastructure, and poor local governance.²⁷

To fully understand the scope and impact of the need for the provision of sanitation facilities in South Africa it is necessary to distinguish between sanitation in the rural context and in the urban context. The 2011 UN MDG Report indicates that improvements in sanitation have failed to reach the poorest of the world's population, who mainly live in rural areas.²⁸ Moreover, globally an urban resident is 1.7 times more likely to use an improved sanitation facility²⁹ than a rural resident.³⁰ This suggests that a nuanced difference exists in the nature of the link between access to and the use of sanitation facilities in the urban and rural contexts. South Africa's Census 2011 statistical release further indicates that there are significant disparities between urban and rural provinces in terms of service delivery.³¹ This would mean that it is not necessarily possible to assess and evaluate sanitation services by means of a one-size fits all approach.

In South Africa, the principal law outlining the duties of municipalities regarding the provision of sanitation is the *Water Services Act* 108 of 1997 (the *Water Services Act*).³² Section 3 of the Act states that everyone has the right to a basic water supply and basic

26 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 16.

27 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 2.

28 Millenium Development Goals Report 2011

[http://www.un.org/millenniumgoals/pdf/\(2011_E\)%20MDG%20Report%202011_Book%20LR.pdf](http://www.un.org/millenniumgoals/pdf/(2011_E)%20MDG%20Report%202011_Book%20LR.pdf) .

29 Improved sanitation refers to a facility that hygienically separates human excreta from human contact, for example a flush toilet or a ventilated improved pit latrine. An example of an unimproved sanitation facility would be a bucket toilet.

30 Millenium Development Goals Report 2011

[http://www.un.org/millenniumgoals/pdf/\(2011_E\)%20MDG%20Report%202011_Book%20LR.pdf](http://www.un.org/millenniumgoals/pdf/(2011_E)%20MDG%20Report%202011_Book%20LR.pdf).

31 Statistics South Africa *Census 2011 Statistical Release* 67.

32 The provisions of the *Water Services Act* should be read with the Regulations Relating to Compulsory National Standards and Measures to Conserve Water GN R509 in GG 22355 of 8 June 2001 (Compulsory National Standards) which provide the minimum standards for basic sanitation and water supply services.

sanitation,³³ and that every water services institution³⁴ has a duty to take reasonable steps to realise this right. The Constitution does not expressly provide for a right to adequate sanitation, but the right could be inferred from other self-standing constitutional rights such as the right to a healthy environment (section 24)³⁵ and the right to access to water (section 27).³⁶ It is important to understand, though, that if access to basic sanitation is not available to communities, this potentially affects a number of constitutional rights including the right to human dignity (section 10), the right to have access to adequate housing (section 26), the right to an environment not harmful to one's health or well-being (section 24) and the right to access to sufficient water (section 27(1)(b)).³⁷ The right to sanitation will therefore always be reinforced by and be interrelated with other constitutional rights.

The relevant literature agrees that there is a link between a healthy environment and the availability of water and sanitation.³⁸ A lack of basic sanitation may, for example, lead to the pollution of water sources such as rivers.³⁹ This in turn may impact on the health of the people using water from these sources. The significance of the link between the right to an environment not harmful to one's health or well-being, access to water and

33 Section 1(ii) of the *Water Services Act* defines basic sanitation as the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.

34 The *Water Services Act* defines a water services institution as a water services authority, a water service provider, a water board and a water services committee.

35 *Fuo Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 184.

36 Du Plessis 2011 *SAJHR* 295; *Fuo Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 184; Kamga 2013 *SAJHR* 634. See 2.3 regarding the nature of the right to sanitation.

37 Liebenberg and Goldblatt 2007 *SAJHR* 338-339 argue that the transformative nature of the South African Constitution demands an interpretation of socio-economic rights that is interdependent. Feris 2008 *SAJHR* 45-46 argues that the interdependence should be understood in a dual context: firstly in the organic sense, which means that one right forms part of another (for example, the right to life cannot be separated from the right to dignity), and secondly in the sense that the rights have a 'related interdependence', as they are mutually reinforcing (for example, the right to privacy and the right to human dignity). Also see Scott 1989 *Osgoode Hall Law Journal* 769-878.

38 Stewart and Horsten 2009 *SAJPL* 493.

39 The Department of Water Affairs (DWA) reports that the main problems affecting water quality in South Africa in 2010/2011 were 'eutrophication, faecal pollution, salinity, toxicity and acid mine drainage.' <http://www.pmg.org.za/report/20110817-department-water-affairs-health-rivers>.

access to sanitation furthermore lies in the meaning of the concept of environmental justice.

'Environmental justice' has become an established concept in social justice and environmental law discourse, and is a principle incorporated in South African environmental framework law.⁴⁰ The *National Environmental Management Act* 107 of 1998 (the NEMA) refers to environmental justice in section 2(4)(c), stating that 'environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons'. This definition accords with descriptions of environmental justice generally. Although there is no single and uniform definition of environmental justice in its broadest sense, it deals in essence with the environment and social difference.⁴¹ It deals simultaneously with environmental burdens⁴² and environmental benefits.⁴³ There is, however, a tendency to include other aspects of justice in this term, such as recognition and participation.⁴⁴ It will be argued in this dissertation that sanitation should be seen as an environmental justice issue, as an unsanitary environment (due to a lack of access or as a result of poorly maintained sanitation infrastructure) has detrimental impacts on the health and well-being of people (as part of their total environment).⁴⁵

The existence of the interrelationship between an unsanitary environment and negative impacts on people's well-being was judicially confirmed in *Johnson Mototoba Nokotyana and others v Ekurhuleni Metropolitan Municipality and others* (Nokotyana

40 Glazewski *Environmental Law in South Africa* 15. Environmental justice is one of a list of management principles set out in section 2 of the NEMA. See chapter 2 for a discussion of the notion of environmental justice.

41 Walker *Environmental Justice* 14.

42 Environmental bads or environmental hazards include, for example, air pollution and waste landfills. Environmental goods include, for example, access to services such as water and sanitation.

43 Scott and Oelofse 2005 *Journal of Environmental Planning and Management* 449.

44 Millner 2011 *Deakin Law Review* 190; Schlosberg 2013 *Environmental Politics* 40; Schlosberg 2007 *Environmental Politics* 518; Reed and George 2011 *Progress in Human Geography* 839.

45 See par 2.2 regarding the need for sanitation.

case),⁴⁶ where the Constitutional Court dealt with the right of access to basic sanitation. The applicants approached the Constitutional Court seeking one ventilated pit latrine per household after the municipality offered one chemical toilet for every four households. The applicants argued that the right to adequate housing (section 26) should be interpreted in such a manner as to include basic sanitation and electricity.⁴⁷

Further, in January 2010 the South African Human Rights Commission (the SAHRC) received a complaint from the African National Congress Youth League on behalf of the residents of ward 95 in Makhaza, Khayelitsha. *Beja and Another v Premier of the Western Cape* (Beja case)⁴⁸ emanated from this situation. The High Court found that there had been a violation of section 10 (human dignity), section 12 (freedom and security), section 14 (privacy), section 24 (environment), section 26 (housing) and section 27 (healthcare) of the Constitution.

Against the background of the above it seems fitting to critically explore the right to sanitation through the lens of environmental justice, to determine if the Constitution and legislation provide the mechanisms for municipalities to achieve the objectives of environmental justice in the provision of sanitation services. Exploring the right to sanitation as provided for in statute law⁴⁹ against the normative meaning of environmental justice in the South African context may strengthen the understanding of such a right and its interrelationship with a number of self-standing constitutional rights.⁵⁰

The aim of this study is therefore to critically explore the nature of the role of local government in realising the right to sanitation, bearing in mind the purposes of the Constitution and the need for environmental justice in post-apartheid South-Africa. While Schedules 4B and 5B of the Constitution list water and sanitation services as an

46 2009 ZACC 33.

47 Nokotyana case par [22]-[23].

48 2011 JOL 27172 (WCC).

49 In the absence of its being catered for explicitly in the Bill of Rights.

50 A self-standing right is a right that is explicitly mentioned in the Constitution, such as the right to sufficient food and water (section 27).

interwoven and combined local government function, this study specifically deals with the right to sanitation. In order to achieve this objective, the nature and scope of the right to sanitation are considered, albeit with acknowledgment of the attendant need for water. An ancillary objective of the study is to recommend governance tools and other mechanisms that local government (in rural and urban contexts) may use to realise the right to sanitation with the requirement of environmental justice in mind.

This study commences, in chapter 2, with a review of some theoretical approaches to access to sanitation in South Africa. Chapter 2 firstly explores the nature of the right to sanitation and its inter-relatedness with other constitutional rights. Various approaches to environmental justice are also examined. Chapter 3 focuses on the legal mandate of municipalities in relation to sanitation services, for which purpose the Constitution, legislation, various policy documents and case law are examined in a relatively positivistic way. Chapter 4 distinguishes between rural and urban perspectives on the realisation of the right to sanitation. It considers how a municipality's approach to the provision of sanitation may differ in the rural and urban contexts. The chapter also considers the *status quo* of access to basic sanitation services in South Africa from a critical legal perspective and on the basis of recorded information. Chapter 5 consists of a conclusion of and critique of the current state of the right to access to sanitation and offers a number of recommendations.

This study was conducted through the medium of a literature review. A critical analysis and evaluation of the existing constitutional rights framework in South Africa was undertaken to determine what the role of local government is in the realisation of the right to sanitation. It includes the appraisal of various legal texts, including textbooks, journal articles, legislation, case law, government policies and other government reports that are relevant to the role of local government in realising the right to sanitation. The viewpoints of authors on environmental justice are also examined and critiqued. The work of South African and international scholars is considered with respect to defining environmental justice. The work of international scholars is of particular importance in this instance as, despite it being mentioned as a principle in South African law, it is not

conclusively defined. Thus, many international scholars continue to theorise on what the term 'environmental justice' may mean, and it may be fruitful to participate in that discussion here.

CHAPTER 2

Theoretical approaches to the right of access to sanitation

2.1 Introduction

The right to sanitation is not a self-standing right⁵¹ in the Constitution. Yet, as was explained in chapter 1, access to sanitation facilities is a basic need of all human beings.⁵² As it is such, and considering the nature of human rights in general, it could be argued that access to sanitation demands protection in the form of one or a group of constitutional rights.⁵³ To date, this position has been held by many.⁵⁴ Acknowledgement of access to sanitation services as a rights-based claim would imply that there is a duty on the state, including municipalities, to respect, protect, promote and fulfil the right to sanitation.⁵⁵

The objective of this chapter is to unpack some of the theoretical approaches underlying the realisation by municipalities of the right to sanitation. These theoretical approaches include an understanding of the right to sanitation and how it is informed by the notion of environmental justice. First, the need for proper sanitation is elaborated on. Thereafter it is established which particular rights-based claims can be made to sanitation in the international, regional and South African contexts. Against the background of the latter this chapter also specifically explores the meaning of environmental justice and the manner in which it informs the role and function of municipalities in realising the right of access to sanitation. Some of the prevailing approaches to environmental justice are discussed, in particular that of the David Schlosberg.

51 Kruger and Govindjee 2012 *SAPL* 196 refer to rights that are not explicitly mentioned in the Constitution as unenumerated rights.

52 See par 2.2.

53 Bilchitz 2003 *SAJHR* 20 describes the underlying rationale for the recognition of rights as follows: 'Fundamental rights protect certain basic interests that people have. These guarantees are designed to enable people to survive, avoid significantly negative experiences and to be capable of achieving the purposes they value in the world'.

54 Kamga 2013 *SAJHR* 615; Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 184.

55 Section 7(2) of the Constitution.

2.2 The need for sanitation

Through the ages sanitation has been essential to human beings.⁵⁶ Understood to be the collection, removal and treatment of human excreta and domestic wastewater,⁵⁷ sanitation is necessary for a person's health as well as for his or her well-being.⁵⁸ Human beings by nature need to excrete waste. If this waste is not disposed of in the correct manner it could, for example, be hazardous and/or detrimental to the environment, including water resources. Cairncross⁵⁹ maintains that there are three main reasons why sanitation is important, namely that it prevents disease, that it is beneficial for women, and that people value its advantages. Yet, as already indicated, the need for appropriate sanitation remains a worldwide problem with 2.5 billion people still being without access to improved sanitation in 2011.⁶⁰

In 2000 South Africa saw the effects of what were arguably the effects of the inadequate provision of sanitation when Kwazulu Natal experienced a cholera outbreak which claimed the lives of several people and 25 500 people were infected.⁶¹ Generally, there are various sanitation-related diseases which cost millions to treat.⁶² Improper sanitation often creates a breeding place for flies, and such an infestation can cause diseases such as trachoma.⁶³ A lack of proper sanitation may also cause skin infections and induce the onset of such frequent ailments as to give rise to the person's developing a weak immune system in general.⁶⁴

It follows that access to proper sanitation services is vital for development, in that it promotes health, well-being and productivity. Sanitation also relates to the desire for

56 Kamga 2013 *SAJHR* 616.

57 Tissington *Guide to Basic Sanitation* 9.

58 Ndinda *et al* 2013 *Africanus* 98.

59 Cairncross 2003 *International Journal of Environmental Health Research* S123.

60 Unicef 2013 *Water, Sanitation and Hygiene* <http://www.un.org/waterforlifedecade/sanitation.shtml>.

61 Ndinda *et al* 2013 *Africanus* 97. World Health Organisation 2013 http://www.who.int/csr/don/2001_03_28/en/index.html.

62 Ndinda *et al* 2013 *Africanus* 97.

63 Cairncross 2003 *International Journal of Environmental Health Research* S124.

64 Ndinda *et al* 2013 *Africanus* 97.

privacy,⁶⁵ and hence to human dignity.⁶⁶ Privacy is integral to sanitation as people need a private space in which to relieve themselves. It is undignified to relieve oneself in public.⁶⁷ That renders proper sanitation a human need conducive to people's sense of dignity. Against this background, the need and importance of universal access to adequate sanitation has led to its prominence on the international agenda⁶⁸ as well as a number of developments in public international law to which this chapter turns next.

2.3 Legal claims to sanitation

This section sets out to determine the legal claims that people may have in the instance where they are not provided with access to adequate sanitation. The public international law framework is examined to determine the scope of the right to sanitation as acknowledged internationally, and how the internationally recognised right may inform the right to sanitation in South Africa. Thereafter, the various constitutional rights in the Constitution that incidentally protect the right to sanitation are discussed. The latter discussion is important as the existence of the right is best interpreted through an inclusive application of a group of rights.

2.3.1 International law framework

In October 2010 the Human Rights Council of the UN adopted a resolution⁶⁹ that reaffirmed⁷⁰ that the right to access to safe drinking water and sanitation forms part of international human rights law. The Council affirmed⁷¹ that state obligations regarding safe drinking water and sanitation emanate *inter alia* from the International Covenant on

65 See par 2.3.3.5.

66 See par 2.3.3.4.

67 In the Makhaza finding (case ref WC/2010/0029) the SAHRC found that the respondent had violated the right to human dignity by not enclosing the toilets of the complainants.

68 2008 was declared the International Year of Sanitation <http://esa.un.org/iys/>. The UN Deputy Secretary-general, Jan Eliasson, has also initiated the 'Sanitation Drive', which is an advocacy campaign that aims to reach the MDG of sanitation <http://sanitationdrive2015.org/>. The UN General Assembly has also declared 19 November World Toilet Day <http://www.un.org/en/events/toiletday/index.shtml>.

69 Resolution A/HRC/RES/15/9 (adopted 30 September 2010).

70 In terms of resolution A/RES/64/292 (adopted July 2010) the General Assembly for the first time recognised the right to safe and clean drinking water and sanitation as a human right.

71 Resolution A/HRC/RES/15/9.

Economic, Social and Cultural Rights⁷² (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women⁷³ (CEDAW), the Convention on the Rights of the Child⁷⁴ (CRC) and the Convention on the Rights of Persons with Disabilities⁷⁵ (CRD).

The ICESCR does not explicitly refer to the right to sanitation.⁷⁶ However, the Committee on Economic, Social and Cultural Rights⁷⁷ (CESCR) has indicated through reference to the right to water that people use water for drinking, personal sanitation, the washing of clothes, food preparation, personal and household hygiene.⁷⁸ The Committee's approach implies that the scope of application of the right to water includes the protection of access to sanitation. The Committee held that 'access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources'.⁷⁹ The Committee further noted that access to safe potable water and adequate sanitation is important to realise the right to health.⁸⁰ In 2010 the Committee issued an official statement regarding the right to sanitation:⁸¹

The Committee reaffirms that, since sanitation is fundamental for human survival and for leading a life in dignity, the right to sanitation is an essential component of the right to an adequate standard of living, enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to sanitation is also integrally related, among other Covenant rights, to the right to health, as laid down in Article 12 paragraphs 1 and 2 (a), (b) and (c), the right to housing, in Article 11, as well as the right to water, which the Committee recognized in its General Comment No. 15. It is significant, however, that sanitation has distinct features which warrant its separate treatment from water in some respects. Although much of the world relies on

72 UN International Covenant on Economic, Social and Cultural Rights (entry into force 3 January 1976).

73 UN Convention on the Elimination of All Forms of Discrimination against Women (entry into force 3 September 1981).

74 UN Convention on the Rights of the Child (entry into force 2 September 1990).

75 UN Convention on the Rights of Persons with Disabilities (entry into force 3 May 2008).

76 Kamga 2013 *SAJHR* 618.

77 The Committee is a body of experts that is responsible for monitoring the implementation of the ICESCR by the state parties.

78 General Comment No 15 par 12.

79 General Comment No 15 par 29.

80 General Comment No 14.

81 UN Economic and Social Council *Statement on the right to sanitation* E/C.12/2010/1 par 7.

waterborne sanitation, increasingly sanitation solutions which do not use water are being promoted and encouraged.

From the above statement it is clear that sanitation is affirmed as a human right at the international level and that it is intertwined with other rights. However, South Africa has not ratified the ICESCR. Should it have been a state party, it would have stood under the international obligation to give effect to the provisions in the ICESCR through national legislation, programmes and policies and furthermore to create domestic remedies for any violations of the rights.⁸² Still, even though South Africa has not ratified the ICESCR, the ICESCR must guide the judiciary in its interpretation of the Bill of Rights, as provided by section 39 of the Constitution.⁸³

South Africa has ratified the CEDAW. The CEDAW expressly states that there is an obligation on nation states to eliminate discrimination against women regarding water and sanitation by providing that states shall ensure to women the right 'to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication'.⁸⁴ South Africa has also ratified the CRC. The CRC provides that states should take appropriate measures to combat disease and malnutrition, including the provision of clean drinking water.⁸⁵ The CRC further provides that it is an obligation of states to inform children regarding environmental sanitation, among other issues.⁸⁶

It follows that the right to access to safe drinking water and sanitation forms part of public international law and that the realisation of this right rests on nation states. In terms of public international law the right to sanitation seems to be derived from other rights, such as the right to an adequate standard of living. On the issue of human rights obligations related to access to safe drinking water and sanitation, the Independent

82 Liebenberg 2014 *ESR Review* 3.

83 Section 39 provides that courts must consider international law when interpreting the Bill of Rights. Also see Liebenberg 1995 *SAJHR* 372.

84 Article 14(2)(h). See also Kamga 2013 *SAJHR* 619.

85 Article 24(2) (c).

86 Article 24(2)(d).

Expert⁸⁷ has nevertheless argued that as sanitation is necessary for the realisation of many other rights⁸⁸ but cannot entirely be subsumed by any other human right it should be considered as a distinct human right.⁸⁹ It accordingly seems as if there is no consensus internationally on whether the right to sanitation should be a distinct human right or not.

It is imperative that South African courts adhere to the duty to consider the provisions of public international law when interpreting the Bill of Rights.⁹⁰ In terms of section 231(2) of the Constitution an international agreement binds the Republic after it has been approved by both houses of Parliament. Furthermore, in terms of section 231(4) of the Constitution international agreements have to be incorporated into national legislation in order for it to become domestically enforceable law. Section 233 of the Constitution further requires a reasonable interpretation of legislation which is consistent with international law. As already indicated, section 39 of the Constitution further explicitly mandates the courts to consider international law when interpreting the Bill of Rights.

