



Local government's mandate in addressing sewage pollution and ensuring sustainable access to clean water in South Africa

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ABSTRACT

In July 2010, building on Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* of 1966, the United Nations General Assembly adopted a landmark resolution. The resolution recognises the right to safe and clean drinking water and sanitation as an internationally recognised human right that is essential for the full enjoyment of life and all other human rights. The resolution also calls upon states and other organisations to scale up efforts to provide safe, clean, accessible and affordable drinking water for all. In South Africa, the right to access sufficient water is incorporated into the *Constitution of the Republic of South Africa, 1996* (*Constitution*) and specifically its Bill of Rights. Section 27(2) of the *Constitution*, read with sections 7(2), 8 and 40, mandates that the state, and all its spheres of government, must take reasonable measures to ensure the realisation of the right to access to sufficient water. In terms of section 156 and Part B of Schedule 4 of the *Constitution*, this obligation extends to municipalities and the effective functioning of municipal water services.

However, the reality in South Africa is that many municipalities are failing to fulfil this responsibility. The central issue addressed in this mini-dissertation is the inadequate maintenance of drinking water and sewage infrastructure. Due to poor maintenance, these systems become vulnerable to failures such as leaks, blockages, or overflows, which allow raw sewage to enter natural water resources like rivers or aquifers. This pollution leads to the spread of harmful pathogens, pollutants and toxins, compromising the quality of drinking water that reaches domestic water supply systems. Consequently, as will be argued in this mini-dissertation, sewage pollution undermines the right to access to sufficient water in South Africa.

This mini-dissertation explores the legislative framework outlining the mandate of local government in addressing sewage pollution, with the goal of progressively realising the section 27 right of access to sufficient water in South Africa. Although not the main focus of the study, the research considers whether municipalities can be held legally accountable for failing to fulfil this constitutional mandate.

KEYWORDS:

Access to sufficient water; local government accountability; local government's mandate; potable water; sewage pollution; sanitation services; wastewater treatment infrastructure; water infrastructure

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LIST OF ABBREVIATIONS

ACWR	African Institute for Sustainable Development
Afri J Biotechnol	African Journal of Biotechnology
CEDAW	<i>Convention of the Elimination of All Forms of Discrimination Against Women of 1979</i>
CRC	<i>Convention on the Rights of the Child of 1989</i>
IISD	International Institute for Sustainable Development
IRFA	<i>Intergovernmental Relations Framework Act 13 of 2005</i>
ICR	International Rescue Committee
LDD	Law democracy development
LGMSA	<i>Local Government: Municipal Systems Act 32 of 2000</i>
LGMSA	<i>Local Government: Municipal Structures Act 117 of 1998</i>
NWA	<i>National Water Act 36 of 1998</i>
NIMS	National Infrastructure Management Strategy
PER	Potchefstroomse Elektroniese Regsblad
PELJ	Potchefstroom Electronic Law Journal
SDG	Sustainable development goal
SAJS	Southern African Journal of Science
UN	United Nations
WSA	<i>Water Services Act 108 of 1997</i>
WRC	Water Research Commission

Chapter 1: Introduction

1 Background

Building on Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* of 1966, the United Nations (UN) General Assembly adopted a landmark resolution in July 2010. It recognises the right to safe and clean drinking water and sanitation as an internationally recognised human right that is essential for the full enjoyment of life and all human rights. According to the International Institute for Sustainable Development (IISD), water and sanitation services have long been fundamental priorities on the international agenda, with a focus on its critical importance dating back to 1972.¹ Despite this global recognition, scholars like Govender *et al*² argue that many regions³ still face significant challenges in realising the right to safe and clean drinking water and sanitation. In fact, globally, the UN reports that approximately 2.2 billion people are unable to access safe drinking water.⁴ About 703 million people have no access to basic water services, and 3.5 billion lack adequate, sustainable, safely managed sanitation.⁵ In 2022, the IISD reported that approximately 698 million school children do not have access to basic sanitation services at school, and approximately 4.3 billion people are exposed to sanitation services that result in the discharge of untreated human waste directly into the environment and the pollution of water resources.⁶

The mismanagement of water, sewage systems, and wastewater treatment infrastructure further exacerbates these statistics. The lack of sufficient long-term financial investment, which is essential for the improvement and strengthening of water and sanitation services infrastructure,⁷ impedes access to sustainable clean water and sanitation.⁸ Poor maintenance leaves these systems vulnerable to failures such as leaks, blockages or overflows, which allow raw sewage to contaminate natural water resources like rivers or

¹ Paul 2022 <https://www.iisd.org/articles/deep-dive/water-and-sanitation-challenge>.

² Govender et al 2011 *American Journal of Public Health* 5.

³ Wear *et al* 2021 *Biological Conservation* 1.

⁴ UN date unknown <https://www.un.org/sustainabledevelopment/water-and-sanitation/>.

⁵ UN date unknown <https://www.un.org/sustainabledevelopment/water-and-sanitation/>.

⁶ See Paul 2022 <https://www.iisd.org/articles/deep-dive/water-and-sanitation-challenge>.

⁷ Paul 2022 <https://www.iisd.org/articles/deep-dive/water-and-sanitation-challenge>.

⁸ See UN date unknown <https://www.un.org/sustainabledevelopment/water-and-sanitation/>.

other underground sources. This pollution leads to the spread of harmful pathogens, pollutants and toxins, compromising the quality of the drinking water that reaches domestic supply systems. Alarming, marginalised and poor communities are often excluded from the benefits of the already limited government investment in water and sewage infrastructure, perpetuating inequality and neglecting those who need these services the most.⁹ This systemic neglect deepens the cycle of poverty and poor health in these communities.

Against this backdrop, it is accurate to echo Kofi Annan's sentiments:

Access to water is a fundamental human need, and therefore a basic human right. Contaminated water jeopardises both the physical and social health of all people. It is an affront to human dignity.¹⁰

1.2 Problem statement

In South Africa, the right to access to sufficient water is incorporated into the *Constitution of the Republic of South Africa, 1996 (Constitution)* and specifically its Bill of Rights. Section 27(2) of the *Constitution*, read with sections 7(2), 8, and 40 mandates that the state, in all its spheres of government, must take all the necessary reasonable measures to ensure the realisation of the right to access sufficient water. In terms of section 156 and Part B of Schedule 4 of the *Constitution*, this obligation extends to municipalities. Municipalities¹¹ are obliged to ensure the effective functioning of municipal water services.

However, South Africa is grappling with a severe and growing water crisis that is exacerbated by deteriorating water quality and the increasing threat of sewage pollution. Sewage pollution is, in essence, caused by the failing or poor functioning of the sewage infrastructure. Currently, 46% of all water supply systems in the country pose significant human health risks due to pollution,¹² with sewage being a major contributor. This is not

⁹ Paul 2022 <https://www.iisd.org/articles/deep-dive/water-and-sanitation-challenge>.

¹⁰ UN 2001 <https://press.unorg/en/2001/sgsm7738.doc.htm>.

¹¹ Section 1 of the LGMS: Act 117 of 1998 describes or defines municipality as a municipality referred to in section 155(6) of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

¹² Makwakwa 2024 <https://www.iol.co.za/sundayindependent/news/sas-water-shortage-to-get-worse-in-2025>.

just a local problem; it is a national crisis that stems from decades of insufficient investment and maintenance in water and sewage infrastructure.

The National Water and Sanitation Master Plan records that South Africa's water crisis stems from the insufficient upkeep of its water infrastructure.¹³ Alarmingly, it is estimated that 56% of over 1 150 municipal wastewater treatment plants and 44% of the 962 water treatment works are in poor condition, further exacerbating the problem of a lack of access to clean water.¹⁴

This research posits that the core issue lies with the inadequate infrastructure for both water supply and wastewater treatment. Many municipalities are unable to meet the growing demand for clean water, and the inadequate maintenance of sewage systems results in regular overflows, leaks, and untreated sewage discharged into rivers and other water bodies, including underground water. This poor management of sewage and wastewater treatment systems – which are the primary responsibility of local government – undermines the realisation of sustainable access to sufficient water. In fact, the failure to properly maintain and upgrade these critical infrastructures contributes to widespread sewage discharge, which directly threatens the constitutional right to sufficient water and the international human rights to safe and clean drinking water and sanitation.

To address this crisis, this mini-dissertation examines the mandate of local government in effectively managing sewage pollution and ensuring sustainable access to clean water in South Africa from a legal perspective. It explores the legislative and constitutional frameworks that outline local governments' responsibilities, focusing on their duty to maintain water and sewage infrastructure and to prevent sewage pollution. By critically analysing existing laws, policies, and case studies, this study seeks to evaluate whether local governments are adequately fulfilling their obligation to provide sufficient clean water. It also examines how legal mechanisms can be strengthened to propel local governments to be more effective in managing water resources to realise access to clean water. Ultimately, this mini-dissertation aims to provide insights into how improved

¹³ National Water and Sanitation Master Plan 2.

¹⁴ Bega 2021 <http://mg.co.za/the-green-guardian/2021-02-17-why-we-need-the-blue-and-green-drop-reports>.

governance can ensure equitable access to safe, clean water for all South Africans and how local government can be held legally accountable for failing to adequately fulfil the prescribed constitutional mandate.

1.3 Research question

This study seeks to answer the following question:

To what extent does the current legal framework enable local government to ensure sustainable access to clean water and effectively manage sewage pollution in South Africa?

1.4 Objectives of the study

The primary objective of this research is to assess the effectiveness of the current legislative framework in enabling local government in South Africa to ensure sustainable access to clean water, with a particular focus on the role of municipalities in managing water and sewage infrastructure. To achieve the primary objective, the following secondary objectives are set:

- To examine the South African legal framework governing access to sufficient water, focusing on the duties, functions, and powers of government to ensure sustainable access to sufficient water for all South Africans, including local communities. This analysis will explore the role of the 'cooperative governance' principle in the water sector, emphasising the shared responsibility of all three spheres of government in realising the right to access to sufficient water. This theoretical foundation will provide a basis for critically evaluating the effectiveness of local government in fulfilling its constitutional mandate regarding water and sanitation services.
- To identify the challenges local governments face in managing sewage pollution and ensuring sustainable access to clean water and effective sanitation services. The research focuses on the consequences of untreated sewage and the failure of local governments to adequately maintain sewage and wastewater treatment infrastructure. It also examines the experiences of three municipalities – the

Kgetlengrivier Local Municipality, the Emfuleni Local Municipality and City of Tshwane Metropolitan Municipality – highlighting specific challenges and the impact of poor management on water quality.

- To explore potential legal and policy frameworks for holding local governments accountable for failing to fulfil their constitutional mandate regarding access to sufficient water. This objective aims to propose pathways to improve service delivery in line with the constitutional obligations and international human rights standards.

1.5 Research methodology

This research was conducted using a critical and integrated literature review, with an emphasis on analysing and interpreting both primary and secondary legal sources related to water law, infrastructure and sewage pollution. The primary sources consulted include the Constitution, relevant legislation, case law, policies, and government notices. Secondary sources include journal articles, textbooks, theses, research reports and internet sources, which were used to extract and apply instrumental legal principles pertaining to local government's mandate to ensure sufficient and sustainable access to clean water and address sewage pollution.

In addition, a case study approach is used, focusing on three municipalities: Kgetlengrivier Local Municipality, Emfuleni Local Municipality and City of Tshwane Metropolitan Municipality. These three municipalities were chosen because the communities they serve are facing significant and ongoing challenges due to the adverse effects of inadequate service delivery related to the theme of this research.

1.6 Justification of the study

This study is significant and timely, contributing to both academic discourse and practical solutions. This study endeavours to clarify the constitutional and statutory mandates imposed on local governments in South Africa, specifically their responsibility to provide sufficient clean water and address sewage pollution. Such pollution contaminates water sources and leads to environmental degradation. By means of a case study of

Kgetlengrivier Local Municipality, Emfuleni Local Municipality, and the City of Tshwane Metropolitan Municipality, this study highlights the role of poor maintenance of sewage and wastewater treatment infrastructure in the inadequate provision of sustainable clean water.

Additionally, the mini-dissertation examines the failures of local government in addressing sewage pollution, a key factor in the deterioration of water quality. By examining these issues, this study underscores the importance of local government's role in water management and the need for effective legal mechanisms to ensure accountability and safeguard public health and environmental sustainability.

1.7 Research Framework

Chapter 1 is an introductory chapter that outlines the purpose and direction of the mini-dissertation. It presents the background to the study, the problem statement, research question, aims and objectives, and research methodology.

Chapter 2 examines the South African legal framework governing access to sufficient water resources and services, focusing on the duties, functions, and powers of government in ensuring sustainable access to clean water for all South Africans. The chapter also explores the role of the principle of 'cooperative governance' in the water sector, emphasising the shared responsibility of all three spheres of government in realising the right to access to sufficient water in South Africa. This theoretical foundation provides a basis a critical evaluation of the effectiveness of local government in fulfilling its constitutional mandate regarding water and sanitation services in the following chapters.

Chapter 3 identifies the challenges local governments face in managing sewage pollution and ensuring sustainable access to clean water and effective sanitation services. The research focuses on the consequences of untreated sewage and the local government's failure to regularly maintain sewage and wastewater treatment infrastructure. It examines the experiences of three local municipalities, namely the Kgetlengrivier Local Municipality, the Emfuleni Local Municipality and the City of Tshwane Metropolitan

Municipality, highlighting specific challenges and the impact of poor management of water quality and even public health.

Chapter 4 explores potential legal and policy frameworks that hold local governments legally accountable for failing to fulfil their constitutional mandate regarding access to sufficient water and the effective management of sewage pollution.

Chapter 5 presents the findings and recommendations on the local government's duty or responsibility to provide sustainable clean water and basic sanitation services to local communities. This chapter proposes pathways for improving service delivery in line with constitutional obligations and international human rights standards.

Chapter 2: The Legal Framework for Access to Sufficient Water: Government Duties and Cooperative Governance

2.1 Introduction

Chapter 1 of this study laid the foundation by exploring the significance of access to clean water as both a fundamental human need and a basic human right, as recognised in international law and South Africa's legal framework. Water is an essential and increasingly scarce resource that sustains all forms of life, human well-being, and ecosystems, necessitating responsible governance and protection. However, as this chapter argues, anthropogenic activities, ageing infrastructure, and inadequate wastewater treatment facilities have contributed to the contamination of rivers, dams, and other freshwater sources with untreated or poorly treated sewage. The ongoing challenge of sewage pollution intensifies South Africa's water crisis, and it emphasises the urgent need for effective protection and governance of the country's water resources to ensure equitable access to sufficient water for all. Accordingly, this chapter assesses the legal framework governing access to sufficient water in South Africa, with a focus on government duties and the principle of cooperative governance. The objective is to clarify the government's mandate and responsibilities regarding the right to have access to sufficient water.

In an effort to achieve the set objective, this chapter is structured into six key parts to provide a comprehensive analysis of the legal framework for the government's role in ensuring sustainable access to clean water. The first part examines the constitutional foundations and structure of South Africa's legal system, highlighting the supremacy of the *Constitution* and its relevance to water governance. The second part explores the importance of local government's role within the cooperative governance framework, emphasising its responsibility in achieving effective service delivery.¹⁵ The third part outlines the duties and powers of local government as set out in the regulatory framework, focusing on its responsibility to provide potable water and sanitation services to South African communities. Part four of this chapter focuses on how the right to access

¹⁵ For the purpose of this study, service delivery is used in and limited to the context of water supply.

sufficient water is interpreted and enforced within the framework of the *Constitution*, the *National Water Act* 36 of 1998 (*NWA*), and the *Water Services Act* 108 of 1997 (*WSA*). Part five delves into section 24 of the *Constitution* and its connection to environmental protection, particularly concerning water pollution and the right to clean water. Finally, the chapter concludes with a brief summary of the theoretical foundation to use as a benchmark in subsequent chapters to evaluate the effectiveness of local government in fulfilling its constitutional obligations regarding water and sanitation services.

2.2 Constitutional provisions

2.2.1 Foundational Principles and Structure

Section 1(c) of the *Constitution* confirms the supremacy of the *Constitution* and the rule of law, establishing that the *Constitution* is the highest law in the Republic and that the rule of law must always be upheld.¹⁶ This principle is further reinforced in section 2, which explicitly states that the *Constitution* is the supreme law, and any law or conduct inconsistent with it is invalid. These provisions ensure that all government actions and legislation, including those related to water governance in the country, must align with and adhere to the *Constitution's* principles and requirements. In *Merifon (Pty) Ltd v Great Letaba Municipality and Another* (1112/2019) [2021] ZASCA 50 (22 April 2021) at para 1 (hereafter *Merifon (Pty) Ltd* case), Petse AP confirmed that no organ of state or public official may act contrary or beyond the powers granted to them by law. In doing so, Petse AP stated that:

The doctrine of legality and the rule of law lie at the heart of the Constitution. Numerous reported decisions of our courts have unequivocally affirmed the fundamental truism that the exercise of public power derives from the law. Accordingly, no organ of state or public official may act contrary to or beyond the scope of their powers as laid down in the law. This is one of the fundamental values of our constitutional democracy.¹⁷

The South African constitutional framework establishes a system of three spheres of government: national, provincial, and local,¹⁸ as outlined in section 40(1) of the

¹⁶ Stacey 2018 *Law & Social Inquiry* 1-10.

