

Municipal legal accountability for environmental damage in the context of environmental rule of law: a jurisprudential appraisal

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DEDICATION

Anonymized

The information used and presented in this mini-dissertation was correct and up to date on 30 November 2021 when research for this study was concluded. Any later political, social and/or legal developments have not been considered.

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ABSTRACT

There is evidence, past and present, to the effect that local government or municipalities do at times renege on and violate their duty to provide basic services to the residents within their jurisdiction. In view of this, the discussion sought to establish the links between local government's constitutional and legislative duties regarding service delivery, and particularly sanitation-service delivery. Once this was clarified, and with a view to demonstrating how civil society and citizens could pursue judicial avenues for the enforcement of their service-delivery rights, the discussion then evaluated past and present case law to determine the extent to which, and the methods through which, courts are holding local governments accountable for failing to deliver sanitation services.

Keywords: Municipal legal accountability; local government accountability; basic services; service delivery; sanitation services; wastewater; sewage disposal; South Africa

LIST OF ABBREVIATIONS AND ACRONYMS

IDPs	Integrated development plans
NEMA	<i>National Environmental Management Act</i>
VIP latrines	Ventilated improved pit latrine toilets

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1 INTRODUCTION

1.1 Background

In 2018, Richard Stacey observed that there is a gap between constitutional norms and municipal conduct, going as far as stating that “economic and social rights themselves may be significantly limited in their usefulness as legal tools to achieve objectives of social justice”.¹ This was after he had observed that municipalities in the Vaal and in Kroonstad, at times, construct what is termed *skelmpype*, meaning any structure (including pipes) that “furtively and illegally discharges pollutants into a watercourse in a way that escapes detection by monitoring authorities”.² Needless to say, such actions are blatantly against the constitutional obligations of local government.³ Stacey goes further in indicting municipal officials:

Officials responsible for sewage and wastewater treatment have taken active steps, in the construction of *skelmpype* and the clandestine discharge of wastewater, to achieve the appearance of compliance with the formal requirements of clean water, all the while dumping raw sewage into rivers out the back door.⁴

Failures of this nature in service delivery are believed to be one of the causes of the frequent service-delivery protests that routinely rock South Africa.⁵ In the context of sanitation services, there was even a so-called “poo protest”, where protesters threw human faeces in public spaces, including Parliament, as a way of protesting about poor sanitation services.⁶ A recent study found that “water and sanitation-related protest-events countrywide increased from 528 in 2017 to 737 in 2018, with all provinces witnessing an increase in both water and sanitation protest events”.⁷

¹ Stacey 2018 *Law & Social Inquiry* 798.

² Stacey 2018 *Law & Social Inquiry* 809.

³ See discussion under 3.2 below. The study will use the collective/umbrella word local government interchangeably with municipalities when referring to either metropolitan, local or district municipalities. See Scheepers 1999 *Koers-Bulletin for Christian Scholarship* 339.

⁴ Stacey 2018 *Law & Social Inquiry* 809.

⁵ SALRC *Review of Regulatory, Compliance and Reporting Burdens Imposed on Local Government by Legislation* 9; Pieterse 2014 *South African Law Journal* 151.

⁶ Barnes 2018 *Journal of Social and Political Psychology* 545.

⁷ Mudombi 2020.
<https://www.dailymaverick.co.za/article/2020-04-02-access-to-water-and-sanitation-in-south-africa-a-renewed-call-for-more-action/>.

Illegal actions on the part of local government, such as the *skelmpyp* example mentioned above, are a direct affront to the *National Environmental Management Act* (hereafter NEMA),⁸ which places a duty on all organs of state to operate within the ambit of the principles set out in Section 2 of NEMA. For example, NEMA requires environmental management to place people and their needs at the centre of concern;⁹ that the environment is held in trust for the people and it should be used for the benefit of such people.¹⁰ Furthermore, a polluter, whether a natural or juristic one, bears the costs of remedying the environment.¹¹ One could thus state that when local government fails, there is a violation of the *Constitution of the Republic of South Africa*,¹² (hereafter the Constitution), which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".¹³

While there are many forms of accountability, this study focuses on legal accountability. In the context of local government, the latter is described as the judicial accountability of local government for their constitutional and legislative mandates.¹⁴ In other words, when local government specifically violates constitutional and legislative mandates, there must be judicial consequences, irrespective of whether or not there are political ramifications. This becomes a key issue considering that, when local government fails in basic service delivery, people suffer.¹⁵ For example, when services failed in Zimbabwe, around the year 2008, there was one of the biggest cholera outbreaks in the region, which spilt over to countries like Zambia and Malawi.¹⁶

Proof that basic services, and specifically sanitation services, are a global concern is perhaps reflected in the fact that, in 2010, the United Nations General Assembly passed a resolution declaring "the right to safe and clean drinking water and sanitation as a

⁸ *National Environmental Management Act*, 107 of 1998.

⁹ Section 2(2) of the *National Environmental Management Act*.

¹⁰ Section 2(4)(o) of the *National Environmental Management Act*.

¹¹ Section 2(4)(p) of the *National Environmental Management Act*.

¹² *Constitution of the Republic of South Africa*, 1996.

¹³ Local government is an organ of state of state and is bound to respect the Constitution. This is reflected in Section 8(1) of the Constitution which states that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." See also Pieterse 2014 *South African Law Journal* 156.

¹⁴ Maropo *The lack of accountability and transparency in local government in South Africa* 51.

¹⁵ Algotsson *et al* 2009 *LHR Publication Series* (1/2009), funded by Developed Bank of South Africa 8.