In *Glenister v President of the Republic of South Africa*⁹¹ (Glenister case) the Constitutional Court addressed the nature and effect of international agreements on the South African legal system.⁹² In this case the court found that section 231(2) is applicable to the Republic's obligations only in the international arena (ie between states).⁹³ The court went further to state that section 231(2) is significant when interpreting the state's duty in terms of section 7(2), however.⁹⁴ When tasked with the determination of the content of the section 7(2) duty to realise the rights in the Bill of

87 Appointed in accordance with the Human Rights Council Resolution 7/22.

88 For example the right to adequate housing and the right to education.

89 Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, de Albuquerque A/HRC/12/24.

90 Section 39 of the Constitution.

91 2011 3 SA 347 (CC).

92 For a discussion of the Glenister case, see Cameron 2013 *Duke Journal of Comparative and International Law* 389-409; Stubbs 2011 *Constitutional Court Review* 137-165; Gowar 2011 *SAYIL* 307-325.

93 *Glenister case* par [181].

94 *Glenister case* par [200].

Rights, the court *must* take into account international law.⁹⁵ The court describes this process as follows:

Our Constitution appropriates the obligation for itself and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.⁹⁶

After the content of a domestic duty or right has been determined with recourse to international provisions, it can be said that the obligation arises from the Constitution itself. Gowar maintains that the *Glenister* case creates the basis for international law to be used not only as an interpretive tool by the courts but as authority where constitutional rights have been infringed.⁹⁷ The *Glenister* case is seen as authority for the argument that international law obligations can form part of the domestic legal system *via* an interpretation of section 7(2) of the Constitution. The case affirmed that the state is bound by international agreements not only in the international arena (ie between states) but that international agreements that have been ratified could have domestic effect. The court does not elaborate on the extent to which international law might have a domestic effect, however.⁹⁸ Yet, given the reasoning in the *Glenister* case, the implication of the international recognition of a right to sanitation is arguably that South Africans could hold the state accountable for fulfilling its obligations in terms of the international agreements that it has ratified, for example the CEDAW. It is also possible for the Committee on the Elimination of Discrimination against Women to receive individual complaints.⁹⁹ However, domestic remedies have first to be exhausted by the individual instituting the complaint.¹⁰⁰

95 Section 39 of the Constitution.

96 *Glenister case* par [189].

97 Gowar 2011 *SAYIL* 324.

98 See Cameron 2013 *Duke Law Journal* 406.

99 Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (entry into force 22 December 2000).

100 Article 4 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

2.3.2 African regional law perspectives

There is no African human rights instrument that expressly provides for the right to sanitation.¹⁰¹ This right is inferred, however, from the *African Charter on Human and People's Rights*,¹⁰² which South Africa has ratified.¹⁰³ Article 16(1) of the *African Charter on Human and People's Rights* provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. Article 24 further provides that every individual has the right to an environment favourable to his or her development. In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*¹⁰⁴ the African Court for Human and People's Rights had the opportunity to give content to articles 16 and 24 of the Charter. The Commission held that a clean and healthy environment is closely linked to other social and economic rights, as the environment affects the quality of life and the safety of an individual. From the foregoing statement it is possible to deduce that article 24 protects interests such as a sanitary environment, as the Commission affirmed that one's environment has a direct effect on one's quality of life and safety. The African Charter on the Rights and Welfare of the Child also affirms the obligation to promote the highest attainable state of mental, physical and spiritual health.¹⁰⁵ It can also be deduced that a sanitary environment is protected by the highest attainable mental and physical health as an unsanitary environment has an effect on one's mental and physical health. Individuals can file complaints at the African Commission on Human and People's Rights, where there has been an alleged violation of the *African Charter on Human and People's Rights*.¹⁰⁶ It is important to note, however, that all available remedies in the country of origin should first be exhausted, and that the decision of the Commission is not binding on the particular nation state.¹⁰⁷ Individuals may also approach the African Court on Human and People's Rights, in cases where there has been an alleged violation of the *African*

101 Kamga 2013 SAJHR 620.

102 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

103 Kamga 2013 SAJHR 620.

104 (2001) AHRLR 60 (ACHPR 2001).

105 Article 14 of the African Charter on the Rights and Welfare of the Child.

106 Article 55 of the African Charter on Human and People's Rights.

107 Amadi 2002 ESR Review 5.

Charter on Human and People's Rights.¹⁰⁸ The court may grant an appropriate remedy where a violation is found, including the payment of compensation or reparation.¹⁰⁹

2.3.3 *The South African constitutional right to sanitation*

While the right to sanitation is not expressly provided for in South Africa's Constitution, it finds expression in the *Water Services Act*, which provides that everyone has the right of access to basic sanitation services.¹¹⁰ The question arises whether or not the absence of an express constitutional right to sanitation means that people's access to sanitation does not enjoy constitutional protection.¹¹¹ It is argued in this study that the Constitution does protect the right to sanitation – not expressly but by virtue of the inclusive interpretation of the right to an environment not harmful to one's health and well-being (section 24), the right to access to water (section 27), the right to adequate housing (section 26), the right to human dignity (section 10) and the right to privacy (section 14). The basis of this reasoning is that the right to sanitation can be implicitly derived from other constitutional rights by the judiciary.¹¹² Krüger and Govindjee maintain that silence regarding a particular right claimed does not mean that it does not enjoy constitutional protection.¹¹³ They argue further that rights are not regarded as fundamental rights only as a result of their constitutional entrenchment.¹¹⁴ Rights in the Bill of Rights are indeed inter-related and inter-connected.¹¹⁵ It is furthermore possible for courts to grant constitutional protection to interests that are not expressly mentioned in the Constitution.¹¹⁶ Section 39(3) of the Constitution states that the Bill of Rights does

108 Article 5(3) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

109 Article 27 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

110 Section 3 of the Water Services Act.

111 Krüger and Govindjee 2012 *SAPL* 196.

112 Kamga 2013 *SAJHR* 633. Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 184.

113 Krüger and Govindjee 2012 *SAPL* 207.

114 Krüger and Govindjee 2012 *SAPL* 207.

115 Liebenberg *Socio-Economic Rights* 52.

116 In *Dawood v Minister of Home Affairs* 2000 (3) SA 936(CC) par [34] – [38], for example, the Constitutional Court afforded constitutional protection to marriage and family life by means of the right to human dignity, even though the right to family life is not mentioned in the Constitution. In *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (tJoseph case) the Constitutional Court held

not deny the existence of any other rights that are recognised or conferred by common law, customary law or legislation, provided they are consistent with the Constitution. In the discussion that follows, each of the above-mentioned constitutional rights and the manner in which it affords protection to adequate sanitation are discussed.

2.3.3.1 The environmental right

Section 24 of the Constitution entrenches a substantive and enforceable environmental right. Section 24 provides that

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

The Constitutional Court has not yet given content to the full scope of the constitutional environmental right.¹¹⁷ Section 24 has generally been interpreted to be people-centred or anthropocentric,¹¹⁸ as it is primarily directed at human beings and their health and well-being.¹¹⁹ Section 24(a) firstly states that everyone has a right to an environment that is not harmful to his or her health. Health is relevant in the environmental right context, as external factors such as having insufficient access to safe drinking water

that a right to receive basic municipal services includes the right to electricity, basing this decision on the objects of local government, the Systems Act and the Housing Act 107 of 1997. The Joseph case is further discussed in chapter 3.

117 In *Fuel Retailers Association of Southern Africa v Director – General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 (6) SA 4 (CC) the Constitutional Court affirmed the importance of the environmental right, although the emphasis was largely on sustainable development. See Du Plessis 2011 *SAJHR* 289; Feris 2008 *SAJHR* 30; Feris 2008 *Constitutional Court Review* 235 – 253; Tladi 2008 *Constitutional Court Review* 488-504; Murombo 2008 *SALJ* 488-504.

118 There are generally two main approaches to environmental rights, namely the eco-centric or anthropocentric approach. The former approach focuses on the environment as an end in itself whereas the latter focus on the (inter) relationship between people and the environment. See Feris 2008 *SAJHR* 30-33; Scholtz 2005 *TSAR* 69-85.

119 Du Plessis 2011 *SAJHR* 292; Fuo 2013 *Obiter* 88.

and sanitation can threaten a person's health.¹²⁰ Section 24(a) further states that everyone has the right to an environment that is not detrimental to his or her well-being. The concept of 'well-being', however, is elusive.¹²¹ The term may include aesthetic and spiritual dimensions.¹²² It has also been argued that the notion 'well-being' includes ecological concerns such as conservation.¹²³ Well-being could also refer to the protection of a person's welfare, which would include, for example, the provision of appropriate infrastructure for sanitation.¹²⁴

As stated earlier, inadequate sanitation has a direct effect on a person's health as it often results in illness or disease.¹²⁵ Being in an environment that is unsanitary undoubtedly affects a person's well-being, as such an environment is often permeated by bad smells. It follows that access to sanitation is a matter that is one of the interests that the constitutional environmental right seeks to protect.

Section 24(b) creates a positive obligation on the state to protect the environment, through legislative and other measures, in contrast to the negative obligation created by subsection (a). The protection is aimed at preventing pollution, promoting conservation, and using natural resources in a sustainable manner.¹²⁶ From scientific studies it may be gleaned that a causal link exists between inadequate sanitation infrastructure and the pollution of natural resources such as water and soil. Langergraber and Muellegger indicate that inadequate sanitation may lead to the contamination of underground water resources, for example.¹²⁷ Adequate sanitation is necessary for the protection of the quality of exposed natural resources such as water, soil, biodiversity and air.¹²⁸ The duty on the state in terms of section 24(b) to protect the quality of natural resources

120 Du Plessis 2011 *SAJHR* 293.

121 Kidd 1999 *Acta Juridica* 155. See also Currie and De Waal *The Bill of Rights Handbook* 526.

122 Kidd 1999 *Acta Juridica* 155.

123 Currie and De Waal *The Bill of Rights Handbook* 526.

124 Du Plessis 2011 *SAJHR* 295.

125 See par 2.2.

126 Section 24(b) of the Constitution.

127 Langergraber and Muellegger 2005 *Environment International* 434. Also see Ashbolt 2004 *Toxicology* 230; Palamuleni 2002 *Physics and Chemistry of the Earth* 845-850.

128 Hofmeyr *Intergovernmental Response Measures to Address Failing Municipal Water Supply Services: A Legal Perspective* 42-43.

(such as water and soil) fortifies the understanding that the provision of adequate sanitation also falls within the purview of the duties on the state created by section 24(b). The integrity and protection of the environmental right rely in part on adequate sanitation. It follows that the environmental right by implication creates a constitutional basis for access to adequate sanitation.¹²⁹

2.3.3.2 The right to access to sufficient water

As alluded to above, sanitation is often referred to in combination with access to sufficient water.¹³⁰ This seems logical since many toilets are waterborne.¹³¹ Water is also required for hygienic practices such as the washing of hands and clothes etc. In addition to this, and as explained above, adequate sanitation contributes to the ability to supply water that is of adequate quality.¹³² The Constitution provides that everyone has the right to have access to sufficient food and water.¹³³ As was indicated earlier, the right to access to sufficient water is further protected by the *Water Services Act*. Section 3 of the *Water Act* provides that everyone has the right to a basic water supply. The Act defines a 'basic water supply' as:

the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

129 Kamga 2013 SAJHR 644.

130 Currently the *Water Services Act* provides that everyone has a right to a basic water supply and sanitation. Res A/HRC/RES/15/19 speaks of a human right to access to safe drinking water and sanitation. Res A/RES/64/292 refers to the right to water and sanitation. The UN report of the independent expert on human rights (A/65/254) relating to water and sanitation addresses water and sanitation as a human right. Target 7C of the MDGs speaks of access to safe drinking water and sanitation. The South African government has recently established a Water and Sanitation Ministry <http://www.sanews.gov.za/south-africa/new-water-sanitation-minister-hit-ground-running>.

131 According to the South African 2011 Census results, 57 per cent of South African households have a flushed toilet connected to a sewerage system, and a further 3.1 per cent of households have a flushed toilet connected to a septic tank.

132 OHRE, WaterAid, SDC and UN-HABITAT *Sanitation: A human rights imperative* 6. See par 2.3.3.1.

133 Section 27 (1)(b) of the Constitution.

The definition of a basic water supply seems to confirm the fact that water is needed to ensure proper personal hygiene and, by implication, proper sanitation.¹³⁴ This is further confirmed by existing studies in this field.¹³⁵

In *Lindiwe Mazibuko and Others v City of Johannesburg and Others (Mazibuko case)*¹³⁶ the Constitutional Court dealt with the right to access to sufficient water. The court had to decide whether or not the City of Johannesburg's free basic water policy was in line with the right of access to water contained in section 27. The court affirmed that the right of access to sufficient water places a duty on the state to take reasonable legislative and other measures to progressively realise the right within the state's available resources.¹³⁷

Water and sanitation services are inter-connected.¹³⁸ As sufficient water includes the amount of water needed for personal hygiene,¹³⁹ it is possible to argue that the right of access to sufficient water includes the protection of the right of access to sanitation.

2.3.3.3 The right to adequate housing

The Constitution provides that everyone has the right to have access to adequate housing and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.¹⁴⁰ In the landmark judgment in *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁴¹ the courts interpreted the right to adequate housing for the

134 The White Paper on Basic Household Sanitation 5-6 states that 'appropriate health and hygiene awareness and behaviour' form part of the minimum acceptable basic level of sanitation.

135 WHO *Domestic Water Quality, Service, Level and Health* http://cdrwww.who.int/water_sanitation_health/diseases/WSH03.02.pdf. See also Schweitzer and Mihelcic 2014 *Comprehensive Water Quality and Purification* 299-314.

136 2010 (3) BCLR 239 (CC).

137 *Mazibuko case* par [50].

138 Kamga 2013 SAJHR 642-644. Hunter *et al* 2010 *PLoS Medicine* 1.

139 Dhananjay Singh *et al* 2011 *International Journal of ChemTech Research* 52.

140 Section 26 of the Constitution.

141 2001 (1) SA 46 (CC).

first time. The court stated with reference to section 26 that adequate housing requires sanitation services:¹⁴²

It recognises that housing entails more than bricks and mortar. It requires available land, *appropriate services such as the provision of water and the removal of sewage* and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. (Own emphasis)

The court went further to explain that the context of each case should be kept in mind:

The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.¹⁴³

Sanitation is thus also a fundamental part of adequate housing.¹⁴⁴ There have been numerous judgements since the *Grootboom* case dealing with the right to adequate housing.¹⁴⁵ In the *Beja* case, for example, the applicants argued that the right to adequate housing includes basic sanitation services. Although the court did not arrive at a conclusion on whether or not the right to adequate housing includes basic sanitary services the court confirmed that adequate sanitary facilities are central features of housing development in South Africa.¹⁴⁶ It follows that the right to housing affords

142 2001 (1) SA 46 (CC) par [35].

143 2001 (1) SA 46 (CC) par [37].

144 Tissington *Basic Sanitation in South Africa* 27. Since 2009 the responsibility for household sanitation has been moved from the Department of Water Affairs to the Department of Human Settlements, although the Department of Water Affairs is still responsible for bulk reticulation.

145 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 (2) BCLR 99 (CC); *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC).

146 *Beja* case par [52]. The *Beja* case is discussed further in chapter 3.

protection to adequate sanitation, since adequate sanitary facilities form part of housing developments that are suitable and adequate.¹⁴⁷

2.3.3.4 The right to human dignity

The right to human dignity is enshrined in the Constitution.¹⁴⁸ Dignity is understood as that quality that deems one worthy of respect.¹⁴⁹ In *S v Makwanyane*¹⁵⁰ the court affirmed the importance of respecting the dignity of all human beings.¹⁵¹

Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.

At the core of human dignity lies the duty to respect the intrinsic worth of all human beings.¹⁵² Developing appropriate responses to disadvantages such as a lack of basic sanitation is recognising the value of human dignity.¹⁵³ In the *Beja* case the court reiterated that access to sanitation has a direct bearing on the right to human dignity.¹⁵⁴ The case dealt with an agreement between the municipality and the members of the community. The municipality alleged that there had been a valid agreement that the members of the community would provide enclosures to waterborne toilets if the municipality provided the toilets.¹⁵⁵ The court found that any housing development that

147 Kamga 2013 SAJHR 637. De Visser 2003 *Law, Democracy and Development* 210 argues that it is part of the minimum obligation of local government to provide basic sanitation in an effort to realise children's right to shelter in terms of section 28 of the Constitution.

148 Section 10 of the Constitution: Everyone has inherent dignity and the right to have their dignity respected and protected.

149 Du Plessis AA 2008 'Local government's environmental duty' 365. Also see Currie and De Waal *The Bill of Rights Handbook* 272 – 275. Ackermann *Human Dignity* 95 maintains, however, that a person does not acquire human dignity from the Constitution but that it is already inherent in every human being. He states further that although human dignity may suffer infringement, the inherent dignity of a human being cannot be destroyed.

150 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

151 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) par [329].

152 Liebenberg 2005 SAJHR 31.

153 Liebenberg 2005 SAJHR 31.

154 *Beja* case par [136].

155 *Beja* case par [17].

did not provide for toilets with adequate sanitation facilities and privacy violated the right to privacy and human dignity and would be inconsistent with the right to housing.¹⁵⁶

Based on the above it can be contended that human dignity stands at the basis of the right to sanitation. Having to defecate in public or in an unsafe place is undignified.¹⁵⁷ The right to human dignity can thus not be regarded as being protected or respected if a person does not have access to sanitation.

2.3.3.5 The right to privacy

The Constitution provides that everyone has a right to privacy.¹⁵⁸ The South African common law also recognises the right to privacy as a personality right.¹⁵⁹ Access to sanitation in combination with privacy is especially important for vulnerable groups such as women and children who are exposed to danger when using a sanitation facility that is not private.¹⁶⁰ The Beja case illustrated the importance of a private sanitation facility when Mrs Beja, a 76-year old woman, was stabbed after covering herself with a blanket while using an unenclosed toilet to relieve herself.¹⁶¹ In the Beja case the court established providing that a toilet without an enclosure violates the right to privacy.¹⁶² The court held further that privacy is an essential element to housing development in South Africa.¹⁶³ Based on the above, it can be said that the right to privacy is infringed when a person does not have access to adequate sanitation.

156 Beja case par [143]. For cases dealing with the right to respect for one's dignity also see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Government of the Republic of South and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

157 Murthy 2013 *Berkeley Journal of International law* 116.

158 Section 14 of the Constitution. See also Currie and De Waal *The Bill of Rights Handbook* 315-332. For cases dealing with the right to privacy also see *Bernstein v Bester NO* 1996 (2) SA 751 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

159 *Universiteit van Pretoria v Tommy Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) par [455 H]. Ackermann *Human Dignity* 98.

160 Kamga 2013 *SAJHR* 647.

161 Kamga 2013 *SAJHR* 647.

162 Beja case par [143].

163 Beja case Par [52].

2.3.3.6 Observations

The above discussion shows that although the right to sanitation is not expressly included in the Constitution it does enjoy constitutional protection by virtue of the scope of protection afforded by other, related rights. Access to basic sanitation is implied in the right to an environment not harmful to one's well-being and health, as well as in the right to housing. The right is also related to the rights of access to water, privacy and dignity.

The right to sanitation can be regarded as a constitutional right by virtue of its implicit derivation from the above-mentioned rights. The right to sanitation must be judicially recognised for explicit recognition.¹⁶⁴ It is in principle furthermore affirmed by section 39(3) of the Constitution which states that the Bill of Rights does not deny the existence of any other rights conferred by legislation.¹⁶⁵ This means that there is an obligation in terms of section 7(2) on the state (in all three spheres) to respect, protect, promote and fulfil the right to sanitation.

There also seems to be a conceptual link between the interests protected by the above-mentioned group of rights, the implicit constitutional protection of access to sanitation, and the interests that the notion of 'environmental justice' attempts to safeguard.