¹⁷ *Merifon (Pty) Ltd v Great Letaba Municipality and Another* (1112/2019) [2021] ZASCA 50 (22 April 2021) para 1.

¹⁸ *Intergovernmental Relations Framework Act* 13 of 2005 (IRFA).

Constitution. The principle of cooperative governance is essential to ensure that these spheres of government collaborate effectively in fulfilling their respective duties. In the context of the rule of law, this cooperation is vital to ensure that each sphere adheres to its constitutional responsibilities and upholds the legal standards set out by the *Constitution*. This is especially pertinent in areas such as the provision of clean water and sanitation services, where coordinated collaboration or action is necessary to meet constitutional and human rights obligations.

In the functional area of water provision, the overall governance of water is an exclusive national competence in terms of the Constitution,¹⁹ and the national Department of Water and Sanitation (DWS) carries out this responsibility.²⁰ It is worth noting that there are provincial DWSs that are mandated, in terms of section 62 of the *WSA*, to oversee the performance of local government. In addition, section 139 of the *Constitution* empowers the provincial government to intervene in local government affairs when necessary. However, it must be noted that the Constitution does not provide express functions to provincial DWSs with regard to water governance. Only section 62(1) of the *WSA* refers to this by stipulating that the Minister and any relevant province must monitor the performance of every water service institution.

The provision of clean water, as a basic municipal service, requires the collaboration of all three spheres of government. Local government (municipal) powers and functions are entrenched in section 156 of the Constitution read with section 73 of the *LGMS: Act 32* of 2000.²¹ Section 156 provides that a municipality has the executive authority the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution;²² and any other matter assigned to it by national and provincial legislation.²³ Part B of Schedule 4 of the Constitution set out particular items that local government must administer and realise optimally: water and sanitation

¹⁹ See Feris "Environmental Rights Protected in the Constitution" 4.

²⁰ See preamble of the *NWA*.

²¹ *Bon Vista and Another v Mookgopong Local Municipality and Others* [2019] JOL 41156 (GP) para 27.

²² Section 156(1)(a) of the Constitution.

²³ Section 156(1)(b) of the Constitution.

services limited to potable water supply systems²⁴ and domestic water and sewage disposal systems.²⁵ Further, section 152 of the Constitution outlines the objectives of local government. Feris²⁶ holds the view that local government is a co-responsible organ of state, and in the context of water rights, local government must adhere to the fundamental prescripts of section 7(2) of the Constitution, among others.²⁷ The principle of cooperative governance is discussed in detail in the below paragraph.

2.2.2 The Role of Local Government in Cooperative Governance

Governance is a process that involves interactions and relationships in decision-making processes.²⁸ De la Harpe²⁹ asserts that governance encompasses both decision-making and implementation processes. On the one hand, Saunders³⁰ highlights that the *Constitution* provides local government with a more significant autonomous role in ensuring good governance for local communities. On the other hand, Du Plessis and Nel³¹ are of the view that every municipality in the local sphere of government operates within a system of cooperative government. These scholarly contributions arguably underscore the importance of collaboration and interdependence between different government spheres. Moreover, it is important to recognise that governance is not a unilateral process, but one that involves ongoing interactions and relationships between spheres of government. Within this cooperative framework, the local government plays a pivotal role in ensuring effective service delivery and the realisation of constitutional rights, particularly in essential areas such as water and sanitation.

The core objective of cooperative government is to meticulously provide effective, efficient, transparent, accountable, and coherent government duties to South African citizens.³² The essence of cooperative governance is to significantly secure the well-being

²⁴ Section 84(1)(b) of the *LGMS: Act 117 of 1998*.

²⁵ Section 84(1)(d) of the *LGMS: Act 117 of 1998*.

²⁶ Feris "Environmental Rights Protected in the Constitution" 5.

²⁷ See Fuo 2013 Murdoch University Law Review 26.

²⁸ De la Harpe 2007 *ICR* 2. These sectors may involve government, public sector, private sector and civil society.

²⁹ De la Harpe 2007 *ICR* 2.

³⁰ Saunders 2024 *PER/PELJ* 2.

³¹ Du Plessis and Nel "An Introduction" 28.

³² Preamble of the *IRFA*; see also Du Plessis and Nel "An Introduction" 29.

of the people and ensure progressive realisation of their constitutional rights.³³ Moreover, Visser *et al*³⁴ contend that “the Constitution contains an intricate division of responsibilities between the three spheres of government”. Therefore, when assessing the performance of the government in service delivery, it must first be ascertained which sphere of government is responsible for which tasks to ensure that the people in communities have access to clean water.³⁵

These spheres of government are distinctive, interdependent, and interrelated.³⁶ The *NWA* establishes that the national government has overriding responsibility and authority in respect of the nation’s water resources.³⁷ Also, the preamble of the *WSA* provides that there is an existing duty on all spheres of government to ensure that water supply and sanitation services³⁸ are provided in an efficient, equitable, and sustainable manner.³⁹ Therefore, a collective effort by all three spheres of government⁴⁰ to provide basic sanitation and water services can enable local government to provide clean water to the people.

The provision of clean water is a constitutional mandate that is formally bestowed to all three spheres of government. Part B of Schedule 4 of the *Constitution* makes it apparent that local government must carry out such mandate effectively,⁴¹ *albeit* under the supervision and support of national and provincial government.⁴² This constitutional

³³ Preamble of the *IRFA*; Du Plessis and Nel “An Introduction” 28-29.

³⁴ Visser *et al* 2003 *LDD* 28.

³⁵ Visser *et al* 2003 *LDD* 28.

³⁶ See section 40(1) of the Constitution.

³⁷ See Preamble of the *NWA*; see also section 3 of the *NWA*.

³⁸ Murombo *et al* 2009 *LHR Publication* 2. The authors aptly show that the constitution does cater for the right to basic sanitation. The authors submit that the right to sanitation could consequently be derived from the right to a clean environment read in conjunction with the right to access to clean water. This is a practically logical and sound argument.

³⁹ Preamble of the *WSA*.

⁴⁰ Section 154(1) of the Constitution provides that the national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers, and to perform their functions.

⁴¹ Part B of Schedule 4 of the Constitution; see also section 152(1)(b) of the Constitution; see also Steyn *The Realisation of the Constitutional Water Right in South Africa Cities* 126.

⁴² Section 139(1) of the Constitution.

mandate requires a concerted effort that would ensure that access to sufficient and sustainable clean water is realisable.⁴³

This process aims to ensure municipal water services,⁴⁴ specifically sustainable clean water, is a priority of the government.⁴⁵ Governance does not only involve government, but it involves all other parties with a legitimate interest in the outcome of the decision-making process, which includes governmental organisations and service providers.⁴⁶ According to De la Harpe, collaborative government would play a pivotal role in fostering sound and feasible cooperative governance in the water sector.⁴⁷

All spheres of government are required to cooperate effectively to fulfil their constitutional mandate to make access to clean water practically achievable. A concerted effort by the three spheres of government will make the realisation of access to clean water possible. The consequence of any practice contrary to the provisions of the *Constitution* and national law on the above-highlighted issues would adversely affect human health and well-being by supplying water that does not meet national water standards.⁴⁸ In support of this argument, Soyapi accurately asserts that “the provision of sufficient water must relate to water that meets basic standards for human health and well-being”.⁴⁹ The executive power to ensure the delivery of water and sanitation services that meet the basic standards for human health and well-being to the citizens falls squarely on local government because local government directly interacts with local communities.⁵⁰

Supporting the above submission, the Constitutional Court in *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 34 (hereinafter *Joseph* case) stated the following regarding the duty of municipalities to provide service delivery:

⁴³ See the Preamble of the *IRFA* 13 of 2005.

⁴⁴ Section 4(2)(d) and (f) of the *LGMS: Act* 32 of 2000; Saunders 2024 *PER/PELJ* 2.

⁴⁵ De la Harpe 2007 *ICR* 2.

⁴⁶ See De la Harpe 2007 *ICR* 2.

⁴⁷ De la Harpe 2007 *ICR* 2.

⁴⁸ *South African Human Rights Commission v Msunduzi Local Municipality & Others* (8407/2020) [2021] ZAKZPHC 35 (17 June 2021) para 107; section 24(a) of the *Constitution*; du Plessis and Fuo 2024 *SAJS* 1.

⁴⁹ Soyapi 2016 *PER/PELJ* 3.

⁵⁰ Part B of Schedule 4 of the *Constitution*; see also section 156(1) of the *Constitution*; du Plessis and Fuo 2024 *SAJS* 2; van der Walddt and Fuo “Municipal service delivery and the environment” 3.

The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whatever or not they have a contractual relationship with the relevant public service provider.⁵¹

These are critical aspects that, if not adequately performed, impede access to clean water. In this regard, local government, under Part B of Schedule 4 of the *Constitution*, is mandated to deliver and realise hygiene services, including water and sanitation services, to South African communities.⁵² However, this does not necessarily imply that local government is the only sphere of government that has an absolute responsibility⁵³ to do so.⁵⁴ Du Plessis and Fuo⁵⁵ correctly argue that “local government is not solely responsible for service delivery⁵⁶ or its failure”. This simply implies that all three spheres of government have a role to play to ensure that South African communities are subjected to adequate municipal basic services, including water and sanitation.⁵⁷

In support of the above emphasis, in the persuasive authority of *Kgetlengrivier* case para 1, Petersen J pointed out that:

A sad reflection on our nascent democracy is the reality faced by the people of our country brought about by the chronic absence of service delivery. The narrative which is replete in our media on a daily basis implicates service delivery at its core or basic level. The coalface of the absence of service delivery is more often than not at Municipal level, where Municipalities are failing our people.⁵⁸

Additionally, when it is urgently necessary, national and provincial governments must strive to strengthen a local government’s capacity to effectively execute and perform constitutional and statutory mandates.⁵⁹ Although this is the essence of collaborative

⁵¹ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 34.

⁵² National Sanitation Policy, 1996 7.

⁵³ See section 154(1) of the Constitution.

⁵⁴ See National Sanitation Policy, 1996 4.

⁵⁵ Du Plessis and Fuo 2024 *SAJS* 1.

⁵⁶ Saunders 2024 *PER/PELJ* 2. The author argues that municipal service delivery is part of the municipal-community support structure that is necessary to ensure good health and well-being in both rural urban residential areas; see also du Plessis and Fuo 2024 *SAfr J Sci* 1-3.

⁵⁷ National Sanitation Policy, 1996 4.

⁵⁸ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM 79/2021 [2023] ZANWHC 29; [2023] ZANWHC 29; [2023] 2All SA 425 (NWM) (17 March 2023) para 1.

⁵⁹ Section 154(1) of the Constitution. This section provides that the national and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers, and to perform their functions.

government, according to Visser *et al*,⁶⁰ local government remains responsible for the full spectrum of responsibilities of safeguarding and promoting the right to access to clean water. The role of local government in supplying clean water is performed in partnership with the other spheres of government.⁶¹ The preamble of the *IRFA* proffers that the cooperation of all spheres of government can contribute meaningfully to providing clean water services.⁶² Put differently, efficient cooperation may result in effective management of water resources to enable local government to provide sustainable clean water to various South African communities. According to Steytler,⁶³ local government is the delivery arm of government, which must be steered from the centre to achieve defined outcomes.⁶⁴ Therefore, all this may be achieved only when local government officials⁶⁵ are fully compliant with the empowering legislation regulating water and sanitation services.⁶⁶

The Constitutional Court in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 50 (hereinafter *MEC For Health, Eastern Cape Case*) points out that “there is a higher duty on government to protect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights”. In addition, in *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC) paras 60-61 (hereinafter *Merafong City Local Municipality Case*), the Constitutional Court aptly articulates that the “municipality must act as a good constitutional citizen and its conduct should comply with the Constitution”.

Therefore, in light of these persuasive authorities, it is clear that local government is entrusted with the responsibility to ensure that municipal services, in particular water services, are consistently provided to the people in South African communities.⁶⁷ While

⁶⁰ Visser *et al* 2003 LDD 29.

⁶¹ Visser *et al* 2003 LDD 29.

⁶² The then Department of Water Affairs and Forestry date unknown *Water for Growth and Development in South Africa* 46-49.

⁶³ Steytler 2008 TSAR 519.

⁶⁴ Steytler 2008 TSAR 519-520.

⁶⁵ Steytler 2008 TSAR 520.

⁶⁶ See sections 3 and 11 of the *WSA*; sections 3 and 4 of the *NWA*.

⁶⁷ *SALGA v SAMWU* (J1320/07) [2007] ZALC 43; [2008] 1 BLLR 66 (LC); (2007) 28 ILJ 2603 (LC) (12 June 2007) para 12; du Plessis and Fuo 2024 *SAJS* 1-3.

doing so, the provincial government ought to monitor and oversee the performance of local government according to the provisions of section 154(1) of the Constitution. Moreover, national government, on the other hand, ought to ensure the consistent exercise of its powers to supervise the performance of all organs of the State.⁶⁸ The purpose of so doing is to combat non-compliance with the legislation and compel organs of state to comply with the Constitution, *WSA*, and *NWA* to provide basic services to the people,⁶⁹ and to ensure the realisation of access to clean water.

Thus, Van der Walddt and Fuo⁷⁰ postulate that:

Municipalities constitute the sphere of government that is closest to the people, and it is important that they perform their service-delivery function well and in line with applicable law.⁷¹

2.3 Roles and Responsibilities of Local Government under the Regulatory Framework: Duties and Powers in Providing Potable Water and Sanitation

2.3.1 Constitutional Mandate for the Provision of Water and Sanitation Services

The protection of water and environmental rights under sections 27 and 24 of the Constitution is of paramount importance. Local government, under the supervision and support of national and provincial governments, has a constitutional mandate to ensure that South African communities have sustainable access to sufficient clean water and sanitation services.⁷² To achieve this, the environment must be protected from pollution,⁷³ as natural resources are derived from the environment.⁷⁴ In support of this submission, section 152(1)(b) of the Constitution makes it the responsibility of local government to promote a safe and healthy environment.⁷⁵ A safe and healthy environment is one that is

⁶⁸ *Minister of Water and Environmental Affairs v Kloof Conservancy* (106/2015) [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) (27 November 2015) para 10; du Plessis and Fuo 2024 *SAJS* 1-3.

⁶⁹ *Minister of Water and Environmental Affairs v Kloof Conservancy* (106/2015) [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) (27 November 2015) para 10; du Plessis and Fuo 2024 *SAJS* 1-3.

⁷⁰ Van der Walddt and Fuo "Municipal service delivery and the environment" 2.

⁷¹ Steyn The Realisation of the Constitutional Water Right in South Africa Cities 126.

⁷² Feris "Environmental Rights Protected in the Constitution" 8.

⁷³ *Van Staden and Another v Mookgopong Local Municipality and Others* [2019] JOL 41156 (GP) paras 59-61.

⁷⁴ *Van Staden and Another v Mookgopong Local Municipality and Others* [2019] JOL 41156 (GP) para 60.

⁷⁵ Section 4(2)(i) of the *LGMS: Act* 32 of 2000.

protected from untreated sewage, wastewater, or any other hazardous waste. A safe and healthy environment can guarantee the supply of quality water.

2.3.2 Legal mechanism giving effect to access to sufficient water

The legislature introduced two statutes that regulate access to water in South Africa, namely the *NWA* and *WSA*. The *WSA* provides for the rights to access to basic water supply and basic sanitation.⁷⁶ In light of the preamble of the *WSA*, municipalities are entrusted with the authority to handle or administer water supply and sanitation services to benefit South African citizens.⁷⁷ Importantly, the preamble of the *WSA* further requires national and provincial governments to observe and support the performance of local government concerning the provision of municipal services, leading to sustainable access to sufficient clean water and sanitation services.⁷⁸ Section 84(1)(b) of the *LGMS: Act* 117 of 1998 encapsulates the statutory duty of a district municipality with respect to a potable water supply system. This duty is a mirror of Part B of Schedule 4 of the Constitution.⁷⁹

The national government acting through Minister of Water and Sanitation, is entrusted the responsibility of public trustee in respect of the nation's water resources in terms of section 3(1) of the *NWA*. In addition, section 3(1) of the *WSA* further provides that everyone has the right to basic water supply and basic sanitation. As such, the Minister must ensure that water is protected, used, developed, conserved, managed and controlled sustainably. In line with this emphasis, section 62(1)(a) of the *WSA* states that the Minister and any relevant province must monitor the performance of every water service institution for compliance with the national standards prescribed in terms of the Act. Van der Schyff and Viljoen⁸⁰ describe 'public trusteeship' as "the State's duty to act as a custodian or public trustee of water to the benefit of the public as a whole". The fundamental duty of the national government in this respect is to ensure that there is

⁷⁶ Preamble of the *WSA*.

