



The public trust doctrine and local environmental governance in South Africa

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DEDICATION

For the great ordeal and service to my livelihood I dedicate this work to my mother, Nompethithi Methuko, a single women who worked as domestic worker without any form of formal education and found courage and strength to raised 8 children of which two of them pursued the route of law. It is her resilience and resolve in life that gave me strength even when it was difficult and not feasible that I will finish my studies.

Lala ngoxolo Hlathi, Lisa, Sanzanza, Canzi, Ncangala, Bhulashe, Jambashe, Ntombi yase Mamfeneni.

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ABSTRACT

The study explores to what extent the South African Public Trust Doctrine (PTD) obligation that was introduced by the adoption of the Constitution in terms of section 24 creates state's responsibilities and duties that must inform the Local Environmental Governance (LEG). Section 24 was designed to advocate for sole protection of the environment for both the current and future generation through the enactment of legislation and other measures. These measures were to ensure that ecologically sustainable development is secured and careful balance in making sure that the use of natural resources while promoting justifiable economic and social development is maintained. The enactment of NEMA as the framework environmental legislation entrenched and reaffirmed among others the PTD principle, sustainable development and the duty of care to all state organs. As a principle, sustainable development also embraces the vision to ensure intergenerational equity is maintained and the protection of future generation is upheld. As a result of this mandate, the Municipal Systems Act envisaged the vision of local governance that seeks to strive for organisational change that serves as the backdrop on which state rests embedded on the Constitutional notion of developmental local government. Hence the study concludes by finding that through the achievement made by the introduction of PTD by the Constitution, it suggested responsibilities that were to inform the LEG.

Keywords: sustainable development; developmental local government; environmental protection; public trust doctrine; local environmental governance; South Africa.

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LIST OF ABBREVIATIONS

CONNEP	Consultative National Environmental Policy Process
DoRA	Division Of Revenue Act
ECA	Environmental Conservation Act
EI	Environmental Implementation
EIA	Environmental Impact Assessment
EMCA	Environmental Management Cooperation Agreement
EMF	Environmental Management Frame-work
EMP	Environmental Management Plan
IDP	Integrated Development Planning
IEM	Integrated Environmental Management
LDO	Land Development Officer
LEG	Local Environmental Governance
MEC	Member of Executive Council
MFMA	Local Government: Municipal Finance Management Act
MPT	Municipal Planning Tribunal
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NEM: AQA	National Environmental Management: Air Quality Act
NEM: BA	National Environmental Management: Biodiversity Act
NEM: ICMA	National Environmental Management: Integrated Coastal Management Act
NEM: WA	National Environmental Management: Waste Act
NEM: PAA	National Environmental Management: Protected Areas Act
NHRA	National Heritage Resources Act

PAJA	Promotion of Administrative Justice Act
PMS	Performance Management Systems
PTD	Public Trust Doctrine
SDF	Spatial Development Framework
SEMAAs	Sectoral Environmental Management Acts
SPLUMA	Spatial Planning and Land-Use Management Act
WCED	World Commission on Environment and Development

CHAPTER 1 INTRODUCTION

1.1 Background

The elevation of environmental protection on the global scale gained traction during the Stockholm conference.¹ In its declaration among others, the conference concluded that central to states mandate must be to invoke measures to promote environmental protection in their quest to pursue development.² This milestone was echoed by the 'World Commission on Environment and Development's' (WCED) report which propagated for the overall transformation of policy and law based on the concept of sustainable development.³

The importance of maintaining a balance on sustainable development and environmental protection was consolidated during the Rio Conference.⁴ Among the Rio Conference principles, it was the reaffirmation that in order for sustainable development to be achieved, environmental protection as enshrined in international policy and law regime must constitute an integral part of the development process.⁵

It is important to note that sustainable development is defined as a development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.⁶ Feris⁷ argue that this duty posed by a development that is sustainable in the lenses of an environmental governance perspective, represent the objective of 'making decisions in the present that would not instil undue environmental burdens on future generations.'

¹ Declaration of the United Nations Conference on the Human Environment (Stockholm) 16 June 1972, A/CONF. 151/26 (Vol I). Hereafter referred to as the Stockholm Declaration.

² Article 11 of the Stockholm Declaration.

³ Brundtland Report 1987 www.un-documents.net.

⁴ *Rio Declaration on Environment and Development* 1992. UN Doc A/Conf.151/26. Ten years after the United Nations Conference on Environment and Development (the Rio conference).

⁵ Principle 4 of the Rio Declaration.

⁶ Brundtland Report 1987 www.un-documents.net 8.

⁷ Feris L. *The role of good environmental governance in the sustainable development of South Africa* PER/PELJ 2010(13) 1.

The call by the WCED for the fostering of transformation of international environmental law and policy contributed to the seamless methods for promoting international institutionalised co-operation for effective global environmental governance. Environmental governance is defined by environmental scholars as the establishment, confirmation or change of institutions to manage or resolve conflicts over a country's natural resources to ensure the sustainable future of that country (Fakier et al., 2005).

In line with the above-mentioned transformative efforts, it is important to note that environmental governance is enshrined in a number of the South African national environmental legislation. This pieces of legislations contains obligations and mandates that places the responsibility of environmental management on all three spheres of government.

Du plessis (2015a) emphasizes, that if municipalities are to ensure their objective of promoting a safe and healthy environment, the implementation of the environmental governance principles of fairness, accountability, responsibility and transparency are critical to not only ensuring environmental protection at the local level but also for ensuring that local government are on the path to sustainable development. This achievement is confirmed by Harsant⁸ when she reflect on environmental governance in South Africa. She makes the following observations:

“That it is clear an attempt has been made to synchronise the global environmental legal and normative framework with those of national and local levels.”

Noting the above observations, the Local Environmental Governance (hereinafter “LEG”) finds its genesis from the global environmental governance initiatives that found expression and was introduced in the South African legislative regime through the inclusion of section 232 and 233 in our supreme law.⁹ The former section confirms the fact that Customary international law to the extend it is consistent with the Constitution is part of our law.

⁸ Harsant A. *Environmental governance in the new South Africa: A decade of greening?*

⁹ *Constitution of the Republic of South Africa, 1996* (hereinafter the *Constitution*).

In terms of the latter section, guidance is given by the Constitution that when interpreting any legislation the preferred interpretation must be compliant with the ethos of international law.

Given the fact that the Constitution declared the South African Republic as one, sovereign, democratic state¹⁰ that comprises of three spheres with a strong and relatively autonomous local government sphere, central to its role as "developmental local government" that operates close to the people, municipalities are legally mandated to provide municipal services in a sustainable way¹¹ and to help promote the constitutionally entrenched right to a safe and healthy environment.¹² The reality is that environmental protection and the conservation of natural resources such as water remains a pipedream in many municipal areas. This is despite the existence of constitutional environmental right as supported by a suite of national environmental legislation. The reasons for this, range from the lack of implementation of the co-operative (environmental) governance principles in the Constitution¹³ and legislation such as the Intergovernmental Relations Framework Act 13 of 2005, to the often lamented ambiguity in the interpretation of the environmentally-relevant functions and roles of authorities situated in the three spheres of government. Yet, the *de jure* situation is that municipalities are responsible for local environmental governance (LEG). This has been argued extensively by authors such as Du Plessis, Nel, Du Plessis and Fuo.¹⁴ In this context, LEG is defined as:

The management process executed by local government and communities to holistically regulate human activities and the effects of these activities on their own environment as well as the impact on the environment as a whole.¹⁵

¹⁰ Section 1 of the Constitution.

¹¹ Section 152(1) (b) of the Constitution.

¹² Section 152(1) (d) of the Constitution. See also s 4(2)(i) of the Local Government: Municipal Systems Act 32 of 2000 (hereinafter the *Systems Act*).

¹³ Chapter 3 of the Constitution.

¹⁴ Du Plessis *Constitutional Environmental Right in the Local Government Sphere* 287.

¹⁵ Du Plessis *Constitutional Environmental Right in the Local Government Sphere* 521.

LEG is legally embedded in a mix of the Constitution, national local government (such as the Municipal Systems Act)¹⁶ and environmental legislation (such as the National Environmental Management Act 107 of 1998). It however also ties in with the so-called 'Public Trust Doctrine' (hereafter PTD) to the extent that every municipality is an organ of state.

PTD can be defined as a traditional common law doctrine rooted both in the English and Roman law and serves to limit government (public) power over natural resources.¹⁷ The father of this doctrine, Sax¹⁸ held that in order for the PTD 'to be an effective tool' in governments' environmental protection efforts, it must possess at least three characteristics that must include the fact that: 1) it has to create an obligation that could be enforceable against the government; 2) it has to vest some concept of a legal right in the general public, and 3) it has to be capable of being interpreted consistent with contemporary concerns for environmental quality.

Within the South African legal context it may be argued that section 24 of the Constitution¹⁹ served as the impetus and conduit of the development of the South African version of the PTD. This was reaffirmed in the *Fuel and Retailers-case*²⁰ where the Constitutional Court stated that:

"Section 24 of the Constitution confers upon the authorities a stewardship role whereby the present generation is constituted as the custodian or trustee of the environment for future generations."

Irrespective of the fact that different laws (e.g. the National Water Act 36 of 1998 (hereafter NWA) and the National Environmental Management: Biodiversity Act 10 of 2004 (hereafter NEM: BA), word the PTD differently, Freedman²¹ asserts that a

¹⁶ Section 4 (2) (d) of the Local Government: Municipal Systems Act 32 of 2000.

¹⁷ Ruddy 2020 *SSRN* 140.

¹⁸ Sax 1970 *MLR* 474.

¹⁹ Section 24 (b) of the Constitution state that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

²⁰ *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 6 SA 4 (CC) para 102.

²¹ Du Plessis *Environmental Law and Local Government in South Africa* 275.

single, unified and coherent PTD has been introduced in South African environmental law. The PTD is usually understood with reference to federal or national-level authorities. However, in the South African context, the Constitution, local government legislation and environmental law foresee a role for local government in the management and protection of the environment. For example, chapter 7 of the Constitution states that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.²²

This should be read with the environmentally relevant functions of municipalities listed in Schedules 4B and 5B of the Constitution. These areas typically include air pollution, control of public nuisances and refuse dumps and solid waste disposal. In terms of section 4(2) (d) of the Systems Act, it is stated that central to the obligation of the municipality is the duty to strive to the provision of municipal services to its local community in a financially and environmentally sustainable manner.

It is important to note that NEMA principles enshrined in section 2 as well as the duty of care in section 28 of the Act are applicable to all organs of state and from this it is possible to gather that municipalities are expected to *inter alia* take all reasonable steps and measures to prevent pollution including mitigating circumstance that would avert degradation of the environment from occurring.

The scholarly literature of Basson and Du Plessis (2004:51-52) confirms the principle that municipalities are co-responsible for 'environmental governance in South Africa.' In the *Le Sueur*²³ and *Gauteng Development Tribunal*,²⁴ one sees how the courts regard municipalities as key in serving an environmental governance function. In the main the South African environmental jurisprudence have referred to the obligation of "the State in the fulfilment of its role as the custodian holding

²² Section 156(5) of the Constitution.

²³ *Le Sueur and others v Ethekwini Municipality and Others* 2013 ZAKZPHC 6 para 35.

²⁴ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 2 SA 554 (SCA) para 3.

the environment in public trust for the people” including the nature of the duty of care contained in section 28 of the NEMA.²⁵

Corroborating these facts Du Plessis has argued that local government is co-responsible together with other spheres for the realisation of section 24 of the Constitution.²⁶ Her justification is embedded in the ‘subsidiary principle which calls for the devolution of public functions to the level of government at which they will be mostly effectively executed and fulfilled.’²⁷

The research question underpinning this study is how the South African PTD and the state’s responsibilities emanating from it, inform the LEG. This will be explored through the extensive interrogation of the various transformative measures brought about by the advent of the Constitutional democracy in South Africa with the focal point on LEG.

The study will be carried out through the aid of information found in primary and secondary sources of law. The study is desk-based. The primary sources for the purposes of the literature review include legislation (e.g. the NEMA, the NWA, the *National Heritage Resources Act* 25 of 1999, the *Mineral and Petroleum Resources Development Act* 28 of 2002, the *National Environmental Management: Biodiversity Act* 10 of 2004, the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008), case law, government policies, municipal by-laws and strategies, etc. Where necessary, the former are supported by secondary sources, such as journal articles, textbooks and general and specialised reports some of which have been retrieved from the internet.