2.4 Environmental justice

The objective of this study is to explore through the lens of environmental justice the role of local government in the realisation of the right to sanitation. Environmental justice is a suitable conceptual lens for use in this study as the principles that inform the aims of environmental justice and the outcomes which it seeks to achieve are sympathetic to the objective of providing access to appropriate sanitation facilities to all people. Environmental justice is concerned with the distribution of environmental hazards and benefits in such a way that no person is unfairly discriminated against. This applies

164 Kamga 2013 *SAJHR* 633.

165 As indicated earlier, the right to basic sanitation is recognised in section 3 of the *Water Services Act*.

particularity to vulnerable people.¹⁶⁶ As has already been explained, access to sanitation is an environmental concern¹⁶⁷ which renders the distribution thereof a factor that may affect the objectives and aims of environmental justice. Environmental justice also forms part of the broader constitutional objective of social justice.¹⁶⁸ To be able to reflect on the meaning of the right to sanitation as perceived and understood through the lens of environmental justice it is necessary to consider the origin of the latter concept, its meaning, and some prevailing approaches to it in the South African context.

2.4.1 *The origins of the environmental justice movement*

The 'environmental justice movement' had its origins in the United States of America. The movement started as a reaction to the siting of a landfill facility in a low-income and predominantly black area in Warren County, North Carolina, in 1982.¹⁶⁹ This resulted in the formation of the first environmental justice movement, which at the time consisted of engagement in community protests which led to over 500 arrests.¹⁷⁰ The protests resulted in a study by the General Accounting Officer into the matter in 1983.¹⁷¹ The study found that there was a strong link between the siting of hazardous waste landfills, race, and socio-economic status.¹⁷² A further study was performed by the United Church of Christ Commission for Racial Justice in 1987.¹⁷³ This study similarly found that there was a link between race and the siting of hazardous waste sites.¹⁷⁴ Thereafter, the environmental justice movement received prominence in the Clinton administration. President Clinton promulgated an Executive Order that required every

166 Section 2 of NEMA.

167 See par 2.4.3 regarding environmental concerns.

168 Millner 2011 *Deakin Law Review* 190 is further of the opinion that environmental justice is an important part of social justice, as the regulation of the environment and the taking of decisions about development impact on the quality of people's lives.

169 Liu *Environmental Justice Analysis* 1; Kidd 1999 *Acta Juridica* 142; Bullard and Johnson 2000 *Environmental Justice: Grassroots Activism and its Impact on Public Policy Decision Making* 556.

170 Bullard and Johnson 2000 *Environmental Justice: Grassroots Activism and its Impact on Public Policy Decision Making* 556.

171 Figueroa and Mills in *A Companion to environmental philosophy* 429.

172 Figueroa and Mills in *A Companion to environmental philosophy* 429.

173 Figueroa and Mills in *A Companion to environmental philosophy* 429.

174 Figueroa and Mills in *A Companion to environmental philosophy* 429.

federal agency to make environmental justice part of its administration.¹⁷⁵ In 1991 the First National People of Colour Environmental Leadership Summit was held in Washington DC. The summit produced the first list of the principles of environmental justice,¹⁷⁶ which included the adoption of public policy that does not discriminate, the sustainable use of the earth's resources, the protection of the right to a safe and healthy working environment and the basis of environmental justice in international law.

The first forms of environmental justice in the US were largely based on the politics of race.¹⁷⁷ The concept of environmental justice has since evolved, however, and it now includes more issues, many of which are independent of racial concerns. Of relevance to this study is the fact that environmental justice is today understood to also deal with issues such as equal access to services.¹⁷⁸ What follows is an overview of the different conceptual approaches to the different dimensions of environmental justice, generally. The objective of this overview is (a) to establish which approach may be best suited to the South African rights context; and (b) to discern what environmental justice implies for making sense of the rights-based protection and accompanying duties of the state (in particular, of local government) in relation to access to sanitation.

2.4.2 *Conceptual perspectives on environmental justice*

Various conceptions and taxonomies exist concerning the scope or meaning of the term 'environmental justice'.¹⁷⁹ Ikeme is of the opinion that 'environmental justice' is one of the most misused and misinterpreted terms in the literature on sustainable development, and that the nature of this concept is therefore unclear.¹⁸⁰ He states

175 Walker *Environmental Justice* 19.

176 For a full list of the principles see <http://www.ejnet.org/ej/principles.html>.

177 Walker *Environmental Justice* 20.

178 Towela Sambo *A Conceptual Analysis of Environmental Justice Approaches* 62; Walker *Environmental Justice* 2; Schlosberg 2013 *Theorising environmental justice: the expanding sphere of a discourse* 37; Sze and London 2008 *Environmental Justice at the Crossroads* 1331.

179 For example Kuehn 2000 *Environmental Law Reporter* 10681, Bullard 1996 *Social Sciences Quarterly* 493-499 and Ikeme 2003 *Global Environmental Change* 195-206.

180 Ikeme 2003 *Global Environmental Change* 195.

further that the terms 'equity'¹⁸¹ and 'environmental justice' have often been conflated.¹⁸² In an attempt to clarify the terms he construes environmental justice as a broad, overarching concept encompassing all justice issues in environmental decision-making, including procedural¹⁸³ and distributive justice.¹⁸⁴ He notes that, unlike equity, which primarily focuses on distributive concerns, environmental justice encompasses procedural and distributive justice.¹⁸⁵ He argues further that it is possible to approach environmental justice *inter alia* from a preventative, corrective and retributive angle.¹⁸⁶ He distinguishes between an internationally applicable Southern and Northern conception of environmental justice within the context of climate change – a view of environmental justice which is, however, not exactly suitable for the domestically applicable context of the 'right to sanitation'.¹⁸⁷

Bullard has written extensively on environmental justice as applicable in the United States.¹⁸⁸ He has mapped environmental disparities between race groups and the exposure to environmental hazard, for example. Bullard's framework for environmental justice has the following characteristics: the right of all individuals to be protected from environmental degradation; a public health model based on a prevention strategy; a burden of proof that rests on the polluter; the ability of disparate impact or statistics to infer discrimination; and the redress of disproportionate burdens.¹⁸⁹ Bullard and Johnson define environmental justice as

181 Ikeme regards equity as dealing solely with the distributive dimension of environmental justice Ikeme 2003 *Global Environmental Change* 200.

182 Ikeme 2003 *Global Environmental Change* 195.

183 The procedural dimension deals with procedures and processes. Ikeme 2003 *Global Environmental Change* 200.

184 The distributive dimension deals with 'outcomes people receive in social exchanges' as per Ikeme 2003 *Global Environmental Change* 200.

185 Ikeme 2003 *Global Environmental Change* 200.

186 Ikeme 2003 *Global Environmental Change* 200.

187 Ikeme 2003 *Global Environmental Change* 201-203. The distinction Ikeme makes between North and South deals with the manner in which the two hemispheres conceptualise environmental justice and which issues, in the context of climate change, play a leading role. The South, for example, focuses more on equality and distributive justice, whereas the North focuses more on global ecological health and stability.

188 Bullard *Dumping in Dixie: Race, Class and Environmental Quality*; Bullard 1996 *Social Sciences Quarterly* 493-499; Bullard 1993 *Yale Journal of International Law* 319-335; Bullard 1994 *Journal of Environmental Law and Litigation* 281-308.

189 Bullard 2001 *Phylon* 153-154.

the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to development, implementation and enforcement of environmental laws, regulations and policies.¹⁹⁰

They continue to define fair treatment as ensuring that no group bears a disproportionate share of negative environmental consequences.¹⁹¹ The framework approaches environmental justice from a preventative angle; ie, the prevention of environmental hazards.¹⁹² Bullard also focuses largely on racism in environmental matters,¹⁹³ which is seen as one part of environmental injustice.¹⁹⁴

Schlosberg argues that distributive justice is central to environmental justice but that there are other forms of justice which render a more complete understanding as to why certain injustices occur.¹⁹⁵ According to Schlosberg the important components of environmental justice are: justice as procedure; justice as participation; justice as recognition; and justice as capability.¹⁹⁶ Justice as capability is particularly appealing in the context of this study to the extent that access to resources such as proper resource-dependent sanitation infrastructure affects a person's capability or ability to function.

The different ideas of the nature of environmental justice would seem to relate to the different underlying environmental concerns that trigger such theorising.¹⁹⁷ For the present purposes Bullard's framework is not preferred, as it focuses largely on environmental burdens or hazards rather than on environmental benefits such as access to natural resources. Furthermore, there is a strong focus on race in Bullard's work. Although it can be argued that most of the people who suffer environmental

190 Bullard and Johnson 2000 *Journal of Social Issues* 558.

191 Bullard and Johnson 2000 *Journal of Social Issues* 558.

192 Bullard and Johnson 2000 *Journal of Social Issues* 559.

193 Bullard 2001 *Phylon* 160 defines environmental racism as 'any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended), individuals, groups, or communities based on race or color.'

194 Bullard and Johnson 2000 *Journal of Social Issues* 558.

195 Schlosberg 2004 *Environmental Politics* 529-530. See also Walker *Environmental Justice* 42.

196 Each of these elements of environmental justice are discussed in more depth in par 2.4.4.4.

197 The diversity of environmental concerns in the environmental justice approach is further discussed in par 2.4.3.

injustices in South Africa are black, such a perspective would limit the contribution of this study, as the focus here is on vulnerable groups in general, irrespective of race.¹⁹⁸ Ikeme sheds some light on the difference between environmental justice and equity by indicating that environmental justice is indeed broader than the distributive dimension, but his framework focuses largely on climate change issues at the international level, which focus is not suitable for application in the present analysis and the domestic South African context. Ikeme's approach also only has two dimensions, namely the distributive and the procedural - and lacks a dimension dealing with issues of recognition, for example, which are of particular importance in a country like South Africa that is characterised by rich cultural diversity. In the final instance Schlosberg's perspective is preferred in this study, as his understanding of justice goes beyond the distributive aspect of justice while his emphasis on elements such as participation and recognition seems to complement an investigation of what is necessary for the realisation of the right to sanitation. Schlosberg's approach is particularly useful to municipalities, as it categorises justice into distinctive elements, each of which demands certain government actions. This should make it easier for municipalities to translate the requirements of environmental justice into their plans, policies, bylaws, budgets, performance management systems and other governance instrumentation.

What follows is a discussion of the broad scope of the 'environment' as depicted in the notion environmental justice, and an outline of the meaning of environmental justice as distribution, recognition, participation and capability. The objective is to make meaning of the term 'environmental justice', to show its relevance in the South African context, and to further inform the understanding of what is required of local government in the realisation of the right of access to sanitation.

198 Dugard and Alcaro 2013 SAJHR 18; Also see Cock 2004 http://www.populareducation.co.za/sites/default/files/Cock%20Connecting%20the%20red,%20brown%20and%20green%20The%20environmental%20justice%20movement%20in%20South%20Africa_0.pdf .

2.4.3 The 'environment' in environmental justice

As alluded to earlier, protection of the environment and the interests in the environment can be seen from an ecocentric (which excludes human beings) or an anthropocentric approach (where human beings are included).¹⁹⁹ Traditionally environmental justice has been thought to be anthropocentric.²⁰⁰ The 1987 Brundtland Report suggests that 'all human beings have the fundamental right to an environment adequate for their well-being'.²⁰¹ The aforementioned principle clearly upholds the anthropocentric approach to the environment.²⁰² The Draft Principles on Human Rights and the Environment of the UN further declares that 'all persons have the right to a secure, healthy and ecologically sound environment'.²⁰³ The Draft Principles provide that this right is interdependent with other civil, cultural, economic, political and cultural rights.²⁰⁴ These principles indicate that the legal protection of the environment deals not only with natural resources but also with the more inclusive inter-relationship between human beings and the environment, more specifically the impact the environment has on a person's well-being.²⁰⁵

In the context of environmental justice specifically, Walker notes that environmental concerns cover a range of environmental risks, benefits and resources.²⁰⁶ Schlosberg notes further that earlier research on environmental justice focused largely on the distribution of environmental hazards, but that this focus has since expanded to include issues concerning environmental benefits as well, such as access to fresh food and

199 Sambo *A Conceptual Analysis of Environmental Justice Approaches* 66. Regarding the ecocentric and anthropocentric approaches also see Feris 2008 *SAJHR* 29-49; Scholtz 2005 *TSAR* 69-85.

200 McDonald *Environmental Justice* 3.

201 Annexe 1, Principle 1.

202 Feris 2008 *SAJHR* 29.

203 Draft Principles on Human Rights and the Environment E/CN.4/Sub.2/1994/9, Annexe I (1994) Part I.2.

204 Draft Principles on Human Rights and the Environment E/CN.4/Sub.2/1994/9, Annexe I (1994) Part I.2.

205 Kidd *Environmental Law* 4; Feris 2008 *SAJHR* 33.

206 Walker *Environmental Justice* 3.

public transport.²⁰⁷ He also notes that the expansion of environmental justice as a concept has led to the recognition of the environment as a place where ‘we work, live and play’.²⁰⁸ It would seem therefore that ‘the environment’ as denoted in ‘environmental justice’ generally has a very strong anthropocentric character and that it is ultimately concerned with people in the environment and people’s interrelationship with the natural resource base and their living and working environment.

In the South African context, section 1 of the NEMA also takes an anthropocentric approach towards environmental protection that includes the acknowledgement of human, plant and animal life and the inter-relationship among them.²⁰⁹ Section 24 of the Constitution similarly takes an anthropocentric view of environmental protection by providing that everyone has a right to an environment not detrimental to their health or well-being.²¹⁰

Based on the extensive scope of the legal meaning of ‘the environment’ in general and in the South African context in particular, it is possible to argue that the notion of ‘environmental justice’ by implication has a similarly wide reach. Environmental justice must be understood to be particularly inclusive and to cover a wide range of environmental issues and concerns – including issues of human access to amenities that are natural resource-dependent.

207 Schlosberg 2013 *Environmental Politics* 38.

208 Schlosberg 2013 *Environmental Politics* 38-39.

209 Section 1 of the NEMA defines the environment as ‘the surroundings within which humans exist and that are made up of -(i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing’.

210 Du Plessis 2011 *SAJHR* 292; Feris 2008 *SAJHR* 49; Scholtz 2005 *TSAR* 69.

2.4.4 *Environmental justice as distribution, recognition, procedure and capability*

As stated earlier, this study prefers to work with Schlosberg's understanding and explanation of environmental justice.²¹¹ A more detailed discussion of each element that he regards as forming part of environmental justice would therefore be important to the process of establishing what may be necessary for local government's realisation of the right to sanitation that meets the requirements of environmental justice in the South African context.

2.4.4.1 Justice as distribution

There is a tendency in political literature to define justice *per se* as equity in the distribution of social goods.²¹² Schlosberg observes that this conceptualisation of justice is focused on socio-economic factors and is rooted in the economic structure of society.²¹³ He notes further that distributional justice is often used in support of proposals for social redistribution or more social equity.²¹⁴ To support his argument that there has been an over-emphasis on the distribution of social goods he refers to a number of justice theorists, including Rawls, Barry and Walzer.

In Rawls' theory of 'justice as fairness', justice is regarded as a standard according to which the distribution of goods and benefits may be assessed.²¹⁵ Rawl's theory of justice is based on a group of people who are behind a 'veil of ignorance'.²¹⁶ A number of people are in the original position which consists of a group of individuals who are ignorant about their race, gender and position in society. In the original position the individuals have to develop a system of justice.²¹⁷ The people in the original position have a mutually disinterested rationality meaning that these people try to acknowledge

211 See par 2.4.2.

212 Schlosberg *Environmental Justice* 79.

213 Schlosberg *Environmental Justice* 79.

214 Schlosberg *Environmental Justice* 80.

215 Johnson *et al* 2001 *Jurisprudence* 180.

216 Johnson *et al* 2001 *Jurisprudence* 181.

217 Johnson *et al* 2001 *Jurisprudence* 180.

principles which advance their scheme of ends as far as possible (while they do not know what their ends will be).²¹⁸ Those in the original position compete for primary social goods which can be divided into basic rights (so-called freedom rights) and rights related to wealth, income and resources (so-called socio-economic rights).²¹⁹ The difference principle stands out in Rawls' theory which determines that the position of the worst off person in society should be as good as possible.²²⁰

Barry's concept of (social) justice is equally focused on distribution. Barry²²¹ asserts that

when we ask about the justice of an institution we are inquiring into the way it distributes benefits and burdens.

For Barry, justice concerns issues where distributive considerations are involved.²²²

Schlosberg, however, prefers Walzer's concept of distributive justice, which is not based on a universal theory of justice but is instead tied to a cultural and historical context.²²³ He argues that such an understanding is particularly suitable to environmental justice.²²⁴ Schlosberg agrees that different things are valued differently by different people.²²⁵ Schlosberg is, however, at pains to stress that although he prefers Walzer's ideas to Rawls', this is only to the extent that they relate to distribution. Schlosberg argues that any concept of justice that focuses solely on distribution is incomplete.²²⁶

In the context of access to sanitation the distributional element of environmental justice is essential. People need to be provided with adequate sanitation facilities and with the other necessary resources, for example with water to wash their hands.²²⁷ However, to be provided only with resources such as sanitation facilities would be incompletely just,

218 Johnson *et al* 2001 *Jurisprudence* 180.

219 Johnson *et al* 2001 *Jurisprudence* 183.

220 Johnson *et al* 2001 *Jurisprudence* 185.

221 Barry *Theories of Justice* 355.

222 Barry *Sustainability and Intergenerational equity* 94.

223 Schlosberg *Environmental Justice* 80.

224 Schlosberg *Environmental Justice* 80.

225 Schlosberg *Environmental Justice* 80.

226 Schlosberg *Environmental Justice* 80.

227 Section 3 of the *Water Services Act*. The *Water Services Act* is further discussed in chapter 3.

as Schlosberg suggests. Recognition and participation in the decision-making process of how such resources (eg sanitation infrastructure and water) are divided is also essential to being involved in a just system.

2.4.4.2 Justice as recognition

The idea that justice has to do solely with distribution has been challenged in the last decade.²²⁸ Young, in particular, challenged this notion most directly.²²⁹ She makes the following statement:²³⁰

Equating equality with equal treatment ignores deep material differences in social position, division of labor, socialized capacities, normalizing standards and ways of living that continue to disadvantage members of historically excluded groups. Commitment to substantial equality thus requires attending to rather than ignoring such differences.

This view suggests that justice is not simply about equal distribution and that the 'deep material differences' in society have to be taken into account when dealing with distribution. Addressing such differences would mean addressing the causes of inequality. Recognition is particularly important when working with vulnerable and disadvantaged groups such as women, the poor and the disabled. Recognition requires that the differences between groups be taken into account, for instance when making decisions that will affect a community.

Taylor²³¹ makes the following statement in relation to recognition:

the thesis is that our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.

228 Schlosberg *Environmental Justice* 81.

229 Schlosberg *Environmental Justice* 81.

230 Young *Structural Injustice and the Politics of Difference* 362.

231 Taylor *Multiculturalism* 25.

Taylor thus asserts that lack of recognition is a form of injustice as well. In the sanitation context, the recognition of people is of particular importance, especially in relation to decision making by the community regarding the choice of a sanitation facility. An injustice in the form of a lack of recognition played itself out in the *Beja* case, for example, in that an agreement on the provision of sanitation was reached without all the members of the community having been consulted.²³² The lack of adequate sanitation services can also be a form of misrecognition.²³³

2.4.4.3 Justice as procedure

The participation of communities in taking decisions affecting them is seen as the manner in which recognition and distribution will be achieved in environmental justice.²³⁴ Justice as procedure is directly linked to democratic participation or participatory democracy.²³⁵ Participation by community members in decision-making is an essential part of recognition, and is therefore essential to environmental justice in general. Public participation²³⁶ is of particular importance in the local government context as it is one of the objects of local government.²³⁷ It is therefore essential that when a municipality decides on which sanitation service it will provide, for example, that the community should participate in the decision-making process. Participatory democracy gives expression to the element of justice as procedure.