⁷⁷ *DWS National Water and Sanitation Master Plan*, 2018 19. The Master Plan further provides that everyone living in South Africa has a constitutional right to access to basic water supply and basic sanitation services.

⁷⁸ *DWS National Water and Sanitation Master Plan*, 2018 19; sections 62 and 63 of the *WSA*

⁷⁹ *Bon Vista and Another v Mookgopong Local Municipality and Others* [2019] JOL 41156 (GP) para 61.

⁸⁰ Van der Schyff and Viljoen 2008 *Journal for Transdisciplinary Research in Southern Africa* 340.

equitable access to clean water, not just access to water. Van der Schyff and Viljoen⁸¹ submit further that the “*NWA* is based on the principle that water as a natural resource belongs to all people”. In light of this submission, section 3(2) of the *NWA* expressly implants the responsibility on the Minister of Water and Sanitation to ensure that sufficient water is provided and distributed equitably to the people.

Section 4 of the *NWA* allows South African citizens to have adequate and equitable access to water. The quality of this water must conform to the prescribed national standards as required by section 9 of the WSA and Regulation 5.⁸² In terms of section 11(1) of the *WSA*, municipalities as water services authorities have a statutory duty to progressively ensure sustainable access to clean water.⁸³ This statutory provision reflects the constitutional provision of section 27(1)(b) of the Constitution.⁸⁴ Therefore, it is evident that all spheres of government are required to participate in realising sustainable access to clean water and sanitation services. The right to sustainable access to clean water and sanitation services ought to be respected, protected, promoted, and fulfilled by all spheres of government.⁸⁵

The nexus between water and the environment is inevitable. The definition of environment in section 1 of *NEMA* therefore incorporates ‘water’. To ensure South African citizens have adequate access to sustainable clean water, the environment must be protected from all potential hazardous harm or pollution.⁸⁶ The reason for this is to safeguard the inherent constitutional human rights envisaged in section 10 of the *Constitution*.⁸⁷ Failure to supply clean water impairs the enjoyment of this constitutional right. The *National Water Resource Strategy* (NWRS) by the then Department of Water Affairs in its 2013 edition aptly indicates that:

⁸¹ Van der Schyff and Viljoen 2008 *Journal for Transdisciplinary Research in Southern Africa* 340.

⁸² See Regulation 5 in GN 509 of GG 22355 of 8 June 2001.

⁸³ Qumbu 2021 *PER/PELJ* 7-8.

⁸⁴ Qumbu 2021 *PER/PELJ* 7-8.

⁸⁵ Feris “Environmental Rights Protected in the Constitution” 9.

⁸⁶ See section 24(a) of the Constitution; section 19(1)(b) and (2) of the *NWA*.

⁸⁷ See *National Sanitation Policy*, 1996 3; see also section 7(2) of the Constitution.

Given constraints and demands which reduce supply, such as pollution, inefficient water management practices, lack of infrastructure maintenance, unaccounted for water and poor governance.⁸⁸

As such, there is a need to prioritise infrastructural development to secure the preservation of water quality. The benefit of such prioritisation is to have a sound long-term sustainability plan that will address the total life-cycle operating and maintenance requirements.⁸⁹

The underlying reason for this effort is to curb the trend of untreated effluent,⁹⁰ sewage spillage, and hazardous waste discharged directly into watercourses, affecting water quality. Moreover, sewage and wastewater treatment infrastructure must be maintained regularly so as not to interfere with the supply of clean water.⁹¹ Any deficiency on the part of the Minister of Water and Sanitation or the local government to adequately address these issues will regrettably result in water pollution. Under such circumstances, the effort to realise sufficient access to clean water would diminish and remain unmeritorious. This outcome may potentially deprive citizens of their constitutional right to have access to sufficient water as purported by section 27(1)(b) of the Constitution.⁹²

These rights, read in conjunction with Part B of Schedule 4 of the Constitution, require local government to enable the people of South African communities to access clean water using its resources. To ensure access to sustainable clean water, the preamble of the *Critical Infrastructure Protection Bill* of 2017, *inter alia*, stipulates that there is a need to enhance cooperation between the three spheres of government and the private sector to protect critical infrastructure. It is evident that infrastructure plays a critical role in the preservation of the quality of water to the effect of ensuring access to clean water.⁹³

⁸⁸ National Water Resource Strategy, 2013.

⁸⁹ National Sanitation Policy, 1996 8.

⁹⁰ See Regulation 9 in GN 509 of GG 22355 of 8 June 2001. In terms of this regulation, a water service institution is obliged to accept only the quality and quantity of industrial effluent or any other substance into a sewage system that the sewage treatment plant linked to that system is capable of purifying or treating to ensure that any discharge to a water resource is in compliance with any standard prescribed under the *National Water Act*.

⁹¹ See Regulation 9 GN 509 of GG 22355 of 8 June 2001.

⁹² Section 27(1)(b) of the Constitution.

⁹³ See Steyn *The Realisation of the Constitutional Water Right in South African Cities* 159-160.

The purpose of cooperation is to preserve the quality of water and ensure that South African citizens have sustainable access to clean water. This is a core function of local government under the constitutional dispensation.⁹⁴ Therefore, any contrary practice by local government would deprive South African citizens of their constitutional right to access and enjoy sustainable clean water. For local government to effectively and efficiently realise this constitutional right, there must be proper wastewater management as required by Part B of Schedule 4 of the Constitution. This shall contribute immensely to preserving the quality of water and providing good quality water for consumption.⁹⁵ It requires the effective performance of local government duties. This concept is discussed below.

2.3.3 Local government duties and powers to provide municipal services that ensure potable water and sanitation services

In terms of section 156(1)(a) of the Constitution, it is the duty of local government to deliver water and sanitation services⁹⁶ and through its executive power.⁹⁷ The provision of these municipal services is also expressed in section 4(2)(d) of the *LGMS: Act* 32 of 2000, read with section 73 of the *LGMS: Act* 117 of 1998. Moreover, in terms of section 156(5) of the Constitution, local government is bound to effectively perform conferred constitutional functions and exercise bestowed constitutional powers in the interest of the people of South Africa.⁹⁸ The preamble of the *WSA* further provides that proper water supply and basic sanitation are pivotal to ensuring access to clean water.⁹⁹ Section 84(1)(b) of the *LGMS: Act* 117 of 1998 further proffers that the district municipality has a duty to offer a potable water supply. This municipal duty, in terms of section 84(1)(d) of the *LGMS: Act* 117 of 1998, extends to domestic wastewater and sewage disposal systems. Ensuring access to safe and drinkable water require proper infrastructure.

⁹⁴ Section 156(1)(b) and Part B of Schedule 4 of the Constitution.

⁹⁵ See du Plessis 2022 *One Earth* 129.

⁹⁶ See Preamble of the *WSA*.

⁹⁷ See section 151(2) of the Constitution. This section expressly establishes that the executive and legislative authority of Municipalities vest in the Municipal Council.

⁹⁸ Part B Schedule 4 of the Constitution; see also Chapter 7 of the Constitution.

⁹⁹ Moyo *Steps Towards Addressing Municipalities' Non-Compliance with the Law Relating to Sewage Treatment* 6.

Sewage spills and dysfunctional wastewater treatment infrastructure contribute adversely to environmental degradation and water resources.¹⁰⁰ They pose immense risks to water resources, environment and public health.¹⁰¹ It is important to take into cognisance the provisions of section 152(1)(d) of the Constitution, which requires local government to promote a safe and healthy environment. Section 4(2)(i) of the *LGMS: Act 32* of 2000 buttresses this constitutional provision on the promotion of a safe and healthy environment. Importantly, the 152(1)(d) constitutional provision gives effect to sections 24(a) and (b) of the Constitution, which require municipalities to make an effort to prevent adverse pollution of the environment where natural resources are derived. Furthermore, these adverse effects damage the enshrined constitutional right to dignity afforded South African citizens,¹⁰² and also jeopardise the chances of South African people in various communities to have sustainable access to clean water. Supplying South African communities with contaminated water and permitting them to live in an environment full of sewage spills, violates their rights to dignity.¹⁰³

Moreover, these instances deprive South African citizens of their right to access to sufficient, clean water. These circumstances arise from local governments' failure to comply, fulfil, and execute the prescribed constitutional mandate and obligation.¹⁰⁴ In the context of water, a crucial mandate implanted on local government relates to preventing the pollution of freshwater.¹⁰⁵ This can happen by preventing untreated sewage and wastewater from flowing directly into the rivers and lakes. This is a major crisis that deprives South African citizens of their constitutional right to enjoy a dignified life and have sustainable access to clean water that is not harmful to human health and well-being.¹⁰⁶

¹⁰⁰ Green Drop Department of Public Works 2022 ii.

¹⁰¹ Green Drop Department of Public Works 2022 ii.

¹⁰² Section 10 of the Constitution. This section provides that everyone has the right to have their dignity respected and protected.

¹⁰³ See section 152(1)(d) of the Constitution. This section strongly imposes a duty on local government to promote a safe and healthy environment. This study argues that the purpose of doing this is to lead to the realisation of sustainable access to clean water.

¹⁰⁴ Sections 152(1)(b), 156(1)(a) and Part B of Schedule 4 of the Constitution.

¹⁰⁵ Section 19 of the *NWA*. This section caters for the prevention of pollution or spreading of pollution.

¹⁰⁶ South African Human Rights Commission Report on sewage pollution 2021 5.19.

The preamble of the *LGMS: Act 117* of 1998 requires local governments to fulfil their constitutional obligations. This should happen by ensuring sustainable, effective, and efficient municipal services. Further, municipalities must, in line with the values of the Constitution,¹⁰⁷ encourage a safe and healthy environment by involving communities in curbing or preventing environmental and water pollution. To achieve this, municipalities are required to effectively perform the powers and duties assigned to them by sections 156 and 220 of the Constitution, read together with Part B of Schedule 4 of the Constitution.¹⁰⁸ Section 156(1) of the Constitution requires local government to provide water and sanitation services limited to potable water supply and proper sewage disposal system.

Section 83(3)(b) of the *LGMS: Act 117* of 1998 provides that a municipality must promote bulk infrastructure development and services that would benefit the people of South Africa by ensuring sustainable water supply. Good quality infrastructure contributes fundamentally to the purification or treatment of sewage and wastewater to meet the required national standards.¹⁰⁹ In addition, regular improvement and maintenance of the sewage and wastewater infrastructure are critical for municipalities to ensure equitable access to clean water. Municipalities must build the capacity to perform their functions and exercise their powers optimally to achieve this objective.¹¹⁰

Section 84 of the *LGMS: Act 117* of 1998 deals with the division of functions and powers between district and local municipalities. This section is the mirror of section 156 of the Constitution. Section 84(1)(b) of the *LGMS: Act 117* of 1998 expressly indicates that municipalities have the statutory duty to ensure potable water supply. This provision reflects Part B of Schedule 4 of the Constitution and section 3 of *WSA*. Moreover, section 84(1)(d) of the *LGMS: Act 117* of 1998 places an inevitable duty on local government to ensure that there are proper sewage disposal systems and wastewater infrastructure. An effective effort to adequately address these issues would contribute meaningfully and

¹⁰⁷ Sections 152 and 156(1) of the Constitution.

¹⁰⁸ See section 83(1) of the *LGMS Act 117* of 1998

¹⁰⁹ Regulation 5 of GN 509 in GG 22355 of 8 June 2001.

¹¹⁰ See section 83(3)(c) of the *LGMS: Act 117* of 1998.

significantly to the prevention of water pollution. In addition, it would contribute effectively to the provision of clean water to the citizens of South Africa.

The preamble of the *LGMS: Act 32 of 2000* acknowledges that there is a need to develop a strong local government system capable of effectively and efficiently exercising the functions and powers assigned to it. To ensure sustainable access to clean water, local governments ought to adequately exercise the assigned constitutional and statutory duties and powers in respect of regular maintenance of sewage and wastewater infrastructure to protect water sources from potential sewage.

Section 4 of the *LGMS Act 32 of 2000* establishes rights and duties of the municipal council. This statutory provision reflects the provisions of section 151(2) of the Constitution, which bestow the legislative and executive authority of municipalities in the municipal council. The essence of these provisions, in the context of municipal services, is that the municipal council must perform its functions effectively, particularly regarding supplying South African people with water that meets the required standards.¹¹¹ Therefore, ensuring access to clean water is no exception to the municipal council's functions, duties, and powers as fundamental role players in local government.

Section 4(2)(a) of the *LGMS Act 32 of 2000* places a duty on the municipal council to exercise the municipality's executive and legislative authority to provide municipal services in the best interest of South African communities. Clearly these municipal services also refer to access to sufficient water. This objective requires the involvement of the local community to participate in addressing the local government's affairs.¹¹² The involvement of local communities should be considered to ensure that they are consulted about the level, quality, and impact of the municipal services that are provided by municipalities.¹¹³ Furthermore, section 4(2)(i) of the *LGMS Act 32 of 2000* requires local government to promote a safe and healthy environment. The essence of this obligation is to ensure there is no sewage overflow to water sources. Therefore, when providing quality basic municipal services, including upgrading and maintaining sewage and

¹¹¹ See also section 152(1)(a) and (b) of the Constitution.

¹¹² Section 4(2)(c) of the *LGMS: Act 32 of 2000*.

¹¹³ Section 4(2)(e)(i) of the *LGMS: Act 32 of 2000*.

wastewater infrastructure to realise access to clean water, municipalities must do so by bearing in mind public health and the human rights to dignity and integrity.

2.4 Interpreting the right to have access to sufficient water and sanitation services within the constitutional, NWA and WSA regulatory framework

The right to have access to water is not only recognised by the South African *Constitution*. In fact, two international human rights treaties refer explicitly to water rights. They are the *Convention of the Elimination of All Forms of Discrimination Against Women* of 1979¹¹⁴ and the *Convention on the Rights of the Child* of 1989.¹¹⁵ Therefore, in demonstrating the importance of water rights, section 233 of the Constitution allows international human rights to be considered, including water rights, when interpreting affected human rights.¹¹⁶ In short, these international treaties place the duty on member states, *inter alia*, to protect and promote the right to enjoy adequate living conditions, particularly sanitation and water supply.¹¹⁷

In light of the above emphasis, section 27(1)(b) of the Constitution guarantees everyone the right to access sufficient water.¹¹⁸ Unequivocally, this provision seeks to ensure that all individuals have a constitutional entitlement to adequate water.¹¹⁹ Furthermore, section 27(2) of the Constitution places a duty on the State to take reasonable legislative and other measures to realise the constitutional water right progressively.¹²⁰ Therefore, it is apparent that there is a need for multifaceted responsibility in the government to ensure constant access to clean water.¹²¹ Tsoka J in *Mazibuko and Others v City of Johannesburg and Others* (06/13865) [2008] ZAGPHC 491; [2008] 4 All SA 471 (W) (30

¹¹⁴ Hereinafter referred to as *CEDAW*. This international treaty is not discussed in detail because it does not form part of the main scope of this mini-dissertation.

¹¹⁵ Hereinafter referred to as *CRC*. This international treaty is not discussed in detail because it does not form part of the main scope of this mini-dissertation.

¹¹⁶ See Fuo 2013 *Murdoch University Law Review* 24.

¹¹⁷ Article 14(2)(h) of *CEDAW*.

¹¹⁸ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) 98 October 2009) para 19.

¹¹⁹ *Mazibuko and Others v City of Johannesburg and Others* (06/13865) [2008] ZAGPHC 491; [2008] 4 All SA 471 (W) (30 April 2008) para 41.

¹²⁰ See Stacey 2018 *Law & Social Inquiry* 1.

¹²¹ Feris "Environmental Rights Protected in the Constitution" 4.

April 2008) para 1 (hereinafter *Mazibuko and Others* Case) aptly asserted that “water is life, sanitation is dignity”.¹²²

More importantly, section 3 of the *WSA* explicitly sets out the right to access to basic water supply and sanitation services. In *Mangele v Durban Transitional Metropolitan Council* [2002] 2 All SA 39 (D) P 43 (hereinafter *Mangele* Case), Nle Duner J strongly asserted that the *WSA* was passed to achieve the right embodied in section 27(1)(b) of the Constitution. Interestingly, section 21(1) of the *WSA* unequivocally provides that municipalities as water service authorities must make bylaws setting out specific conditions for the provision of water services. The *WSA* gives direction for the realisation of the right to access water.