Chapter 2 of the study will explore the meaning and relevance of developmental local government within the context of the LEG. This chapter will give the historical

²⁵ *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (E) 418B-C.

²⁶ Du Plessis A. *The "brown" environmental agenda and the Constitutional duties of local government in South Africa: A conceptual introduction* PER/PELJ 2015(18)5 1854.

²⁷ Du Plessis *The Role of Local Government in Realizing Section 24 of the South African Constitution* 265-266.

account of the Constitutional transformative role played by developmental local government post-apartheid era.

This chapter will also put into perspective the environmentally relevant mandate and duties of municipalities. Lastly, it will shed light as to what is meant by LEG including the provision of key instruments that must give effect to the LEG.

Chapter 3 will give the historical background and account of the birth of PTD in law including its inclusion in the South African statutory law. This will be done by the identification of the legislative regime that advocates for the PTD and to demonstrate the state's responsibilities flowing from the said PTD. Finally, this chapter reliant from the judicial and academic interpretations, will outline the meaning of the PTD within the South African environmental legal context.

Chapter 4 of this study will critically analyse the legally relevant nexus between PTD and the LEG and what it suggest for municipal action.

CHAPTER 2 POST-APARTHEID DEVELOPMENT LOCAL GOVERNMENT AND LEG

2.1 Introduction

The ushering in of the Constitutional democracy has made it possible for the realisation of three distinctive, interdependent and interrelated spheres of government.²⁸ At the heart of this development, is the concretisation of the principles espoused in the Constitution of co-operative governance and the prioritisation of the intergovernmental relations that among others foster for the provision of effective, transparent, accountable and coherent government²⁹ including co-operating with one another in mutual trust and good faith. Also by making sure that they informing one another of, and consulting one another on, matters of common interests.³⁰

For this reason, this chapter will outline the strides made in terms of the Constitutional transformation of local government with regards to the LEG. This will be done by giving the meaning of what constitute developmental local government responsible for more than just a mere service. This exercise will demonstrate the environmentally relevant mandate and duties of municipalities with regards to the LEG including highlighting the meaning and key instruments of local environmental governance.

2.2 The constitutional transformation of local government after 1996

The constitutional democracy project made it possible for the realisation of environmental law enactment that contributed to the evolution of the environmental policy in a form of the National Environmental Management Act 107 of 1998 (NEMA) and its Specific Environmental Management Acts (SEMAs) that are meant to address all aspects of environment within the South African context.

²⁸ Section 40 (1) of the Constitution.

²⁹ Section 41 (1) (c) of the Constitution.

³⁰ Section 41 (1) (h) (iii) of the Constitution.

The enactment of NEMA and its SEMA's as the overarching environmental policy framework was to give effect to the directive and obligations of the Constitution.³¹ This Constitutional directive must be read with section 7(2)³² which enjoin all state organs to respect, protect, promote and fulfil the rights envisaged in the Bill of Rights. This achievement was premised on a commitment to environmental sustainability and various forms of participatory local democracy that would allow citizens and their associations to shape the agenda and actions of municipalities, not only through elections, but also through annualised moments of engagement that would link high-level city, district or town plans to the budget.³³ The enacted NEMA is applicable to the state [local government included] and all the organs of state. As the overarching frame-work for the environmental governance across all the levels of state (local municipalities included), it outlines environmental functions and duties for local government as well as a number of environmental law principles that should guide municipalities' interpretation, administration and implementation of environmental matters.³⁴

By implication *Fuo* note 'that the environmental management principles contained in section 2 of NEMA should also guide the implementation of the section 24 constitutional environmental obligations by all organs of state and in particular to municipal actions that have the potential to significantly affect the environment.'³⁵ In support of this assertion, section 2 of NEMA stipulate that all principles stated under it are binding across the republic including organs of state, in line with the national environmental management principles that among others state that the environment must be held in public trust for the people, including the beneficial use

³¹ Section 24 of the Constitution.

³² Constitution of South Africa.

³³ Van Donk *et al*/Consolidating Developmental Local Government: Lessons from the South African Experience, 2013.

³⁴ Du Plessis *Fulfilment of South Africa's constitutional environmental right in the local government sphere*. PhD Thesis, North West University pp. 391-401.

³⁵ *Fuo Role of courts in interpreting local government's environmental powers in South Africa*.

of the environmental resources that must serve the public interest and making sure that the environment must be protected as the people's common heritage.³⁶

In line with the objects of local government, Du Plessis makes critical evaluations with regards to the fact that the duty imposed by the Constitution for the promotion of 'a safe and healthy environment³⁷,' suggest that municipalities should strive to ensure that the inter-relationship between people and the natural environment is such that the environment is not and does not become harmful to human health. Furthermore she contends that municipalities should manage the environment in such a manner that it can cater for peoples' dependence on resources such as drinking water, food and air to breathe.³⁸

NEMA also places the duty of care and remediation of environmental damage on every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.³⁹

In line with the spirit of co-operative governance as envisaged in the Constitution, NEMA as the overarching policy frame-work foster for environmental management co-operation agreements between the three sphere of government. The Act in terms of section 35 (1) state as follows:

- (1) The Minister and every MEC and municipality, may enter into environmental management co-operation agreements with any person or community for the purpose of promoting compliance with the principles laid down in this Act.

³⁶ Section 2 (4) (o) of NEMA.

³⁷ Section 152 (1) (d) of the Constitution.

³⁸ Du Plessis South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty. *South African Journal on Human Rights*, 27 (2), 293–294.

³⁹ Section 28 (1) of NEMA.

- (2) Environmental management co-operation agreements must-
- (a) only be entered into with the agreement of-
 - (i) every organ of state which has jurisdiction over any activity to which such environmental management co-operation agreement relates;
 - (ii) the Minister and the MEC concerned;
 - (b) only be entered into after compliance with such procedures for public participation as may be prescribed by the Minister; and
 - (c) comply with such regulations as may be prescribed under section 45.

Qualifying this principle of co-operative governance, section 45 (2) of NEMA state that an MEC or municipal council may substitute his, her or its own regulations and or bylaws, as the case may be, for the regulations issued by the Minister under subsection (1) above: Provided that such provincial regulations or municipal bylaws must cover the matters enumerated in subsection (1), and comply with the principles laid down in this Act.

Over and above the environmental management co-operation agreements mentioned above NEMA allows the Minister to draft model environmental by-laws that could be introduced by municipalities. On the same vain, municipalities can also sponsor a request to the Director-General for the assistance with the preparations of by-laws on matters affecting the environment.⁴⁰ In addition of the above submission, *Fuo*⁴¹ state that 'in the context of local government, sections 4(2)(j) and 23(1)(c) of the Systems Act explicitly obliges municipalities to contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in, *inter alia*, section 24 of the Constitution.'

⁴⁰ Section 46 (1) – (2) of NEMA.

⁴¹ *Fuo Role of courts in interpreting local government's environmental powers in South Africa.*

The direct implication of these statutory provisions is that municipalities are legally bound to realise aspects of the constitutional environmental right that fall within their shared or exclusive areas of competence.

2.3 The meaning of developmental local government: responsible for more than mere services

In order to correctly define what constitute developmental local government, it is vital to characterise local government pre-democratic order. The pre-democratic local government epoch is properly characterised by the twenty year review paper on 'the environment and sustainable development.'⁴² This assessment of the twenty year review of South Africa among others depict a very bad state of affairs brought about by the apartheid regime and it has this to say:

“South Africa emerges from a legacy of apartheid in which environmental issues and sustainable development were fragmented. In this respect, narrow environmental goals were pursued for the benefit of the minority at the expense of the majority. Legislation and policies were very weak and did not promote environmentally sustainable development. The apartheid system was poised to ensure that the poor and marginalised were excluded and suffered from the legacies of deliberate and poor environmental management”.

Having comprehended the state of local government pre-1994, it is relevant for this study to record the progressive work that has been done to confirm and affirm the South African local sphere of government as the one having developmental features. Parnell⁴³ define developmental local government as:

“a local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives”

⁴² Twenty year review South Africa 1994-2014 Background paper: Environment and sustainable development.

⁴³ Parnell S. & Pieterse E. *Developmental local government: the second wave of post-apartheid urban reconstruction.*

The above definition by Parnell finds proper expression in accordance with the White Paper basic tenants on Local Government where it states that 'the establishment of the democratic order in South Africa's post-apartheid set-up created the basis for a new developmental local government system, which is committed to working with citizens, groups and communities to create sustainable human settlements which provide for a decent quality of life and meet the social, economic and material needs of communities in a holistic way.'⁴⁴

Elaborating on the same subject matter and putting proper context to the core mandate given by the Constitution, Du Plessis states that:

"Local government's constitutional mandate centres mainly on the idea of "developmental local government". It is argued that as part of its developmental mandate local government is co-responsible for the realisation of the constitutional environmental right. Environmental governance is regarded as one of the mechanisms available to government by means of which to achieve this. It follows that local environmental governance should be one of the mechanisms available to local authorities in doing the same, albeit specifically at the local level.⁴⁵

This untenable situation depicted by Du Plessis, through the adoption of the Constitution, was rectified by invocation of the Consultative National Environmental Policy Process (CONNEP) which formed the basis for the development of the White paper and NEMA.⁴⁶ It must be noted that after the adoption of the Constitution as the supreme law of the land, parallel process unfolded between the CONNEP and the development of the Environmental Impact Assessment (EIA) Regulations as prescribed in the Environmental Conservation Act.⁴⁷ The platform created by this two processes was to make sure that all impacts of development brought about on the environment are considered before a decision is arrived at in line with the principles of Integrated Environmental Management (IEM) as stipulated in NEMA.

⁴⁴ Introduction of the White Paper on Local Government.

⁴⁵ Du Plessis "Local environmental governance" and the role of local government in realising section 24 of the South African constitution.

⁴⁶ Twenty year review South Africa 1994-2014: Environment and sustainable development, page 10.

⁴⁷ Act 73 Of 1989.

To demonstrate that local municipalities as agents propagating for developmental local government, was not merely designed for service only, but also to set-up institutional arrangement that will give effect to the realisation of the environmental protection and LEG.

This is demonstrated by developmental duties imposed by the Constitution to both municipalities and national sphere of government. The Constitution⁴⁸ dictates that in order for municipalities to meet their developmental duties they must make sure that their administration, budgeting and planning processes are structures and managed in such a manner that it priorities basic needs of the communities including the promotion of the social and economic development of the community.

Furthermore, the Constitution⁴⁹ dictates that prior the allocation or re-allocation of equitable share in terms of the Division of Revenue Act (DoRA), prior consultations with provincial governments, organised local government and the Financial and Fiscal Commission and taking into account the 'developmental and other needs of provinces, local government and municipalities.'

2.4 The environmentally relevant mandate and duties of municipalities: an overview of the literature, the Constitution, framework legislation and case law

2.4.1 Constitution

Blackmore succinctly state that 'the PTD in South African environmental law lies beyond the country's Constitution, and appears to have multiple bloodlines, which dispels the notion that South Africa hermetically imported the concept from a single source.' He further restate that 'the interpretation and hence the nature of the application of the doctrine in South Africa is likely to be influenced by the country's

⁴⁸ Section 153 of the Constitution.

⁴⁹ Section 214 (2) (f) of the Constitution.

heritage and hence is likely to vary between the disciplines that constitute South Africa's environmental law.⁵⁰

The transformative environmental mandate and duties posed to the local municipalities' finds expression from the Constitution itself. Adopted as the overarching body of law in the Republic, it states that any law or conduct inconsistent with it is invalid and it directs that all obligations imposed by it must be fulfilled.⁵¹

Part of how the Constitution directed with regards to the duties and mandate that are applicable to the municipalities' is contained in section 24 which states the following:

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.

Feris⁵² notes that giving effect to section 24 is therefore part of good environmental governance implying that every decision that may impact on the environment must be considered against the dictates of section 24.

⁵⁰ Blackmore, A.C., 2018, 'Getting to grips with the public trust doctrine in biodiversity conservation: A brief overview', *Bothalia* 48(1), a2308. <https://doi.org/10.4102/abc.v48i1.2308>.

⁵¹ Section 2 of the Constitution.

⁵² Fers L.A. The role of good environmental governance in the sustainable development of South Africa PER/PELJ 2010(13)1, 77/234.