2.4.4.4 Justice as capability

A further dimension of environmental justice is justice as capability.²³⁸ Schlosberg relies on the capabilities approach of Sen and Nussbaum to argue that justice is not merely about the distribution of goods but also about how those goods affect the people's well-

232 Beja case par [83]. The Beja case is further discussed in par 3.5.2.

233 Fuo 2014 *Stell LR* 207.

234 Schlosberg *Environmental Justice* 84.

235 Schlosberg *Environmental Justice* 84.

236 Public participation is further discussed in chapter 3.

237 Section 152 of the Constitution. See also chapter 4 of the Systems Act.

238 Schlosberg 2013 *Environmental Politics* 44; Schlosberg *Justice, ecological integrity and climate change* 166.

being and the functioning of their lives.²³⁹ He argues that a capabilities-based theory of justice essentially asks the question of what is needed to transform goods into a fully functioning life.²⁴⁰ The capabilities approach is described as being suitable for addressing the relationship between the environment and human needs.²⁴¹ When the environment is defiled or degraded, an injustice is perpetrated not only to the environment but also to the people who rely on the environment to function.²⁴² The capabilities approach furthermore acts as a bridge between social justice and environmental issues.²⁴³ This is as a result of the fact that the capabilities approach has the ability to include issues of justice within the surrounding distributional paradigm.²⁴⁴ An environmental justice framework based on capability supports the right to sanitation, as adequate sanitation is crucial for people to be able to function and to do so in a dignified way. Based on the elements of distribution, recognition, participation and capability that have just been discussed, it is now time to define and determine what is required by environmental justice in the South African context.

2.4.5 *Defining environmental justice*

It has been established that environmental justice is an abstract notion which is difficult to define²⁴⁵ - *inter alia* because of the fact that it cuts across many disciplines, including geography, environmental management and law.²⁴⁶ Although an all-encompassing definition is elusive it may also not be desirable, as context and need differ from place to place. As the concept is entrenched in South African law, it is nevertheless necessary to ground the elements of environmental justice within the South African context. Walker maintains that environmental justice is most often defined in terms of an objective.²⁴⁷ In similar vein, section 2(4)(b) of the NEMA provides that 'environmental justice should be

239 Schlosberg *Justice, ecological integrity and climate change* 166.

240 Schlosberg *Justice, ecological integrity and climate change* 166.

241 Schlosberg 2013 *Environmental Politics* 44.

242 Schlosberg 2013 *Environmental Politics* 44.

243 Schlosberg 2013 *Environmental Politics* 44.

244 Schlosberg *Justice, ecological integrity and climate change* 166.

245 Glazewski 1999 *Acta Juridica* 30; Kidd 1999 *Acta Juridica* 142; Cowen 1999 *Acta Juridica* 135; Gerrard *et al The Law of Environmental Justice* xxxiii.

246 Schlosberg 2013 *Environmental Politics* 37.

247 Walker *Environmental Justice* 8.

pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons'. Section 2(1) of the NEMA further provides that the principles set out in the Act, including environmental justice, shall apply alongside the state's responsibility to respect, promote, protect and fulfil the socio-economic rights contained in the Bill of Rights, especially in regard to the basic needs of the vulnerable and disadvantaged.

Environmental justice can thus be defined as the distribution of adverse environmental impacts and benefits in such a way as to recognise the dignity of all people and their importance in environmental decision-making procedures regarding such distribution, in order not to unfairly discriminate against vulnerable and disadvantaged persons.

2.5 Conclusion

It has been established that there is a need for adequate sanitation. This has led to its prominence on the international agenda, and has culminated in internationally recognition of the right to access to adequate sanitation facilities. In the African regional context, the right to sanitation is further buttressed by the right to a clean and healthy environment (article 24) and the right to attain the best possible mental and physical health (article 16 of the *African Charter on Human and People's Rights*).

It has furthermore been established that a statutory right to basic sanitation exists in South Africa. Although there is no express constitutional right to access to improved sanitation it has been argued that such a right can be inferred from various constitutional rights, including the right to an environment not detrimental to one's health and well-being (section 24), the right of access to sufficient water (section 27), and the right to adequate housing (section 26). The right to adequate sanitation is furthermore supported by the existence of the rights to human dignity and privacy.

It has been shown that the notion of environmental justice provides a meaningful lens for understanding and addressing issues relating to sanitation. There is no uniform and

agreed upon definition of environmental justice, as the concept is context- and place-specific.²⁴⁸ Access to sanitation can be seen as an environmental benefit. A sanitary environment is indeed beneficial to one's health and well-being, a fact that suggests that the application of an environmental justice approach might be productive. However, the term 'environmental justice' refers not only to the distributive aspect of sanitation – ie, how many people have received a sanitation facility - but also to recognition and participation in the processes that determine the distributive aspect. This notion informs the definition of environmental justice as the distribution of adverse environmental impacts and benefits in such a way as to recognise the dignity of human beings and their importance in decision-making procedures regarding such distribution in order not to unfairly discriminate against vulnerable and disadvantaged persons.

It has further been established that the right to access to improved sanitation facilities in South Africa is a right that must be respected, protected, promoted and fulfilled by the entire 'state', including local government or municipalities. The provision of sanitation facilities is a constitutionally entrenched function of municipalities specifically.

The next chapter builds upon the contextual theoretical discussion by determining to what extent national legislation, policy and case law on sanitation reflect the established elements of environmental justice. The intention is to establish what these elements and their provision in law and policy suggest for the execution of the legal duty of local government to fulfill the right of access to sanitation in South Africa.

248 Walker *Environmental Justice* 11.

Chapter 3

The provision of sanitation as a legal duty of local government

3.1 Introduction

The right to sanitation is a right which can be fulfilled only through positive action on the part of government, as was explained in chapter 2. From the division of the functions of government set out in the Constitution one may conclude that the most prominent government role player in the realisation of the right to sanitation is local government – ie the approximately 270 municipalities in South Africa. As it stands and as has already been suggested, the Constitution is, however, not clear on the scope and specifics of the right to sanitation, let alone the government action necessary to respect, protect, promote and fulfill this right. It may therefore be useful to scrutinise and evaluate existing South African law, policy and case law to ascertain how the right to sanitation has thus far been translated into and interpreted as a local government function, and what the scope of the concomitant legal duty of municipalities is.

Considering the nature of the objective of this study, the use of a one-dimensional description of local government's sanitation-related duties would scarcely be appropriate here. Accordingly, for our present purposes the identification and evaluation of the sanitation-related duties of local government is approached from the perspective of environmental justice, and, this chapter is therefore concerned not only with the extent to which the right to sanitation has over time been legally translated into duties of municipalities but also with the extent to which this has been done in such a way as to cater for distribution, recognition, participation and capability as critical elements of environmental justice.²⁴⁹

249 See par 2.4.4.

The point of departure in identifying and evaluating the duties of local government with regard to sanitation is that one may expect, on the basis of the discussion in chapter 2, that relevant South African law and policy would at the minimum provide for the distributive, participatory, recognition and capability elements of environmental justice. This understanding is further premised on the fact that section 7(2) of the Constitution provides that the state has the duty to respect, protect, promote and fulfil the rights in the Bill of Rights. As discussed in chapter 2, although the right to sanitation is not expressly mentioned in the Constitution, it is protected and supported by various constitutional rights, while it is explicitly provided for in the Water Services Act.²⁵⁰

The chapter starts out with a general introduction to the section 7(2) duties in terms of the Constitution. The constitutional objects and developmental duties of local government are subsequently explained, whereafter the discussion turns to the identification and outline of the sanitation-related duties of local government in terms of applicable framework and sector-specific legislation (including relevant regulations and norms and standards), national policy and case law. These sources are evaluated through the lens of environmental justice and its underlying elements, as discussed in chapter 2.

3.2 *The section 7(2) duties, objects, powers and functions of South African local government*

South African local government has undergone significant transformation since the adoption of the Constitution.²⁵¹ This transformation has influenced the status, objects, powers and functions of municipalities. This part of the chapter serves as a general introduction to the duty of local government to realise the right to sanitation. The discussion starts with an explanation of the ‘realisation’ obligation of local government in terms of section 7(2).

250 See par 2.3.3.

251 See chapter 1.

3.2.1 *The duties in terms of section 7(2) of the Constitution*

It has been pointed out by the Constitutional Court that to understand the nature of a right one must first understand the nature of the obligation arising from the right.²⁵² Having established in chapter 2²⁵³ that the right to sanitation exists, it can be argued that section 7(2) of the Constitution applies to municipalities with respect to sanitation. Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. 'The state' in this instance includes local government, which implies that the rights-based duties of government in relation to the Bill of Rights rest on municipalities (collectively and individually) as well. The four parts of every municipality's obligation with respect to the rights in the Bill of Rights will be discussed in turn.

The duty to *respect* implies a negative duty.²⁵⁴ The demolition of someone's house or shack would constitute the infringement of the state's duty in terms of section 26 of the Constitution, for example.²⁵⁵ With respect to the right to sanitation it (the duty to respect) means that a municipality may not unjustly interfere with the sanitation facility or system of a household or do anything that would compromise the right, for example. This duty would include not interfering with the infrastructure which provides access to sanitation services. It could be argued that interfering with a person's access to water, for example by disconnecting water supply without a valid reason, might also constitute an infringement of this duty, as some amount of water is needed for hygienic practices such as washing one's hands.²⁵⁶

252 *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 par 46: "As with all rights, to understand the nature of the right, we need to understand the nature of the obligations imposed by it. What obligations does it impose and upon whom?"

253 See par 2.4.3.6.

254 Brand *Introduction to socio-economic rights* 158; Liebenberg "The interpretation of socio-economic rights" 33-6; *SERAC and Another v Nigeria* par [45]; Tissington *A Resource Guide to Housing in South Africa* (1994-2010) 42.

255 Brand *Introduction to socio-economic rights* 158; Liebenberg "The interpretation of socio-economic rights" 33-6.

256 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) par [27].

The duty to *protect* implies a positive duty on the part of the municipality,²⁵⁷ which requires the municipality to prevent undue interference from third parties or non-state actors.²⁵⁸ It is incumbent on municipalities to pass by-laws which protect a person's right of access to sanitation, for example.²⁵⁹ The duty to protect also places a duty on courts to provide remedies where third parties interfere with a person's right to access to sanitation.

The duty to *promote* requires the municipality to raise awareness and to embrace educational measures regarding a particular right.²⁶⁰ It is sometimes regarded as being part of the duty to fulfil.²⁶¹ This duty would imply that municipalities need to promote hygiene education, for example. Public awareness programmes may also be expected to be run *via* community outreach programmes and the media.²⁶² A municipality may in terms of this obligation also be expected to inform communities about the importance of washing hands and not throwing foreign objects into drains or toilets, for example.

The duty to *fulfil* requires of municipalities to realise the right to sanitation.²⁶³ It also requires that municipalities ensure that the people who do not have access to certain services receive such access.²⁶⁴ It is argued that the right to sanitation should be progressively realised within available resources. This means that it is not expected of the municipality to provide every person with a toilet, but the municipality should at least provide the basic minimum service to the vulnerable and disadvantaged.²⁶⁵ Strategic

257 Brand *Introduction to socio-economic rights* 158; Tissington *A Resource Guide to Housing in South Africa (1994-2010)* 42.

258 Brand *Introduction to socio-economic rights* 158.

259 Hofmeyr *Intergovernmental Response Measure to Address Failing Municipal Water Supply Services: A Legal Perspective* 35.

260 Brand *Introduction to socio-economic rights* 158; Liebenberg "The interpretation of socio-economic rights" 33-6.

261 Liebenberg "The interpretation of socio-economic rights" 33-6.

262 Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 206-207.

263 Brand *Introduction to socio-economic rights* 158; Tissington *A Resource Guide to Housing in South Africa (1994 – 2010)* 43.

264 Liebenberg "Interpreting Socio-economic rights" 33-36.

265 According to Regulation 2 of the Compulsory National Standards the minimum standard for basic sanitation services is a toilet which is safe, reliable, environmentally sound, easy to keep clean,

planning, budgeting and municipal policies may typically be used to assist with the progressive realisation of the right in the short, medium and long term.

Section 7(2) informs the role of municipalities in realising the right to access to sanitation to the extent that it clarifies the broad constitutional duty of municipalities in relation to socio-economic rights. The duty to realise the right to access to sanitation is strengthened by the fact that further expression is given to the right in enforceable legislation, for example the *Water Services Act*.

3.2.2 *The constitutional objects and developmental duties of local government*

The Constitution sets out specific objects and developmental duties for local government.²⁶⁶ These are relevant for the purposes of the present analysis by virtue of the fact that the provision of sanitation forms part of the developmental duty and objects of local government.²⁶⁷ The Constitution makes it clear that municipalities are no longer only service delivery agents but that they serve as agents of development as well.²⁶⁸ The first object of local government is to provide democratic and accountable government for local communities.²⁶⁹ The new local government system based on democratic values is in direct contrast to the local government system in the previous dispensation that imposed administrative structures on the majority of people.²⁷⁰ According to De Visser the involvement of communities and community organisations is part of the still recently established democracy.²⁷¹ The WPLG also reiterates that municipal councils have a central role to play in promoting local democracy.²⁷² In the encouragement of community participation municipalities must be sensitive to the

provides adequate privacy and protection from the weather, and is also well ventilated to keep smells to a minimum and prevent flies from entering.

266 Sections 152 and 153 of the Constitution.

267 See chapter 1.

268 Steytler and De Visser *Local Government Law of South Africa* 5-8.

269 Section 152(1)(a) of the Constitution.

270 Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 111.

271 De Visser *Developmental Local Government: A case study* 70.

272 See '1.3 Democratising development, empowering and redistributing' in WPLG (1998).

vulnerable and disadvantaged in the community.²⁷³ Democratic government also means that local government must ensure the holding of free, fair and regular local elections.²⁷⁴ Democratic local government may in light of the former be expected to make provision for recognition²⁷⁵ of the kind that establishes one of the elements of environmental justice, as every community member is constitutionally entitled to be recognised through his or her participation in governance, whether it be in terms of participatory democracy²⁷⁶ or in terms of representative democracy.²⁷⁷

The second object of local government is to ensure the provision of services to communities in a sustainable manner.²⁷⁸ According to the Systems Act municipalities have a duty to provide the minimum level of basic municipal services.²⁷⁹ The Systems Act defines a basic municipal service as a municipal service that is necessary to ensure an acceptable and reasonable quality of life, and that would endanger public health or safety or the environment if it were not provided.²⁸⁰ Sanitation can be regarded as a basic municipal service, as a lack thereof could adversely affect public health and the environment.²⁸¹ This position was affirmed in the Beja case, where the court held that basic municipal services include sanitation services.²⁸² Furthermore, services must be provided in a sustainable manner. Sustainability refers to financial sustainability as well as environmental sustainability.²⁸³ Environmental sustainability means that municipal services must be provided in such a manner that the risk to the environment, human

273 See '1.3 Democratising development, empowering and redistributing' in WPLG (1998).

274 De Visser *Developmental Local Government: A case study* 70. See also Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 111.

275 See par 2.4.4.2 regarding recognition as an element of environmental justice.

276 According to Currie and De Waal *Constitutional and Administrative law* 87, participatory democracy means 'that individuals or institutions must be given the opportunity to take part in the making of decisions that affect them.'

277 According to Currie and De Waal *Constitutional and Administrative law* 83, representative democracy means that 'the people should participate in politics through their duly elected representatives.'

278 Section 152 (1)(b) of the Constitution.

279 Section 73(1)(c) of the Systems Act.

280 Section 1 of the Systems Act.

281 See par 2.2.

282 The Beja case par [143]. Regarding the Beja case see par 3.5.2.

283 Section 1 of the Systems Act.

health and safety is minimised to the extent reasonably possible under the prevailing circumstances; that the potential benefits to the environment and to human health and safety are maximised to the extent reasonably possibly under the prevailing circumstances, and that legislation intended to protect the environment and human health and safety is complied with.²⁸⁴ Financially sustainable means that municipal services must be provided in a manner that ensures that the financing of (and budgeting for) that service from internal or external resources is sufficient to cover the costs of the initial capital expenditure required for the service, operating the service, and maintaining, repairing and replacing the physical assets used in the provision of the service.²⁸⁵

Local government is also specifically mandated to promote social and economic development.²⁸⁶ The WPLG expressly states that the central contribution made by local government in this regard is the provision of basic household infrastructure.²⁸⁷ This includes essential municipal services such as water, sanitation and electricity that is needed to sustain a healthy and safe standard of living. The provision of sanitation services thus directly contributes towards the achievement of this objective. Other methods to promote social and economic development include the provision of municipal support services, creating local policies aimed at job creation, and the provision of social welfare services.²⁸⁸

Local government should also promote a safe and healthy environment.²⁸⁹ According to De Visser a safe environment refers to issues of security such as crime.²⁹⁰ The second component, namely a healthy environment, implies that development must take place in

284 Section 1 of the Systems Act.

285 Section 1 of the Systems Act.

286 Section 152(1)(c) of the Constitution.

287 See '1.1 Maximising social development and economic growth' in the WPLG (1998).

288 See '1.1 Maximising social development and economic growth' in the WPLG (1998).

289 Section 152(1)(d) of the Constitution. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right*.

290 De Visser *Developmental Local Government: A case study* 71.

an environmentally sustainable manner that will not compromise or negatively affect human health.²⁹¹

Every municipality has a duty to encourage the involvement of communities and community organisations in the matters of local government.²⁹² Great emphasis is placed on this duty of local government.²⁹³ The Systems Act, for example, provides that public participation must take place through councillors and other appropriate mechanisms established by the municipality.²⁹⁴ The objectives of local government thus make explicit provision for the participatory element of environmental justice.²⁹⁵

Together with the objects of local government, the Constitution also sets out specific developmental duties for municipalities. Section 153 of the Constitution mandates local government to give priority to the basic needs of the community and to participate with provincial and national government in this regard. The WPLG defines developmental local government as local government committed to working with citizens and communities to find sustainable ways to meet their social, economic and material needs and thus to improve the quality of their lives.²⁹⁶ It is a developmental duty of local government to provide sanitation services, as sanitation is a service that meets a specific need of people and that improves the overall quality of people's lives. The provision of basic and essential services and the promotion of social and economic development are regarded as pillars of developmental local government.²⁹⁷

It has been established that proper sanitation is a basic need.²⁹⁸ Local government improves the quality of people's lives *inter alia* through the provision of sanitation services. Sanitation provision therefore falls within the general constitutional objects and

291 De Visser *Developmental Local Government: A case study* 71.

292 Section 152(1)(e) of the Constitution.

293 Chapter 4 of the Systems Act provides a framework for community participation by municipalities. Public participation is further discussed in par 3.3.1.

294 Section 17 of the Systems Act.

295 See par 2.4.4.3.

296 Section B of the WPLG.

297 Bekink *Local Government Law* 14.

298 See par 2.2.

developmental functions of municipalities. In what follows, the constitutional powers and functions of municipalities are briefly discussed. The positive steps that municipalities can take towards the realisation of the right to sanitation depend on the parameters of their legislative and executive authority.

3.2.3 *The constitutional powers and functions of municipalities*

Section 156 of the Constitution sets out the powers and functions of municipalities. Section 156 (1) provides that municipalities have executive authority and the right to administer local government matters set out in part B of Schedules 4 and 5, and any other matter assigned to it by national and provincial legislation. It is necessary to distinguish between original and assigned powers. The provision of sanitation services is a direct constitutional function of local government and can be regarded as an original power. The significance of original powers lies therein that these powers cannot be removed or amended by national or provincial legislation.²⁹⁹ Powers may, however, also be assigned to local government in terms of section 156(4) of the Constitution, if the matter would most effectively be administered locally and the municipality has the capacity to administer it. An example of the assignment of functions and powers in the sanitation context is the accreditation of municipalities to administer National Housing Programmes.³⁰⁰ Adequate sanitation facilities form part of housing development,³⁰¹ and although housing development is not an original function of local government it can be assigned to municipalities.³⁰²

The powers and functions of local government set out in section 156 of the Constitution must be read with section 11 of the Systems Act. This section provides that a municipality may exercise its legislative or executive authority *inter alia* by developing and adopting policies, plans, strategies and programmes, including setting targets for

299 Steytler and De Visser *Local Government Law of South Africa* 5-5. See also *City of Cape Town and Other v Robertson* par [60]; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* par [36].