The interpretation of the water rights under section 27 of the Constitution has been addressed on several occasions.¹²³ In the judgment in *Residents of Bon Vista Mansion v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) para 27 (hereinafter *Residents of Bon Vista Mansion* Case), the courts emphasised the responsibility of the government, particularly local government, to ensure the realisation of this right.¹²⁴ In an effort to flesh out the right of access to water, the legislature, acting in line with section 27(2) of the *Constitution*, promulgated specific legislation, namely the *NWA* and *WSA*.¹²⁵

Local government is obliged to respect, protect, and promote South African citizens' rights to enjoy sustainable access to clean water as intended by the provisions of section 27(1)(b) of the Constitution. These rights include the right to have access to sufficient water and a clean environment.¹²⁶ This submission does not detract from the fact that the overall management of water resources is a national area of competence.¹²⁷ Practically, the environment must be protected and sustained to realise sustainable access to clean water since water as a natural resource is derived from the

¹²² See Fuo 2013 Murdoch University Law Review 22-23.

¹²³ See *Mazibuko and Others v City of Johannesburg and Others* (06/13865) [2008] ZAGPHC 491; [2008] 4 All SA 471 (W) (30 April 2008) para 31.

¹²⁴ See *Van Staden and Another v Mookgopong Local Municipality and Others* [2019] JOL 41156 (GP) paras 59-64.

¹²⁵ Stacey 2018 *Law & Social Inquiry* 1.

¹²⁶ See sections 24(a) and 27(1)(b) of Constitution.

¹²⁷ See Feris “Environmental Rights Protected in the Constitution” 4.

environment.¹²⁸ The government should monitor, manage, communicate, and regulate drinking water quality to protect public health.¹²⁹

The national DWS has the power to oversee the activities of all role players in the water sector.¹³⁰ This implies that for South African citizens to have adequate access to clean sufficient water, the national DWS must monitor the performance of municipalities in providing water that complies with the national standards.¹³¹ It is worth noting that municipalities have a co-responsibility to give effect to the right to access to sufficient clean water.¹³² Moreover, South African courts have acknowledged the right to sustainable sanitation as a fundamental human right.¹³³

According to Murombo *et al*,¹³⁴ "The right to basic sanitation¹³⁵ is not an explicit constitutional right." The authors further articulate that the right to sanitation is derived from environmental rights read in conjunction with the right to access to clean water.¹³⁶ Further, Part B of Schedule 4 of the Constitution expressly recognises sanitation services as crucial basic services that are functional areas administered by the local government.¹³⁷ Sanitation services of good quality are the epitome of human dignity and public health.¹³⁸ Access to sanitation or basic hygiene services is essential for the realisation of sustainable access to clean water.¹³⁹ These objectives can only be achieved when local government

¹²⁸ Water Supply and Sanitation Policy White Paper, 1994 28.

¹²⁹ See Stacey 2018 *Law & Social Inquiry* 23.

¹³⁰ Section 3(1)-(3) of the *NWA*.

¹³¹ Feris "Environmental Rights Protected in the Constitution" 4-5.

¹³² Feris "Environmental Rights Protected in the Constitution" 5.

¹³³ Feris "Environmental Rights Protected in the Constitution" 5.

¹³⁴ Murombo et al 2009 *LHR Publication Series* 2.

¹³⁵ See section 1 of the *WSA*. This section defines basic sanitation as the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic wastewater and sewage from households, including informal households.

¹³⁶ Murombo et al 2009 *LHR Publication Series* 2.

¹³⁷ The Department of Water Affairs and Forestry *Water Supply and Sanitation Policy White Paper* 1994, 9.

¹³⁸ The Department of Water Affairs and Forestry *Water Supply and Sanitation Policy White Paper* 1994, 6. This white paper goes further to express that water supply and sanitation should be integrated into programmes for the provision of other basic needs.

¹³⁹ See Soyapi 2016 *PER/PELJ* 3.

regularly and adequately maintains water and sewage infrastructure¹⁴⁰ to avoid poor water service delivery.¹⁴¹

To achieve a high standard of sanitation services, the local government must ensure that sewage and wastewater treatment infrastructure are regularly maintained and monitored.¹⁴² It is the local government's progressive responsibility to protect the water and sanitation rights of South African citizens.¹⁴³ Additionally, access basic water supply and sanitation is necessary for the creation of an environment that is not harmful to human health and well-being.¹⁴⁴ The consequences of the local government's failure to fulfil the prescribed constitutional mandate for the provision of effective and efficient sanitation services could be severe punishment for non-compliance with the constitutional mandate.¹⁴⁵

As indicated above, the responsibility of local government is further fleshed out in Chapter 7 of the *Constitution* where functions and powers of local government are embedded and Part B of Schedule 4 of the *Constitution*, which contains areas falling within the jurisdiction of local government. A discussion on the protection of the environment is provided hereunder.

2.4.1 Interpreting section 24 of the Constitution

Section 24(a) of the Constitution¹⁴⁶ provides that everyone has the right to an environment that is not harmful to their health or well-being. Water is a natural resource that is found in the environment. A supply of clean water means that the environment must be protected from any form of pollution, specifically raw sewage. The discussion of section 24 of the Constitution is important for this reason. Section 24(b) of the

¹⁴⁰ Stacey 2018 *Law & Social Inquiry* 23.

¹⁴¹ The Department of Water Affairs and Forestry *Water Supply and Sanitation Policy White Paper* 1994, 9.

¹⁴² The Department of Water and Sanitation *National Water and Sanitation Master Plan*, 2018 2. According to the Department, these impacts will be exacerbated if they are not adequately addressed. It further recorded that in April 2017, 14.1 million people had used sanitation facilities that were below the RDP standard.

¹⁴³ The Department of Water Affairs and Forestry *Water Supply and Sanitation Policy White Paper* 1994, 19-22.

¹⁴⁴ Du Plessis 2018 *SAJHR* 2-18.

¹⁴⁵ Twani and Soyapi 2022 *SAJHR* 99-100.

¹⁴⁶ Section 24(a) of the Constitution.

Constitution requires environmental rights to be protected for the benefit of present and future generations through legislative and other measures. Du Plessis¹⁴⁷ argues that there is a meaningful nexus between the environment, health and well-being that resides in section 24(a) of the Constitution. The quality of the environment has a huge impact on the quality of water, human health and well-being.¹⁴⁸ Therefore, a clean environment would protect the quality of water, human health and well-being from hazardous waste. It may also contribute significantly to the quality of water supplied by water service authorities.¹⁴⁹

According to du Plessis,¹⁵⁰ human health and well-being depend on the quality of the environment. The author argues further that four environmental principles are central to protecting human health and well-being from adverse effects in the environment. The said environmental principles include the principle of precaution, prevention, polluter-pays, and rectification of damage at the source.¹⁵¹ The judgment of *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products* 2004 (2) SA 393 (E) confirms that pollution results in the infringement of the right to access to clean water, well-being and is a threat to human health.

Therefore, protecting environmental integrity may contribute positively to human well-being and the right to dignity¹⁵² and clean water. Moreover, an environment that is safe from pollution tends to offer water resources that are safe from hazardous pollution. In light of this, it is important to note that the environment is a functional area of the provincial and national government with concurrent legislative competence.¹⁵³ But, in terms of section 152(1)(d) of the Constitution, local government is mandated to promote a safe and healthy environment. It is therefore the responsibility of local government.

¹⁴⁷ Du Plessis 2018 *SAJHR* 3.

¹⁴⁸ Du Plessis 2018 *SAJHR* 7.

¹⁴⁹ Bega 2021 <http://mg.co.za/the-green-guardian/2021-02-17-why-we-need-the-blue-and-green-drop-reports>.

¹⁵⁰ Du Plessis 2018 *SAJHR* 3.

¹⁵¹ Du Plessis 2018 *SAJHR* 7.

¹⁵² Du Plessis 2018 *SAJHR* 9.

¹⁵³ Part A of Schedule 4 of the Constitution.

The right to a clean environment is a constitutional right that requires adequate protection.

To underpin the above argument, Ngcuka submits that:

Municipalities that do not address pollution of their water systems, or have not put in place plans to sort out the pollution, have been criminally charged by the Department of Water and Sanitation for breaching the National Water Act.¹⁵⁴

This is a mandate the *Constitution* requires local government to exercise in the best interest of local communities.¹⁵⁵ Therefore, it is apparent that local government is the best-positioned sphere of government to deliver services to local communities. In combatting water and environmental pollution, in terms of section 156(1)(b) of the Constitution, the local government must be firm in prioritising that responsibility. This is the only way to meaningfully prevent untreated wastewater and sewage from flowing directly into water resources.¹⁵⁶

It is important to note that there is a nexus between sections 24 and 27 of the Constitution that can best be described as 'the environment and water' Bill of Rights found in Chapter 2 of the Constitution. Section 27 of the Constitution makes a provision for access to sufficient water and section 24 caters for the right to an environment that is protected from pollution. The section 24 of the Constitution rights play a pivotal role in the realisation of section 27 rights.¹⁵⁷ With this in mind, it is argued that untreated sewage spillages and wastewater result in environmental degradation and continue to threaten the quality of water resources.¹⁵⁸ It follows that to realise access to clean and sufficient water, the environment must be saved from pollution.

Local government is required to adequately maintain sewage and wastewater treatment infrastructure to preserve water quality.¹⁵⁹ Part B of Schedule 4 of the Constitution directly

¹⁵⁴ Ngcuka 2023 <https://dailymaverick.co.za/articles/2023-07-11-department-lays-criminal-charges-against-municipalities>.

¹⁵⁵ Section 152(1)(b) of the Constitution; see also du Plessis and Fuo 2024 *SAJS* 3.

¹⁵⁶ Du Plessis 2022 *One Earth* 129.

¹⁵⁷ Section 24(A) of the *Constitution*; see also Murombo and Poole 2009 *LHR Publication Series* 2.

¹⁵⁸ Moyo *Steps Towards Addressing Municipalities' Non-Compliance with the Law Relating to Sewage Treatment* 4.

¹⁵⁹ *Green Drop* Department of Public Works 2022. In this report, the DWS reported that 850 wastewater treatment plants were tested and 334 were in a critical state.

requires the local government to effectively and efficiently administer sewage disposal systems to avoid sewage leakages that would lead to the pollution of the environment. Environmental pollution would lead to the contamination of water resources.

Water and environmental pollution are frequently caused by an overflow of untreated sewage, among others.¹⁶⁰ The danger of poor sewage and wastewater infrastructure maintenance is that untreated sewage or wastewater ends up flowing directly into water resources to contaminate fresh water.¹⁶¹ Part 4 of the *NWA* provides that the person who owns, occupies or controls the land, including a municipality, is responsible for ensuring that there are measures in place that can be used to prevent pollution of water resources.¹⁶² In terms of Regulation 6(1)(b) of the regulations relating to compulsory national standards and measures to conserve water,¹⁶³ as water services institutions, municipalities must ensure that harmful substances are not discharged directly into the watercourse.¹⁶⁴

The *Water Supply and Sanitation Policy White Paper* provides that all effluents, including sewage, must be purified before being discharged into rivers.¹⁶⁵ Du Plessis¹⁶⁶ in 2022 reported that 44% of generated wastewater was deposited into water bodies either completely or partially untreated. Kidd¹⁶⁷ further articulates that the underlying problem in these instances is not scientific or technical, but poor governance, political will, lack of financial investment in upgrading infrastructure, and lack of technical skills. Therefore, sewage and wastewater management, which seems to be a major problem,¹⁶⁸ ought to be a priority of local government in order to prevent the pollution of water resources and protect public health.¹⁶⁹

¹⁶⁰ Moyo *Steps Towards Addressing Municipalities' Non-Compliance with the Law Relating to Sewage Treatment* 3-10.

¹⁶¹ See Moyo *Steps Towards Addressing Municipalities' Non-Compliance with the Law Relating to Sewage Treatment* 1.

¹⁶² See section 19 of the *NWA*.

¹⁶³ GN 509 in GG 22355 of 8 June 2001.

¹⁶⁴ Moyo *Steps Towards Addressing Municipalities' Non-Compliance with the Law Relating to Sewage Treatment* 4.

¹⁶⁵ Water Supply and Sanitation Policy White Paper, 1994 30-31.

¹⁶⁶ Du Plessis 2022 *One Earth* 129.

¹⁶⁷ Kidd 2023 <https://www.dailymaverick.co.za/opinionista/2023-07-17-litigation>.

¹⁶⁸ See Akpor and Muchie 2011 *Biotechnol* 2380-2386.

¹⁶⁹ Kidd 2023 <https://www.dailymaverick.co.za/opinionista/2023-07-17-litigation>.

2.5 Holding Municipal Councils Accountable

Section 157 of the Constitution¹⁷⁰ defines a municipal council as elected members. These elected members have the responsibility to perform the general duties set out under section 73 of the *LGMS: Act 32 of 2000*. The provisions of section 4(2)(a) of the *LGMS: Act 32 of 2000* require the municipal council to exercise the conferred executive authority in performing local government affairs within its financial and administrative capacity.¹⁷¹ In essence, it entails using the resources of the municipality in the best interests of South African communities.¹⁷² This can contribute meaningfully to the realisation of sustainable and equitable water. Untreated sewage flowing directly into the watercourse affects the quality of water and renders such water unsuitable for human consumption.¹⁷³ Attention must be given to section 84(1)(d) of the *LGMS: Act 117 of 1998*, which gives effect to domestic wastewater and sewage disposal systems. Sewage and wastewater infrastructure has a bearing on the quality of water that is distributed to the people.

The above submission is contrary to the provisions of section 4(2)(d); (f) and (i) of *LGMS: Act 32 of 2000*. Section 4(2)(d) of the *LGMS: Act 32 of 2000* provides that Council of the municipality has the duty to ensure the provision of municipal services to the local communities. Section 4(2)(f) of the *LGMS: Act 32 of 2000* requires municipalities to give members of the local community equitable access to the municipal services. The affected community members of any municipality can, among other things, invoke section 4(2)(b) of the *LGMS: Act 32 of 2000* to hold accountable municipalities that fail to perform their constitutional mandate effectively.¹⁷⁴ Among other things, the justifiable ground for such accountability would be that such municipalities are acting contrary to the international pronouncement as the UN pointed out that “governments must take a human rights-based approach to water and sanitation improvements to ensure no one gets left behind.”

¹⁷⁰ Section 157 of the Constitution.

¹⁷¹ Karsten *Local Government Accountability in South Africa: An Environmental Law Reading* 100-101.

¹⁷² See section 156(1) of the *Constitution*; see also *White Paper* 2.4 -2.5.

¹⁷³ See the South African Human Rights Commission Report, 2019 5; see also *Minister of Water and Sanitation v Msukwalgwa Local Municipality and Others* (unreported Judgment: case no 4860/2022).

¹⁷⁴ Section 4(2)(b) of the *LGMS: Act 32 of 2000* provides that the Council of the municipality has the duty to provide, without favour, prejudice, democratic and accountable government.

Koma¹⁷⁵ aptly points out that local government is a sphere of government that is well-placed to respond positively to the needs, interests and expectations of local communities.¹⁷⁶ Therefore, local government practices that are contrary to the duties and responsibilities provided under Chapter 7 of the Constitution ought to attract legal accountability for such non-compliance. Such non-compliance is contrary to the prescribed constitutional obligation. In such circumstances, local government ought to be held legally accountable to offer a remedy to affected members of communities for breaching the prescribed constitutional duties¹⁷⁷ and falling short of adequately providing the required standards of municipal services.¹⁷⁸

Legal accountability will generally flow from a breach of the obligation that is imposed on the municipal council.¹⁷⁹ This submission is underpinned by the provisions of section 151(2) of the Constitution, which expressly confer the executive authority of a municipality on the municipal council. The municipal council exercises oversight over the operations of municipal affairs. This authority must be exercised effectively to the extent that the actions of local government are buttressed by firm coordination and supervision of other spheres of government.¹⁸⁰ In doing so, a concerted effort is generally required to improve the state of sewage and wastewater infrastructure to prevent sewage pollution. These efforts should fall within the spectrum of basic services.¹⁸¹

In section 4(2)(d) of the *LGMS: Act 32 of 2000*, the municipal council is legislatively bound to ensure that municipal services are adequately and sustainably provided to South African communities.¹⁸² Section 4(2)(f) of the *LGMS: Act 32 of 2000* reaffirms the position by providing that a municipality, through the municipal council, must give members of the local community equitable access to dignified municipal services. This must happen in a financially and environmentally sustainable manner.¹⁸³ The purpose of so doing is to

¹⁷⁵ Koma 2010 *Journal of Public Administration* 113.

¹⁷⁶ See section 4(2)(f) of the *LGMS Act 32 of 2000*.

¹⁷⁷ Section 152(1)(a) of the Constitution; see also Ngcobo 2023 *PER/PELJ* 10-12.

¹⁷⁸ See Du Plessis and Fuo 2024 *SAJS* 14.

¹⁷⁹ See section 4(1)(a) of the *LGMS Act 32 of 2000*.

¹⁸⁰ Sections 154(1) and 156(1)(a) and (4) of the Constitution.