2.4.2 NEMA

In sync with the departing constitutional imperative NEMA reaffirms that the environment is held in public trust for the people and the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

The primary objective for the enactment of NEMA is found in its long title where it states that its aim is among others: "To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith."

Flowing from this prescripts, NEMA and its SEMA's was enacted to further give effect to the aspirations of section 24 of the Constitution including to give flesh to the environmental justice concepts encapsulated in section 2 (4) (c) of NEMA which states that 'environmental justice must be pursued so that adverse environmental impact shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.'

This mandate is further qualified in the *Earthlife Africa* case where it is directed that 'NEMA must also be interpreted consistently with international law.' Section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Therefore, it will be correct to state that various international agreements on climate change are relevant to the proper interpretation of section 24O (1) (b) of NEMA as opined in this judgement.⁵³

⁵³ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017) para 83.

In support of this assertion, the court in this judgement referred to Article 3(3) of the UN Framework Convention⁵⁴ that requires all states parties to take precautionary measures to anticipate, prevent or minimise causes of climate change. This directive also including article 4(1)(f) of the UN Framework Convention that imposed an obligation on all states parties to take climate change considerations into account in their relevant environmental policies and actions, and to employ appropriate methods to minimise adverse effects on public health and on the environment.

2.4.2.1 National Water Act

The 1998 National Water Act translates the principles of the PTD into statutorily imposed duties, declaring that the National Government will be “the public trustee of the nation’s water sources” and must “ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.”⁵⁵

2.4.3 Municipal Systems Act

To realise the co-operative legislative mandate and duties allocated to all states organs in the implementation of the local environmental governance including the prioritisation of environment protection and conservation, the Constitution among the objects it sets for local municipalities’ states that they must strive for the promotion of a safer and healthy environment.⁵⁶ This objective was actualised by engraving it in the systems Act which stated that ‘municipality must undertake developmentally-oriented planning so as to ensure among others that together with other organs of state contribute to the progressive realisation of the fundamental rights contained in section 24, 25, 26, 27 and 29 of the Constitution.’⁵⁷

⁵⁴ United Nations Framework Convention on Climate Change, 1992.

⁵⁵ Takacs D. South Africa and the human right to water: Equity, Ecology, and the Public Trust Doctrine, 34 Berkeley Journal of International Law 55 (2016), Research paper No.225 at 76.

⁵⁶ Section 152 (1) (d) of the Constitution.

⁵⁷ Section 23 (1) (c) of the Municipal Systems Act.

2.4.4 White paper on conservation and sustainable use of South Africa's biodiversity

In terms of this white paper, an emphasis is made that local government/or municipalities in the process of enacting municipal by-laws in pursuance of their legislative mandate are required to take into consideration environmental factors when developing spatial planning instruments, such as spatial development frameworks and land use schemes, and when taking land development decisions.⁵⁸ Furthermore, a directive is made with regards to the mainstreaming mechanisms and tools meant to biodiversity conservation and sustainable use including the priority of the biodiversity economic interventions into National, Provincial and municipal socio-economic development plans including that of the district development model.⁵⁹ To give flesh to the biodiversity white paper, a proposed biodiversity bill have been gazetted to solicit inputs and key to the changes suggested are the Spatial Biodiversity plans that will among others tiers of government also allow municipalities to publish their spatial biodiversity plans which applies to their geographical area including the identification of geographic biodiversity priority areas with the municipality.⁶⁰ Central to the proposed biodiversity management plans is to make sure that they take considerations of any plans issued in terms of chapter 3 of NEMA, IDP and any applicable spatial biodiversity plans.⁶¹ Lastly, the proposed Bill dictates that the preparations of the Environmental Implementation or Environmental Management Plan (EI or EMP), the Integrated Development Plans (IDP) and the Spatial Development Framework (SDF) must be aligned with any biodiversity planning tools.⁶²

⁵⁸ Clause 1.6.3. of the white paper on conservation and sustainable use of South Africa's biodiversity, No.48785.

⁵⁹ Clause 7 of the white paper on conservation and sustainable use of South Africa's biodiversity under goal 2 dealing with sustainable use.

⁶⁰ Section 35 of the draft national Environmental Management: Biodiversity Bill No.50706, 24 May 2024.

⁶¹ Section 37 Biodiversity Bill.

⁶² Section 39 (1) of the Biodiversity Bill.

2.4.5 Climate change Act

The enacted Climate Change Act makes observations under its preamble 'that responding to climate change raises unique challenges to effective governance as its impact transcends and challenges traditionally sectoral governance approaches, which require a nationally driven, coordinated and cooperative legal and administrative response that acknowledges the significant role of the provincial and municipal spheres taking into account the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005).'⁶³In order to mitigate to the climate change challenges, the Act directs that among other players, the district municipality within two years after it has undertaken the climate change needs and response assessment must develop, implement and publish a climate change response implementation plan that is aligned to the provincial planning instruments.⁶⁴

2.4.6 Case law

Some of the fundamental case law that laid the firm foundations for the proper interpretation of the environmental law and in particular section 24 of the Constitution was in the *Director Mineral Development*,⁶⁵ *BP Southern*⁶⁶ and *Fuel Retailers* judgements.⁶⁷

Noting the enormous damage mining inflict to the environment and ecological systems in our country, in the former judgement, the court opined 'that development which meets the present needs must take place without compromising the ability of future generations to meet their own needs reiterating the clarion call made in the *Brundtland* report.'⁶⁸

⁶³ Preamble of the Climate Change Act No. 22 of 2024.

⁶⁴ Section 17 of the Climate Change Act.

⁶⁵ *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999) para 20.

⁶⁶ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

⁶⁷ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007(10) BCLR 1059 (CC).

⁶⁸ *Brundtland, G.H. (1987) Our Common Future: Report of the World Commission on Environment and Development*. Geneva, UN-Document A/42/427.

In elucidating this point further, the court went on to state 'that our Constitution, by including environmental rights as fundamental, justiciable human rights, by implication required that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country.'

This determination of the former case law was reiterated in the *BP Southern* case. In the *BP Southern* case the principle of "intergenerational equity" equivalent to the PTD was re-affirmed and the court quoted the *king v Dykes* case where it was mentioned that the notion that the owner of property can do as it pleases with his property was rapidly giving way and embracing the view that the owner holds his land in trust for future generations.⁶⁹

In the latter case law, an affirmation of the role that our courts play with regards to the environmental protection including giving effect to the principle of sustainable development. The importance of the PTD entrusted to our courts to the extent of securing the environment for both the current and future generations was re-emphasised.⁷⁰

Ngcobo J in the *HTF Developers* case re-stated the proper interpretation of section 24 and 'stated that development cannot subsist upon a deteriorating environmental base as a result unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.'⁷¹

Fuo⁷² states 'that although the Constitutional Court indicated in the *Fuel Retailers* case that municipalities are obliged to promote the objectives of sustainable development, it has not precisely defined the responsibility of municipalities in realising section 24 of the Constitution.'

⁶⁹ King v Dykes 1971 3 SA 540 (RA) at 545 G-H.

⁷⁰ Fuel Retailers para 102.

⁷¹ MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited (CCT 32/07) [2007] ZACC 25; 2008 (2) SA 319 (CC); 2008 (4) BCLR 417 (CC) (6 December 2007).

⁷² Fuo O. Role of courts in interpreting local government's environmental powers in South Africa, CJLG Issue 18: December 2015 25.

In terms of our LEG jurisprudence, case studies have demystified the notion that environmental issues were to be dealt with at national and provincial levels only. One such case is the *Earthlife Africa*⁷³ where an emphasis was made that environmental issues are dealt with across all the competent authorities including local municipalities. The first emphasis was to the effect that considerations must be made on any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application.⁷⁴

Furthermore the judgment highlighted one of the environmentally relevant mandate and duties to municipalities that includes the consideration of climate change impacts in the AEL process. In terms of this judgement, it was mentioned that the licensing authority in terms of the Act⁷⁵ will be the air quality officer of the Waterberg District Municipality.⁷⁶

In the *Vukan*⁷⁷ case, the centrality of the PTD was emphasised and the court stated that Section 24(b) of the Constitution gives effect to the measures necessary to protect the environment so that everyone (present and future generations) may have an environment that is not harmful to their health or well-being. The distinction between section 24 (a) and (b) of the Constitution was properly defined where upon it was submitted that section 24(a) sets the basic minimum for environmental protection (an environment that is not harmful), whereas section 24(b) goes further, requiring the state to take reasonable steps to protect the environment even where human health and well-being are not immediately threatened.⁷⁸

⁷³ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017).

⁷⁴ Section 240 (1) (b) (vii) of NEMA.

⁷⁵ National Environmental Management: Air Quality Act 39 of 2004.

⁷⁶ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017) 124.

⁷⁷ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022) para 82.4.

⁷⁸ *Ibid* at para 43.

2.4.7 Literature

Feris⁷⁹ reaffirms the point that section 24(b) is more in the nature of a directive principle, having the character of a so-called second generation [or socio-economic] right imposing a constitutional imperative on the State to secure the environmental rights by reasonable legislation and other measures. In conclusion of her argument, she argues that the importance of section 24 cannot be gainsaid. It is a right that goes to the heart of the continued existence of humankind. It therefore guarantees an environment that will not be detrimental to the continued existence of this and future generations.

This view also finds expression in Du Plessis when she state that section 24(b) of the Constitution guarantees intergenerational environmental protection to the people of South Africa while imposing an obligation on the state to adopt and implement inter alia legislation and policies that will secure sustainable development.⁸⁰Elucidating this point of intergenerational environmental equity further, she states that although section 24 is cast in broadly-construed terms, it protects their right to live a healthy life, to enjoy well-being and to have their own and their children's natural environment protected. Aligning himself with the above views, Takacs states that 'the emerging framework for managing water in South Africa begins with the Public Trust Doctrine, which delineates a government's responsibility to manage and steward essential resources sustainably.'⁸¹ Over the years a lot of work have been registered through well researched literature that responded to the environmentally relevant mandate and duties of municipalities. Hartzler and Du Plessis⁸² points out to section 43 (5) of MPRDA amendment read with that of section 1 (xxiv) of NEMA.

⁷⁹ Feris L.: The socio-economic nature of section 24(b) of the Constitution – Some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (2008) 23 SA Public Law 194-207 pg 198.

⁸⁰ Du Plessis Du Plessis "South Africa's Environmental Right Generously Interpreted: A Focus on the Role of Poverty" 2011 27 SAJHR 290.

⁸¹ Takacs D. South Africa and the human right to water: Equity, Ecology, and the Public Trust Doctrine, 34 *berkeley Journal of International Law* 55 (2016), Research paper No.225 at 75.

⁸² Hartzler S. and Du Plessis W. the liability of historical mine authorisation holders for rehabilitation of 'old order mine dumps', footnote 131, 137.

In terms of the former, these authors state that among others that “this amendment promotes ‘environmental cooperative governance’ and gives insurance to the holder that all his or her liabilities and responsibilities end with regard to the mining area.” In terms of the latter section, they argue that pollution can be engaged in by any person or an organ of state.

Given the fact that local government is the sphere of government closest to the people,⁸³ Du Plessis states⁸⁴ that it is described as a ‘co-responsible organ of state’ in a sense that it is also subjected to the dictates of section 24 of the Constitution and has to subject itself to the same fundamental values and principles enshrined in section 7(2) of the Constitution that foster for the respect, protection and fulfilment of the rights contained in the Bill of rights.

Elucidating this directive further, she states that ‘the duty to respect, protect, promote and fulfil the environmental right should resonate the loudest at the level, whether with regards to the adoption and implementation of environmental policies, including land-use and planning decisions positioned closely with the rights holders.’⁸⁵ Supporting this view further, Du Plessis states that it can be argued that the correct reading of section 24 (b) of the Constitution together with section 152 (1) (d) dealing with objects of local government, declares the vision that the Constitution sets out for local environmental governance in South Africa.⁸⁶ In the latest work, Blackmore⁸⁷ made a point where he reconciles the PTD and the environmental rights interpretation.

⁸³ Joseph v City of Johannesburg 2010 (4) SA 55 (CC) 25.

⁸⁴ Du Plessis A. “Local Environmental Governance” and the role of local government in realising section 24 of South African Constitution (2010) 2 Stellenbosch L.R 265 at 276.

⁸⁵ Du Plessis A. Environmental Law and Local Government in South Africa, 2nd Edition, at 6-9

⁸⁶ Du Plessis A. Environmental Law and Local Government in South Africa, 2nd Edition, at 6-9.