300 Tissington *A Resource Guide to Housing in South Africa (1994 -2010)* 76.

301 See the discussion in par 2.3.3.3.

302 Tissington *A Resource Guide to Housing in South Africa (1994 -2010)* 14. Housing development as a function of local government is further discussed in par 3.6.5.

delivery; promoting and undertaking development; implementing applicable national and provincial legislation and its by-laws; providing municipal services to the local community, or appointing appropriate service providers; monitoring the provision of municipal services and where such services are provided by a service provider, ensuring their proper regulation; preparing, approving and implementing its budgets; imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees; monitoring the impact and effectiveness of any services, policies, programmes or plans; promoting a safe and healthy environment; and passing by-laws on the above-mentioned matters. Section 11 of the Systems Act should not be regarded as an exhaustive list of what municipalities can do in relation to their governing powers.³⁰³

What follows is an exposition of the various pieces of legislation and policy which regulate the functions and powers of local government in relation to the provision of sanitation services. The aim is to determine the extent to which legislation and policy provide for instrumentation and mechanisms to realise the right to sanitation and to simultaneously achieve the objectives of environmental justice.

3.3 The legislative framework

3.3.1 The Local Government: Municipal Systems Act

The Systems Act is one of the key pieces of legislation that guides municipalities in the performance of their functions by providing the core principles that are necessary for municipalities to progressively move towards the social and economic upliftment of local communities and to ensure access to essential services such as sanitation. The Systems Act is relevant to this discussion as the Act contains important framework provisions that relate to the provision of sanitation services. These provisions include the procedure for public participation (including with respect to bylaw-making and

303 *Fuo Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 105.

budgeting),³⁰⁴ the statutory framework for integrated development planning³⁰⁵ and the rights and duties of municipal councils.³⁰⁶

The Systems Act reiterates the Constitution by stating that the municipal council may govern on its own initiative the local government affairs of the local community.³⁰⁷ A municipality may also charge fees for its services.³⁰⁸ A municipality has the duty to provide services in a financially and environmentally sustainable manner.³⁰⁹ A municipality should also consult the community regarding the type of services that will be provided and encourage the involvement of the community.³¹⁰ The Act furthermore reiterates that it is the duty of the municipal council to contribute to the progressive realisation of the rights in sections 24, 25, 26, 27 and 29 of the Constitution.³¹¹ It has been argued earlier that a right to sanitation is implicitly recognised by sections 24, 26, 27, 10 and 14 of the Constitution.³¹² There is thus a statutory duty on municipalities to progressively realise the above-mentioned rights and a correlated duty to progressively realise the right to sanitation.

As indicated earlier, chapter 4 of the Systems Act is dedicated to public participation at local government level. The Act provides that a municipality must develop a culture of municipal governance that complements a system of representative government with participatory governance.³¹³ Public participation takes place through councillors, ward committees and advisory committees.³¹⁴ A municipality must establish appropriate mechanisms, processes and procedures to enable the local community to participate in its affairs.³¹⁵ These affairs include strategic planning, bylaw-making and budgeting.³¹⁶

304 Chapter 4 of the Systems Act.

305 Chapter 5 of the Systems Act.

306 Section 4 of the Systems Act.

307 Section 4(1) of the Systems Act.

308 Section 4(1)(c)(i) of the Systems Act.

309 Section 4(2) of the Systems Act. See par 3.2.2 regarding the sustainability of services.

310 Section 4(2) of the Systems Act.

311 Section 4(3) of the Systems Act.

312 See par 2.3.3.

313 Section 16(1) of the Systems Act.

314 Section 17(1)(d) and 17(4) of the Systems Act.

315 Section 17(2) of the Systems Act.

For this reason the municipality must provide for the receipt, processing and consideration of petitions and complaints lodged by members of the local community; notification and public comment procedures; public meetings and hearings by the municipal council; consultative sessions with local community organisations; and reporting back to the community.³¹⁷ When establishing these mechanisms, processes and procedures the municipality must take into account the special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups.³¹⁸ A municipality must communicate information concerning community participation regarding the available mechanisms, processes and procedures in relation to community participation, the matters in regard to which community participation is encouraged, the rights and duties of members of the local community, and municipal governance, management and development. Municipalities are furthermore obliged to take into account the language preference and usage of people and the needs of people who cannot read or write.³¹⁹ Members of the public are permitted to attend municipal council meetings.³²⁰ Any notices given to the community must be published in the local newspaper of the area or by means of radio broadcasts in the area.³²¹ De Visser notes that the Systems Act restricts the autonomy of municipalities by over-regulating what is required in terms of public participation.³²² However, the extent to which the Systems Act makes provision for public participation is commendable. It is particularly significant that special provision is made for vulnerable members of the community including women, people who are disabled, and illiterate people. The special provision for the vulnerable members of society supports the objective of environmental justice to prevent unfair discrimination against vulnerable people in the community. Furthermore, these provisions give expression to the recognition element of environmental justice by recognising the differences between people that will hinder

316 Section 25 of the Systems Act.

317 Section 17(2) of the Systems Act.

318 Section 17(3) of the Systems Act.

319 Section 18(2) of the Systems Act.

320 Section 20 of the Systems Act.

321 Section 21 of the Systems Act.

322 De Visser *Developmental Local Government: A case study* 105.

their participation in municipal decision-making, including decisions about access to sanitation.

According to the Systems Act, local government planning must be developmentally orientated.³²³ The purpose of such a developmental orientation is threefold. Firstly, municipalities should strive to achieve the objects of local government as set out in the Constitution. Secondly, municipalities should give effect to their developmental duties. Thirdly, municipalities must contribute to the progressive realisation of the fundamental rights in the Constitution. The Systems Act provides for integrated development planning (IDP) that consists of a strategic plan for the development of the municipality, which can possibly be used as a mechanism to realise the right to sanitation.

The Systems Act provides for the process of adopting an IDP.³²⁴ According to the Act the IDP must have the following core components: the municipal council's vision for long-term development, with an emphasis on the municipality's most critical development and internal transformation needs; an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services; the council's development priorities and objectives for its elected term; the council's development strategies; a special development framework; the council's operational strategies; applicable disaster management plans; a financial plan; and key performance indicators and performance targets.³²⁵

The IDP can be a key instrument in improving the delivery of basic services such as sanitation, as it aids municipalities to identify the sanitation needs of the community and enables the municipality to respond with a planned strategy with measurable targets,

323 Section 23 of the Systems Act.

324 Section 27-34 of the Systems Act.

325 Section 26 of the Systems Act.

timeframes and benchmarks for performance, for example.³²⁶ As indicated already, the IDP is also key in facilitating public participation during the preparation, implementation and review stage of the most critical strategic planning in local government.³²⁷ The IDP is a key mechanism in realising socio-economic rights and can be specifically useful in the realisation of the right to sanitation.³²⁸

The IDP can materialise in conjunction with four additional municipal instruments, namely water and sanitation bylaws, municipal budgets, the performance management of a municipality, and indigent policies. As far as concerns by-law making, the Systems Act states that a municipality has the authority to pass by-laws.³²⁹ In terms of municipal budgeting the Municipal Systems Act determines that a municipality exercises its legislative or executive authority by preparing, approving and implementing its budgets.³³⁰ Notably, also, provision is made in national government Municipal Infrastructure Grants (MIGs) to provide additional financial support for sanitation infrastructure in local government. The MIG-system involves a grant system where funds can be used for infrastructure for basic levels of service.³³¹ With regard to performance management systems, it is provided in the Municipal Systems Act that a municipality must establish a performance management system.³³² A municipality must also establish a mechanism to monitor and review its performance management system.³³³ In addition, the National Framework for Municipal Indigent Policies makes provision for the adoption of municipal indigent policies, the function of which is to eradicate those elements of poverty over which local government has control.³³⁴

326 Access to sanitation must be specifically addressed in a municipality's water services development plan, which forms part of the IDP. The water services development plan is further discussed in par 3.3.4.

327 Section 16(1)(a) of the Systems Act. See also Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 366.

328 Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 371.

329 Section 11(3) of the Systems Act.

330 Section 11(3) of the Systems Act.

331 Department of Provincial and Local Government <http://www.cogta.gov.za/mig/docs/1.pdf> .

332 Section 38 of the Systems Act.

333 Section 40 of the Systems Act.

334 National Framework for Indigent Policies 1.3.

Chapter 8 of the Systems Act enables the provision of services by municipalities. According to the Systems Act a municipality must give priority to the basic needs of the community; promote the development of the community; and ensure that all members of the local community have access to at least the minimum level of basic municipal services.³³⁵ It has already been established that sanitation is regarded as a basic municipal service.³³⁶ The WPLG includes water, sanitation, local roads, storm water drainage, refuse collection and electricity as basic services.³³⁷

From the above discussion it can be concluded that the Systems Act mandates local government to provide sanitation services as a basic service. The Systems Act provides for various mechanisms and instruments, such as the IDP, budgets, by-laws, the municipal PMS and public participation processes to provide such a service while taking into account the objectives of environmental justice by the mechanisms and procedures in place to facilitate public participation. The Systems Act further serves the objectives of environmental justice by making special provision for the vulnerable in society, particularly in relation to public participation. By means of the IDP and more specifically the water services development plan to be discussed below, a municipality can ensure that the distributive element of environmental justice is fulfilled by planning how resources will be distributed, for example. It is critical, however, for the IDP to be aligned with the municipal budget and the PMS of the municipality. Rules and regulations pertaining to water services management in the municipality can also be enforced only in terms of an enforceable water services and sanitation bylaw.

3.3.2 The Local Government: Municipal Structures Act

The *Municipal Structures Act* allows for the provision of different categories of municipalities and provides for different functions to be allocated to these

335 Section 73(1) of the Systems Act.

336 See par 3.2.2.

337 WPLG 2.1 Provision of household infrastructure and services. Also see Steytler 2004 *Law, Democracy and Development* 165.

municipalities.³³⁸ A district municipality must seek *inter alia* to achieve integrated developmental planning of the whole district, building the capacity of local municipalities and promoting the equitable distribution of resources between local municipalities.³³⁹ Domestic waste-water and sewage disposal systems are specifically a function of district municipalities.³⁴⁰ The provision of solid waste disposal sites is also a function of district municipalities in as far as it relates to the following matters:³⁴¹

- (i) The determination of a waste disposal strategy;
- (ii) the regulation of waste disposal;
- (iii) the establishment, operation, and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district.

Sewage disposal systems are thus specifically the responsibility of a district municipality. It must be noted that the Minister may authorise a local municipality to perform some of the functions of a district municipality.³⁴² Such an authorisation must take place by means of a notice in the *Government Gazette*.³⁴³ The Minister must consult with the cabinet member responsible for the functional area as well as the MEC for local government in the province.³⁴⁴ The performance of the function is subject to national legislation.³⁴⁵

Steytler notes that the performance of district functions by local municipalities differs in practice.³⁴⁶ Many of the local municipalities in most provinces still perform water and sewage functions.³⁴⁷ This has the implication that many of the large local municipalities

338 According to section 155 of the Constitution, a category A municipality (a metropolitan municipality) has exclusive executive and legislative authority in its area. A category B municipality (a local municipality) shares executive and legislative authority with a category C municipality within its area. A category C municipality (a district municipality) has municipal executive and legislative authority in an area that includes more than one municipality.

339 Section 83(3) of the *Municipal Structures Act*.

340 Section 84(1)(d) of the *Municipal Structures Act*.

341 Section 84(e) of the *Municipal Structures Act*.

342 Section 84(3)(a) of the *Municipal Structures Act*.

343 Section 84(3) of the *Municipal Structures Act*.

344 Section 84(3) of the *Municipal Structures Act*.

345 Section 84(3) of the *Municipal Structures Act*.

346 Steytler 2003 *Law, Democracy and Development* 238.

347 Steytler 2003 *Law, Democracy and Development* 238.

retain their previous powers and functions and the district municipalities will mostly provide services to rural areas, a situation which could result in an inconsistent approach throughout South Africa.³⁴⁸ However, Steytler also notes that the performance of functions by district municipalities has certain implications for local municipalities. Firstly, complaints regarding service delivery will not be directed at the district municipality but will be regarded as a failure on the part of the local municipality.³⁴⁹ Secondly, the relationship between local and district municipalities leaves much to be desired and might lead to turf battles.³⁵⁰ Thirdly, removing these functions from local municipalities would mean they could not charge for these services.³⁵¹ The allocation of functions and powers between local and district municipalities is thus complex. The Structures Act does, however, provide that local and district municipalities must cooperate by assisting and supporting each other.³⁵²

The *Municipal Structures Act* also provides for ward committees. A ward committee must be established for each ward in the municipality.³⁵³ It can facilitate public participation in this matter, as it provides a mechanism for community members to express their sanitation needs and concerns to the municipal council via the ward councillor.³⁵⁴

The *Municipal Structures Act* divides the responsibility for sanitation functions between local and district municipalities, which assists in the distribution of resources between the two categories of municipalities and thereby enhances the distributive element of environmental justice. However, public participation may be curtailed as people do not vote for district municipalities but for local municipalities. The accountability of the local municipality might also be affected, as members of the community might perceive a lack

348 Steytler 2003 *Law, Democracy and Development* 239.

349 Steytler 2003 *Law, Democracy and Development* 239.

350 Steytler 2003 *Law, Democracy and Development* 239.

351 Steytler 2003 *Law, Democracy and Development* 239.

352 Section 88(1) of the *Municipal Structures Act*.

353 Section 73(1) of the *Municipal Structures Act*.

354 Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 267.

of service delivery as a failure on the part of the local municipality instead of a failure of the district municipality. The realisation of the right to sanitation depends on the clear division of roles and powers within the local government sphere, and it can therefore be concluded that a consistent approach is needed in the implementation of the *Municipal Structures Act*.

3.3.3 *The National Environmental Management Act*

The NEMA is the only piece of legislation in South Africa which expressly states that environmental justice should be pursued as a principle of environmental management by all organs of state whose decisions may significantly affect the environment.³⁵⁵ The objective of environmental justice in terms of the Act is that adverse environmental impacts will not be distributed in such a manner as to unfairly discriminate against any person, particularly a vulnerable and disadvantaged person.³⁵⁶ The NEMA states further that equitable access to environmental resources and benefits and services must be pursued to meet basic human needs. Special measures must be taken to meet the needs of disadvantaged persons.³⁵⁷ Section 4(d) of the NEMA provides that equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued, and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination. This principle requires municipalities, for example, to be mindful of the needs of disadvantaged persons and vulnerable people such as the poor, women and children, when providing communities with environmentally relevant services such as sanitation services.

The NEMA sets out the environmental management principles which are to guide the actions of all organs of state, including municipalities. It determines that environmental management must place people and their needs at the forefront of their attention and serve their physical, psychological, developmental, cultural and social interests

355 Section 4(c) of NEMA.

356 Section 4(c) of NEMA.

357 Section 4(d) of NEMA.

equitably.³⁵⁸ These principles speak directly to the objectives of environmental justice by emphasising the needs of vulnerable and disadvantaged persons in granting them access to environmental resources and benefits.

The NEMA provides various other mechanisms for the pursuit of environmental justice, such as environmental implementation plans.³⁵⁹ An environmental implementation plan must be prepared by every province and every national department.³⁶⁰ The environmental implementation plan serves to co-ordinate the environmental policies and plans of the different national departments, to minimise the duplication of procedures and functions, and to promote consistency.³⁶¹ Every organ of state must exercise those of its functions that may significantly affect the environment within the constraints of the environmental implementation plan.³⁶² The NEMA also makes provision for integrated environmental management.³⁶³

Particularly important mechanisms in the sanitation context are environmental management co-operation agreements (EMCAs).³⁶⁴ In terms of these agreements municipalities can conclude agreements with communities for the purpose of promoting compliance with environmental management principles, including the principle of environmental justice. EMCAs make provision for the elements of participation and recognition, since they allow for meaningful engagement between the municipality and the community.

3.3.4 *The Water Services Act*

From the preamble of the *Water Services Act* it is clear that the Act gives expression to the constitutional environmental right and the constitutional right of access to sufficient water, by stating that the rights of access to a basic water supply and basic sanitation

358 Section 2(2) of NEMA.

359 Chapter 3 of NEMA.

360 Section 11 of NEMA.

361 Section 12(a) of the NEMA. See also Kidd *Environmental Law* 40.

362 Section 16(1)(a) of the NEMA.

363 Chapter 5 of the NEMA.

364 Chapter 8 of the NEMA.

are necessary to ensure the provision of sufficient water and of an environment not harmful to health or well-being.³⁶⁵ It furthermore provides for mechanisms through which municipalities can realise people's right to basic sanitation, including the development of a water services development plan. The Act furthermore obliges municipalities to make by-laws that contain the conditions for the provision of water services.³⁶⁶

The *Water Services Act* is the only piece of legislation that expressly guarantees a right to basic sanitation. The main objects of the *Water Services Act* is to provide for the right of access to a basic water supply and the right of access to basic sanitation, which are necessary to secure sufficient water and an environment not harmful to human health or well-being.³⁶⁷ The Act states that everyone has a right to access to basic sanitation and that every water services authority (a municipality is a water services authority) has an obligation to provide for measures to realise this right in its water services development plan.³⁶⁸ The Act defines basic sanitation as the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic wastewater and sewage from households, including informal households.³⁶⁹ According to regulation 2 of the Compulsory National Standards and Measures to Conserve Water,³⁷⁰ basic sanitation services include:

- (a) The provision of appropriate education; and
- (b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests

The compulsory national standards create a minimum national requirement for access to basic sanitation. A variety of sanitation options can meet the requirements set out in

365 Preamble of the *Water Services Act*.
366 Section 21 of the *Water Services Act*.
367 Section 2(a) of the *Water Services Act*.
368 Section 3 of the *Water Services Act*.
369 Section 1 of the *Water Services Act*.
370 GN R 509 in GG 22355 of 8 June 2001.

regulation 2 of the compulsory national standards. A municipality thus has a wide discretion to determine which type of facility it will use.

Section 3(3) of the *Water Services Act* obliges every water services authority to provide measures to realise these rights in its water services development plan, which forms part of the IDP.³⁷¹ A water services authority must take reasonable steps to bring the draft water services development plan to the notice of its consumers and invite public comment thereon.³⁷² The Act furthermore provides that preference should be given to the provision of a basic water and sanitation supply if the water services institution is unable to meet the requirements of all its existing consumers. It is imperative, however, that the water services development plan make sufficient reference to the sanitation needs of the community rather than placing an over-emphasis on water services.³⁷³

The regulations to the *Water Services Act* contributes towards the distributional element of environmental justice by setting a minimum standard for basic sanitation, for example. As stated earlier, the *Water Services Act* also facilitates public participation and involvement by requiring that each municipality develop a water services development plan which forms part of the IDP. By inviting public comment on the water services development plan, the municipality also gives recognition to the members of the community.

3.3.5 *The Housing Act*

The Housing Act is relevant to the present discussion as adequate sanitary facilities form part of housing development, as is evident from the above definition.³⁷⁴ One of the key functions of the Housing Act is to define the functions of local, provincial and national government in relation to housing development.³⁷⁵

371 Section 12(1)(a) of the *Water Services Act*. See par 3.3.1 regarding the Integrated Development Plan.

372 Section 14 of the *Water Services Act*.

373 National Sanitation Strategy (2005) 29.

374 See also the Grootboom case par [35].

375 See the preamble of the *Housing Act*.

The *Housing Act* defines housing development as

the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities and to health, educational and social amenities in which all citizens and permanent residents of the Republic will on a progressive basis have access to -

- (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- (b) potable water, adequate sanitary facilities and domestic energy supply.