¹⁸¹ National Development Plan, 2011 153-157.

¹⁸² See section 4(2)(f) of the *LGMS Act 32 of 2000*.

¹⁸³ Section 4(2)(i) of the *LGMS Act 32 of 2000*.

fulfil the objectives of section 152(1)(b) of the Constitution, which requires local government to ensure that services are adequately and sustainably provided to local communities.¹⁸⁴ Municipalities must encourage communities to participate¹⁸⁵ in the processes of improving the quality of municipal services by ascertaining the quality municipal services.¹⁸⁶

These are critical issues that deserve to be adequately addressed by the municipal executive council in a manner that benefits local communities.¹⁸⁷ The municipal executive council must encourage the municipal manager to ensure that critical municipal services are provided to local communities. This can happen by way of deploying competent municipal officials, having sufficient and sustainable finance, and political will to perform municipal duties effectively.¹⁸⁸ In support of this submission, Ngcobo¹⁸⁹ correctly points out that the “political structures of municipalities are the highest governing authorities in municipalities”.

2.6 Concluding Remarks

The objective of this chapter was to give a detailed outline of the legal framework governing water and sanitation in South Africa. Achieving this objective starts with first outlining the constitutional right to access to sufficient water and a healthy environment in terms of sections 27(1)(b) and 24 of the *Constitution*. This chapter argued that there is a need for a concerted effort from all three spheres of government to collectively strive to ensure that South African people have access to clean water. To realise this, the national government through the Minister of Water and Sanitation is the public trustee of the nation’s water resources in terms of section 3(1) of the *NWA*. As a result, the Minister must ensure that water is protected, used, developed, conserved, managed, and controlled sustainably. Although this is the position, local government forms the delivery arm of government. It must be steered from the centre to achieve defined outcomes.

¹⁸⁴ Du Plessis and Nel “An Introduction” 37.

¹⁸⁵ Du Plessis and Nel “An Introduction” 37.

¹⁸⁶ Section 4(2)(e)(i) of the *LGMS: Act* 32 of 2000.

¹⁸⁷ Du Plessis and Nel “An Introduction” 37; see also Ngcobo 2023 *PER/PELJ* 3.

¹⁸⁸ Feris “Environmental Rights Protected in the Constitution” 4-5; see also Du Plessis and Nel “An Introduction” 37.

¹⁸⁹ Ngcobo 2023 *PER/PELJ* 3.

Section 156(1)(b) of the Constitution binds local government to effectively perform functional areas encapsulated in Part B of Schedule 4 of the Constitution.

In terms of section 156(1)(a) of the Constitution, municipalities must deliver water and sanitation services using its executive power. To realise sustainable access to clean water, local government must regularly maintain sewage and wastewater treatment infrastructure. The essence of so doing is to combat the discharge of untreated sewage, which ultimately flows into water resources and contaminates the quality of water. This will help enormously to prevent sewage pollution as required by section 19 of the *NWA*. This chapter further argued that cooperative governance plays a pivotal role in ensuring effective water resource management by national government so that municipalities as the water services authority can provide potable water to the citizens of South Africa. These objectives can materialise when sewage disposal systems are effectively managed and maintained to prevent the overflow of untreated sewage into water sources to preserve water quality and prevent environmental degradation.

Chapter 3: Case Studies on Local Government Failures in Maintaining Sewage and Wastewater Treatment Infrastructure for Sustainable Access to Sufficient Water

3.1 Introduction

This chapter follows on the legal examination of the regulatory framework that ensures access to sufficient water, and the government duties and cooperative governance discussed in the previous chapter. It focuses on practical case studies that illustrate the challenges local governments face in managing sewage pollution and ensuring sustainable access to clean water and effective sanitation services. Through the lens of case studies, this chapter highlights the severe consequences of untreated sewage, which often results from local governments' failure to regularly maintain and upgrade sewage and wastewater treatment infrastructure.

These case studies demonstrate how inadequate infrastructure and mismanagement undermine efforts to ensure the realisation of the constitutional right to clean water and sanitation. Inadequate infrastructure and mismanagement exacerbate the water crisis and threaten South African communities' health and well-being. The findings of this chapter will provide insight into the systemic issues that prevent local governments from fulfilling their obligations.

Chapter 3 argues further that local government is responsible for fulfilling the constitutional and legislative mandate to improve, upgrade or maintain sewage and wastewater treatment infrastructure to prevent water and environmental pollution. Therefore, sufficient access to clean water and sustainable care of sewage infrastructure falls squarely within the ambit of the service delivery that is a core function of local government with the support of national and provincial governments. The chapter investigates the above by way of analysis of the Kgetlengrivier Local Municipality in the North-West, the Emfuleni Local Municipality, and the City of Tshwane Metropolitan Municipality in Gauteng as case studies. The chapter illustrates the impact of the failure of these three municipalities to control sewage spills by regularly maintaining and upgrading sewage disposal systems and wastewater treatment infrastructure to preserve the quality of water and ensure consistent access to clean water.

The discussions start with a description of the state of affairs in the Kgetlengrivier Local Municipality in the North West, followed by the Emfuleni Local Municipality and the City of Tshwane Metropolitan Municipality in Gauteng.

3.2 Sewage pollution and the challenges of wastewater treatment infrastructure in the Kgetlengrivier Local Municipality

Several towns in the Kgetlengrivier Local Municipality have suffered from severe sewage pollution, among others Koster and Swartruggens. Sewage spills cause sewage pollution. These spills occur when wastewater is transported by underground pipes and there is an overflow of sewage from manholes or seepage through broken pipes directly into the environment. As part of service delivery,¹⁹⁰ local government has the constitutional mandate to ensure that sewage and wastewater systems function properly.¹⁹¹ The purpose of so doing is to prevent the overflow of untreated sewage directly into rivers, dams, lakes and the environment.

It is important to prevent such overflow to ensure that water quality is not affected and the municipality can provide people with safe drinking water. Both Koster and Swartruggens encountered problems dysfunctional water treatment infrastructure and controlling sewage spills due to poor infrastructure.¹⁹² This was the result of the poor performance of the municipal manager and the municipal administration.¹⁹³ These persons play key roles in the performance of municipal services. They are constitutionally required to fulfil the prescribed constitutional mandate entrenched in Chapter 7 and Part B of Schedule 4 of the Constitution regarding the provision of potable water. Moreover, these role players have the responsibility to maintain and monitor sewage disposal systems¹⁹⁴ in order to realise the right to sufficient water.

¹⁹⁰ See *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 1.

¹⁹¹ Graham and Taylor 2024 <https://theconversation.com/sewage-leaks-put-south-africas-freshwater-at-risk>.

¹⁹² Kretzmann 2022 <https://ccij.io/article/taking-matters-into-their-own-hands/>.

¹⁹³ Kretzmann 2022 <https://ccij.io/article/taking-matters-into-their-own-hands/>.

¹⁹⁴ *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) paras 36-38.

The affected and concerned parties from the Kgetlengrivier Local Municipality first approached the Magistrate's Court for an order granting them access to the municipal water treatment works.¹⁹⁵ Put differently, the court granted the affected persons access to the municipal water treatment works to restore the water supply.¹⁹⁶ This demonstrates that issues surrounding the sustainable supply of clean water by South African municipalities, remain a challenge.¹⁹⁷ The residents of the Kgetlengrivier Local Municipality are deprived of their constitutional right to have access to sufficient clean water and an environment that is free from harm as provided by the provisions of section 27(1)(b), section 24 of the Constitution read with section 3 of the *WSA*, and section 4 of the *NWA*.¹⁹⁸ Furthermore, the discharge of untreated sewage into the rivers and the environment violates the constitutional environmental rights of the people of Kgetlengrivier Local Municipality contained in section 4(2)(i) of the *LGMS Act* 32 of 2000; section 24 of the Constitution,¹⁹⁹ and it is also contrary to the provisions of section 152(1)(d) of the Constitution.

For the Kgetlengrivier Local Municipality to ensure sustainable clean water and preserve a clean environment, qualified engineers must be appointed to monitor sewage and wastewater treatment infrastructure and to maintain it regularly.²⁰⁰ During or around 2020, affected persons from the Kgetlengrivier Local Municipality approached the North West High Court²⁰¹ on an urgent basis for the order permitting them to take over the municipal water treatment works and sewage works.²⁰² The purpose of this request was

¹⁹⁵ Kretzmann 2022 <https://ccij.io/article/taking-matters-into-their-own-hands/>.

¹⁹⁶ Kretzmann 2022 <https://ccij.io/article/taking-matters-into-their-own-hands/>.

¹⁹⁷ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 1.

¹⁹⁸ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 5.

¹⁹⁹ See *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) para 31.

²⁰⁰ South African Human Rights Commission Report 2019 7-8.

²⁰¹ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023).

²⁰² Kretzmann 2022 <https://ccij.io/article/taking-matters-into-their-own-hands/>; *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 9 - 10.

to restore the water supply and upgrade the sewage infrastructure to minimise environmental degradation and water pollution. The affected persons insisted on fixing all the dysfunctional infrastructure by themselves because the Kgetlengrivier Local Municipality has failed to do so for many years. The residents of the Kgetlengrivier Local Municipality deserve to live in a humane, healthy, and clean environment free from sewage spills and to be provided with sustainable clean water.²⁰³ Municipalities that fail to fulfil this mandate should be held legally accountable on a strict and consistent basis.

3.2.1 Developments in the North West High Court

In *Kgetlengrivier* case para 10, the court soundly pointed out that:

The impunity with which no service delivery occurs coupled with the impunity of non-compliance with court order, cannot be condoned and must be condemned in the strongest possible terms. The time has undoubtedly come in my view, that those who fail to honour their constitutional mandate in serving the people, must be dealt with decisively. This court must never lose sight that in seeking to bring to account offending behaviour which flouts constitutional mandates, same must be done within the confines of the law by following due process which accords with the letter of the law.²⁰⁴

On 18 December 2020 under case number UM 271/2020, an order was granted against the Kgetlengrivier Local Municipality and the municipal manager for failing to comply with the constitutional obligation. The municipal manager was sentenced to 90 days imprisonment, which was suspended on condition that he and the Kgetlengrivier Local Municipality take reasonable steps to ensure that raw sewage is not discharged into the river and environment of Koster and Swartruggens within 10 (ten) weeks of the granting of the order.²⁰⁵ Furthermore, the Kgetlengrivier Local Municipality and municipal manager

²⁰³ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 7.

²⁰⁴ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 10.

²⁰⁵ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 16.

were ordered to take remedial steps to stop the cause of sewage pollution, fix the cause of sewage spills, and rehabilitate the affected areas.²⁰⁶

This court judgment confirms that the affected residents of various South African communities are entitled to be supplied with sufficient clean water and must live in a clean environment free from sewage spillages.²⁰⁷ In support of this emphasis, section 151(1) (i) of the *NWA* provides that no person may unlawfully and intentionally or negligently commit any act or omission that pollutes or is likely to pollute water resources. In accordance with the provisions of section 139(1) of the Constitution read with section 62 of *WSA*, the provincial government is required to intervene in circumstances where municipalities are unable to perform the prescribed constitutional mandate of effectively performing municipal services and ensuring the right to access sustainable clean water.

3.3 Effects of Sewage Pollution and Dysfunctional Wastewater Treatment Infrastructure in Emfuleni Local Municipality

In 2021, the South African Human Rights Commission conducted an investigation into the discharge of raw sewage that resulted in the pollution of the Vaal River²⁰⁸ in the Emfuleni Local Municipality.²⁰⁹ The report indicates that raw sewage flowing into water bodies amounts to a contamination of water resources.²¹⁰ The report estimated that approximately 19 million people depend on the Vaal River for drinking water, and domestic and commercial use.²¹¹ The presence of sewage made it apparent that the Emfuleni Local Municipality failed to provide quality sustainable services to local communities in line with the provisions of sections 152(1)(b), 24(b)(i) of the Constitution read with sections 4(2)(d) and 73 of *LGMS: Act 32 of 2000*. The Emfuleni Local Municipality failed to execute its constitutional mandate to prevent pollution and

²⁰⁶ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 16.

²⁰⁷ See *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 7.

²⁰⁸ South African Human Rights Commission Report 2021.

²⁰⁹ South African Human Rights Commission Report 2021.

²¹⁰ South African Human Rights Commission Report 2021 63.

²¹¹ South African Human Rights Commission Report 2021 2.

ecological degradation through reasonable legislative and other measures.²¹² The uncontrollable overflow of raw sewage deprives the residents of Emfuleni Local Municipality of their constitutional right to access to sufficient clean water under the provisions of section 27(1)(b) of the Constitution and threatens the health and well-being of the residents.²¹³

The Emfuleni Local Municipality failed to fulfil the prescribed constitutional mandate contained in section 152(1)(d) of the Constitution and sections 4 and 73 of *LGMS: Act 32* of 2000. These statutes require the local government to promote a safe and healthy environment. Basic service delivery attracts accountability in terms of sections 19 of *NWA* addresses issues of prevention and remedying effects of pollution, and 28 of *NEMA* deals with the duty of care and remediation of environmental damage for the aftermath of sewage pollution.²¹⁴ The accountability of municipalities is generally triggered by the fact that untreated sewage pollution affects the natural ecosystem and adversely affects the health and well-being of the residents. This is caused by the municipality's failure to appoint competent people with the necessary skills to provide regular maintenance of sewage and wastewater treatment infrastructure. This is contrary to the provision of section 73 of *LGMS: Act 32* of 2000, which requires municipalities to prioritise the basic needs of South African local communities and ensure that there is access to basic municipal services. These basic needs and municipal services include the provision of potable water and the timeous maintenance and upgrading of sewage and wastewater treatment infrastructure.²¹⁵

3.3.1 Intervention of the National and Provincial Governments

The preamble of the *WSA* unequivocally states that it is the responsibility of all three spheres of government to ensure that the people are supplied with clean water and sanitation services. These services must be provided in a manner that is efficient, equitable and sustainable.²¹⁶ Moreover, although local government has direct interaction

²¹² Section 24(b)(i) of the Constitution.

²¹³ See section 24(a) of the Constitution.

²¹⁴ South African Human Rights Commission Report 2021 3.

²¹⁵ South African Human Rights Commission Report 2021 67-68.

²¹⁶ South African Human Rights Commission Report 2021 71.

with local communities, the national government has custodial powers over the water resources of South Africa. In light of this submission, the Gauteng province or national DWS ought to have intervened in the affairs of Emfuleni Local Municipality in terms of the provisions of section 139 of the Constitution read with sections 62 and 63 of the *WSA*. This could have prevented the discharge of raw sewage, resulting in water pollution, and could have supported the upgrading of wastewater treatment and sewage infrastructure to prevent water pollution.²¹⁷ The national DWS is a water service institution and they should step in when a local municipality fails. The case of the Emfuleni Local Municipality illustrates that the commission of sewage pollution by municipalities should trigger legal accountability as required by the provisions of sections 19 of the *WSA* and 28(1) of *NEMA*.

3.3.2 Findings of the investigation

The Human Rights Commission Report found that raw and untreated sewage has been discharged into the Vaal River.²¹⁸ The dysfunctional wastewater treatment and sewage infrastructure has been unable to effectively treat sewage and wastewater.²¹⁹ In addition, Emfuleni Local Municipality's failure to administer its affairs effectively and to ensure basic services to the residents violates various of the constitutional rights of the residents. Such constitutional rights are the right to dignity, the right to sufficient water, and the right to an environment that is clean. The right to dignity²²⁰ was affected since raw sewage was flowing through residential streets, schools, homes and other public areas.²²¹

Failure to provide basic municipal services violates residents' constitutional rights to freedom and security of the person.²²² The Emfuleni Local Municipality fails to provide basic services to the residents in terms of sections 4; 73 of *LGMS: Act 32 of 2000* read in conjunction with sections 24; 27(1)(b) and 156(1) of the Constitution. Therefore, there was a need for the affected persons from the Emfuleni Local Municipality to invoke the provisions of section 19 of *NWA*, 28 of *NEMA* and 63 of *WSA* to ensure that their

²¹⁷ South African Human Rights Commission Report 2021 74.

²¹⁸ South African Human Rights Commission Report 2021 95.

²¹⁹ South African Human Rights Commission Report 2021 95.

²²⁰ Section 10 of the Constitution.

²²¹ South African Human Rights Commission Report 2021 95.

²²² Section 12(1)(e) of the Constitution.

constitutional rights to have access to sufficient clean water and the enjoyment of unpolluted environment would be promoted, protected and respected as required by the provision of section 152(1)(b) and (d) and section 7(2) of the Constitution. They could also invoke the aforementioned sections to claim constitutional damages as a result of the impact of sewage pollution on the health and well-being of affected residents.