⁸⁷ Blackmore A. ‘Rediscovering the Origins and Inclusion of the Public Trust Doctrine in South African Environmental Law: A Speculative Analysis’ (2018) 27 Wiley Reel 187.

2.5 The meaning and key instruments of local environmental governance

As stated above, Du Plessis defines LEG as the management process executed by local government and communities to holistically regulate human activities and the effects of these activities on their own environment as well as the impact on the environment as a whole.

In order to achieve this, including drawing a balance between sustainable development and the preservation of the environment, key LEG instruments must be invoked by local municipalities. Responding to this question of LEG instruments, Du Plessis⁸⁸ provides four categories of such tools available to local municipalities. In her attempt to highlight the importance of LEG with regards to the principle of developmental local governance and the compliance with the obligations and duties prescribed in section 24, Du Plessis state that:

“For as long as section 24 remains uncoupled with municipal service delivery performance, understanding of how the environmental right informs municipal decision-making and planning as well as the design, adoption and implementation of local environmental governance instrumentation (e.g. integrated development plans, spatial plans, zoning schemes, budgets, performance management systems, bylaws, public-private partnerships, public participation processes, municipal rates and taxes and municipal policies), will remain unexplored”.⁸⁹

Du Plessis furthermore indicates that the definition of LEG includes local authorities' governance of the behaviour of local communities as well as the behaviour in the local authority itself.⁹⁰ It is on this basis that the four LEG tools and or instruments will be explored by this study as the measures that can be employed in the attainment of the developmental local government tasks that seek to respond to the directives enshrined in section 24 of the Constitution.

⁸⁸ Du Plessis A. Environmental law and local government in South Africa 2-38 and 39.

⁸⁹ Du Plessis, The 'Brown' environmental agenda and the Constitutional duties of local government in South Africa: A conceptual introduction, 2015 Vol. 18 No. 5.

⁹⁰ Du Plessis *Constitutional Environmental Right in the Local Government Sphere* 157.

This is done with the understanding that local government is best placed to know, understand and deal with issues involving the environment at local level.⁹¹

2.5.1 Governing instruments

2.5.1.1 Civil-based instruments and rights

The genesis of public participation can be located in the Constitution itself where the key critical object of local government relevant to this study are emphasised. This object confer obligation to municipalities of making sure that they promote safe and healthy environment⁹² and encourage the involvement of communities and community organisations in the matters of local government.⁹³ Du Plessis qualifies the importance of public participation/or community engagement in environmental decision-making as a tool that relates:

“To the notion of participatory democracy and environmental justice and that often comes to the fore in academic analyses of environmental rights. It has been observed that a ‘participation explosion’ has been occurring throughout the world over the last four decades and that by whatever name (public participation, citizen involvement, indigenous peoples’ rights, local community consultation, et cetera), the idea that the governed should engage in their own governance is “gaining ground and rapidly expanding in both law and practice”.⁹⁴

Setting the policy agenda on the matter of public participation, the White Paper characterised developmental local government as a platform where inputs and energy of local citizens must be harness. This view is supported by section 2 of NEMA whether the legislation state that environmental management must place people and their needs at the forefront of its concern, and serve their physical,

⁹¹ *Le Sueur* (KZP) para 20.

⁹² Section 152 (1) (d) of the Constitution.

⁹³ Section 152 (1) (e) of the Constitution.

⁹⁴ Du Plessis, *Public Participation, Good Environmental Governance and Fulfilment of the Environmental Rights*, 2008 Vol.2.

psychological, developmental, cultural and social interests equitably⁹⁵ including making sure that the participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.⁹⁶

Confirming the importance of public participation as a LEG tool in the furtherance of environmental rights and in environmental decision-making, Du Plessis state six pertinent points:

- Affected persons likely to be otherwise unrepresented in, for example, environmental assessment and decision-making processes are provided an opportunity to present their views;
- Communities may provide useful additional information to decision-makers – especially when cultural, social or environmental values are involved that cannot be quantified easily;
- Accountability of political and administrative decision-makers is likely to be reinforced if environmentally relevant processes are open to public view. Openness puts pressure on administrators to follow, for example, a required procedure in all cases;
- Without integrating the viewpoints of citizens, environmental policy runs the risk of being delayed early in the implementation phase. Public participation enhances community ownership of decisions and resultant outcomes because of the community being part of the wider decision-making process;
- Stakeholder engagement may result in partnerships or alliances between interested parties and local government; and

⁹⁵ Section 2 (2) of NEMA.

⁹⁶ Section 2 (4) (f) of NEMA.

- Public confidence in the reviewers and decision-makers is enhanced since citizens clearly can see in every case that all environmentally-relevant issues have been fully and carefully considered.⁹⁷

The right of interested and affected parties to raise environmental objections as the basis for objecting and their entitlement to be heard before a decision is made and 'the principle of sustainable development' has previously been affirmed through case law.⁹⁸In terms of this case law the Court held that meaningful consultation [as contemplated in the Mineral and Petroleum Resources Development Act 28 of 2002 (hereinafter MPRDA)] 'entails a discussion of ideas on equal footing, considering the advantages and disadvantages of each course and making concessions where necessary.'

In conclusion, the right to public participation at the door step of local government when preparing the tabling of both the IDP and the budget as the tools to solicit inputs from their communities with regards to environmental management functions including the financing thereof is succinctly expressed in both the Systems Act⁹⁹ and the Municipal Finance Management Act 56 of 2003 (hereinafter MFMA)¹⁰⁰ respectively.

Elevating the importance of consultation further, the MFMA state that after the draft annual budget and IDP have been tabled, the municipal council is obliged to consider any views of the local community including permitting the mayor an opportunity to respond to the submissions and if necessary, to revise the budget and table amendments for consideration by council.¹⁰¹

⁹⁷ Du Plessis Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights, 2008 Volume 2.

⁹⁸ *Duduzile Baleni & Others v Regional Manager: Eastern Cape Department of Mineral Resources & Others (CALS intervening)* [Case No.96628/2015].

⁹⁹ Section 16 (1) (a) (i) of the Systems Act.

¹⁰⁰ Section 21 (1) (b) (iv) of the MFMA.

¹⁰¹ Section 23 (1) (a) and 23 (2) (a) – (b) of the MFMA.

2.5.1.2 By-laws

The powers vested with local municipalities is now entrenched under section 151 (2) and (3) of the constitution. This powers where clearly explained in the *Fedsure case* where the court stated that:

*"Local governments have a place in the constitutional order...and are entitled to certain powers, including the power to make bylaws and impose rates."*¹⁰²

This averment by the court is confirmed in terms of the Constitution which states that 'municipality may impose rates on property and surcharges on fees for services provided by or on behalf of the municipality including additional taxes authorised by national legislation.'¹⁰³ Aligning himself with this constitutional prescript, *Fuo* state that 'for municipalities with a viable economic base can self-fund environmental programmes adopted to give effect to their constitutional environmental mandate.' The constitutional powers accorded to municipalities to generate internal revenue is given legislative effect by, *inter alia*, sections 4(1) (c) and 71 of the *Systems Act*.¹⁰⁴

In addition, in terms of National planning legislation¹⁰⁵ a municipality may pass by-laws aimed at enforcing its land use scheme.¹⁰⁶ Since the enactment of the SPLUMA in 2015, many municipalities have adopted SPLUMA by-laws to clarify salient issues not addressed by the main legislation. Over and above what the Constitution confer to municipalities in terms of section 156 (1) Du Plessis state that 'municipalities are mandated to make by-laws in terms of specific national legislation such as section 50 of the NEM: ICMA which provides that municipality may make by-laws for the implementation, administration and enforcement of its coastal management

¹⁰² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 at par 36.

¹⁰³ Section 229 (1) (a) – (b) of the Constitution.

¹⁰⁴ Fuo O. Role of courts in interpreting local government's environmental powers in South Africa.

¹⁰⁵ Section 2 Spatial Planning and Land-Use Management Act 16 of 2015.

¹⁰⁶ Section 32 of SPLUMA.

program.¹⁰⁷The same legislation place an obligation to municipalities to draft their coastal management program that cover specific areas and issues.¹⁰⁸

Du Plessis¹⁰⁹ further state that other command and control mechanism available to municipalities for effective enforcement of environmental law includes the appointment of municipal officials in the process of the enforcement of national legislations. These directives are encapsulated in the National Forestry Act,¹¹⁰ National Water Act¹¹¹ and Marine Living Resources Act.¹¹²

2.5.1.3 Compulsory reporting

Many legislations dealing with the implementation of LEG in the quest to discharge the Constitutional mandate referred to in terms of section 32¹¹³ and 33¹¹⁴, make provision for compulsory reporting. One such piece of legislation is the SPLUMA. SPLUMA state that the 'municipality must keep and maintain a written record of all applications submitted and the reasons for decision in respect of such applications for the amendment of its land-use scheme.'¹¹⁵

¹⁰⁷ Du Plessis Environmental law and local government in South Africa 9-9.

¹⁰⁸ Section 48-49 of NEM: ICMA.

¹⁰⁹ Du Plessis environmental law and Local government in South Africa 9-15.

¹¹⁰ Section 65 (a) of the National Forestry Act 84 of 1998 allows for the Director-General to appoint a person in local government as a forest officer who will in this capacity have the authority to enforce the Act.

¹¹¹ Section 124 of the National Water Act provides that the Minister or a water management institution may appoint any suitable person (e.g. a municipal official) as a person authorised to enforce the Act.

¹¹² Section 9 of the Marine Living Resources Act 18 of 1998 determines that the Minister responsible for fisheries may, subject to the laws governing the public service, designate posts or ranks in any organ of state (including a municipality) that appoints the incumbents as fishery control officers.

¹¹³ Section 32 of the Constitution stipulate that everyone have the right of access to any information held by the state including any information held by third parties required for the exercise or protection of any right.

¹¹⁴ Section 33 of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair including the right to be given written reasons.

¹¹⁵ Section 31 of SPLUMA.

2.5.2 The governance instruments

2.5.2.1 IDP/Budget

The drafters of the Constitution and that of the Municipal Systems Act preferred that municipal planning must be developmental oriented.¹¹⁶ This mandate finds expression in terms of section 23 (1) and is stated as follows:

23 (1) A municipality must undertake developmentally-oriented planning so as to ensure that it—

- (a) strives to achieve the objects of local government set out in section 152 of the Constitution;
- (b) gives effect to its developmental duties as required by section 153 of the Constitution; and
- (c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 4, 25, 26, 27 and 29 of the Constitution

In the sphere of local govern two critical LEG tools that are geared to respond to the three areas of developmental-oriented planning are both the IDP and budget. With regards to the safe guarding of the environmental rights embedded in the in the Constitution, the IDP as a planning tool can be utilised in order to give effect to the instruments LEG tool in soliciting inputs from local communities with regards to how their environment can be protected and preserved for the current and future generations as stated in section 24 of the Constitution.

Once adopted by council, the IDP is clothed with the legal status of being the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality.¹¹⁷ Furthermore it binds the municipality in the

¹¹⁶ See section 153 of the Constitution and 23 of the Municipal Systems Act.

¹¹⁷ Section 35 of the Municipal Systems Act.

exercise of its executive authority, except to the extent of any inconsistency between a municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails. Lastly, it binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law.

The legal nexus between the IDP and the Budget as LEG tools finds its expression in terms of section 25 of the Systems Act which states that 'each municipal council must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality which among others it is intended to links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality. Which also takes a posture of aligning all the resources and capacity of the municipality with the implementation of the plan and subsequently forms the policy framework and general basis on which the annual budget must be based.'¹¹⁸

For local municipalities to be capable to fund their environmental management functions in the process of the advancement of the LEG, it must adopt a budget¹¹⁹in congruent with the prescripts of Systems Act.¹²⁰This is done by being cognisant of the measurable performance objectives for revenue from each source and for each vote in the budget, taking into account the municipality's IDP.¹²¹During the budget preparatory stages, the MFMA dictates to the Executive Mayor of a municipality to be seized with the co-ordination of the annual budget and the review process of the IDP including any budget related policies to ensure that all the tabled documents are mutually consistent and credible.¹²²

¹¹⁸ Mahlatsi LK. Role of local government in promoting environmental rights.

¹¹⁹ Section 16 of the Municipal Finance Management Act, No.56of 2003(Hereafter MFMA).

¹²⁰ Section 25 (1) (a) – (c) of the Systems Act.