Section 9 of the Act sets out the functions of municipalities in relation to housing development. Municipalities must, as part of the process of integrated developmental planning, take all reasonable and necessary steps to ensure that the inhabitants in its area of jurisdiction have access to adequate housing on a progressive basis.³⁷⁶ The municipality must furthermore ensure that services in respect of water and sanitation are provided in a manner which is economically efficient.³⁷⁷ The municipality should do this by actively pursuing the development of housing, addressing issues of land, and creating an enabling environment for housing development.³⁷⁸ Since the realisation of this right should be performed on a progressive basis it can be assumed that the realisation will be subject to the municipality's resources.

Apart from the general duty on municipalities to progressively realise the right to adequate housing, a municipality may also apply for the administration of national housing programmes. For a municipality to be accredited, it must prove that it has the capacity to plan, implement and maintain projects that are integrated within municipal IDPs.³⁷⁹ The Housing Code sets out the principles, guidelines and norms and standards of the national housing programmes. However, a few problems have been experienced with the accreditation process. In 2010 only five municipalities have been granted

376 Section 9(1) of the *Housing Act*.

377 Section 9(1) of the *Housing Act*.

378 Tissington *A Resource Guide to Housing in South Africa (1994-2010)* 15.

379 Tissington *A Resource Guide to Housing in South Africa (1994-2010)* 76.

accreditation (all of them being in urban areas).³⁸⁰ This has the implication that most municipalities in South Africa are still not in a position to perform the housing function. The tension between provincial and local government has been problematic in this regard, as it is provincial government that must ultimately hand over control to municipalities.³⁸¹ The tension between provincial and local government is especially problematic in the Western Cape and Gauteng provinces.³⁸²

The provisions of the *Housing Act* assist in facilitating the realisation of the right to sanitation through housing development, as the provision of adequate sanitary facilities forms part of housing development. However, it is important to note that a municipality will have to prove that it has the capacity to perform the functions of housing development.³⁸³ Many municipalities, for example poor rural municipalities, might not be able to perform these functions. This highlights the importance of good intergovernmental relations (including open communication) and cooperative government (including joint planning) in the provision of sanitation services.

3.4 The policy framework on the provision of sanitation

3.4.1 The White Paper on Basic Household Sanitation (2001)

In 2001 the government published the White Paper on Basic Household Sanitation, which addresses problems of inadequate sanitation. The White Paper focuses mainly on the provision of a basic level of household sanitation to rural communities and informal settlements, as these are perceived as the areas with the greatest need.³⁸⁴ It defines the minimum acceptable basic level of sanitation as follows:³⁸⁵

- (a) appropriate health and hygiene awareness and behavior;
- (b) a system for disposing of human excreta, household waste water and refuse, which is acceptable and affordable to the users, safe, hygienic and easily

380 Tissington *A Resource Guide to Housing in South Africa (1994-2010)* 77.

381 Tissington *A Resource Guide to Housing in South Africa (1994-2010)* 78.

382 Tissington *A Resource Guide to Housing in South Africa (1994-2010)* 78.

383 Section 10 of the *Housing Act*.

384 White Paper on Basic Household Sanitation (2001) 5.

385 White Paper on Basic Household Sanitation (2001) 5.

- accessible and which does not have an unacceptable impact on the environment;
and
(c) a toilet facility for each household.

From the White Paper it is clear that good sanitation transcends the provision of infrastructure alone to include other aspects such as hygiene awareness, safety and accessibility.³⁸⁶ It reiterates that local governments are responsible for the provision of sanitation services in the first instance. According to the White Paper the role of local governments in addressing the sanitation backlog includes identifying the sanitation needs of the local community, responding to those needs within the IDP and WSDP, and aligning their budgets to such a plan.³⁸⁷

There are certain policy principles in the White Paper which highlight the link between sanitation and environmental justice, including demand-driven sanitation, which means that the desire for access to sanitation must come from the community.³⁸⁸ The White Paper furthermore regards community participation as a policy principle and as essential to decision-making regarding sanitation facilities.³⁸⁹ This is of particular relevance, as community participation is an essential component of the procedural and recognition element of environmental justice.³⁹⁰

386 White Paper on Basic Household Sanitation (2001) 5.

387 White Paper on Basic Household Sanitation (2001) 21.

388 White Paper on Basic Household Sanitation (2001) 11. See the White Paper on Basic Household Sanitation (2001) 11-12 for other policy principles, which include integrated planning and development, and the views that sanitation is about environmental health, that basic sanitation is a human right, that the provision of access to sanitation services is a local government responsibility, that the goal is 'health for all' rather than 'health for some', the equitable regional allocation of development resources, that water has an economic value, the polluter pays principle, that sanitation services must be financially sustainable, and that environmental integrity is essential.

389 White Paper on Basic Household Sanitation (2001) 11.

390 See par 2.4.4.2 and 2.4.4.3.

3.4.2 *The National Sanitation Strategy (2005)*

The National Sanitation Strategy of 2005 has as its aim to provide a coherent approach to the delivery of sanitation services in South Africa.³⁹¹ The Strategy acknowledges that the responsibility to provide sanitation services and infrastructure rests with local government.³⁹² In relation to sanitation the Strategy only names the right to dignity, the right to life, the right to a safe environment and the right to access to health care but offers no indepth explanation of these rights.³⁹³

The Strategy recognises that municipalities have different needs and will therefore have different approaches to sanitation provision. The Strategy suggests a few approaches to such provision. The first is the community-based (CB) approach, in which the emphasis is on the involvement of the community. In terms of the strategy the CB approach is the best approach for service provision as well as for poverty alleviation.³⁹⁴ The CB approach also promotes a sense of ownership amongst users, with the implication that maintenance costs are minimised since there is less abuse of the facilities.³⁹⁵ It would seem that the CB approach is also a sustainable approach, as it involves the approval of the community. Secondly, the Strategy suggests the use of the Nominated Sub-Contractor approach.³⁹⁶ In terms of this approach, infrastructure projects are outsourced.³⁹⁷ However, there are many pitfalls to the use of this approach including delays, the cutting of costs, and the use of cheap staff rather than of the best skills.³⁹⁸ Thirdly, the Strategy suggests the use of the Turnkey approach.³⁹⁹ In terms of this approach the service provider plans the project, organises the community and human resources, provides the materials and then procures the labour.⁴⁰⁰ One advantage of

391 National Sanitation Strategy (2005) 9.

392 National Sanitation Strategy (2005) 23.

393 National Sanitation Strategy (2005) 1.

394 National Sanitation Strategy (2005) 49.

395 National Sanitation Strategy (2005) 49.

396 National Sanitation Strategy (2005) 43.

397 National Sanitation Strategy (2005) 50.

398 National Sanitation Strategy (2005) 50.

399 National Sanitation Strategy (2005) 44.

400 National Sanitation Strategy (2005) 51.

this approach is that it is easier to exercise quality control, since the Service Provider decides on the materials and labour.⁴⁰¹

The Strategy states that the national sphere of government is responsible for the creation of norms and standards; ie, for determining a basic level of service.⁴⁰² It is the responsibility of the provinces, for example, to monitor compliance with national legislation, promote integrated development planning and monitor progress within the sanitation sector.⁴⁰³ The strategy reaffirms that the constitutional mandate to provide sanitation infrastructure and services rests with local government.⁴⁰⁴

The Strategy can be categorised as an administrative policy.⁴⁰⁵ As such it could possibly be used to enforce the right to sanitation, as various constitutional rights (such as the right to water) place a duty on the state to take reasonable legislative and other measures to give effect to the right.⁴⁰⁶ The Strategy reiterates many of the policy principles stated in the White Paper on Basic Household Sanitation, such as the use of a demand-driven approach⁴⁰⁷ and an insistence on community participation. It is commendable that the Strategy proposes different approaches to the provision of sanitation services. In such a manner provision is made for the different needs and challenges of municipalities.

3.4.3 *The Free Basic Sanitation Implementation Strategy (2009)*

The Free Basic Implementation Strategy (the FBS strategy) of 2009 affirms that in order to achieve sustainable development the focus has to be on the eradication of poverty

401 National Sanitation Strategy (2005) 51.

402 National Sanitation Strategy (2005) 22.

403 National Sanitation Strategy (2005) 22.

404 National Sanitation Strategy (2005) 23.

405 Fuo 2013 *PER* 7.

406 Fuo 2013 *PER* 3-4.

407 According to Tissington *Basic Sanitation in South Africa* 5, the demand-driven approach refers to 'the motivation/desire for sanitation originating from within the community, as opposed to from an outside agency.'

and on economic development.⁴⁰⁸ The aim of the FBS strategy is to ensure that the poorest of the poor receive basic sanitation services.

The Free Basic Implementation Strategy acknowledges that individual households and municipalities share the responsibility for achieving better sanitation.⁴⁰⁹ The FBS strategy furthermore promotes a flexible approach to sanitation that does not compromise the environment, dignity, the cultural views of people and the long-term sustainability of the service.⁴¹⁰ In the executive summary of the strategy it is alleged that the right to a basic level of sanitation service is enshrined in the Constitution. However, there is no mention of the section in which this right is purported to be enshrined.

The Strategy further acknowledges that local governments must in this regard work in co-operation with the other spheres of government.⁴¹¹ This implies the receipt of a subsidy from national government as well as other forms of support from national and provincial government.⁴¹²

The Strategy does not specifically state what is meant by the word 'free'. However, it does state that as a starting point 'free' basic sanitation would mean that (poor) consumers would not be required to pay for the service except in the case of certain on-site facilities.⁴¹³ In regard to operation and maintenance, it is recommended that 15 litres per person per day should be provided for water-borne systems.⁴¹⁴ Households will also have to take part in the communication process.⁴¹⁵ The Strategy is aimed mainly at poor households, which must be identified on the basis of their income.

408 FBS Strategy Preface.

409 FBS Strategy Preface.

410 FBS Strategy Preface.

411 FBS Strategy 13.

412 FBS Strategy 13.

413 FBS Strategy 9.

414 FBS Strategy 9.

415 FBS Strategy 9.

This Strategy too can be categorised as an administrative policy, and it may be argued that it could be used to enforce the right to sanitation. The Strategy serves the objectives of environmental justice in that it caters for a vulnerable group in society. By ensuring that the poor receive basic sanitation the strategy ensures that the poor are not unfairly discriminated against as a result of an environmental hazard such as inadequate sanitation.

3.5 Case law on the provision of sanitation

The discussion that follows turns to the judicial interpretation of the duties of local government in terms of the legislation and policy as set out above. The aim is to determine to what extent, in their interpretation of municipal duties, the courts have recognised, commented on or developed any of the elements of environmental justice. Thus far the Constitutional Court has dealt with the right to sanitation *per se* in only two cases, namely *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality*⁴¹⁶ and *Others and Ntombentsha Beja and Others v Premier of the Western Cape and Others*.⁴¹⁷ These two cases are therefore fundamental regarding the interpretation of the right to sanitation. *Joseph and Others v The City of Johannesburg*⁴¹⁸ deals with the importance of the provision of basic services by municipalities. As the provision of sanitation services is a basic municipal responsibility, the Joseph case is also relevant to this discussion by way of analogy.

3.5.1 *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*

This case dealt with a community in the Harry Gwala informal settlement in Gauteng. In 2006 the municipality (the first respondent) submitted a proposal to the MEC to have the informal settlement upgraded to a formal township in terms of Chapter 13 of the

416 2009 ZACC 33.

417 2011 JOL 27172 (WCC).

418 2010 (4) SA 55 (CC).

Housing Code, which would entitle the residents to certain basic services. Three years later a decision had still not been taken by the MEC. The applicants sought an order against the municipality in the South Gauteng High Court to be supplied with communal water taps, temporary sanitation facilities, refuse removal and high-mast lighting. The municipality was willing to provide communal water taps and refuse removal but the High Court found that there was no obligation on the municipality to provide sanitation facilities or high-mast lighting until a decision had been taken by the MEC. The applicants appealed to the Constitutional Court and sought an order against the municipality to provide them with basic services, including sanitation and high-mast lighting, while they awaited a decision on whether or not the settlement would be upgraded. The applicants argued that the right to adequate housing in terms of section 26 of the Constitution included basic sanitation.

The first question the court addressed was if the applicants were entitled to emergency services in terms of chapter 12 of the Housing Code. The court held that chapter 12 did not apply, as an emergency had to be declared by the MEC, which had not happened.⁴¹⁹ Chapter 12 of the Housing Code is intended for people with an emergency housing situation beyond their control, which poses a threat to their lives, health and safety.⁴²⁰ The residents of Harry Gwala informal settlement indeed lived in conditions that posed a threat to their lives, health and safety. Bilchitz in this respect maintains that it is problematic that an emergency situation is dependent on the decision of the MEC rather than on the actual circumstances.⁴²¹

The second issue the court addressed was chapter 13 of the Housing Code, which deals with the *in situ* upgrading of informal settlements. The court held that the municipality had complied with its duty in terms of chapter 13 of the Housing Code, since the decision of the MEC was still awaited.⁴²² This seems to be a very formalistic approach from the courts and an avoidance of the question that the court was to address. It is the very issue of what services communities are entitled to before a decision has been

419 Nokotyana case par [39].

420 Bilchitz 2010 SALJ 598.

421 Bilchitz 2010 SALJ 598.

422 Nokotyana case par [44].

taken by the MEC that must be answered.⁴²³ There seems to be a misrecognition of the community by the courts in this regard.

The next issue was the content of section 26 of the Constitution. The court found it inappropriate to make a finding on whether or not section 26 includes sanitation, as chapters 12 and 13 of the Housing Act were promulgated to give effect to section 26. The court held further that the applicants could not be allowed to rely directly on the Constitution.⁴²⁴ However, the court also neglected to engage with other legislation such as the Water Services Act, which had been used by the applicants and clearly sets out the right to sanitation. The court proceeded to note that it would be inappropriate to decide on the reasonableness or rationality of the city's policy since a decision from the MEC was still awaited.⁴²⁵ The court found, however, that the delay of three years on the part of the MEC was unacceptable and went on to order the MEC to make a decision within 14 months.⁴²⁶

The judgment in *Nokotyana* was the first case which dealt with the right to sanitation to appear before the Constitutional Court. The judgment was disappointing, however, as the court avoided the question of whether or not sanitation forms part of the right to adequate housing. The court in effect refused to make a finding, even though it admitted that the applicants and many others in South Africa are living in dire circumstances.⁴²⁷

It can be said that the reasoning and judgment of the court did not serve the objectives of environmental justice, as the unwillingness of the court to address the constitutional issue of sanitation despite the dire circumstances of the applicants resulted in the misrecognition of the applicants as vulnerable members of society. The deference of the court resulted in a missed opportunity to address any of the other elements of environmental justice as well. However, in *Ntombentsha Beja and Others v Premier of*

423 Bilchitz 2010 *SALJ* 600.

424 *Nokotyana* case par [46].

425 *Nokotyana* case par [52].

426 *Nokotyana* case par [55].

427 Kapindu 2010 *Constitutional Court Review* 215.

the Western Cape and Others the High Court was more actively engaged with the issue of sanitation.

3.5.2 *Ntombentsha Beja and Others v Premier of the Western Cape and Others*

The Beja case dealt with the issue of the construction of unenclosed toilets in Silvertown, Khayelitsha. The City of Cape Town had decided to upgrade an informal settlement at Silvertown Khayelitsha. Toilets were installed on a 1:5 ratio; ie, one toilet for every five households. The city alledged that it had had a meeting with the community in November 2007 where it was agreed that each of the erven would have a toilet, but the community would have to enclose it themselves. The toilets were installed and enclosed in 2009, except for 55 toilets in Makhaza that were not enclosed. This situation resulted in members of the community having to use unenclosed toilets while covered in blankets in full view of the public. The first applicant, Mrs Beja, a 76-year-old female, was using one of the toilets while covering herself with a blanket when she was attacked and stabbed.

The first issue the court adressed was whether or not the agreement between the community and the municipality was valid. The court emphasised the importance of meaningful engagement with a community. In this regard the court also set out specific requirements for such an agreement. The court held that there had been various procedural shortcomings in the agreement, including the fact that no minutes of the meeting had been taken and that the meeting had been held two years before the installation of the toilets.⁴²⁸ The court furthermore emphasised that the municipality had been meeting with a poor and vulnerable community regarding important decisions relating to their day-to-day existence, and was required by the Constitution and the Housing Code to take part in meaningful engagement.⁴²⁹ The court set out the following

428 Beja case par [83].

429 Beja case par [94-95].

requirements for an agreement between a municipality and a community regarding their socio-economic rights:⁴³⁰

- (i) it must be concluded with duly authorised representatives of the community;
- (ii) it must be concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies;
- (iii) it must be properly minuted and publicised; and
- (iv) it must be preceded by some process of information sharing and where necessary technical support so that the community would be properly assisted in concluding such an agreement.

The court proceeded to note that none of these requirements had been met in the present case. The court held further that even if all these requirements had been met, a majority within a community cannot conclude an agreement in terms of which the rights of a vulnerable minority are violated.⁴³¹ In the present case only 60 people had been present when the alleged agreement was reached. The decision was to decide the fate of approximately 6000 people. The court held that this was unacceptable.⁴³²

The court proceeded to determine if the 1:5 ratio of the toilets was adequate. The court held that the Silvertown project did not involve emergency housing. The municipality had erred in that it had wrongly used provisions from the emergency housing programme.⁴³³ The court then turned to the question of whether or not the applicants' constitutional rights had been violated by the provision of the unenclosed toilets. The court held that the communal toilets infringed upon the right to human dignity.⁴³⁴ The court held that section 73 of the Systems Act obliges municipalities to provide communities with the minimum level of basic municipal services and that such services would include sanitation. The court held further that any housing development that does not provide for toilets which are safe and private does not comply with section 26 of the Constitution and would violate the rights to privacy and

430 Beja case par [98].

431 Beja case par [99].

432 Beja case par [99].

433 Beja case par [114].

434 Beja case par [136].

dignity.⁴³⁵ The municipality was ordered to enclose those toilets which were not yet enclosed.

The Beja case is useful in that it emphasises the element of recognition in environmental justice.⁴³⁶ The judgment further emphasises that sanitation is not only about the distribution of resources but that it is about meaningful engagement as well, and thereby affirming the element of recognition. Through a process of meaningful engagement, members of the community are recognised as human beings, and their participation is valued. The court acknowledged the importance of community participation by setting out specific minimum requirements for agreements between a community and a municipality regarding socio-economic rights. The judgment furthermore illustrates how important privacy⁴³⁷ and dignity⁴³⁸ are to sanitation services. Moreover, the court established that (basic) sanitation services form part of the minimum level of basic services that municipalities are required to provide. Herein the court recognised the element of capability by acknowledging that a certain level of basic sanitation is needed for a person to be able to live a dignified life.

3.5.3 *Joseph and Others v The City of Johannesburg*

The Joseph case is useful for the present discussion as it deals with the provision of basic municipal services such as sanitation. This case deals with the disconnection of the electricity supply of a group of tenants of a block of flats called the Ennerdale Mansions. The tenants had paid the cost of their electricity to the landlord and owner, who was in arrears with the municipality. The electricity supply to the Ennerdale Mansions was therefore subsequently disconnected. The legal question was if a legal relationship existed between the tenants and the municipality that entitled the tenants to procedural fairness before the electricity was disconnected.

435 Beja case par [143].

436 See par 2.4.4.2.

437 See par 2.3.3.5.

438 See par 2.3.3.4.

The court held that the provision of basic municipal services is a cardinal function of a municipality.⁴³⁹ The court held further that it is the duty of municipalities to build their capacity to meet the basic needs of all the inhabitants of South Africa.⁴⁴⁰ The city provides electricity as a basic municipal service, irrespective of a contractual relationship. The court held that although no provision is made for electricity in the Constitution, by virtue of the objects of local government, section 73 of the Municipal Systems Act and the Housing Act, a 'public law right' to electricity exists. In delivering the service of an electricity supply the municipality was obliged to be procedurally fair before it took a decision which would materially and adversely affect the applicants. It could be argued that a public law right to sanitation could be established in the same manner as the right to electricity in the Joseph case, as the provision of sanitation services is a basic municipal responsibility.⁴⁴¹

The judgment of the court has contributed to the objectives of environmental justice in that it has affirmed the importance of the provision of basic services such as electricity and sanitation in general. In doing so the court has recognised the importance of basic municipal services to enable people to lead dignified lives, which forms part of the element of justice as capability. Furthermore, the element of procedural justice was recognised by the court through the acknowledgment of the need for procedural fairness. By acknowledging this requirement the court also affirmed the element of justice as recognition. The court has also actively contributed to socio-economic jurisprudence by engaging with various pieces of legislation such as the Systems Act and the Housing Act.