3.4 The Effects of Sewage Pollution and Dysfunctional Wastewater Treatment Infrastructure in the City of Tshwane Metropolitan Municipality

On 24 February 2021, the South African Human Rights Commission investigated the state of the City of Tshwane Metropolitan Municipality's wastewater treatment infrastructure. The investigation was triggered by the complaints lodged by the residents of the City of Tshwane Metropolitan Municipality regarding the malfunctioning of the wastewater treatment infrastructure.²²³ As a result of the malfunctioning, untreated sewage was discharged into the Apies and Pienaars Rivers, and the Roodeplaat and Leeukraal dams.²²⁴ Clean water became a major challenge. The purpose of the investigation was to assess the effect of the failure of wastewater treatment on the rivers and dams.

The investigation also had to determine avenues to correct the constitutional violation caused by the spillage of raw sewage into the rivers and dams, which polluted the freshwater sources in the City of Tshwane Metropolitan Municipality. The wastewater treatment infrastructure was inadequate to treat sewage and untreated sewage was discharged into rivers and dams. Drinking water is mostly obtained from fresh surface sources, such as rivers and dams.²²⁵ Therefore, the City of Tshwane Metropolitan Municipality has a constitutional duty, in terms of section 152(1)(d) of the *Constitution*, to promote a safe and healthy environment²²⁶ to ensure the realisation of access to sufficient clean water. Moreover, the City of Tshwane Metropolitan Municipality has the responsibility to ensure the provision of services to the communities in a sustainable

²²³ South African Human Rights Commission Report 2021 para 1.1.

²²⁴ South African Human Rights Commission Report 2021 para 1.2.

²²⁵ South African Human Rights Commission Report 2021 para 2.11.

²²⁶ Section 4(2)(i) of the *LGMS Act* 32 of 2000.

manner in terms of section 152(1)(b) of the Constitution.²²⁷ The essence of providing these services is to protect the health and well-being of the residents of the City of Tshwane Metropolitan Municipality in accordance with the provision of section 24(a) of the Constitution and to further ensure that residents have access to potable water as enshrined in Part B of Schedule 4, read with section 27(1)(b) of the Constitution.

The South African Human Rights Commission Report also indicates that the release of untreated domestic and industrial wastewater results in freshwater pollution and depletion of clean water sources.²²⁸ As a result of this, the residents of Hammanskraal complained that they had been receiving contaminated and foul water.²²⁹ The residents of Hammanskraal pointed out that this was due to the malfunctioning of the wastewater treatment plant. Wastewater infrastructure is central to the provision of sustainable clean water. Sewage pollution contaminates water sources and violates section 27(1)(b) of the Constitution, read with sections 3 and 11(1) of the *WSA*.

3.4.1 Intervention of the National and Provincial Governments

The South African Human Rights Commission Report in para 2.22 correctly argues that the national and provincial governments must work together to resolve the pollution and discharge of sludge.²³⁰ This relationship and/or form of governance flows from the provisions of section 41 of the Constitution, which deals with cooperative government. This would give effect to the provisions of sections 62 and 63 of *WSA*, read in line with section 154(1) of the Constitution on intervention to compel compliance with the regulations. In light of this emphasis, section 151(1)(i) of *NWA* renders any act or omission, whether by intent or negligence, that results in pollution of or pollutes water resources, unlawful. The City of Tshwane Metropolitan Municipality ought to face the consequences of the application of these provisions for its deficiencies and non-compliance with the constitution.

²²⁷ Section 4(2)(d) of the *LGMS Act* 32 of 2000.

²²⁸ South African Human Rights Commission Report 2021 para 2.12.

²²⁹ South African Human Rights Commission Report 2021 para 2.18.

²³⁰ South African Human Rights Commission Report 2021 para 2.22.

3.4.2 Findings of the Investigation

The South African Human Rights Commission found that the discharge of untreated or partially treated sewage has adverse effects for the water, ecosystem and residents of the City of Tshwane Metropolitan Municipality.²³¹ The report further points out that people and animals who drink that water will be exposed to illnesses such as bilharzia, cholera and hepatitis.²³² This is a violation of the constitutional right of the residents contained in section 24(a) of the Constitution. The residents of the City of Tshwane Metropolitan Municipality have been supplied with polluted water since 2008. It is evident that the City of Tshwane Metropolitan Municipality has been failing its residents for years, in the process violating their constitutional rights. It also acted contrary to the provisions of section 151(1) of the *NWA*. This failure means a breach of the constitutional mandate on the part of the local government or non-complying municipalities. They failed to promote a safe and healthy environment in terms of section 4(2)(i) and 152(1)(d) of the Constitution.

3.5 Concluding Remarks

The objective of this chapter was to demonstrate through case studies the implications of local governments' failure to adequately provide municipal services with a view to ensure access to sustainable and sufficient clean water and protect the environment from sewage pollution. The three local municipalities included the Kgetlengrivier Local Municipality, the Emfuleni Local Municipality and the City of Tshwane Metropolitan Municipality. Water supply systems must operate optimally, and sewage disposal systems must be regularly maintained and monitored to prevent sewage overflow. This part of the study further demonstrated the impact of South African municipalities' failure to regularly and adequately improve sewage and wastewater infrastructure to realise access to clean water. The chapter revealed that inadequate management or mismanagement of the infrastructure undermines the efforts to ensure the realisation of the constitutional right to clean water and sanitation. It further illustrated that inadequate infrastructure and mismanagement exacerbate the water crisis and threaten the health and well-being

²³¹ South African Human Rights Commission Report 2021 para 9.3.

²³² See South African Human Rights Commission Report 2021 para 9.3.

of South African citizens in communities. In addition, this chapter advanced an argument that the mismanagement of water, sewage, and wastewater infrastructure hinder municipalities from realising the right to access to sustainable and sufficient clean water.

The chapter further argued that local government is responsible for fulfilling a constitutional and legislative mandate to improve, upgrade, or maintain sewage and wastewater treatment infrastructure to prevent water and environmental pollution in order to realise access to sufficient water. Chapter 3 further reflected on the essence of the intervention of national and provincial governments in local government affairs when a local government fails to perform the prescribed constitutional duties. The core issue lies with the inadequate infrastructure for both water supply and wastewater treatment. Many municipalities are unable to meet the growing demand for clean water. The neglect of sewage systems results in regular overflows, leaks and untreated sewage discharged into rivers and other water bodies, including underground water. This poor management of sewage and wastewater treatment systems, which are the primary responsibility of local government, seriously undermines the realisation of sustainable access to sufficient water. In fact, the failure to properly maintain and upgrade these critical infrastructures contributes to widespread sewage discharge, which directly threatens the constitutional right to sufficient water and the international human right to safe and clean drinking water and sanitation.

Chapter 4: Legal and Policy Frameworks that Ensure the Responsibility of the Local Government Responsibility to Realise the Right to Access to Sufficient Water

4.1 Introduction

This chapter builds on the discussions in the previous chapters. Chapter 2 highlighted the critical role of cooperative governance in water service delivery and examined the mechanisms for coordination and cooperation between national, provincial and local spheres of government in South Africa. In Chapter 3, the study referred to the challenges local governments encounter, particularly in the cases of the Kgetlengrivier Local Municipality, the Emfuleni Local Municipality, and the City of Tshwane Metropolitan Municipality, where evidence shows that failure to maintain sewage and wastewater treatment infrastructure has contributed significantly to public health risks and environmental degradation – and ultimately – the non-realisation of the right of access to sufficient water.

This chapter aims to delve into the legal and policy frameworks that govern local governments' responsibilities to realise the right to access to sufficient water, with the focus on holding local government accountable for failing to provide clean water and sanitation services. The chapter also assesses the existing legal mechanisms for accountability, including legal instruments, policy guidelines, and regulatory frameworks. Additionally, this chapter argues that improvements in the policy and legal framework regulating local government's affairs is integral to strengthening local government's capacity to fulfil its duties. It would ensure that the provision of clean water aligns with their constitutional mandates and international human rights standards. The chapter aims to not only enhance the efficacy of local water management systems but also to uphold the constitutional and human rights obligations to ensure access to sufficient, clean water for all South Africans.

4.2 Local Government Responsibilities: The Legal Framework as Benchmark

Section 27(1)(b) of the Constitution lists the rights of South African citizens as they pertain to access to sufficient water.²³³ Section 27(2) of the Constitution requires the State to put in place reasonable legislative and other measures to achieve the progressive realisation of the rights in the Constitution related to access to sufficient water. The legislature subsequently enacted the *NWA* and the *WSA* to give effect to section 27 of the Constitution. In principle, water and sanitation rights must be protected by the government. The UN points out that “governments must take a human rights-based approach to water and sanitation improvements to ensure no one gets left behind”.²³⁴ Section 75 of the *LGMS: Act 32* of 2000 requires that bylaws must be implemented to give effect to the policy. The realisation of the right to access to clean water is critical, and effective bylaws are needed to make this possible.

The local government is mandated to ensure that local communities have sustainable access to clean water,²³⁵ aided by effective coordination and support from national and provincial governments.²³⁶ Section 152(1) of the Constitution determines that the objective of local government is to ensure the effective and sustainable provision of services to local communities.²³⁷ These obligations, *inter alia*, require local government to ensure that sustainable services to local communities are adequately provided.²³⁸ Section 153 (a) of the Constitution also requires a municipality to structure and manage its administration and budgeting processes to prioritise the basic needs of local communities.²³⁹ With this in mind, the prioritisation of the maintenance and improvement of sewage and wastewater treatment infrastructure would resort under local communities' basic needs. This municipal service should be prioritised to ensure that

²³³ Swart and Adams “Water Services Provision and the Protection of Water Resource” 6; see also section 3 of the *WSA*.

²³⁴ UN date unknown <https://www.unwater-facts/human-rights-water-and-sanitation>.

²³⁵ See Swart and Adams “Water Services Provision and the Protection of Water Resource” 6; sections 83 and 84 of *LGMS: Act 117* of 1998.

²³⁶ *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) para 38.

²³⁷ *Oppenheimer Park Golf Club v Matjabeng Local Municipality & Another* (137/2019) [2020] ZAFSHC 78; [2020] 2 All SA 574 (FB) (26 February 2020) para 35.

²³⁸ Section 152(1)(b) of the Constitution.

²³⁹ National Infrastructure Maintenance Strategy, 2007 20-24.

water sources are protected from the potential overflow of sewage to ensure that people have water that is compliant with national standards for consumption.

The municipal council,²⁴⁰ as the appropriate authority in the administration of municipal affairs, must exercise its inherent executive authority to ensure that skilled operators or engineers are deployed to improve the design and construction of wastewater infrastructure.²⁴¹ This would guarantee regular maintenance of sewage and wastewater infrastructure with a view to providing clean water.²⁴² Such efforts will lead to the effective performance of constitutional matters entrenched in Part B of Schedule 4 of the *Constitution*.

4.2.1 Accountability of Local Government for Malperformance

According to du Plessis and Nel,²⁴³ “accountability and transparency are the key features of ensuring that a municipality performs its functions effectively and efficiently and in the best interest of local communities”. Du Plessis and Nel²⁴⁴ further assert that the accountability of local government should be measured against the outcomes of the municipal services that have been delivered and reported. Karsten²⁴⁵ on the other hand, is of the opinion that municipal liability can only arise once accountability has been proven. To underpin Karsten’s view, Dube²⁴⁶ holds the view that legal accountability is more concerned with constitutional constraints that work to compel public office-bearers to act in a manner that is consistent with the constitutional requirements. The *White Paper on Local Government* affirms that local government has various powers and functions that must be fulfilled effectively and adequately.²⁴⁷

²⁴⁰ See Ngcobo 2023 *PER/PELJ* 3-32.

²⁴¹ National Infrastructure Maintenance Strategy, 2007 5-10.

²⁴² Qopo *Regulation of Wastewater Treatment Plants in the Ba-Phalaborwa Municipality* 13.

²⁴³ Du Plessis and Nel “An Introduction” 36-37.

²⁴⁴ Du Plessis and Nel “An Introduction” 37.

²⁴⁵ Karsten *Local Government Accountability in South Africa: An Environmental Law Reading* 9. The author describes the position as that liability is not the same as accountability. The former is understood to be the penalty or consequences of the lack or absence of accountability.

²⁴⁶ Dube *Enhancing Democratic Accountability Through Constitutionalism in South Africa* 165.

²⁴⁷ *White Paper on Local Government* 2.5.

The role players in municipalities are entrusted with various responsibilities that require the effective exercise of the powers of a local government.²⁴⁸ Such role players involve the municipal council, municipal manager, executive mayor, heads of departments, members of the mayoral committee and portfolio committees.²⁴⁹ With this in mind, the legal accountability of a local government would in practical terms result from the poor performance of the municipal role players with respect to the constitutional obligation.²⁵⁰ In particular, these are the people who ought to effectively perform the core functions and duties of the municipalities to satisfy the conferred constitutional mandate.

According to Karsten,²⁵¹ legal accountability involves complete and thorough observation of the principle of the rule of law. The role players in local government must adequately comply with the regulatory obligations.²⁵² Similarly, Dube²⁵³ describes legal accountability as a legal process rooted or founded in the Constitution and statutes, and where office-bearers are expected to account to the courts. The description of legal accountability demonstrates the bases on which and instances where local government can be held legally accountable for breaching the constitutional and statutory mandate to provide sustainable access to clean water and to curb sewage pollution.²⁵⁴ The National Development Plan notes that many municipalities do not have a long-term plan that gives them the technical capacity to build and manage their wastewater treatment infrastructure.²⁵⁵ Such technical capacity can prevent potential water resource pollution.²⁵⁶

Section 156(1)(a) of the Constitution expressly indicates that a municipality has the executive authority and right to administer the local government matters that are enshrined in Part B of Schedule 4 of the Constitution.²⁵⁷ Over the years, municipalities have failed to perform their constitutional and legislative obligations effectively and

²⁴⁸ PWC 2010 *Local Government and King III* 4.

²⁴⁹ Karsten *Local Government Accountability in South Africa: An Environmental Law Reading* 12-13; see also Ngcobo 2023 *PER/PELJ* 3-4.

²⁵⁰ Dube *Enhancing Democratic Accountability Through Constitutionalism in South Africa* 209.

²⁵¹ Karsten *Local Government Accountability in South Africa: An Environmental Law Reading* 82.

²⁵² Karsten *Local Government Accountability in South Africa: An Environmental Law Reading* 82.

²⁵³ Dube *Enhancing Democratic Accountability Through Constitutionalism in South Africa* 153.

²⁵⁴ National Development Plan, 2011 153.

²⁵⁵ National Development Plan, 2011 157.

²⁵⁶ National Development Plan, 2011 157.

²⁵⁷ See also *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) para 32.

consistently.²⁵⁸ Without good governance, local government will continue to fall short of providing sustainable basic services, which will in turn affect the citizens' right to have access to a clean environment and sustainable access to clean water.²⁵⁹

Local government can be held legally accountable when good governance is lacking. Karsten²⁶⁰ correctly argues that “good governance in the public sector requires accountability”. Any failure by a local government to provide sustainable clean water, or to maintain and improve sewage and wastewater treatment infrastructure to preserve the quality of water, would warrant bad governance. Section 152(1)(a) of the Constitution must be invoked in these circumstances to hold such a municipality accountable.²⁶¹ The national treasury in turn should allocate sufficient budget to enable local government, among others, to invest in sewage and wastewater treatment infrastructure.²⁶² A multi-tiered effort is needed to preserve water quality and supply clean water to the citizens. The National Infrastructure Maintenance Strategy Document, 2007 provides the following:

Of concern at Municipal level is the state of wastewater treatment, water treatment, water and sewer reticulation, on-site sanitation, electricity reticulation, and arterial roads...these are the fundamental building blocks for economic growth and healthy communities. Of greatest concern is the state of wastewater treatment.²⁶³

The National Infrastructure Document further states that the sustainable provision of services is under threat.²⁶⁴ The basis of this submission is that many municipalities are failing to perform their prescribed mandates in accordance with the provisions of the constitution and national legislation regulating local government.²⁶⁵ In particular, the highlighted shortfalls of local government in addressing sewage pollution can be cured by rigorous maintenance of sewage and wastewater infrastructure. Any contrary practice

²⁵⁸ In *Oppenheimer Park Golf Club v Majhabeng Local Municipality and Others* (137/2019) ZAFSHC 78; [2020] 2 All SA 574 (FB) (26 February 2020) para 51, the court highlighted that the municipality has failed to comply with its constitutional obligation.

²⁵⁹ See Ngcobo 2023 *PER/PEL* 9-10.

²⁶⁰ Karsten Local Government Accountability in South Africa: An Environmental Law Reading 6.

²⁶¹ *Oppenheimer Park Golf Club v Majhabeng Local Municipality and Others* (137/2019) ZAFSHC 78; [2020] 2 All SA 574 (FB) (26 February 2020) paras 35-36.

²⁶² See the National Infrastructure Maintenance Strategy, 2007 5, 22 and 23.

²⁶³ The National Infrastructure Document 22.

²⁶⁴ The National Infrastructure Document 22.