¹²¹ Section 17 (3) (b) of the MFMA.

¹²² Section 21 (1) (a) of the MFMA

2.5.2.2 Performance Management Systems (hereinafter PMS)

The Systems Act prescribe that in order for the IDP to be properly implemented as a LEG tool it must be enhanced by a PMS.

Central to the core components of the performance management system is that the municipality must set appropriate key performance indicators as a yardstick for measuring performance, including outcomes and impact, with regards to the municipality's developmental priorities and objectives set out in its IDP.¹²³ Furthermore a municipality must establish a process of regular reporting among others to the public and appropriate organs of state.¹²⁴

In order to enable proper monitoring of any LEG including the performance with regards to environmental management functions within the municipal IDP and approved budget, compliance will have to be adhered to with section 44 of the of the Act.

This section prescribe that a municipality 'must make known, both internally and to the general public, the key performance indicators and performance targets set by it for purposes of its performance management system.' Supporting the importance of a performance management system, *Mahlatsi* argue that PMS is an approach to management that harnesses the endeavours of individual managers and workers to an organisation's strategic goals.

It defines goals and the outputs needed to achieve those goals, it gains the commitment of individuals or teams to achieve those outputs and monitor outcomes.¹²⁵

¹²³ Section 41 (1) (a) of the Municipal Systems Act.

¹²⁴ Section 41 (1) (e) (ii) of the Municipal Systems Act

¹²⁵ Mahlatsi L.K Role of local government in promoting environmental rights.

2.5.2.3 Internal audit

The Public Audit Amendment Act has brought changes in terms of how local municipalities must conduct their business. One notable amendment relates to the invocation of the terms called 'the material irregularity'. This term is defined as:

"any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public"¹²⁶

Its relevance as LEG tool in the advancement of the environmental rights envisaged in the section 24 of the Constitution have been lately seen on the binding remedial actions passed by the auditor general against municipalities that among others failed to conserve and protect the environment. Material irregularity with regards to non-compliance with legislation must have resulted in or be likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public.¹²⁷

In such cases there is no need to prove material financial loss or misuse of or loss of material public resources or substantial harm to the public sector institution or the general public. Non-compliance with binding remedial action of the Auditor General with regards to the issued material irregularity lead to the issuing of a certificate of debt. A typical example is the material irregularity flagged by the Auditor General during the 2021-22 Audit outcomes of the JB Marks local municipality.¹²⁸

This amendment of the Public Audit Amendment Act is fortified by the current ruling of the Constitutional Court where this judgement lifted the veil on the

¹²⁶ Section 1 (g) of the Public Audit Amendment Act 5 of 2018.

¹²⁷ Section 5A (3) of the Public Audit Amendment Act.

¹²⁸ JB Marks local municipality 2021-22 audit outcomes briefing note No. 26, Pollution Of Water Resource Not Prevented – Ventersdorp Wastewater Treatment Works and Pump Stations.

disclosure of the record on an imminent and serious public safety or environmental risk with regards to the mandatory disclosure in public interest.¹²⁹

2.5.3 The compliance-based instruments

2.5.3.1 EIA

One of the strategic tool brought about the enactment of both the Environmental Conservation Act 73 of 1989¹³⁰ (hereinafter ECA) and NEMA¹³¹ through regulation in order to give effect to the provisions of section 24 of the Constitution is the Environmental Impact Assessment (hereinafter EIA). The environmental impact management regulatory framework was introduced through the enactment of NEMA. Pertinent to this regulatory frameworks and key to the primary objects of EIA as a tool is to require the integration of social, economic and environmental factors to be considered during all the stages of planning, implementation and evaluation of decision making ensuring prudent development that respond to ethos and needs of current and future generations. As a starting point NEMA prescribe that the environmental impacts of listed activities must be considered, investigated, assessed and reported on to the competent authority tasked with making a decision on environmental authorisation.¹³² In addition to this directives, NEMA places an obligation to competent and empowered authorities to take into account of all relevant factors in deciding on an application for environmental authorisation.¹³³ Critical to the EIA as a tool to contribute to the environmental conservation and protection is that it serve as an assessment of possible and expected impacts a proposed development would have on the environment.¹³⁴

¹²⁹ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 at 77.

¹³⁰ GNR 1182 & 1183: Government Gazette No 18261, Pretoria, 5 September 1997.

¹³¹ GNR 324, 325, 326 and 327 on 07 April 2017, Government Gazette 40772, Pretoria, 07 April 2017.

¹³² Section 24 (1) of NEMA.

¹³³ Section 24O (1) of NEMA.

¹³⁴ Section 24 (1) (a) – (c) of NEMA.

Among key aspects to be taken into consideration during the assessment among others includes ensuring public information and participation,¹³⁵ reporting on gaps of knowledge¹³⁶ and coordination guided by co-operation between organs of state during the consideration of assessment where an activity falls under the jurisdiction of more than one organ of state.¹³⁷

2.5.3.2 Permits and licenses

NEMA define environmental authorisation 'as the authorisation by a competent authority of a listed activity or specified activity in terms of this Act and it includes a similar authorisation contemplated in a Specific Environmental Management Act.'¹³⁸ Over and above the environmental authorisation that are determined by the EIA regulations permits and licences constitute additional tools to regulate developmental applications. This required permits and licences are found in areas that cover heritage resources, water or waste and biodiversity. Other developmental applications need both the EIA authorisation and issuance of relevant licence. One such application that must satisfy both the authorisation is the disturbance of a wetland including river-course. In such instances the provisions of NEMA are applicable.¹³⁹ This section provides for the alignment of environmental authorisation with that which comprises of permits and licences including the issuing of an integrated environmental authorisation.

Substantiating the above point, NEMA specifically state that 'a competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of a listed activity or specified activity may regard such authorisation as a sufficient basis for the granting or refusing of an authorisation, a permit or a licence under a specific environmental management Act if that specific environmental management Act is also administered by that competent authority.'¹⁴⁰

¹³⁵ Section 24 (7) (d) of NEMA.

¹³⁶ Section 24 (7) of NEMA.

¹³⁷ Section 24 (7) (g) of NEMA.

¹³⁸ Section 1 of NEMA.

¹³⁹ Section 24L of NEMA.

¹⁴⁰ Section 24L (3) of NEMA.

2.5.4 Other instruments

2.5.4.1 Spatial Development Framework (SDF)

Critical to note is that the Municipal Systems Act¹⁴¹ demands that municipalities adopt their Spatial Development Frameworks (hereinafter SDF) as part of their Integrated Development Plans.

This legislative directive finds credence in SPLUMA where the Act¹⁴² instructs that the municipal SDF must be prepared and aligned with the municipality's IDP in accordance with the provisions of the Municipal Systems Act. SPLUMA enjoins all the sphere of government to prepare SDF that will among others 'interpret and represent the spatial development vision of the responsible sphere of government and competent authority.'¹⁴³ Furthermore the prepared SDF will contribute to a coherent, planned approach to spatial development in all three sphere of government¹⁴⁴ including taking cognisance of any environmental management instrument adopted by the relevant environmental management authority.¹⁴⁵ SPLUMA when confirming the status of an approved SDF reaffirms that no Municipal Planning Tribunal (hereinafter MPT) or Land Development Officer (hereinafter LDO) required or mandated to make a land development decision in terms of this Act or any other law relating to land development, may make a decision inconsistent with a SDF framework adopted by such sphere.¹⁴⁶

The Court in the *Choisy-Le-Roy* case¹⁴⁷ held that, while the Municipal SDF is not a statute, its binding effect on the municipality and the public, demands that its statutory principles should apply to its interpretation.

¹⁴¹ Section 26 (e) of the Municipal System Act.

¹⁴² Section 20 (2) of SPLUMA.

¹⁴³ Section 12 (1) (a) of SPLUMA.

¹⁴⁴ Section 12 (1) (f) of SPLUMA.

¹⁴⁵ Section 12 (1) (m) of SPLUMA.

¹⁴⁶ Section 22 of SPLUMA.

¹⁴⁷ *Choisy-Le-Roi Owners (Pty) Ltd v The Municipality of Stellenbosch and Another* (10240/2020) [2022] ZAWCHC 71; 2022 (5) SA 461 (WCC) (11 May 2022).

2.5.4.2 Environmental Management Framework (EMF)

The Environmental Management Frameworks (hereinafter EMF) is brought about by the enabling provisions of NEMA.¹⁴⁸ The Act permits both the Minister and the MEC to prepare a draft EMF. The drafted EMF serve as a tool to guide spheres of government to guide the developmental activities in their respective areas of jurisdiction. Key to their purpose, EMF provide environmental support for decision makers in all the affected spheres of government.

Central to the role played by EMF is to provide framework which its primary objective is to inform the IDP and the SDF. SPLUMA makes an emphasis that developmental principles that must be applicable to spatial planning, land development and land management among others includes the efforts of upholding the consistency of land use measures in accordance with environmental management instruments.¹⁴⁹

The legal status of the EMF was considered by our courts¹⁵⁰ and it was held that assertions regarding environmental sensitivities and recommendations in an EMF are not absolute. Snyman¹⁵¹ state that the EMF is an environmentally focused spatial development tool that can be used to assist in achieving integrated environmental management (IEM). (Dowie, 2009) argue that EMFs are one of the chief tools chosen to implement the constitutional imperative of sustainable development.

More specifically, they have been designed for the purpose of enabling the accommodation of a broad spectrum of stakeholders and minimizing the social and economic cost of maintaining sensitive areas.

¹⁴⁸ Section 24 (3) of NEMA.

¹⁴⁹ Section 7 (b) (iii) of SPLUMA.

¹⁵⁰ *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and Others* 2013 (80) ZASCA.

¹⁵¹ Snyman L.G. *Environmental management frameworks: balancing environmental and developmental imperatives in sensitive areas*, The journal of the Southern Africa Institute of Mining and Metallurgy Vol 117 January 2017 21.

2.5.4.3 Co-operative government-type instruments

Being compliant with the co-operative governance principles stated in chapter 3 of the Constitution serves as another other tool that can be considered in order to fast-track 'sustainable development' at a local level includes those that are determined by SPLUMA. SPLUMA foresee a situation where alignment of authorisation¹⁵² including the prior consultation with other land development authorities¹⁵³ might be encountered in the process of consideration of land development applications.

In such instances, the Act direct that 'local municipality must consult any organ of state responsible for administering legislation relating to any aspect of an activity that also requires approval in terms of this Act in order to coordinate activities and give effect to the respective requirements of such legislation, and to avoid duplication.' In the spirit of co-operative governance, this will be attained through a written agreement between the spheres of government affected. With regards to the alignment of authorisation, the Act stipulate that the relevant municipality and any empowered organ of state to authorise the activity in terms of the other law may exercise their respective powers jointly by issuing a separate/ or joint authorisation. Lastly, in cases where the earmarked development is affecting national interests, in line with the ethos of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter PAJA), such land development application must be referred to the relevant ministry for consideration.¹⁵⁴

2.6 Closing remarks

The advent of the constitutional democracy in South Africa has placed the burden on local government to rebuild local communities and environments from the systemic destruction during the apartheid dispensation. Evidently, this was possible through the adoption of the Constitution and national legislations that gave effect to the rights enshrined in section 24 of the Constitution.

¹⁵² Section 30 of SPLUMA.

¹⁵³ Section 29 of SPLUMA.

¹⁵⁴ Section 52 of SPLUMA.

Despite this remarkable achievement of the invocation of the PTD and the LEG tools within our legislative regime in their efforts to giving effect to section 24 rights, the contours that must guide local government's role with regards to the environmental powers are not clearly define. This chapter, however demonstrate that the overwhelming legislative prescripts and the pockets of decided cases seem to suggest that local municipality as the sphere closest to the people is best placed to effect the rights enshrined in section 24 of the Constitution. According, this chapter has demonstrated that there is a cogent evidence demonstrating policy frame-work and legislative enactment¹⁵⁵ that make a case to the effect that local government as part of the state is co-responsible in the protection of the environment for both the current and future generations through the utilisation of the LEG tools.

¹⁵⁵ Climate Change Act 22 of 2024.