439 Joseph case par [34].

440 Joseph case par [34].

441 Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 130.

3.6 Conclusion

The focus of this chapter has been on the legal mandate of local government in relation to sanitation, as viewed from an environmental justice perspective. It has been established that it is an original function of municipalities to provide sanitation services and that this function falls within the developmental mandate of local government. The duty of local government to provide sanitation services is reiterated in the Constitution, legislation, various policy documents and case law. Section 7(2) of the Constitution implies positive and negative duties. Municipalities should not unduly interfere in the provision of access to a sanitation facility, and should prevent third parties from unduly interfering in it. The municipality is also required to actively raise awareness regarding the right to sanitation and hygiene. Municipalities must also actively work at ensuring that vulnerable and disadvantaged persons receive the basic minimum sanitation services. The IDP and Water Services Development Plan are specific instruments that can assist municipalities in this regard. Other instruments include budgeting, performance management and indigent policies.⁴⁴²

In almost all the applicable laws and policies the distributional element of sanitation is emphasised by providing for a minimum level of sanitation which should at least be a toilet that is safe, private, keeps smells to a minimum, and is environmentally sound. Within this broad minimum requirement municipalities still have scope in which to choose a sanitation facility which best suits the needs of the community. The laws and policies have also highlighted the importance of community involvement and public participation.

It has also been confirmed by the courts in the Joseph and Beja cases that the provision of basic municipal services is a key function of municipalities, and that such services include sanitation services. Unfortunately, in the Nokotyana case the court was reluctant to engage with the content of the right to sanitation. Although the approach of the

442 These instruments are further discussed in chapter 5.

judiciary to sanitation services and basic services has to date not been consistent, the legislation and policy on the role of local governments in providing sanitation services commendably give expression to the elements of environmental justice, namely distribution, recognition, participation and capability.

In the next chapter the urban and rural perspectives on sanitation will be discussed with the objective of determining if and to what extent what is necessary for the realisation of the right to access to sanitation by municipalities may differ in these two different spatial and societal contexts. The initial hypothesis is that urban and rural municipalities may have to rely on different types of instrumentation for the purposes of realising the community's right of access to sanitation in a way that also satisfies the demands of environmental justice.

CHAPTER 4

Urban and rural perspectives

4.1 Introduction

The discussion in chapter 3 has shown that it is the duty of municipalities to provide access to sanitation as a basic municipal service. The Constitution, legislation and policy documents guide municipalities on how and through the use of which instruments it should provide these services. The relevant legislation and policy documents provide for mechanisms that simultaneously contribute to the pursuit of the objects of environmental justice.⁴⁴³ It has furthermore been established in chapter 3 that municipalities have a measure of discretion in deciding which type of sanitation facility to use, for example, provided that the facility complies with the minimum standards.⁴⁴⁴

During the Apartheid era waterborne sanitation was predominantly supplied to middle and upper class municipalities.⁴⁴⁵ The bucket system⁴⁴⁶ was used in many black townships and little or no attention was paid to sanitation in rural areas.⁴⁴⁷ The spatial planning of the Apartheid era had a direct influence on the challenges that municipalities currently face in realising access to improved sanitation.

443 See par 3.3 and 3.4.

444 See par 3.3.4.

445 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 7.

446 The bucket system can be described as a 'dry on-site sanitation system consisting of a top-structure with a seat positioned above a bucket or other container located in a small compartment beneath.' Tissington *Basic Sanitation in South Africa: A guide to Legislation, Policy and Practice* 5. In 2005 the National Bucket Replacement Programme was launched, which aimed to eradicate the bucket system by 2007. However, it has been reported by the Minister of Co-operative Government and Traditional Affairs that as many as 272 995 bucket toilet systems are still in operation <http://www.news24.com/SouthAfrica/News/Bucket-system-still-rife-in-SA-20130516> .

447 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 7.

By 2011 approximately 60 per cent of South Africans lived in urban areas, and it has been estimated that by 2030 70 per cent of the population will be living in such areas.⁴⁴⁸ The rapid urbanisation of South Africa places a burden on South African municipalities, particularly in relation to access to sanitation services and housing.⁴⁴⁹ Approximately 40 per cent of South Africa's population live in rural areas.⁴⁵⁰ Therefore municipalities in urban and rural areas may have to rely on different types of instrumentation for the purposes of realising the right of access to sanitation for local communities in a way that also meets the demands of environmental justice.

The purpose of this chapter is to explore if and how South Africa's urban and rural realities may require different understanding of and approaches to the execution of the duty of municipalities to provide sanitation. The chapter further critically considers the mechanisms that municipalities can use to address the different elements of environmental justice, namely distribution, recognition, participation and capability, in the rural and urban contexts respectively. In relation to the main research question the relevance of this chapter lies in the fact that an understanding of the needs and challenges of the rural and urban landscape will inform the implementation of the role of municipalities in realising the right to sanitation.

In this chapter the present position regarding sanitation services in general will be set out in order to be able to comment on the sanitation needs of South Africa with reference to the rural and urban divide. After the particular needs and features of the urban and rural areas have been established, the mechanisms that may be required by municipalities situated in urban as against rural landscapes to achieve the elements of environmental justice are addressed.

448 National Planning Commission 2011 *National Development Plan 7*.

449 Department of Co-operative Governance and Traditional Affairs 2013 *Towards an Integrated Urban Development Framework* 21.

450 World Bank Indicators <http://www.tradingeconomics.com/south-africa/rural-population-percent-of-total-population-wb-data.html>.

4.2 The status quo regarding sanitation services

Overall, South Africa has made progress in providing access to sanitation since 1994. In 2011 57 per cent of the South African population had a flush toilet connected to a sewerage system, 3 per cent had a flush toilet connected to a septic tank, and 8 per cent had a pit toilet with improved ventilation.⁴⁵¹ however, there is still a significant number of people (19.3 per cent of the population) using unventilated pit latrines. Unfortunately, the census 2011 results do not distinguish between urban and rural areas, as Figure 1 below indicates.

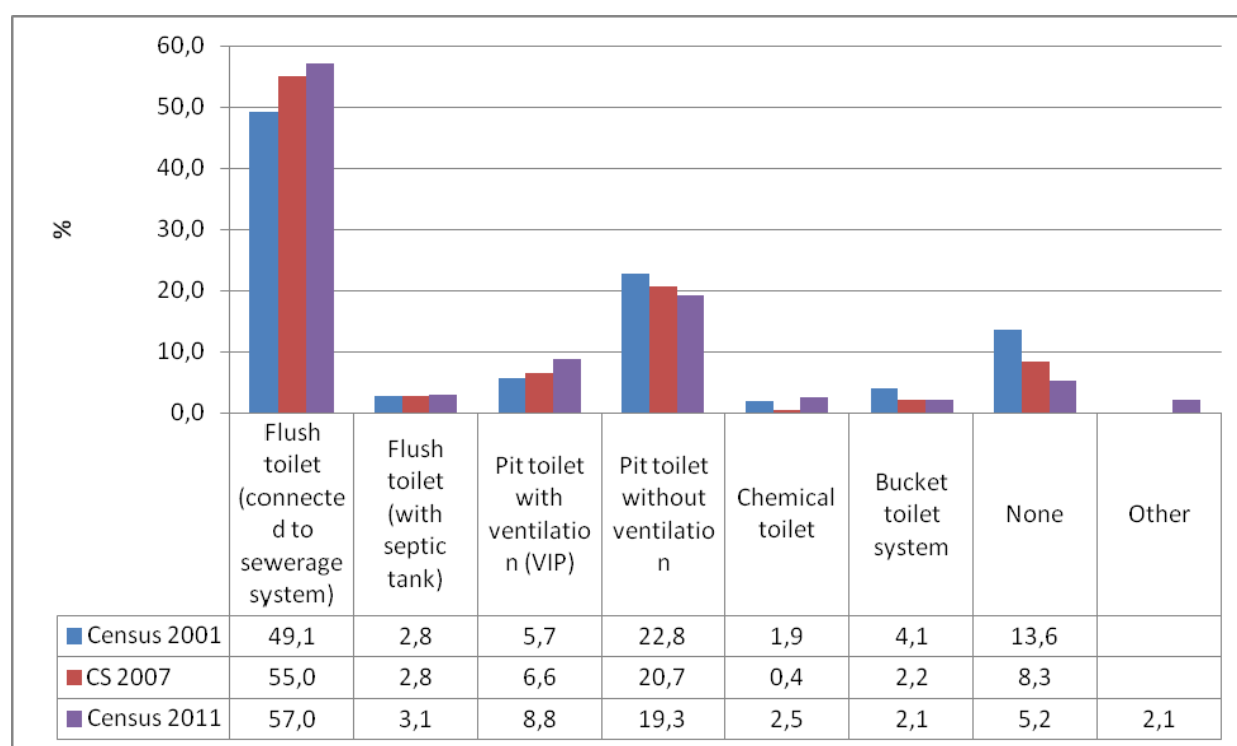


Figure 1: Percentage distribution of households by type of toilet facility⁴⁵²

The *Report on the status of sanitation services in South Africa* issued by the Department of Human Settlements adds to the above data in a manner more relevant to this discussion. According to the Report, access to sanitation has improved, but there

451 Statistics South Africa Census 2011 *Statistical Release 60*.

452 Figure adopted from the Census 2011 *Statistical Release 60*.

are many who face a risk of service failure (26 per cent).⁴⁵³ 64 per cent of households in informal settlements use interim sanitation services.⁴⁵⁴ The report indicates that the unserved population (11 per cent) is predominantly in dispersed rural areas.⁴⁵⁵ The areas that have infrastructural and maintenance needs are also mainly located in rural provinces: Limpopo, KwaZulu-Natal, Free State, Mpumalanga, Northern Cape and the Eastern Cape.⁴⁵⁶ The provinces where services are most adequate are the Gauteng Province and the Western Cape Province, which contain large urban areas.⁴⁵⁷

4.3 The urban landscape

In recent years the world has undergone massive urban growth, with more than half of the world's population currently living in cities.⁴⁵⁸ Most of the urban growth has come about as a result of rural – urban migration accompanied by natural growth of the population and the reclassification of rural areas as urban areas.⁴⁵⁹ There are various factors that pull people to urban areas including the availability of better job opportunities and better health and social services.⁴⁶⁰ However, economic growth has not been able to keep up with the rate of urban growth in many areas.⁴⁶¹ This has led to the creation of many informal settlements and slums.⁴⁶²

South Africa is no stranger to the global trend towards urbanisation. After the demise of Apartheid, urbanisation accelerated as a result of the abolition of restrictions on

453 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 16.

454 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 16.

455 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 17.

456 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 17.

457 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 17.

458 Buhaug and Urdal 2013 *Global Environmental Change* 1; Davis *Planet of Slums* 2; Godfrey and Julien 2005 *Clinical Medicine* 137.

459 Buhaug and Urdal 2013 *Global Environmental Change* 2.

460 Buhaug and Urdal 2013 *Global Environmental Change* 2.

461 Buhaug and Urdal 2013 *Global Environmental Change* 2.

462 Turok 2012 *Urbanisation and Development in South Africa* 21.

movement.⁴⁶³ It is estimated that by 2033 more than three quarters of South Africa's population will be living in urban areas.⁴⁶⁴

There is, however, no uniform definition of what constitutes an urban area. This poses some challenges for research and analysis. Urbanisation can generally be said to be taking place when the number of people living in cities increases as against the number of those living in rural areas.⁴⁶⁵ In South Africa urban municipalities are categorised as B1 (secondary cities), B2 (large towns) and metros.⁴⁶⁶ In 2011 there were 56 urban municipalities in South Africa.⁴⁶⁷

The rapid urbanisation that has taken place in South Africa has had many negative consequences, the first of which is overcrowding as a result of an increase in the population of the cities.⁴⁶⁸ A large number of unemployed people live in the cities,⁴⁶⁹ which are low in density.⁴⁷⁰ As the cities cannot accommodate these large numbers of people in the formal hubs, these people have to live on the outskirts of the city and therefore have to travel long distances in and out of the city, if that is where they work.⁴⁷¹ Catering for the informal settlements that mushroom on the outskirts of the cities is particularly challenging for municipalities, as they have to provide expensive infrastructure (in this case, sanitation infrastructure) to these areas.⁴⁷²

463 Turok 2012 *Urbanisation and Development in South Africa* 12.

464 UN Population Division *World Urbanization Prospects* 2011 <http://esa.un.org/unup/Documentation/final-report.htm>; Turok 2012 *Urbanisation and Development in South Africa* 13; National Treasury 2011 *Local Government Budget and Expenditure Review* 211.

465 Enviro Facts <http://www.botany.uwc.ac.za/envfacts/facts/urbanisation.htm>.

466 National Treasury 2011 *Local Government Budget and Expenditure Review* 193.

467 National Treasury 2011 *Local Government Budget and Expenditure Review* 193.

468 National Treasury 2011 *Local Government Budget and Expenditure Review* 215.

469 National Treasury 2011 *Local Government Budget and Expenditure Review* 215.

470 National Treasury 2011 *Local Government Budget and Expenditure Review* 215.

471 National Treasury 2011 *Local Government Budget and Expenditure Review* 215; Turok 2012 *Urbanisation and Development in South Africa* 21; National Planning Commission 2011 *National Development Plan* 237 – 238.

472 National Treasury 2011 *Local Government Budget and Expenditure Review* 215.

The increase in the population has accordingly led to increased pressure on municipalities to provide basic services such as sanitation.⁴⁷³ The main sanitary challenges facing urban municipalities are thus resource and land constraints. As a result of the lack of land in urban areas informal settlements are growing and it is particularly difficult for municipalities to provide sanitation services to these areas.⁴⁷⁴

4.4 The rural landscape

Despite the growing urbanisation that has taken place in recent years, the remaining rural areas are still extensive, and are economically important, particularly in relation to the production of food and minerals, for example.⁴⁷⁵ The Rural Development Framework (1997) defines a rural area as:

Sparsely populated areas in which people form or depend on natural resources, including villages and small towns that are dispersed through these areas and areas that include large settlements in the former homelands, which depend on migratory labour and remittances as well as government social grants for their survival, and typically have traditional land tenure systems.⁴⁷⁶

Most rural municipalities in South Africa are situated in the Kwazulu-Natal, Eastern Cape, Northern Cape and Limpopo provinces.⁴⁷⁷ Rural municipalities are categorised as B3 (small towns) and B4 (mostly rural) municipalities.⁴⁷⁸ B3 municipalities have no urban core settlement, they have a small population and are characterised by the presence of commercial farms.⁴⁷⁹ B4 municipalities are typically located in former homelands and are characterised by communal land tenure and villages.⁴⁸⁰

473 National Treasury 2011 *Local Government Budget and Expenditure Review* 215; Department of Co-operative Governance and Traditional Affairs 2013 *Towards an Integrated Urban Development Framework* 21; Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 255.

474 Turok 2012 *Urbanisation and Development in South Africa* 21.

475 National Planning Commission 2011 *National Development Plan* 239.

476 Rural Development Framework (1997)1.2.

477 National Treasury 2011 *Local Government Budget and Expenditure Review* 193.

478 National Treasury 2011 *Local Government Budget and Expenditure Review* 193.

479 National Treasury 2011 *Local Government Budget and Expenditure Review* 193.

480 National Treasury 2011 *Local Government Budget and Expenditure Review* 193.

Poverty and inequality is greater in rural areas than in urban areas.⁴⁸¹ Access to basic services has improved but at a slower pace than in urban areas.⁴⁸² There are generally more women than men living in rural areas.⁴⁸³ Rural areas often have limited employment opportunities and access to basic services such as sanitation and water is often limited.⁴⁸⁴ These areas are often located far from the administrative centre of the municipality with the implication that many community members cannot contribute towards public participation.⁴⁸⁵ Generally, rural municipalities are less developed in terms of infrastructure, industries and economic activities.⁴⁸⁶ A further challenge to rural municipalities is their dependence on municipal grants, since they do not have a large revenue base, which affects their resource capacity.⁴⁸⁷

The main sanitation challenges facing rural municipalities are that they are remotely located. The provision of sanitation services is more costly as settlements are dispersed and remotely located from the municipality's administrative hub.⁴⁸⁸ Water-borne sewage pipe systems might be too expensive to install in rural areas and therefore different sanitation technologies will have to be considered.⁴⁸⁹

Against this introductory background, the next section succinctly considers the sanitation needs and features of the rural and urban areas in South Africa as they relate to the elements of environmental justice.

481 National Planning Commission 2011 *National Development Plan* 195.

482 National Planning Commission 2011 *National Development Plan* 195.

483 National Treasury 2011 *Local Government Budget and Expenditure Review* 194.

484 National Treasury 2011 *Local Government Budget and Expenditure Review* 191.

485 Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 262.

486 Fuo *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 262.

487 National Treasury 2011 *Local Government Budget and Expenditure Review* 207.

488 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 8.

489 National Treasury 2011 *Local Government Budget and Expenditure Review* 198.

4.5 Particular needs and features

4.5.1 Distribution

As stated above, the distributional element of environmental justice has to do with the infrastructure and resources needed for sanitation services.⁴⁹⁰ The minimum requirements for the distributional element are set out in the Regulations to the Compulsory National Standards and Measures to Conserve Water.⁴⁹¹ Most of the infrastructural challenges in rural communities relate to the fact that these communities are located far from urban areas.⁴⁹² The fact that they are remotely located means that their municipalities will have to expend resources and money on building infrastructure to meet these communities' sanitation needs. As sanitation in rural communities requires substantial infrastructural resources, providing it would be quite costly.⁴⁹³ For this reason many rural municipalities use dry on-site sanitation facilities. The ventilated improved pit latrine (the VIP) is an example of a dry on-site sanitation system that falls within the standard set by the the regulations to the Compulsory National Standards and Measures to Conserve Water.⁴⁹⁴

eThekwini Municipality, which includes 75 000 rural households, has recently adopted a policy of sustainable on-site sanitation.⁴⁹⁵ The municipality has used the urine diversion toilet as a sanitation facility. The municipality decided on this sanitation facility for the following reasons: waterborne sewerage infrastructure would have been too costly and impractical because of physical considerations; the VIP would be unsuitable because of the emptying process; the limited amount of free water supply (200 litres per day) demands dry sanitation; the urine diversion toilet allows for safe on-site disposal; and

490 See par 2.4.5.1.

491 See par 3.3.4.

492 Phaswana – Mafuya 2006 *Health SA* 19.

493 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 8.

494 Regarding the minimum requirements of basic sanitation see par 3.3.4.

495 Gouden *et al* 2006 *Provision of Free Sustainable Basic Sanitation: The Durban Experience* (Conference Paper) 23.

there is a low risk of environmental damage as the waste is broken down before it reaches the soil.⁴⁹⁶

The VIP will most probably not be suitable for urban areas. Most sanitation systems in an urban area consists of waterborne sanitation, which would be preferable for urban areas as a result of the density and the location of businesses in urban areas.⁴⁹⁷

While there are various technologies that can be used in urban and rural areas respectively, it is essential that the sanitation facility provided should comply with the minimum requirements of basic sanitation as set out in the regulations to the Compulsory National Standards and Measures to Conserve Water.⁴⁹⁸ A toilet - no matter where it is built - must thus be safe, reliable, environmentally sound, easy to keep clean, private, protected against the weather, well ventilated, must keep smells to a minimum, and must prevent the entry and exit of flies. A toilet without an enclosure, as in the Beja case, accordingly does not comply with the distributional element of environmental justice.⁴⁹⁹ It needs to be stressed that the distributional element is essential to environmental justice as people's needs cannot be met without the proper infrastructure - neither in the rural nor in the urban context.