²⁶⁵ The National Infrastructure Document 22.

by local government will lead to a breach or to non-compliance with the provisions of sections 24 and 27(1)(b) of the Constitution, the provisions of section 19 of the NWA, and section 28 of *NEMA* would be invoked. More specifically, section 24(b)(i) of the Constitution read in conjunction with section 19 of *NWA* requires the government to prevent pollution by placing rigorous measures in place. This is a constitutional mandate that must be fulfilled effectively. The North West High Court in the *Kgetlengrivier case* para 72 firmly articulated that:

the endeavours of the KCC in seeking to advocate for potable water and clean environment for the residents resorting under the jurisdiction of the Kgetlengrivier Municipality are undoubtedly noble and commendable.²⁶⁶

This is a clear demonstration that the right to potable water and a clean environment is a guaranteed constitutional right that must be respected, protected, and promoted by the government. In support of this submission, Ngcobo²⁶⁷ articulates that the municipal council must undertake robust actions or measures to prevent municipalities from failing to deliver environmentally related services, including sanitation services and sustainable clean water.

4.3 Non-compliance with the NWA and WSA

NEMA is the leading legislation regulating aspects of environmental management. To preserve natural resources,²⁶⁸ including water, municipalities must consider South Africa's constitutional environmental and water rights.²⁶⁹ Compliance must be a priority for local government to effectively and adequately realise sustainable access to clean water and a clean environment.²⁷⁰ This implies that municipalities must comply with all the duties conferred by the Constitution, the *NWA*, the *WSA*, *NEMA*, *LGMS: Act 32 of 2000* and

²⁶⁶ *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 72.

²⁶⁷ Ngcobo 2023 *PER/PELJ* 12.

²⁶⁸ Du Plessis *PER/PELJ* 1849.

²⁶⁹ Du Plessis *PER/PELJ* 1848.

²⁷⁰ Du Plessis *PER/PELJ* 1853. The author explains that municipalities in South Africa are responsible for air quality management, domestic waste management, the provision of sanitation and access to sufficient water.

*LGMS: Act 117 of 1998 to prevent sewage pollution*²⁷¹ and to ensure access to sufficient clean water as required by section 27(1)(b) of the Constitution.

4.3.1 Non-compliance with the NWA

Section 23 of the *NWA* provides the scope of the quantity of water that a relevant water authority may use. Section 23(a) of the *NWA* sets out circumstances where the Minister may provide a preliminary determination of the quantity of water that the relevant water authority may supply to the people. Further, section 37(1) of the *NWA* provides for controlled activities in respect of land. In light of these controlled activities, section 37(1)(e) of the *NWA* indicates that no person²⁷² may undertake a controlled activity without the relevant authorisation of the authority.²⁷³ In addition, section 37(1)(e) of the *NWA* expressly prohibits any discharge of waste²⁷⁴ or water with waste into the aquifer. This statutory provision does not expressly refer to sewage spills, but municipalities are required in terms of Part B of Schedule 4 of the Constitution read with section 37(1)(e) of the *NWA* and section 24(a)(i) of the Constitution to curb sewage spills that would affect the environment and watercourses. Clearly, regular sewage system maintenance to prevent sewage pollution that ultimately affects water quality is a form of municipal service that requires urgent attention.²⁷⁵

Section 19(1) of the *NWA* places the duty on the owner, occupier, or controller of land to prevent any activity that causes or is likely to cause pollution of water resources. Therefore, municipalities as land controllers are obliged to use their resources or all reasonable measures to prevent pollution from occurring or recurring.²⁷⁶ Municipalities must ensure that they eliminate sewage spills as a source of pollution because this is detrimental to human health, well-being and the environment.²⁷⁷

²⁷¹ The Constitution; *NWA*; *WSA*; *LGMS Act 117 of 1998*; *LGMS Act 32 of 2000*.

²⁷² The definition of 'person' includes municipalities as water services authority.

²⁷³ See section 7 of the *WSA*.

²⁷⁴ Section 1 of the *National Environmental Management Waste Act 59 of 2008* defines the term 'waste' as any substance, object or material that is unwanted, rejected, abandoned, discarded or disposed of...]

²⁷⁵ See Stoddard 2024 <https://dailymaverick.co.za/article/2024-04-21-stop-fouling-komatipoort-with-sewage>.

²⁷⁶ See UN date unknown [HTTPS://www.un.org/sustainabledevelopment/water-and-sanitation/](https://www.un.org/sustainabledevelopment/water-and-sanitation/).

²⁷⁷ For extensive discussion on human health and well-being, see du Plessis 2018 *SAJHR* 2-10.

The SDG 6 aptly reiterates that “access to safe water, sanitation, and hygiene is the basic human need for health and well-being”.²⁷⁸ Furthermore, the UN proposed that civil society organisations must work hard to keep governments accountable.²⁷⁹ This is clear evidence that the government’s failure to comply with the compelling statutory provisions in line with Part B of Schedule 4 and section 152(1)(b) of the Constitution must attract liability and accountability. Moreover, section 152(1)(h) of the *NWA* makes it an offence when a person intentionally refuses or fails to perform any duty.

Municipalities are not exempt from liability for their failures with respect to the regular maintenance and management of sewage and wastewater treatment infrastructure. In addition, section 151(1)(j) of the *NWA* prohibits any person from unlawfully, intentionally, or negligently committing an act or omission that pollutes or is likely to pollute water resources. The argument that local government must be held legally accountable for non-compliance with or for breaching the constitutional and legislative mandate is underpinned by the provisions of section 151(1)(j) of the *NWA* since sewage pollution adversely affects water resources, the environment and the public health and well-being of the citizens.

4.3.2 Non-compliance with the WSA

It is a common cause in terms of section 1 of the *WSA* that municipalities are water services authorities. Under this legislative provision, municipalities are legislatively bound to ensure that there is progressive, sustainable access to water services.²⁸⁰ Using its resources and capacity, municipalities are responsible for ensuring that local communities in South Africa enjoy their embodied rights to access to basic water supply in terms of section 3(1) of the *WSA*.²⁸¹ Accordingly, should local government fail to execute the prescribed duty adequately, the national and provincial governments must intervene in terms of section 62 of the *WSA*.²⁸² The three spheres of government have a share

²⁷⁸ UN date unknown <https://www.un.org/sustainabledevelopment/water-and-sanitation/>.

²⁷⁹ UN date unknown <https://www.un.org/sustainabledevelopment/water-and-sanitation/>.

²⁸⁰ Feris “Environmental Rights Protected in the Constitution” 12.

²⁸¹ Part B of Schedule 4 of the Constitution; see Feris “Environmental Rights Protected in the Constitution” 12.

²⁸² See section 139 of the Constitution.

responsibility to ensure sustainable access to clean water and the effective performance of local government in preventing or minimising sewage pollution. This responsibility or obligation reflects the objectives of section 27(1)(b) of the Constitution, which guarantees everyone the right to have access to sufficient water.

In light of the above emphasis, it is evident that it is the local government's mandate to ensure that local communities have sustainable access to clean water.²⁸³ The quality of the water provided to the citizens must comply with the standards set in terms of section 9(1)(b) of the *WSA*, read with regulation 5 of the *Regulations Relating to Compulsory National Standards and Measures to Conserve Water*.²⁸⁴ Any breach or failure on the part of a municipality to fulfil this constitutional and legislative mandate ought to attract legal accountability in line with section 152(1)(a) of the Constitution, read with section 1 of the Constitution.²⁸⁵

Section 62 of the *WSA* requires national or provincial governments to monitor the performance of municipalities with respect to the provision of sustainable access to water that meets the prescribed national standards.²⁸⁶ Therefore, when it is evident that municipalities are failing to provide clean water, national and provincial governments must exercise their power to compel compliance through intervention.²⁸⁷ Practically sustainable access to clean water is impeded when dysfunctional sewage and wastewater infrastructure affects the quality of water sources. It is evident that, in certain circumstances, the three spheres of government have a joint responsibility to address these issues collectively.²⁸⁸ Section 63 of the *WSA* also enables the Minister to intervene when municipalities are not performing their duties satisfactorily.

4.4 Mechanisms for Holding Local Governments Accountable

²⁸³ Section 3 of the *WSA*; Part B of Schedule 4 of the Constitution; Feris "Environmental Rights Protected in the Constitution" 12-15.

²⁸⁴ GN 509 of 8 June 2001; see *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) para 69.

²⁸⁵ See *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) para 70. O'Regan J pointed out that if government fails to perform its duties, citizens will hold it accountable politically.

²⁸⁶ Feris "Environmental Rights Protected in the Constitution" 13; Section 154(1) of the Constitution

²⁸⁷ See section 62(1)(a)-(b) of the *WSA*; see also Ngcobo 2023 *PER/PELJ* 9.

²⁸⁸ Ngcobo 2023 *PER/PELJ* 9-10.

In section 1 of the *WSA*, the definition of a 'person' includes municipalities. With this in mind, it is argued that municipalities are bound by the provisions of section 82 of the *WSA*, which deal with circumstances in which perpetrators may be held liable for contravening the provisions of the *WSA*. Further, section 83 of the *WSA* expressly provides that the *WSA* governs the State and organs of the State. Put differently, this implies that local government qualifies to be held legally accountable for non-compliance or breach of the constitutional and statutory mandate or obligation to provide sustainable access to clean water.²⁸⁹

Local government can be held legally accountable under the provisions of section 82(1)(c) of the *WSA* for failing to prevent sewage spills from flowing directly into water sources and contaminating fresh water. Additionally, the provision of section 2(4)(ii) of *NEMA* imposes a duty on local government to avoid pollution and degradation of the environment like any other person. In a proper interpretation, water pollution must also be avoided. This requires local government to effectively address poor sewage and wastewater treatment infrastructure to safeguard local communities' rights to have access to sustainable clean water.²⁹⁰ Further, section 2(4)(viii) of the *NEMA* requires local government to consistently work towards preventing or minimising adverse negative impacts on the environment and the environmental rights of the people.

Additionally, municipalities can be held legally accountable for failing to regularly maintain and improve sewage and wastewater treatment infrastructure, leading to water pollution.²⁹¹ The effect of these instances is that the right to access to potable water is jeopardised.²⁹² The arising shortfalls of local government could potentially leave them legally liable in terms of section 152(1)(a) of the Constitution,²⁹³ which creates room for holding local government accountable. Further, local government, under section

²⁸⁹ *Kunogqala Local Residents and Others v Ab Xuma Local Municipality and Another* (4146/2023) [2025] ZAECMHC 4 (6 February 2025) paras 23 – 25.

²⁹⁰ *Kunogqala Local Residents and Others v Ab Xuma Local Municipality and Another* (4146/2023) [2025] ZAECMHC 4 (6 February 2025) paras 28 – 31.

²⁹¹ See Stoddard 2024 <https://dailymaverick.co.za/article/2024-04-21-stop-fouling-komatipoort-with-sewage>.

²⁹² *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) para 32; section 84(1)(b) of the LGMS Act 117 of 1998.

²⁹³ See section 4(2)(b) of the *LGMS Act* 32 of 2000.

156(1)(a) of the Constitution, is required to adequately administer all functions contained in Part B of Schedule 4 of the *Constitution*. Section 2 of the *Constitution* expressly makes any conduct that is contrary to the *Constitution* invalid. Under this provision, a local government can be held legally accountable if they fail to offer sustainable access to clean water and frequently address sewage pollution because of their non-compliance with and breaching of the *Constitution*, *WSA*, and the *NWA*.²⁹⁴

Section 62(1)(a) of *WSA* requires the Minister to monitor the performance of municipalities as water services institutions and enforce compliance with the prescribed national water standards. Any failure by the Municipalities to perform the required water services would be tantamount to non-compliance, and such non-compliance would attract the legal accountability of the defaulting municipality.

4.5 Available Legal Remedies

Section 153(a) of the *NWA* indicates that once a determination has been made in terms of section 152 of the *NWA*, the court may grant an order for damages against non-compliant municipalities and municipal managers.²⁹⁵ Such an order may be triggered by the harm that the affected community members may have suffered as a result of sewage pollution.²⁹⁶ Further, section 153(b) of the *NWA* provides that the court may order the non-compliant municipality to pay the costs of any remedial measures that may be necessary.²⁹⁷ In terms of section 153(c) of the *NWA*, a court may order the municipality and the municipal manager to implement the remedial actions to rehabilitate the harm caused by sewage.²⁹⁸ There are many newspaper reports that argue that municipal managers must face criminal prosecution for failing to ensure the adequate provision of

²⁹⁴ Section 195(1)(f) of the Constitution; *Kunoggala Local Residents and Others v Ab Xuma Local Municipality and Another* (4146/2023) [2025] ZAECHMHC 4 (6 February 2025) para 37.

²⁹⁵ See *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) paras 39 and 50.

²⁹⁶ See *South African Human Rights Commission v Msunduzi Local Municipality* (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021) para 107.

²⁹⁷ *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) para 39.

²⁹⁸ *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) para 50; *Kgetlengrivier Concerned Residents and Another v Kgetlengrivier Local Municipality and Others* (CIV APP FB 04/22; UM69/2021; UM 79/2021) [2023] ZANWHC 29; [2023] 2 All SA 425 (NWM) (17 March 2023) para 16.

critical municipal services,²⁹⁹ specifically with regard to sewage pollution and sustainable access to clean water.

Section 51 of the *LGMS: Act 32* of 2000 makes provision for holding a municipal manager accountable for the overall performance of the municipal administration.³⁰⁰ This accountability may further be buttressed by the provisions of section 51(a) of the *LGMS: Act 32* of 2000, which requires a municipality to be responsive to the needs of local communities. Therefore, municipal failure to address sewage pollution by failing to monitor, maintain, and manage sewage and wastewater treatment infrastructure amounts to non-responsiveness to the needs of local communities. The provisions of section 51(i) of the *LGMS: Act 32* of 2000 could be triggered in such circumstances to hold the municipal manager accountable. Section 55(1) of the *LGMS: Act 32* of 2000 reiterates that a municipal manager as head of the municipal administration is responsible and accountable for non-compliance with the constitutional and legislative mandate or obligation.

In *South African Human Rights Commission* case, the Pietermaritzburg High Court granted a structured interdict³⁰¹ against a non-compliant municipality. The purpose of this structured interdict was to compel the municipality to comply with the constitutional mandate relating to the environment. In granting the interdict, the court pointed out that the “Municipality has lost touch with its citizens”.³⁰² In *Komatipoort* Case para 50, the court ordered the municipal manager to ensure that raw spillage of sewage no longer flows directly into the environment and rivers. In addition, section 28 of *NEMA* indicates that every person, including municipalities, who causes pollution or degradation of the environment must take reasonable steps to prevent or minimise such pollution.

4.6 Concluding Remarks

²⁹⁹ Carnie 2025 <https://www.dailymaverick.co.za/article/2025-02-04-plan-to-nail-municipal-managers->.

³⁰⁰ *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) paras 45 – 49.

³⁰¹ See Sekwakwa 2024 *PER/PELJ* 7-18.

³⁰² *South African Human Rights Commission v Msunduzi Local Municipality* (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021) para 107.

This chapter reflected on the legal and policy frameworks governing local governments' responsibility to ensure sustainable and equitable access to water, with a focus on holding local governments accountable for any failure to provide clean water and sanitation services to South African citizens as required by the *constitution* and international treaties. The right to have access to water is not only recognised by the South African Constitution but is also recognised by international human rights treaties that explicitly refer to water rights. Such treaties include the *CEDAW* and *CRC*. Internationally, water rights are considered human rights. The reference to human rights stems from the implications of sewage pollution for the health and well-being of South African citizens. Although the overall regulation and management of water falls under the national DWS, local government has the constitutional mandate to ensure access to sustainable and equitable water.

The chapter examined the problem in context by considering three case studies, namely the Kgetlengrivier Local Municipality, the Emfuleni Local Municipality, and the City of Tshwane Metropolitan Municipality. In these cases, the evidence shows that municipal failure to maintain sewage and wastewater treatment infrastructure contributed immensely to public health risks and environmental degradation and therefore affected the realisation of the right to sustainable and equitable access to clean water. These failures should result in the non-complying municipalities being held legally accountable. This legal accountability ought to be strengthened in the legal and policy frameworks that regulate water service authorities.