CHAPTER 3 MEANING OF PTD IN SOUTH AFRICAN ENVIRONMENTAL LAW

3.1 Introduction

Erin¹⁵⁶ in her latest work with regards to the history of the PTD postulate that it 'creates a set of public rights and responsibilities with regard to certain natural resource commons, obligating the state to manage them in trust for the public.' She further note that 'in the last century, the doctrine has gradually transformed from an affirmation of sovereign authority over these resources to a recognition of sovereign responsibility to protect them for present and future generations.' To qualify this premise, Sax argue that in order for the PTD to be effective in governments' environmental protection efforts, it must 'possess three characteristics: 1) it has to create an obligation that could be enforceable against the government; 2) it has to vest some concept of a legal right in the general public, and 3) it has to be capable of being interpreted consistent with contemporary concerns for environmental quality.' *Juxtaposing* this point Olson¹⁵⁷ state that 'the PTD, like all common law principles should not be considered fixed or static, but should be moulded and extended to meet changing conditions and needs of the public it was created to benefit.'

3.2 The historical birth of the PTD in law

It is stated that the PTD's epistemology is premised in the ancient Roman law and the Wisconsin Constitution. Ancient Roman jurists believed that the natural law concept that the waters are common to all was not subject to the changing whims of legislatures let alone that it will be insulated from politics.¹⁵⁸

¹⁵⁶ Ryan E. A Short History of the Public Trust Doctrine and its Intersection with Private Water Law, 2020, Virginia Environmental Law Journal Vol.38:2 at 137-138.

¹⁵⁷ Olson 1975 *Det CLR* 178.

¹⁵⁸ Scanlan M.K. The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin at 135.

Affirming this version that the founding provisions of the PTD emanates from the Roman law, Takacs¹⁵⁹ quotes the codified word of Justinian in the *Corpus Juris Civilis* stating that 'by the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea.' He further alludes to the fact that the PTD as it became to be known, suggest 'that certain resources are common shared property of all citizens, stewarded in perpetuity by the state.' Two judicial precedents¹⁶⁰ were established over time in support of this principle of PTD. The common thread of this two judgements was that government could not divest all its citizens of their common rights and they must be freed from the obstruction or interference of private parties. Proponents of PTD like Sax described the doctrine as the 'principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit', and argued that the 'central substantive thought' in public trust proceedings is:

"[w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any government conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties."¹⁶¹

Du Plessis emphasising the importance and purpose of the PTD at an international level states that initially it was confined to commercial activities but since the 1970's the purpose of the doctrine has evolved in tandem with the changing public perception of the value and use of waterways and today the modern public trust doctrine encompasses other public uses as well.¹⁶² On the other hand, the South African PTD's purpose and objectives given the fact that natural resources are

¹⁵⁹ Takacs D. The Public Trust Doctrine, Environmental Human Rights, and The Future of Private Property, 2008, New York University Environmental Law Journal 711.

¹⁶⁰ See *Arnold v Mundy*, 6 N.J.L. 1, 53 (1821) and *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892).

¹⁶¹ Sax, J., 1970, 'The public trust doctrine in natural resources law: Effective judicial intervention', *Michigan Law Review* 68(3), 471-566. <https://doi.org/10.2307/1287556>.

¹⁶² Du Plessis A. *Environmental Law and Local Government in South Africa*, 2nd Ed at 8-9.

owned both by the state and private persons, is aimed primarily at the protection and preservation of the ecological integrity of the country as compared to the facilitation of public access to and the use of these resources.¹⁶³

3.3 The inclusion of the PTD in South African statutory law

The interpretation of section 24 of the Constitution pre-supposes that it laid the primary basis of the PTD principle within the South African legislative and statutory regime. Subsequent to the adoption of the Constitution and its promise to enact national legislation that will give effect to the directives of section 24. This process was preceded by the policy statement where the PTD principle was crystallised and the following was stated:

“To make sure that the values of our democracy and our Constitution are given force in South Africa’s new water law, the idea of water as a public good will be redeveloped into a doctrine of public trust which is uniquely South African and is designed to fit South Africa’s specific circumstances. In its role of guardian of our Nation’s water resources national Government will keep the right to influence the country’s economic and social development – for the benefit of present and future generations – through the responsibility for determining the proper use of the nation’s water resources.”¹⁶⁴

As a result the following national legislations bearing the principle of the PTD were enacted and they included the National Water Act, NEMA, NHRA,¹⁶⁵ MPRDA,¹⁶⁶ NEM: PA,¹⁶⁷ NEM: BA,¹⁶⁸ NEM: AQA,¹⁶⁹ NEM: ICMA¹⁷⁰ and NEM: WA.¹⁷¹ Proponents of the PTD states that since the adoption of the Constitution and the enactment of NEMA and its SEMA’s, the legal rules and principles governing the conservation and

¹⁶³ Du Plessis A. Environmental Law and Local Government in South Africa, 2nd Ed at 8-15.

¹⁶⁴ 1 April 1997 <http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf> [used 9/08/2010].

¹⁶⁵ Act 25 of 1999.

¹⁶⁶ Act 28 of 2002.

¹⁶⁷ Act 57 of 2003.

¹⁶⁸ Act 10 of 2004.

¹⁶⁹ Act 39 Of 2004.

¹⁷⁰ Act 24 of 2008.

¹⁷¹ Act 59 of 2008.

sustainable use of natural resources in South Africa have undergone a process of change.¹⁷²

Noting this progression, Van Der Schyff affirms that 'with the promulgation of these pieces of legislation, the state has had conferred upon it the obligation to act as either trustee or custodian of the environment or a specific natural resource, whilst the environment or that particular natural resource has been bequeathed to the people of South Africa.'¹⁷³

3.3.1 The Constitution of the Republic of South Africa, 1996

From the onset it is prudent to note the observations made by Blackmore in his attempt to shed light on the subject matter. He claims that 'the *prima facie* origin of the doctrine is the Bill of Rights in South Africa's 1996 Constitution, multilateral environmental agreements in Africa appear to have had a significant influence on how the doctrine was conceptualized and embraced.'¹⁷⁴

Confirming this assertion, he further makes a point that Section 24 'requires the State (as the ultimate regulator) to have the environment protected, for the benefit of present and future generations.'

Although it is notable efforts have been made since the dawn of a democratic state that prefers a constitutional democracy and the embracing of the rule of law, some scholars with great level of disappointment, state that 'the explicit incorporation of the public trust doctrine into South Africa's Bill of Rights in South Africa's Constitution, and its subsequent codification into the country's environmental biodiversity, protected area, water, minerals and heritage legislation, occurred to a large extent without applause or fanfare.'¹⁷⁵

¹⁷² Du Plessis A. Environmental Law and Local Government in South Africa, 2nd Ed at 8-2.

¹⁷³ Van Der Schyff E. Unpacking The Public Trust Doctrine: A Journey Into Foreign Territory, PER/PELJ 2010 (13) 5 at 122.

¹⁷⁴ Blackmore AC. 2018 Rediscovering the origins and inclusion of the public trust doctrine in South African environmental law: A speculative analysis. *RECIEL* 27(3):1-12.

¹⁷⁵ Blackmore, A.C., 2018, 'Getting to grips with the public trust doctrine in biodiversity conservation: A brief overview', *Bothalia* 48(1), a2308. <https://doi.org/10.4102/abc.v48i1.2308>.

A firm basis of the PTD was laid in our case law where upon it was found that the South African courts have reaffirmed, and hence entrenched, the notion that the doctrine is both retrospective and progressive in its application including the reaffirmation that the fiducial duties of government included the consideration of potential environmental degradation where such may manifest in the distant future.¹⁷⁶

Upholding the directive given to state in the quest to respect, protect, promote and fulfil the rights in the Bill of Rights,¹⁷⁷ the PTD principle was solidified by *Ngcobo J* when he stated that 'development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.'¹⁷⁸

3.3.2 The National Water Act 36 of 1998

Informed by the policy framework on the National Water White Paper (hereafter NWWP), the NWA introduced the concept of the PTD principle. In its long title, the Act places fundamental principles that among others includes sustainability and equity identified as central guiding principles in the protection, use, development, conservation, management and control of water resources.

These guiding principles recognise the basic human needs of present and future generations, the need to protect water resources, the need to share some water resources with other countries, the need to promote social and economic

¹⁷⁶ Blackmore A. The Application Of And The Prospects For The Public Trust Doctrine In South Africa.

¹⁷⁷ Section 7(2) of the Constitution.

¹⁷⁸ See *Fuel Retailers* at para 44.

development through the use of water and the need to establish suitable institutions in order to achieve the purpose of the Act.¹⁷⁹

Concretising this principles, the Act ingrain the PTD and stated that 'as the public trustee of the nation's water resourced the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.'¹⁸⁰The Constitutional mandate referred to in section 3 of the NWA is the obligation directed to in section 24 of making sure that the environment is protected for the benefit of both the present and future generations.¹⁸¹

In conclusion I concur with the submission made by Van Der Schyff when she contended that 'it is evident from the *White Paper* that the concept of public trusteeship is central to the approach to water management as stated in paragraph 1.5.2 of the White Paper.'¹⁸² Be it as it may, it can safely be said that the PTD was incorporated in the NWA to give effect to the objectives of section 2 of the Act.

3.3.3 The National Environmental Management Act 107 of 1998

The Constitution in chapter two states that 'the Bill of Rights serves as our democratic cornerstone in South Africa.'¹⁸³ This assertion reaffirms the fact that the Bill of Rights served as the foundation for South Africa's environmental civil rights that contributed to the incorporation of the public trust doctrine into the country's environmental legislation. Section 24 as part of this important milestones contributed to the enactment of NEMA as the overarching environmental legislation.

The embracing of the PTD principle by NEMA translated to its inclusion in the Act and the following is stated 'that the environment is held in public trust for the

¹⁷⁹ Chapter 1 of the Act dealing with interpretation and fundamental principles.

¹⁸⁰ Section 3(1) of the National Water Act 36 of 1998.

¹⁸¹ Section 24 (b) of the Constitution.

¹⁸² Van Der Schyff E. The concept of public trusteeship as embedded in the South African National Water Act, 1998 at 43.

¹⁸³ Section 7(1) of the Constitution.

people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.¹⁸⁴

Blackmore affirms that the origins of the PTD in NEMA may be linked to its founding policy¹⁸⁵ that also was influenced by international declarations that among others includes the Brundtland Report, the 1992 Rio Declaration on Environment and Development and the 1992 Convention on Biological Diversity.¹⁸⁶ Blackmore further reaffirms 'that following from the Environmental Right in the Constitution, and in keeping with the provisions of White Paper on Environmental Management, this inclusion of the doctrine entrenches into South African environmental law the common law duty placed on government that the environment is to be held in trust for all people.'¹⁸⁷

In his assessment of the NEMA principles¹⁸⁸ that are embracing PTD, Blackmore arrives at a conclusion that the preamble to the NEMA provides for the Act to be applied in a manner that serves both present and future generations. It thus follows that use of the term 'people' in its general form in this principle, embraces both present and future generations and in therein brings to the fore inter- and intra-generational equity in decision-making.¹⁸⁹ Concluding on the intricacies involving the NEMA principles and that of the PTD, Blackmore succinctly comes to the conclusion that 'in addition to a common law application of the public trust doctrine, the NEMA provides a framework of principles that must be explicitly and jointly applied by government in all environmental decision-making, in order to achieve the purpose of the doctrine.' This is to maintain the integrity of South Africa's biodiversity for

¹⁸⁴ Section 2(4)(o) of National Environmental Management Act [NEMA] 107 of 1998.

¹⁸⁵ Department of Environmental Affairs and Tourism, 'White Paper on Environmental Management Policy' (1998) 14, 19 and 21 (White Paper on Environmental Management Policy).

¹⁸⁶ See the World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) (Brundtland Report) and White Paper on Environmental Management Policy (n 33) 14.

¹⁸⁷ Blackmore A. The Relationship Between the NEMA and the Public Trust Doctrine: The Importance of NEMA Principles in Safeguarding South Africa's Biodiversity (2015) 20 SAJELP 89.

¹⁸⁸ Section 2(2) of Act 107 of 1998.