4.5.2 Recognition

Environmental justice deals not only with distribution but has an element of recognition as well.⁵⁰⁰ This element takes into account deep material differences.⁵⁰¹ Recognition in rural areas requires that attention be paid to the particular needs of such an area, for example the location of the facilities provided, and education regarding the use of the particular facility. Recognition requires taking into account the needs of the vulnerable

496 Gouden *et al* 2006 *Provision of Free Sustainable Basic Sanitation: The Durban Experience* (Conference Paper) 23.

497 Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 12.

498 See par 3.3.4.

499 See par 3.5.2 regarding the importance of an enclosed toilet in the Beja case.

500 See par 2.4.4.2.

501 See par 2.4.4.2.

and disadvantaged of society. As already indicated, there are reportedly more women than men living in rural areas. Therefore it is essential that women, as vulnerable members of society, should be recognised in the decisions on the choice of the technology to use and the introduction of any sanitation facility to a community.⁵⁰² The sanitation facility in a rural area will most likely be operated and maintained by the user of such a facility. It is thus imperative that people be informed and educated about the sanitation facility that will be used. It is equally important that hygiene awareness be promoted by the municipality.

Waterborne sanitation, which is used mostly in urban areas, presents its own challenges. The end user of a sanitation facility in an urban area is very often not a permanent resident, and does not take final responsibility for the facility, and this affects the sustainability of the sanitation facility.⁵⁰³ The existence of large informal settlements in urban areas creates a problem as well, as a result of overcrowding.⁵⁰⁴ Nevertheless, urban residents should also be informed regarding the use and sustainability of a sanitation facility.

As part of the element of recognition a municipality has to take into account the cultural preferences of a community. This applies to rural and urban municipalities equally. A sanitation facility that is sensitive to the cultural needs of a community is likely to be more sustainable than one that is not. The issue of cultural needs may be more important in rural than in urban areas, as people in rural areas lead a more traditional lifestyle than city dwellers. Communities in rural areas also tend to be bonded by their common cultural practices and values.

502 See par 4.4.

503 Schaub-Jones *Sanitation matters* 4.

504 Turok 2012 *Urbanisation and Development in South Africa* 28.

4.5.3 Procedure

Procedure as an element of environmental justice requires public participation,⁵⁰⁵ which can also be seen as a means of achieving distributional equity and political recognition.⁵⁰⁶ It has been established that municipal legislation makes extensive provision for public participation procedures.⁵⁰⁷ Decision-making procedures lie at the heart of procedural justice.⁵⁰⁸ These procedures include public meetings and hearings by the municipal council. The municipality has a wide discretion when deciding which procedures to use to facilitate public participation. It is imperative, however, that municipalities take into account the needs of the vulnerable, such as those who cannot read or write, people with disabilities and women. In the Beja case the court reiterated the importance of *meaningful* engagement with communities, particularly vulnerable and disadvantaged communities.⁵⁰⁹

It has been proven that a demand driven approach, where the desire for sanitation originates from the community, increases the sustainability of a sanitation facility.⁵¹⁰ It is thus important that communities should be involved in the decision-making procedures regarding which sanitation facility is to be used. Public participation in decision-making is equally important in urban areas.⁵¹¹ Municipalities have to find innovative ways to reach communities and include them in the decision-making processes of the municipality.

505 Schlosberg *Environmental Justice* 84. See par 2.4.4.3.

506 Schlosberg *Environmental Justice* 84.

507 See par 3.3.1.

508 Schlosberg *Environmental Justice* 84.

509 Beja case par [95]. See also *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA (CC) par [15].

510 Phaswana – Mafuya 2006 *Health SA* 21; Tissington *Basic Sanitation in South Africa* 5; The White Paper on Household Sanitation (2001).

511 Knoetze 2014 <http://allafrica.com/stories/201407161639.html> reports that the SAHRC has recently found that the City of Cape Town (an urban municipality) did not adequately consult with the communities regarding the provision of sanitation services.

4.5.4 Capability

The element of capability asks the essential question of what is needed to transform the distribution of goods into contributing to a fully functioning life.⁵¹² It has been established that adequate sanitation is crucial for people to be able to function in a dignified way and adequate distribution thus improves a person's ability to lead a functioning life.⁵¹³ A key mechanism in improving the capabilities of communities is education in how to use the sanitation facilities provided and in the importance of hygiene. Communities in urban and rural areas will not be able to improve their lives unless they are educated regarding the use of the specific sanitation facility.⁵¹⁴ Education on the use of a sanitation facility is particularly important in rural areas where the most suitable sanitation system will be on-site sanitation which the end-user would have to operate and maintain themselves.⁵¹⁵

eThekweni municipality has implemented an education programme on the sanitation services provided to rural communities. In terms of the project each household is visited five times during the pre-construction and delivery phases.⁵¹⁶ During these visits the members of the community are informed about the type of sanitation facility that will be used and are instructed about the use and maintenance of the facility.⁵¹⁷ Educating rural communities regarding the use of the sanitation facility improves the sustainability of the facility. People should also be educated about the possible contamination of water resources arising from poor sanitation practices. If important water resources are contaminated, this affects the people who depend on those resources. Education about the contamination of water resources is equally important in those urban areas where

512 Schlosberg *Justice, Ecological Integrity and Climate Change* 166.

513 See par 2.4.4.4.

514 Phaswana – Mafuya 2006 *Health SA* 20.

515 See par 4.5.1.

516 Gounden et al 2006 *Provision of Free Sustainable Basic Sanitation: The Durban Experience* (Conference Paper) 24.

517 Gounden et al 2006 *Provision of Free Sustainable Basic Sanitation: The Durban Experience* (Conference Paper) 24.

there are informal settlements. As against the situation in rural areas, most people in urban areas are not responsible for the operation and maintenance of their sanitation facilities, which are usually connected to a sewage system.

4.6 Concluding remarks

This chapter set out to determine in what way the provision of sanitation facilities should differ in rural and urban contexts. It can be concluded that the nature of the duties of municipalities will not be significantly different in urban and rural contexts. It has been found that the rural and urban landscapes differ mostly with respect to the type of infrastructure that will be needed (ie waterborne sanitation for urban areas and on-site dry sanitation for rural areas). However, there are many areas of overlap between the needs of urban and rural municipalities. The members of both the rural and the urban communities need to be recognised in the decision-making processes regarding which sanitation facility is to be used. It is furthermore evident that education and hygiene awareness will play a crucial role in ensuring the performance of proper sanitation practices. Education and hygiene awareness may also enable communities to properly use sanitation facilities to lead to a fully-functioning life. It will be required of urban and rural municipalities alike to properly assess the needs of the local communities, bearing culture and context in mind.

CHAPTER 5

CONCLUSION

Adequate sanitation is a vital need for any human being,⁵¹⁸ yet globally and in South Africa many people still do not have access to such sanitation.⁵¹⁹ In South Africa, local government is responsible for the provision of sanitation services.⁵²⁰ This duty is constitutionally entrenched and is prescribed in some detail in national law and policy. The sanitation issue could *inter alia* be framed as an environmental issue, which is why this study has been premised on the understanding that it is appropriate to view the realisation of the right to sanitation from the perspective of environmental justice.

The research question underpinning this study focuses on the role of local government in realising the right to sanitation as seen from an environmental justice perspective.⁵²¹ In order to answer this question some theoretical approaches to the scope of the right to sanitation were discussed and environmental justice was defined in a way fitting for the South African legal context.⁵²² In order to determine the role of municipalities in the realisation of the right to sanitation, the legal mandate of local government was discussed.⁵²³ The study proceeded to investigate the urban and rural contexts to determine if any significant differences between them exist that may demand a differentiation in municipal sanitation service delivery.⁵²⁴

Chapter 2 set out to determine what legal claims to sanitation services could be made at national and international level. It was found that an international human right to sanitation exists.⁵²⁵ This right is derived from other international rights, including the

518 Par 2.2.
519 Chapter 1.
520 Chapter 1.
521 Chapter 1.
522 Chapter 2.
523 Chapter 3.
524 Chapter 4.
525 Par 2.3.1.

right to an adequate standard of living. The existence of the international human right points to the importance attached to access to adequate sanitation globally. The existence of this international human right could also assist South African courts, as the judiciary is constitutionally obliged to consider international law when interpreting the Bill of Rights. The Glenister case has had the effect that the state is bound by water and sanitation-related agreements at the international level, as relevant ratified treaties have a domestic effect.⁵²⁶

Although there is no express constitutional right to sanitation in South Africa, the existence of such a right can be inferred from other self-standing constitutional rights. It was explained in chapter 2 that the Constitution protects the right to sanitation by virtue of the aggregate application of the right to an environment not harmful to one's health or well-being, the right to access to water, the right to adequate housing, the right to human dignity and the right to privacy. The implicit constitutional right to sanitation can as such be recognised by the judiciary in South Africa.⁵²⁷ However, the constitutional right to sanitation has to date not been explicitly recognised by the judiciary. It could thus be described as an emerging right.

In an effort to analyse the right to sanitation from an environmental justice perspective, the concept of environmental justice was defined.⁵²⁸ After discussing various approaches to environmental justice, it was decided to adopt the view of Schlosberg, as his understanding of justice goes beyond the distributional element of justice, a fact which renders his view particularly useful for the South African context.⁵²⁹ He understands environmental justice to encompass distributional, recognition, participation and capability elements. It was found that the concept 'environment' covers a diversity of risks, benefits and resources including issues such as access to services.⁵³⁰ The distributional element of justice was found to deal with the distribution of certain risks

526 Par 2.3.1.
527 Par 2.3.3.
528 Par 2.4.
529 Par 2.4.2.
530 Par 2.4.3.

and benefits. In the sanitation context the distributional element denotes the distribution of sanitation infrastructure such as sanitation facilities.⁵³¹ The element of recognition entails that deep material differences be taken into account.⁵³² Recognition requires that all people be recognised in the decisions regarding (in this instance) the provision of sanitation facilities, and furthermore that particular attention be paid to the vulnerable in the community such as women and children.⁵³³ Procedural justice has to do with participation in decision-making processes.⁵³⁴ The final element is justice as capability, which addresses the link between the distribution of goods (and services) and people's well-being and ability to lead fully functional lives.⁵³⁵ Using Schlosberg's and the NEMA description of the principle of environmental justice, environmental justice is defined as :

The distribution of adverse environmental impacts and benefits that recognises the dignity of human beings and their importance in decision-making procedures regarding such distribution in order not to unfairly discriminate against vulnerable and disadvantaged persons.⁵³⁶

In chapter 3 it was established that sanitation provision is an original function of local government.⁵³⁷ It was found that sanitation provision falls squarely within the developmental mandate of local government.⁵³⁸ Municipalities have a duty in terms of section 7(2) to respect, protect, promote and realise the right to sanitation. The section 7(2) constitutional duty implies that municipalities should not unduly interfere and should further prevent third parties from unduly interfering with access to a sanitation facility.⁵³⁹ Municipalities should furthermore actively work at raising awareness regarding the right to sanitation and must ensure that vulnerable and disadvantaged persons receive the basic minimum sanitation facility. Various pieces of legislation, policy documents and

531 Par 2.4.4.1.

532 Par 2.4.4.2.

533 Par 2.4.4.2.

534 Par 2.4.4.3.

535 Par 2.4.4.4.

536 Par 2.4.5.

537 Par 3.2.3.

538 Par 3.2.2.

539 Par 3.2.1.

case law were found to make provision for the elements of environmental justice as set out in chapter 2.⁵⁴⁰ South African law and policy cater for the distributional element, for example, by providing for the minimum level of basic sanitation, which is a toilet that is safe, private, keeps smells to a minimum and is environmentally sound.⁵⁴¹ Provision is also made for public participation during planning and decision-making procedures such as the drafting of the IDP.⁵⁴² The courts' approach to the provision of sanitation services and basic municipal services has not been consistent, however, and there has been a reluctance on the part of the court to explicitly engage with the content of the right to sanitation.

The purpose of chapter 4 was to determine to what extent urban and rural municipalities may require a different understanding in the execution of the duty to provide sanitation. Chapter 4 established that rapid urbanisation has taken place in South Africa with approximately 60 per cent of South Africans living in urban areas.⁵⁴³ The incline has placed a burden on South African urban municipalities because of the resultant population growth and the growth of informal settlements.⁵⁴⁴ Access to services in rural municipalities has improved more slowly than in urban areas, and poverty and inequality are still prevalent in rural areas.⁵⁴⁵ It was nevertheless found that the nature of the function of municipalities does not significantly differ in the two contexts, and that the application of the elements of environmental justice are equally relevant and important in both the urban and rural context.⁵⁴⁶ The most visible difference between the rural and urban contexts is the type of infrastructure needed for sanitation facilities, a factor which relates to the distributional element of environmental justice.⁵⁴⁷

In an effort to determine the role of local government in realising the right to sanitation through the lens of environmental justice specifically, a number of findings were made.

540 Par 3.3 and 3.4.

541 Par 3.3 and 3.4.

542 Par 3.3 and 3.4.

543 Par 4.1.

544 Par 4.1 and 4.3.

545 Par 4.4.

546 Par 4.5.

547 Par 4.5.

Firstly there are different understandings of environmental justice, not all of which suit the South African context. Schlosberg's approach was found to be most suitable as it specifically breaks down environmental justice into different elements. This makes for a categorisation that is particularly useful for municipalities when planning for and providing sanitation services. Secondly, although the Constitution does not expressly mention the right to sanitation it may be described as an emerging right in South Africa and the duties arising from such a right befall every municipality. Thirdly, the need for the provision of sanitation services is equally prevalent in the rural and urban contexts, with negligible differences as far as the realisation of the right to sanitation from an environmental justice perspective is concerned.

One of the objectives of this study has been to recommend governance tools and other mechanisms that municipalities may use to realise the right to sanitation. Various tools have been identified throughout the study. The most important instrument available to municipalities is the IDP.⁵⁴⁸ The significance of the IDP lies in the fact that it is the main strategic planning instrument of the municipality and it must be internally reviewed annually. The IDP is also subject to review by the provincial government. As a local governance instrument the IDP promotes all the elements of environmental justice. The distribution element is catered for in the sense that the IDP sets out the municipality's vision for long-term development. The Water Services Development Plan, which is a sector-specific management plan, also forms part of the IDP and more specifically sets out the needs of the community in relation to water and sanitation services. The IDP caters for the elements of participation and recognition by allowing for mechanisms whereby the local community is to be consulted on their development needs and priorities. The local community must by law also be given the opportunity to participate in the drafting and revision of the IDP. The capability element of environmental justice is enhanced, since the IDP is aimed at identifying community needs and planning accordingly and thereby enhancing the quality of life of citizens.

548 Par 3.3.1.

The performance management system (PMS) has also been identified as a useful local governance instrument.⁵⁴⁹ It enhances accountability and participation, as the municipality is obliged to report to the community regarding targets that were not met. The PMS also enhances co-operative governance as it requires that the MEC for local government must report on the performance of the municipality to the provincial legislature as well as the National Council of Provinces.

An important municipal mechanism is public participation.⁵⁵⁰ It has been found that municipalities have a wide discretion to decide on the manner in which they will facilitate public participation. Public participation can, for example, be facilitated through ward committees and councillors. The Beja case serves to underscore the importance of meaningful engagement with a community, particularly in relation to the provision of basic sanitation and other services. Public participation processes have been found sometimes to be problematic in practice in rural municipalities or where urban municipalities have informal settlements situated far away from the administrative hub of the municipality.

A further mechanism that has been identified is the use of public awareness programmes.⁵⁵¹ Programmes that inform communities regarding the availability and use of sanitation facilities, for example, are invaluable for enhancing the recognition of citizens as well as for improving the capability of people to lead fully-functioning lives.

The adoption of by-laws is a critical regulatory instrument for municipalities to prevent, for example, infringement from third parties on the right to access to sanitation. The Water Services Act explicitly obliges municipalities to make by-laws that regulate the provision of water services.⁵⁵² A by-law could also be an enforceable mechanism to regulate the distribution of sanitation facilities by setting different service levels.⁵⁵³

549 Par 3.3.1.

550 Par 3.3.1.

551 Par 3.3.1.

552 Par 3.3.4.

553 Par 3.3.4.

Municipalities can use policies for the indigent as well.⁵⁵⁴ Indigent policies are an important instrument for municipalities to realise the right to access to sanitation. With a municipality's specific indigent policy the distributional element is catered for, as such a policy would provide for the minimum of basic services.⁵⁵⁵ These policies allow indigent citizens to be recognised as people who deserve at least the basic minimum services.

The municipal budgeting process has been identified as a local governance instrument that can be used by municipalities.⁵⁵⁶ It is imperative that municipalities are allocated the proper funds to give effect to the plans contained in their IDPs and to realise the right to sanitation. The MIG has been identified as a key mechanism in enabling municipalities to build infrastructure in order to provide better services.⁵⁵⁷ The MIG can be particularly useful in rural areas where it is quite costly to build sanitation infrastructure.⁵⁵⁸

Co-operative governance can aid municipalities with the careful distribution of functions. It has been established in chapter 3 that confusion can exist between district and local municipalities regarding the division of sanitation functions.⁵⁵⁹ The environmental implementation plan can assist in this regard as it co-ordinates the environmental plans and policies of the different provinces and national departments.⁵⁶⁰

Environmental management co-operation agreements can be concluded between the municipality and the community.⁵⁶¹ These agreements are useful as they allow the community actively to participate and allow for meaningful engagement between the municipality and the community.

554 Par 3.3.1.

555 National Framework for Indigent Policies 1.3.

556 Par 3.3.1.

557 Par 3.3.1.

558 Par 4.4.

559 Par 3.3.2.

560 Par 3.3.3.

561 Par 3.3.3.

On the basis of an analysis of the meaning of environmental justice, it was found that the existing South African law and policy framework applicable to the right to sanitation is lacking in the following areas:

- A clear role division between municipalities and other spheres of government;⁵⁶² and
- A lack of meaningful engagement with communities regarding sanitation facilities.⁵⁶³

Based on the findings in this study, the following general recommendations are made:

- The approach to environmental justice as set out by Schlosberg should be adopted and used by every municipality in the delivery of sanitation services in the rural and urban settings to assist in achieving the different elements of environmental justice;
- Municipalities should ensure that adequate sanitation services that fit community needs are properly and systematically planned for in their IDPs after proper consultation with the community;
- Municipalities should use the PMS to ensure that the relevant sanitation service targets are met;
- A municipality must adopt by-laws that regulate sanitation service delivery which is consistent with the Constitution and legislation;
- Municipalities should make use of indigent policies to ensure that poor households receive the basic minimum requirement of sanitation services;
- Environmental co-operation agreements should be used by municipalities;
- Municipalities should ensure that meaningful engagement takes place with a community before decisions are taken regarding a sanitation facility as well as in the design and revision of IDPs, PMS and water and sanitation bylaws;

562 Par 3.3.2.

563 Par 3.5.

- Municipalities should widely make use of appropriate public awareness programmes regarding sanitation facilities that are suitable for the urban and rural contexts;
- Municipalities should tap into the opportunities offered by the MIG system and must further ensure that a sufficient part of the municipal budget is allocated to sanitation services and sanitation infrastructure which is aligned with the IDP and PMS; and
- municipalities should ensure that the principles of co-operative governance are complied with and that municipal policies and by-laws are aligned with provincial and national policies and legislation.

The right to sanitation can be a powerful right enabling people to enforce the provision of the sanitation services necessary to their being able to live dignified lives. Environmental justice forms part of the broader goal of transformative constitutionalism which is ultimately to create an equal and socially just society.⁵⁶⁴ An adequate legal framework for the provision of sanitation services grounded in environmental justice contributes in part towards the realisation of such an equal society. Government - and local government in particular – must however actively pursue the objectives of environmental justice in their adoption and use of local governance instrumentation for the provision of sanitation services. South Africans have the right to sanitation and this right has a particular role in making the transition to a healthy and safe environment for the entire society. The role of local government in making and keeping this right alive in the urban and rural areas of South Africa is by no means a small or insignificant matter.

564 Klare 1998 *SAJHR* 150.

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