Chapter 5: Conclusion and Recommendations

5.1 Background

Water is an essential natural resource for human and ecological existence.³⁰³ The *NWA* was enacted to provide a framework for the protection, use, and management of water resources. This created a framework for addressing pollution, including pollution caused by untreated sewage. Access to clean water and sanitation services is not only recognised by the Constitution, but by the UN in terms of SDG 6, which requires access to clean water and sanitation services to be made available and accessible to local communities. These basic human needs are referenced by the Constitution as competent functions of local government in Schedule 4 Part B. Additionally, the UN Agenda 21 provides that the quality and supply of freshwater resources should be protected.³⁰⁴

Sewage spills contravene section 24 of the Constitution. Further, it proves non-compliance with UN SDG 7, which prescribes access to good health and well-being. The *WSA* was enacted to ensure that water service authorities provide a sufficient and sustainable water supply that meets the minimum national standard to South African communities.³⁰⁵ Therefore, to ensure stable water supply, municipalities must ensure that the water that is supplied to local communities is not contaminated by untreated sewage. In fact, untreated sewage must be prevented from flowing into water resources because it has an impact on the quality of water. When municipalities fail³⁰⁶ to adequately maintain sewage and wastewater treatment infrastructure, local communities in South Africa do not have access to sustainable clean water. In many municipalities,³⁰⁷ untreated sewage is flowing directly into the watercourses.³⁰⁸ This is mainly as a result of dysfunctional wastewater treatment infrastructure and sewage infrastructure, and it contributes immensely to water pollution.

³⁰³ Viljoen *Water as a Public Property: A Parallel Evaluation of South African and German Law* 294.

³⁰⁴ Section 18.2 – 18.3 of the UN Agenda 21 of 1992.

³⁰⁵ Section 11 of the *WSA*.

³⁰⁶ *Komatipoort Despondent Residents Association v Nkomazi Local Municipality and Others* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024) para 32.

³⁰⁷ See Chapter 3 for this issue.

³⁰⁸ See South African Human Rights Commission Report 2021 and South African Human Rights Commission Report 2019.

The problem described above makes it important for South African municipalities as water service authorities to work with the Minister of Water and Sanitation to ensure that all the infrastructure for sewage and wastewater treatment is regularly maintained and upgraded. This will help minimise water pollution and environmental pollution. The improvement of sewage and wastewater treatment infrastructure should be a priority, especially when considering the right of local communities to have access to sustainable clean water. Any failure by a municipality to address sewage pollution or to offer sustainable access to clean water, attracts the legal accountability of such defaulting municipality.³⁰⁹

5.2 Revisiting the Research Question and Objectives

The research question underpinning this study was: To what extent does the current legal framework enable local government in South Africa to ensure sustainable access to clean water and effectively manage sewage pollution?

In order to address the research question, the following objectives were formulated:

The primary objective of this research was to examine the role and responsibility of local government in ensuring sustainable access to clean water and effectively managing sewage pollution in South Africa. To achieve the primary objective, the following secondary objectives were set:

- To examine the South African legal framework that governs access to sufficient water, focusing on the duties, functions, and powers of government to ensure sustainable access to sufficient water for all South Africans, including local communities. This analysis aimed to explore the role of the 'cooperative governance' principle in the water sector, emphasising the shared responsibility of all three spheres of government in realising the right of access to sufficient water. This theoretical foundation provided a basis for critically evaluating the effectiveness of local government in fulfilling its constitutional mandate regarding water and sanitation services.

³⁰⁹ See section 4(2)(b) of the *LGMS Act* 32 of 2000; section 151(1)(a) of the Constitution.

- To identify the challenges local government faces in managing sewage pollution and ensuring sustainable access to clean water and effective sanitation services. The research focused on the consequences of untreated sewage and the failure of local governments to adequately maintain sewage and wastewater treatment infrastructure. It also examined the experiences of three municipalities – the Kgetlengrivier Local Municipality, the Emfuleni Local Municipality and the City of Tshwane Metropolitan Municipality – highlighting specific challenges and the impact of poor management on water quality.
- To explore potential legal and policy frameworks for holding local governments accountable for failing to fulfil their constitutional mandate regarding access to sufficient water and effectively managing sewage pollution. The objective was to propose pathways for improving service delivery in line with the constitutional obligations and international human rights standards.
- To present findings and recommendations based on the issues discussed in the dissertation regarding local government's duty or responsibility to provide sustainable clean water and basic sanitation services to local communities. The objective was to propose pathways for improving service delivery and strengthening local government accountability in line with the constitutional obligations and international human rights standard.

5.3 Structure of the Analysis

The study was divided into chapters that corresponded with the different objectives. Chapter 1 presented the background to the research question, the problem under discussion, the research methodology, and the objectives of the research. Chapter 2 examined the South African legal framework governing water and sanitation. It focused on the duties, functions, and powers of government in insuring sustainable access to clean water and sanitation services in local communities. Chapter 3 dealt with the assessment of the management and maintenance of sewage and wastewater treatment infrastructure by local government in South Africa. It conducted a case study by examining the experiences of the three local municipalities, namely the Kgetlengrivier Local Municipality, the Emfuleni Local Municipality, and the City of Tshwane Metropolitan

Municipality. Chapter 4 explored potential legal and policy frameworks for holding local governments legally accountable for failing to fulfil their constitutional mandate regarding access to sufficient water and effectively managing sewage pollution. It argued that inadequate sewage and wastewater treatment infrastructure and mismanagement impede the achievement of sustainable access to clean water, and emphasised the legal mechanisms available to hold local government accountable for its failures.

5.4 Main findings

The objectives of the study stated in section 5.2 correspond with the chapters of this mini-dissertation. Each chapter investigated one or more proportions of the research question, and ultimately, resulted in a set of main findings. The findings are used here to explicitly set out conclusions and to inform the knowledge generated in this study on local government's mandate to address sewage pollution through regular maintenance and management of sewage and wastewater treatment infrastructure to ensure access to clean water. Poor sewage and wastewater treatment infrastructure often result in untreated sewage or wastewater flowing directly into waterways, contaminating sources.

5.4.1 Duties, functions, and powers of local government

No organ of state or public official may act contrary to or beyond the scope of their powers as laid down in the law.³¹⁰ Local government must, as a constitutional mandate, ensure the provision of access to sustainable and equitable water and sanitation services. Furthermore, local government must prioritise the adequate maintenance of sewage and wastewater treatment infrastructure with the support of national and provincial governments. The current failure of local government through its municipal officials to provide access to sanitation services and sustainable access to clean water is inconsistent with the provisions of sections 24 and 27(1)(b) of the Constitution.³¹¹ Moreover, the water that is supplied to residents of various communities in South Africa is non-compliant with the standard under regulation 3 of the *Regulations Relating to Compulsory National*

³¹⁰ *Merifon (Pty) Ltd v Great Letaba Municipality and Another* (1112/2019) [2021] ZASCA 50 (22 April 2021) para 1.

³¹¹ See section 4(2) of the *LGMS: Act 32 of 2000*.

*Standards and Measures to Conserve Water.*³¹² Without proper infrastructure, local government would continuously fail to provide adequate municipal services.

These shortfalls are contrary to the provisions of sections 152(1)(d) and 156(1)(a) of the Constitution, which require local government to provide sustainable services to local communities. Moreover, local government must effectively administer local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution.³¹³ In addition, district municipalities are required to promote bulk infrastructural development and services to local communities.³¹⁴ This infrastructural development should include sewage and wastewater treatment infrastructure to contribute meaningfully to the restoration of the quality of water.

5.4.2 Cooperative governance

All three spheres of government should make a concerted and coordinated effort to provide consistent and continuous access to clean water and sanitation services. The *Critical Infrastructure Protection Bill* of 2017, inter alia, emphasises the need to enhance cooperation between the three spheres of government and the private sector to protect critical infrastructure. They should find useful ways of providing proper maintenance of sewage and wastewater treatment infrastructure. De la Harpe is of the view that pertinent stakeholders have a role to play in fostering sound and feasible cooperative governance in the water sector, specifically at the national level.³¹⁵ Du Plessis and Nel submit that every municipality in the local sphere of government operates in a system of cooperative governance.³¹⁶ A collective effort by all three spheres of government to provide basic sanitation services can enable local government to provide clean water to the benefit of local communities.³¹⁷ To make sure that local government performs its duties and functions adequately, national and provincial³¹⁸ governments must monitor, oversee and

³¹² GN 509 in GG 22355 of 8 June 2001.

³¹³ See section 152 of the Constitution.

³¹⁴ Section 83(3)(b) of the *LGMS Act* 117 of 1998; section 156 of the Constitution.

³¹⁵ See Chapter 2.2.2. above.

³¹⁶ Du Plessis and Nel "An Introduction" 28.

³¹⁷ See Chapter 2.2.2. above.

³¹⁸ Sections 139; 155(7) of the Constitution.

assess the overall performance of different municipalities to ensure that access to basic municipal services is apparent.³¹⁹

5.4.3 Sewage and wastewater treatment infrastructure

It is evident that the issue involving sewage pollution and dysfunctional wastewater treatment infrastructure remains a thorny issue in the sphere of local government. The peril of this crisis is that raw sewage is flowing directly into the water resources, contaminating the quality of freshwater. This is contrary to the provisions of Part B of Schedule 4 of the Constitution, which expressly indicates that water and sanitation services, including potable water supply systems, sewage, and wastewater disposal systems, fall under local government. Section 4(2)(d) of the *LGMS Act* 32 of 2000 requires local government to ensure that the municipal services are provided to local communities sustainably.

The regular maintenance of sewage and wastewater treatment infrastructure is a critical municipal service that the municipality must perform in order to preserve the quality of water. Chapter 3 of this study illustrated the effects of poor sewage and wastewater treatment infrastructure on the environment, water, health, and the well-being of the citizens with the case study of three local municipalities, the Kgetlengrivier Local Municipality, the Emfuleni Local Municipality, and the City of Tshwane Metropolitan Municipality.

5.4.4 Ensuring Access to Sustainable and Sufficient Clean Water

Section 84(1)(b) of the *LGMS Act* 117 of 1998 expressly indicates that municipalities have the statutory duty to guarantee potable water supply. It is the responsibility of municipalities, as water service authorities, to protect and ensure the quality and supply of fresh and clean water. Section 4(2)(a) of the *LGMS Act* 32 of 2000 imposes a duty on the municipal council to exercise the municipality's executive and legislative authority to

³¹⁹ Hamza 2023 *Lex Localis: Journal of Local Self-Governance* 2–15.

guarantee the provision of municipal services in the best interest of local communities.³²⁰ The said municipal services include sustainable access to clean water.

Water that is supplied to local communities must meet the required national standard.³²¹ Sewage spillages and dysfunctional wastewater treatment infrastructure contribute adversely to environmental degradation and water resources. This is contrary to the provisions of sections 24 and 27(1)(b) of the Constitution. Access to sufficient and sustainable clean water could be achieved only if municipalities can adequately curb the flow of untreated sewage and increase the regular maintenance of sewage and wastewater treatment infrastructure. In addition, the Minister must ensure that water is protected, used, developed, conserved, managed, and controlled sustainably.

5.4.5 The Legal Accountability of Municipalities

“Accountability and transparency are the key features of ensuring that a Municipality performs its functions effectively and efficiently and to the best interest of local communities”.³²² Therefore, the doctrine of accountability places a duty on local government to report and justify its decisions and to face the consequences for its actions if such actions are contrary to the legal rules and public expectations.³²³ Generally, the accountability of local government ought to be determined by the outcomes of the municipal services.³²⁴

Local governments are accountable to the local communities who are affected by its ineffective decisions.³²⁵ Legal accountability involves complete and thorough observation of the principle of the rule of law.³²⁶ It entails the constitutional constraints that work to compel public office-bearers to act consistently with the constitutional requirements.³²⁷ The law does not countenance an ongoing illegality. Essentially, the courts are required

³²⁰ Hamza 2023 *Lex Localis: Journal of Local Self-Governance* 13.

³²¹ See Chapter 2.3.2 above.

³²² See Chapter 2.2.2 and 4.4 above.

³²³ Hamza 2023 *Lex Localis: Journal of Local Self-Governance* 2.

³²⁴ See Chapter 2.2.2 and 4.4 above.

³²⁵ Hamza 2023 *Lex Localis: Journal of Local Self-Governance* 2.

³²⁶ See Chapter 2.2.2 and 4.4 above.

³²⁷ See Chapter 2.2.2 and 4.4 above.

by the doctrine of legality to enforce the law.³²⁸ The courts must uphold the doctrine of legality by refusing to countenance an ongoing statutory contravention.³²⁹

5.5 Answering the Research Question of the Mini-dissertation

The research question buttressing this study was: To what extent does the current legal framework enable local government to ensure sustainable access to clean water and effectively manage sewage pollution in South Africa?

The study found that local government in South Africa is failing to adequately address sewage pollution to realise sufficient and sustainable clean water to local communities. Municipal councils, as the administrator of municipal affairs, have failed to effectively exercise the conferred constitutional powers to implement mechanisms that would ensure that sewage and wastewater treatment infrastructure are regularly maintained and upgraded and the right to access water is realised. The study further found that some municipal councils are failing dismally in their duties to serve the best interest of local communities.

Therefore, a concise answer to the research question is that the law regulating local government affairs must be reformed to hold municipalities and municipal managers that fail to adequately maintain and upgrade water, sewage and wastewater treatment infrastructure, legally accountable. In addition, failure to supply local communities with sufficient clean water should attract legal accountability from the municipality and municipal manager. Local government's failure to provide clean water not only violates the human rights of the citizens of South Africa, but also violates their integrity and dignity.

5.6 Recommendations

This study traced the legal principles dealing with access to sufficient water and sanitation services. Chapter 1 of this study set out the background of the global recognition of the

³²⁸ *Kunogqala Local Residents and Others v Ab Xuma Local Municipality and Another* (4146/2023) [2025] ZAECHMHC 4 (6 February 2025) para 36.

³²⁹ *Kunogqala Local Residents and Others v Ab Xuma Local Municipality and Another* (4146/2023) [2025] ZAECHMHC 4 (6 February 2025) para 36.

right to access sufficient clean water. The constitutional framework that imposes a duty on local government under the supervision and support of national and provincial governments, was discussed. The study showed that access to ample and sustainable clean water is a constitutional right. It is further demonstrated that the municipal council must exercise its powers so that sewage and wastewater treatment infrastructure is regularly maintained and upgraded to ensure that sewage is treated before being discharged.

This study recommends that senior members of the municipal council, including the municipal manager, be held personally liable by way of fines for environmental damage caused by raw sewage spills and failure to ensure adequate access to clean water. This is essential to make sure that the municipal council and the municipal manager monitor and oversee the performance of municipal employees, particularly to ensure that sewage and wastewater treatment infrastructure is maintained and upgraded regularly. The municipal council has the statutory and constitutional power and duty to fulfil the constitutional mandate of the local government. This constitutional mandate of local government must reflect the international treaties' objectives on water rights and the provision of water of good quality for consumption purposes.

Wastewater treatment infrastructure must be regularly upgraded and maintained to ensure that untreated sewage does not flow directly into water resources. Water must be purified to ensure that water service authorities supply water that complies with the required standards. Municipalities must ensure that sewage and wastewater treatment infrastructure is prioritised. This can happen by ensuring that a sufficient budget is allocated to address poor infrastructure.

When municipalities fail to deliver these municipal services, affected local communities should approach the courts to hold defaulting municipalities legally accountable by seeking a structural interdict against the municipality or criminal prosecution against the municipal manager. Case law demonstrates that municipal managers can be held legally accountable, but there is no certainty about holding them criminally liable. Moreover, holding municipal managers of the defaulting municipalities legally accountable should serve as a special legal remedy in local government. Other senior municipal council

members ought to be held personally liable for not performing municipal duties accordingly. This remedy could contribute immensely to ensuring that municipalities provide adequate municipal services to the utmost benefit of local communities. Municipalities must enact bylaws that would regulate regular maintenance and the monitoring of sewage and wastewater infrastructure. The municipalities must further ensure that people with the relevant skills are deployed to maintain the infrastructure to ensure that water sources are not contaminated by overflowing raw sewage.

5.7 Conclusion

This study addressed the local government's mandate to address sewage pollution and ensure sustainable access to clean water in South Africa. In compiling detailed research on this title, the study sought to answer the question: To what extent does the current legal framework enable local government to ensure sustainable access to clean water and effectively manage sewage pollution in South Africa? The South African legal framework that governs water law was examined to determine the duties and powers of local government to ensure that sewage and wastewater treatment infrastructure is regularly maintained. This should be done to prevent raw sewage from flowing directly into the water resources and affecting the quality of water, since this impedes on the right to adequate access to clean water.

The danger of ignoring this responsibility is that local communities in South Africa would be denied access to sufficient and sustainable clean water and their health and well-being would be affected adversely. People would be supplied with water that does not meet the quality of national standards. This would be detrimental to the health and well-being of South African citizens. To prevent this, the municipal council in local governments must adequately exercise their powers and perform the constitutionally prescribed duties in the best interests of South African communities. The provisions of the Part B of Schedule 4 and 5 of the Constitution is of importance. The municipal council must ensure that local government promotes a safe and healthy environment to preserve the quality of water by preventing sewage pollution.

This study argued that national and provincial governments must monitor the performance of local governments. When necessary, national and provincial governments

must support local government to fulfil its municipal affairs. The provisions of section 41 of the Constitution requires the three spheres of government to work together for the benefit of local communities. Any failure by local government to adequately and effectively render essential basic services to local communities shall attract legal accountability and would further prove ineffective cooperative governance.

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