¹⁸⁹ See Blackmore at 99.

current and future generations, and therein to achieve the sustainable development contemplated by Brundtland and the 1992 Rio Convention.¹⁹⁰

In essence this means that it is the government's duty, in compliance with the Bill of Rights within the Constitution and the environmental principles in NEMA, to struck the balance referred to in the *Fuel Retailers* case.¹⁹¹

3.3.4 The NEM: PA Act 57 of 2003

The enactment of NEMA as the overarching environmental law gave impetus to a number of SEMA's with sole purpose of giving effect to the provisions of NEMA as a whole. NEM: PAA as part of the family of NEMA specific environmental management Acts, raising from the prescripts of section 2 (4) (o) of NEMA and in fulfilling the rights contained in section 24 of the Constitution, dictates that the State through the organs of state implementing legislation applicable to protected areas must- (a) act as the trustee of protected areas in the Republic; and (b) implement this Act in partnership with the people to achieve the progressive realisation of those rights.¹⁹²Blackmore taking this discussion of the PTD further affirms that 'in many respects, it may thus be argued that this right in the Constitution is effectively the origin of the biodiversity and protected area component of the public trust duties of the South African government.¹⁹³It is also important to note that the timing of the drafting of NEMA and NEM: PA allowed for a significant influence of African derived origins of the public trust doctrine.¹⁹⁴

3.3.5 The NEM: BA 10 of 2004

Under its legislative obligation of state's trusteeship of biological diversity, this Act taking que from both the Constitution and NEMA and state that in its intention to

¹⁹⁰ See Blackmore at 114.

¹⁹¹ Fuel Retailers case at para 44.

¹⁹² Section 3 of NEM: PAA.

¹⁹³ Blackmore AC. 2018 Rediscovering the origins and inclusion of the public trust doctrine in South African environmental law: A speculative analysis. *RECIEL* 27(3):.1–12, at pg. 8.

¹⁹⁴ Blackmore, A. (2018). The rediscovery of the trusteeship doctrine in South African environmental law and its significance in conserving biodiversity in South Africa. [Doctoral Thesis, Tilburg University] at 55.

fulfilling the rights contained in section 24 of the Constitution, the state through (a) manage, conserve and sustain South Africa's biodiversity and its components (b) implement this Act to achieve the progressive realisation of those rights.¹⁹⁵ In essence this means that the government, through all its organs of state, has a proactive duty to act as a trustee of the environment and the biodiversity and the genetic resources therein.¹⁹⁶

Qualifying this mandate given by both the Constitution and NEMA, Blackmore states that 'NEM: BA provides a series of tools to give effect to the Public Trust Doctrine by: (a) a national biodiversity framework that provides for a co-ordinated and uniform approach to biodiversity management by, inter alia, organs of state in all spheres of government and ensuring that representative and viable samples of South Africa's biodiversity are conserved; and (b) in defining bioregions of the country and developing management plans thereto as well as supplementary biodiversity plans for the conservation of either an ecosystem or for a specific species.'¹⁹⁷

3.3.6 The NEM: AQ Act 39 of 2004

The preamble of the Air Quality Act notes that 'everyone has the constitutional right to an environment that is not harmful to their health or well-being; And whereas everyone has the constitutional right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that- (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources.'¹⁹⁸ Under its general duty, this Act compels the State in fulfilling the rights contained in section 24 of the Constitution (a) through the organs of state

¹⁹⁵ Section 3 of NEM: BA 10 of 2004.

¹⁹⁶ Blackmore, A.C., 2017, 'Public trust doctrine, research and responsible wildlife management in South Africa', *Bothalia* 47(1), a2217.

¹⁹⁷ Andrew Blackmore, 'The Interplay Between the Public Trust Doctrine and Biodiversity and Cultural Resource Legislation in South Africa: The Case of the Shembe Church Worship Site in Tembe Elephant Park in KwaZulu-Natal', 10/1 Law, Environment and Development Journal (2014), p. 9.

¹⁹⁸ Preamble of the Air Quality Act 39 of 2004.

applying this Act, to protect and enhance the quality of air in the Republic and (b) to apply this Act in a manner that will achieve the progressive realisation of those rights.¹⁹⁹ In making sure that there is no ambiguity in the implementation of this Act, it propagates for the realignment with NEMA²⁰⁰ including making sure that in its quest to give effect to the section 24 (b) of the Constitution it aligns itself with NEMA principles that will include the PTD in terms of section 2(4)(o).²⁰¹

3.3.7 The NEM:ICM Act 24 of 2008

The Integrated Coastal Management Act states that its objectives among others 'is to preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations.'²⁰²

It directs the State's duty in the fulfilment of environmental rights in coastal environment and in its quest to give effect to the rights contained in section 24 of the Constitution of the Republic of South Africa, must (a) through its functionaries and institutions implementing this Act, act as the trustee of the coastal zone; and (b) in implementing this Act, take reasonable measures to achieve the progressive realisation of those rights in the interests of every person.²⁰³

Providing clarity on the ownership of coastal public property, the Act reaffirms the PTD principle and state that 'the ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the State on behalf of the citizens of the Republic.'²⁰⁴ To further qualify this point, the Act state 'that the Coastal public property is inalienable and cannot be sold, attached or acquired by prescription and rights over it cannot be acquired by prescription.'²⁰⁵

¹⁹⁹ Section 3 of the NEM: AQA 39 of 2004.

²⁰⁰ Section 5(1) of NEM: AQA.

²⁰¹ Section 5(2) of NEM: AQA.

²⁰² Section 2 (c) of NEM: ICMA 24 of 2008.

²⁰³ Section 3 of the NEM: ICMA 24 of 2008.

²⁰⁴ Section 11 (1) of the NEM: ICMA 24 of 2008.

²⁰⁵ Section 11 (2) of the NEM: ICMA 24 of 2008.

Additional obligations posed to the State as the trustee of coastal public property is that in its capacity as the public trustee of all coastal public property, must— (a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and (b) take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations.²⁰⁶

3.3.8 The NEM: WA Act 59 of 2008

In its preamble, the National Environmental Management: Waste Act share same sentiments like its SEMA's and reaffirm that everyone has the constitutional right to have an environment that is not harmful to his or her health and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.²⁰⁷In its general objectives among others the Act sought to give effect to section 24 of the Constitution in order to secure an environment that is not harmful to health and well-being.²⁰⁸ The Act on the general duties posed to the State in line with the dictates of section 24 of the Constitution, it compels the State through its organs responsible for implementing this Act, to put in place uniform measures that seek to reduce the amount of waste that is generated and, where waste is generated, to ensure that waste is re-used, recycled and recovered in an environmentally sound manner before being safely treated and disposed of.²⁰⁹

Echoing the same sentiments as prescribed in the Act, Blackmore state that 'the public trust provisions of this Act, which replace the waste management sections in the ECA, are limited to referencing the environmental right in the Constitution.' The concern of waste (as with pollution in general) is centred on the health risks waste may pose to people. It is thus the government's *prima facie* responsibility to manage

²⁰⁶ Section 12 of the NEM: ICMA 24 of 2008.

²⁰⁷ Preamble of the NEM: WA.

²⁰⁸ Section 2 (d) of NEM: WA.

²⁰⁹ Section 3 of NEM: WA.

waste in a manner that avoids this risk in both the short (current generation) and long term (future generations).²¹⁰

3.4 The judicial and academic interpretation of the meaning of the PTD in the South African context: key features

The past three decade of our democracy have seen a great deal of transformation within the South Africa's natural resources law space with the introduction of a new legal concept within the South African environmental law jurisprudence. This was made possible by the introduction of the constitutionally recognized environmental right in section 24 of the Constitution.

This invocation of the environmental rights clause in the Constitution directed for the enactment of several statutes that incorporate the doctrines of public trust into South African environmental and natural resources law. Nevertheless this historical legal achievement, it must be noted that some scholars make a finding that this transition occurred to a large extent without applause or fanfare.²¹¹ Blackmore further conclude that the nature of the application of the public trust doctrine in South Africa remains an enigma, and the development and refinement of this jurisprudence are required. Furthermore a critical observation contributing to the challenges of the judicial interpretations let alone the application of the PTD is characterised by the variable and, in places, conflicting wording of the trust-related provisions in a number of South Africa's environmental statutes suggesting that the doctrine and hence the nature of its application was not fully understood by the drafters of the statutes or by the legislature adopting those statutes into law.²¹²In conclusion with regards to judicial interpretation of the meaning of the PTD in South African context, Blackmore makes a very critical and important observation that the

²¹⁰ Blackmore AC. 2018 Rediscovering the origins and inclusion of the public trust doctrine in South African environmental law: A speculative analysis. *RECIEL* 27(3):.1–12.

²¹¹ Blackmore, A.C., 2018, 'Getting to grips with the public trust doctrine in biodiversity conservation: A brief overview', *Bothalia* 48(1), a2308. <https://doi.org/10.4102/abc.v48i1.2308>.

²¹² See Blackmore supra.

South African judiciary has not yet fully understood the scope and significance of the doctrine, and its link to ensuring people's health and wellbeing.²¹³

Taking this discussion further, Blackmore asserts that 'the courts have, however, not been given an opportunity to venture beyond the immediate scope of the public trust doctrine, as provided for in South Africa's environmental statutes.' Qualifying this assertion, he cites the Fuel Retailers case and state that as much as the court has held that the 'trusteeship position carries with it the responsibility to look after the environment', what was lacking was the responsibility beyond the fiducial duties of an official's decision and the immediate consequences for an extant component of the environment.

With regards to the academic interpretations and implications it has within the South African legal context, for the past three decades since the dawn of our democracy, it is apparent that the existence and importance of the PTD within the academic have largely been overlooked. Irrespective the fact that importance foundation has been laid with regards to the invocation of the PTD in our legislative environment, environmental law practitioners over the three decades have observed that 'very little has been written in South African literature on what the subject might entail.'²¹⁴ Taking cue from the above inputs Blackmore conclude 'that an improved understanding of the doctrine by researchers, public and the wildlife industry would lead to a greater relevance of research, and in turn sound evidence based decision-making and ultimately sustainable use of wildlife.'²¹⁵

3.5 Concluding remarks

The adoption of the Constitution in South Africa has served as the basis for the establishment of the PTD principle in our environmental legislative framework. The enactment of national legislation effecting the Bill of Rights in particular section 24

²¹³ Blackmore A. The Application of And The Prospects For The Public Trust Doctrine In South Africa: A Brief Overview.

²¹⁴ Van Der Schyff E. Stewardship Doctrine Of Public Trust: Has The Eagle Of Public Trust Landed On South African Soil.

²¹⁵ Blackmore, A.C., 2017, 'Public trust doctrine, research and responsible wildlife management in South Africa', *Bothalia* 47(1), a2217. <https://doi.org/10.4102/abc.v47i1.2217>

of the Constitution has given impetus to the South African own version of the PTD. This view is also supported by environmental law scholars who submit that 'the propagation of South Africa's Constitution and subsequent legislation regulating the use of the country's environment by people gave explicit legislative credence to the common law PTD in environmental decision making.'²¹⁶ Almost for the past three decades since the inclusion of the PTD into our supreme law, national legislation including our sector environmental management Acts, a body of researched work shows that a little has been done in both the judicial and academic platforms to fully utilise the PTD in the advocacy of the environmental safety in the country. Blackmore reaffirms this view when he states that 'there has been little academic and legal recognition of the public trust provisions.'²¹⁷

²¹⁶ Blackmore, A.C., 2018, 'Getting to grips with the public trust doctrine in biodiversity conservation: A brief overview', *Bothalia* 48(1), a2308. <https://doi.org/10.4102/abc.v48i1.2308>.

²¹⁷ See Blackmore supra

CHAPTER 4 CRITICAL ANALYSIS OF THE LEGAL RELEVANT NEXUS BETWEEN PTD AND THE LEG

4.1 Introduction

The legally defining relevant nexus between the LEG and the PTD lies in the basic tenants that define the two concepts within the environmental law realm. Central to what defines the PTD is the fact that since its inception as a common law legal principle is intended to places obligations on government to maintain and preserve certain natural resources.²¹⁸ On the other hand the LEG is defined as:

“the management process executed by local government and communities to holistically regulate human activities and the effects of these activities on their own and the total environment,”²¹⁹

In terms of this definition by Du Plessis, this is done through formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the present and future interests human beings hold in the environment. In terms of this two definitions, the legal nexus between the two principles can be summarised as the obligations given to governments in the quest to maintain and preserve natural resources executed through a management process that is intended to regulate human activities and its effects on the environment through a set of institutional arrangements embedded in and drawing mandate from various legislative prescripts with the sole aim to promote current and future interests human beings hold in the environment. Within the context of the South African jurisprudence, it is safe to state that the primary obligation given to state is found

²¹⁸ Lyness S. The Local Public Trust Doctrine.

²¹⁹ Du Plessis A. Environmental Law and Local Government in South Africa, 2nd Ed at 3-2.

in the Constitution where the right of protected environment for the benefit of both the current and future generations is guaranteed.²²⁰

In addition, the PTD principle is also codified in the NEMA and in its SEMA's. The force of judicial litigation of this doctrine is also confirmed where our courts have held "that [s]ustainable development is ... integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures protect the environment for the benefit of present and future generations."²²¹ This view also found expression in the WWF South Africa case²²² where the court among others held that 'the need to preserve environmental resources for the benefit of future generations, often styled 'intergenerational equity', is an important element of sustainable development. The court making reference to principle 3 of the Rio Declaration made an emphasis that the right to development must be fulfilled 'so as to equitably meet developmental and environmental needs of present and future generations.'

4.2 Critical analysis of the legal relevant nexus between PTD and LEG

The primary basis of the legal relevant nexus between the PTD and the LEG is premised in the Constitution itself.²²³ This was done by the codification of the PTD into the Constitution including the prescription of the LEG through the formulation of various pieces of national legislation that were to give effect to section 24. The Constitution prescribed what would be the objects of local government sphere²²⁴ and this found expression as well in terms of the MSA.²²⁵ In line with all this developments, the Act dictated that municipalities together with other organs of

²²⁰ Section 24 (b) of the Constitution.

²²¹ *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others* [2017] ZAGPPHC 58, [2017] 2 All SA 519 (GP) ('*Earthlife*') at para 82.

²²² *WWF South Africa v Minister of Agriculture, Forestry and Fisheries & Others* [2018] ZAWCHC 127, 2019 (2) SA 403 (WCC) para 92.

²²³ Section 24 of the Constitution.

²²⁴ Section 152 (1) (d) of the Constitution prescribed that local municipalities where task with the obligation to promote a safe and healthy environment.

²²⁵ Section 4 (2) (d) of the Systems Act under rights and duties of municipal councils states that they must strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner.

state must contribute to the progressive realisation of the fundamental rights contained in sections 24 of the Constitution.²²⁶

NEMA promulgated to give effect to section 24 of the Constitution served as the embodiment of both the PTD and the LEG. Feris²²⁷ reiterates that 'NEMA which governs the environment in its totality, entrenches the public trust doctrine as a crucial component of South African environmental governance by providing that [T]he environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.'²²⁸The centrality of environmental conservation is also depicted in terms of the Conservation of Agriculture Resources Act where the Executive officer is directed to authorise any employee of local municipality in writing 'to exercise powers or perform duties of the executive officer in terms of the Act' such as the combating of weeds and invader plants in the area of jurisdiction of the local authority concerned.²²⁹To solidify this point it is important to note that the critical role played by municipalities in the conservation of the environment, the Environment Conservation Act among others places an obligation to the municipalities that if they are of the opinion that any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, may direct such person to cease such activity or to take any step it deem fit within a prescribed period.²³⁰

Over and above the Constitution, NEMA as the overarching environmental framework and its SEMA's, there are other national legislations that confirms that municipalities legally play and active role in making sure that environmental protection as dictated to by section 24 of the Constitution is upheld. This legislations

²²⁶ Section 23 (1) (c) of the Municipal Systems Act.

²²⁷ Feris I. 'The Public Trust Doctrine and liability for Historic Water Pollution in South Africa, Vol. 8/1 of Law Environment and Development Journal.

²²⁸ Section 2 (4) (0) of NEMA.

²²⁹ Section 4 (4) (a) of the Act

²³⁰ Section 31A (1) a-b of the ECA 73 of 1989.

include the Hazardous Substance Act of which the Minister is empowered through a notice to authorize any local authority to enforce within its area of jurisdiction and through its officers authorized thereto by it, such provisions of this Act as the Minister may specify in the notice that will include combating any actions leading to degradation of the environment as a result of hazardous substances.²³¹

This contraventions or any failure to comply with the provisions in question which is alleged to have taken place in the said area may lead to prosecution.²³²The South African Police Services Act states that 'every municipality have a right to establish a municipal police service²³³ that among others will play a critical role of implementing municipal by-laws dealing with environmental aspects.'²³⁴This by-laws will be implemented through the established municipal courts by local municipalities. Lastly, the other national legislation that enjoins the primary obligation of the PTD as a critical function of the LEG is the National Prosecution Authority Act²³⁵ read with the Systems Act²³⁶ which authorises the institution of criminal proceedings and prosecution of contraventions of municipal environmental by-laws or any other environmental legislation that may be administered by a municipality.

4.3 What it suggest for municipal action.

Since the advent of a Constitutional democracy in South Africa the obligations and duty of municipalities in the protection of the environment has increased significantly. This is as a result of the adoption of the Constitution as well as general environmental legislation, such as the NEMA that in the main provides principles of environmental management that apply to all organs of state that make decisions that may affect the environment, the National Environmental Air Pollution Act²³⁷and Climate Change Act.²³⁸ The overarching principles of NEMA obligates the state and

²³¹ Section 24 of the Hazardous Substance Act 15 of 1973.

²³² Section 25 (1) of the Hazardous Substance Act 15 of 1973.

²³³ Section 64A of the South African Police Services Act 68 of 1995.

²³⁴ Section 64E (b).

²³⁵ Section 166 of 32 of 1998.

²³⁶ Section 112 of the Municipal Systems Act.

²³⁷ Act 39 of 2004.

²³⁸ Act 22 of 2024.

its organs that "there must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment."²³⁹ To demonstrate the importance of municipalities in the protection of the environment, NEMA provide provisions that enables the Minister, MEC and municipality to enter into environmental management co-operation agreements (EMCA) with any person or community for the purpose of promoting compliance with the principles laid down in this Act.²⁴⁰ The said EMCA as a tool of NEMA states that 'it must only be entered into with every organ of state which has jurisdiction over an) activity to which such environmental management co-operation agreement relates.'²⁴¹In line with this developments, the enactment of the MSA played a critical role in making sure that the environmental rights posed by the Constitution, NEMA and its SEMA's are given the necessary effect. This obligation is given impetus in terms of section 1 of the Act where it defines 'basic municipal services' as a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.

Fostering the spirit and purport of the Constitution, the Systems Act²⁴² prefers that 'planning undertaken by a municipality must be aligned with, and complement, the development plans and strategies of other affected municipalities and other organs of state so as to give effect to the principles of co-operative government contained in section 41 of the Constitution.' This flow of events also gained traction in the latest *Le Sueur* judgement where it was held 'that although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern or sphere of National and Provincial responsibility 'Local governments in the form of Municipalities are in the best position to know, understand and deal with issues involving the environment at local level.'²⁴³ Qualifying this point further the court also held that municipalities are in fact authorised to legislate in respect of

²³⁹ Section 2 (4) of NEMA.

²⁴⁰ Section 35 read with section 2 and 45 of NEMA.

²⁴¹ Section 35 (2) (a) (i) of NEMA.

²⁴² Section 24 (1) of the Systems Act.

²⁴³ *Le Sueur and Another v Ethekewini Municipality and Others* (9714/11) [2013] ZAKZPHC 6 (30 January (2013) para 20.

environmental matters in order to protect the environment at the local level.²⁴⁴ Substantiating this point the judge pointed out that in terms of the Constitution a municipality has a right to exercise any power concerning a matter reasonable necessary for, or incidental, to the effective performance of its functions.²⁴⁵

Affirming the centrality of local government in the protection of the environment Humby²⁴⁶ states that 'Du Plessis had already observed a few years ago that local government is co-responsible, together with national and provincial government, for the realization of section 24 of the Constitution.' The interplay nor the nexus between the PTD and the LEG is best outlined by Lyness²⁴⁷ when his work concluded that the 'local governments play a significant role in the substance and scope of the public trust doctrine. Through their roles as landowner, regulator, and enforcer, local governments wield considerable discretion that impacts the public's experience with the doctrine.'

4.4 Conclusion

The analysis of the legal relevant nexus between the PTD and the LEG was made possible from the onset by defining what constitute the two concepts. Central to their definition it can be concluded that the legal nexus between the PTD and the LEG are the obligations given to the state in the quest to maintain and preserve natural resources executed through a management process that is intended to regulate human activities and its effects on the environment through a set of institutional arrangements embedded in and drawing mandate from various legislative prescripts with the sole aim to promote current and future interests human beings hold in the environment. Through the invocation of the Constitutional prescripts, the enactment of national framework legislation on environment and its

²⁴⁴ Le Sueur judgement at para 40.

²⁴⁵ Section 156 (5) of the Constitution.

²⁴⁶ Humby T.' Localising Environmental Governance: The Le Sueur Case, PER/PELJ 2014 (17) 4, at 1681.

²⁴⁷ Lyness S. 'The local Public Trust Doctrine, Georgetown Environmental Law review Vol.34:1 at pg 32.

SEMA's, literature and case law a demonstration has been made affirming a legal nexus between the PTD and the LEG.

One critical areas that serve as a corner stone within the local municipal legislative framework is the directives posed by the System Act when it envisage an environment where municipalities as part of the state to contribute to the progressive realisation of the fundamental rights contained in sections 24 of the Constitution.²⁴⁸ Lastly, the definition of what constitute 'basis municipal service' in section of the Act, sums up the core founding values that must be adhered to by municipalities at all times in the quest to render services to its constituencies.

²⁴⁸ Section 23 (1) (c) of the Municipal Systems Act.

CHAPTER 5 CONCLUDING REMARKS

5.1 Conclusions

The study explored the relevance of the universal principle of the PTD with regards to the obligations posed by LEG in the South African environmental legal context. Its departing point was the embracing of the fact that the PTD was first codified by the Constitution then cascaded to various national legislative regime dealing with environmental preservation in the country. Giving effect to the Constitutional imperative stated in section 24 (b) this was done by affirming that municipal councils have both the Executive and legislative authority over LEG matters listed in Schedules 4B and 5B.²⁴⁹

In order to demonstrate the importance of the PTD in the realisation of the LEG, the study first gave the meaning and relevance of the developmental local governance within the context of the LEG. This was made possible through drawing positive contribution brought about the impact of constitutional transformative efforts made to declare local sphere as a 'developmental local government'. This in essence meant that the post-apartheid state inclusive of local government had a different agenda and mandate from its predecessor, of making sure that the inter-generations environmental rights promised by the Constitution are espoused in the provisions of the basic municipal service as dictated to by the Systems Act.²⁵⁰ The study found that irrespective of the remarkable achievement made through the invocation of the PTD and the LEG tools within our legislative regime, the contours that must guide local government's role with regards to the environmental powers are not clearly define.

The study established that whilst there was this criticism, there was a clear demonstration that overwhelming legislative prescripts and the pockets of decided cases seem to suggest that local municipality as the sphere closest to the people is

²⁴⁹ See section 151 (2) read with section 156 (1) of the Constitution.

²⁵⁰ Section 1 of the Municipal Systems Act.

best placed to effect the rights enshrined in section 24 of the Constitution. This study have also demonstrated that largely immense there is policy frame-work and legislative enactment²⁵¹ that make a case to the effect that local government as part of the state is co-responsible in the protection of the environment for both the current and future generations through the utilisation of the LEG tools.

Having explored the historical account of the PTD an LEG in law and their importance in environmental law context within South African statutory law, the study analysed various national legislations enacted and the responsibilities flowing from it with regards to PTD and LEG including the usage judicial and academic interpretations within the South African environmental legal context. From the constitutional point of view it can be said that the enactment of national legislation effecting the Bill of Rights in particular section 24 of the Constitution has gave impetus to the South African own version of the PTD.

This view is also support by environmental law scholars who submit that 'the propagation of South Africa's Constitution and subsequent legislation regulating the use of the country's environment by people gave explicit legislative credence to the common law public trust doctrine in environmental decision making.'²⁵² As much this positive outcome is realised it must be noted that the study made findings that little has been done in both the judicial and academic platforms to fully utilise the PTD in the advocacy of the environmental safety in the country. Accordingly, the study also investigated or made the analysis of the legally relevant nexus between PTD and LEG including what it suggest for municipalities. It established that through the invocation of the Constitutional prescripts, the enactment of national framework legislation on environment and its SEMA's, literature and case law a demonstration has been made affirming a legal nexus between the PTD and the LEG.

²⁵¹ Climate Change Act 22 of 2024.

²⁵² Blackmore, A.C., 2018, 'Getting to grips with the public trust doctrine in biodiversity conservation: A brief overview', *Bothalia* 48(1), a2308. <https://doi.org/10.4102/abc.v48i1.2308>.

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