¹⁶ Soyapi "The Judiciary and Environmental Protection in Zimbabwe" 371.

human right that is essential for the full enjoyment of life and all human rights".¹⁷ This resolution was followed by yet another by the Human Rights Council of the United Nations, which also confirmed the right to water and sanitation is legally binding in international law.¹⁸ As such, lack of access to sanitation services is a violation of people's dignity. Worse still, it affects the most vulnerable in society, who are usually the poor, women and children.¹⁹ This is concerning; a report by the South African Law Reform Commission paints an even more alarming picture. While referring to general basic service delivery (not specifically water provision), the South African Law Reform Commission, in 2019, observed that at least 55.5 million citizens who rely on municipal basic services, will suffer if municipalities do not function optimally.²⁰ This is because of the proximity of local government to its residents.²¹ This was confirmed in the case of *Joseph and Others v City of Johannesburg and Others* (hereafter *Joseph*),²² where the Constitutional Court stated that "municipalities are, after all, at the forefront of government interaction with citizens."²³

Consequently, from a Hobbesian theory perspective, the social contract theory has it that people surrender their unlimited natural rights (which would allow them to act in the pursuit of self-interest) in favour of having the state organise society within clear and just laws.²⁴ In this regard, and as will be shown during the course of the discussion, local government (as an extension of the state) is then tasked with dispensing basic municipal services to the people with whom it has a social contract.

1.2 Motivation

As noted earlier, local government itself holds a unique space within the South African social fabric because it is the closest to citizens and located where most basic needs of

¹⁷ UN General Assembly, *The human right to water and sanitation: resolution adopted by the General Assembly, 3 August 2010, A/RES/64/292* (2010).

¹⁸ UN Human Rights Council, *The human right to safe drinking water and sanitation: resolution adopted by the Human Rights Council, 2 October 2014, A/HRC/RES/27/7* (2014).

¹⁹ Van Zyl *Outlining a right of access to sanitation in South African Law* 9.

²⁰ SALRC *Review of Regulatory, Compliance and Reporting Burdens Imposed on Local Government by Legislation* 8.

²¹ Fuo 2017 *De Jure Law Journal* 325.

²² *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).

²³ *Joseph and Others v City of Johannesburg and Others*, para 46.

²⁴ Bilchitz 2010 *Constitutional Court Review* 45.

citizens are delivered.²⁵ That is precisely why some scholars note that “[o]f all the three spheres of government, the notion of a government in service of its community is perhaps most compelling with respect to local government”.²⁶ This responsibility can be traced to the Constitution:

A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.²⁷

Along with the *Local Government: Municipal Systems Act* (hereafter *Municipal Systems Act*),²⁸ section 151 of the Constitution has a number of objectives for local government, one of which is “to promote a safe and healthy environment” as mandated by Section 24.²⁹ Du Plessis thus concludes that “it is the enforceable duty of local government to realise the Section 24 environmental right within the limits of the scope of its constitutional powers.”³⁰ However, the obligations of local government are to be done within the ambit of the available resources: “a municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)”.³¹ Arguably, this could be used as a qualifier for the failures of local government to fulfil its obligations.³²

Nonetheless, there is a case to be made that where a municipality violates environmental rights by, for example, constructing a *skelmpype*, there can be no budgetary excuses and there must be accountability for such actions.³³ This responsibility, however, takes a

²⁵ Pieterse 2014 *South African Law Journal* 151; ETU date unknown <https://www.etu.org.za/toolbox/docs/localgov/munservice.html>. The Constitutional Court also found: “[l]ocal government is the closest government can get to the people. That is where delivery must be seen to be taking place.” See *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), para 44.

²⁶ Steytler and De Visser “Local government” 64.

²⁷ Section 151(3) of the Constitution of the Republic of South Africa.

²⁸ *Local Government: Municipal Systems Act* 32 of 2000. Section 4(2) of the Act specifically speaks to the duties of Municipal Councils. Some of the provisions requires the Municipal Councils to provide accountable governance; and to promote a safe and healthy environment within communities.

²⁹ Section 152(1)(d) of the *Constitution of the Republic of South Africa*. Other local government objectives in terms of section 151 include the promotion of economic and social development; the provision of democratic and accountable government for local communities; the provision of sustainable services to communities and the encouragement of the involvement of communities and community organizations in local government.

³⁰ Du Plessis 2010 *Stellenbosch L Rev* 268.

³¹ Section 151(2) of the *Constitution of the Republic of South Africa*.

³² See in this regard, for example, the discussion of the *Nokotyana* case.

³³ See Steytler, De Visser and Mettler *Making law: A guide to municipal councils* 23-28 on what accountability requires of municipal councils.

clearer path when consideration is given to Section 153, which speaks to the developmental objectives of municipalities:

A municipality must-

(a) structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community³⁴

This is why Pieterse opines that local government is the institutional platform envisaged by the Constitution, to link sustainable development with socio-economic rights.³⁵ This role must be done in the context of constitutional values underpinning public administration, as envisaged by Section 195 of the Constitution. Among others, these values, include the requirement for public administration to be development oriented;³⁶ the need for accountability;³⁷ and the promotion of transparency and access to information.³⁸ This is consistent with the view that official conduct must be consistent with formal rules and must be predictable on that basis. In addition, official conduct must be congruent with the constitutional values and norms that underlie statutory rules.³⁹

As a result, the necessity for local government in South Africa to be responsive to the developmental and environmental needs of its constituents, has never been more urgent, especially in the context of the gradual move towards sustainable cities. Yet, the increased rates of urbanisation create pressures for local government,⁴⁰ such that local government is almost always a step behind. In the context of sanitation services, the pressures are even greater, with one commentator noting that "the water and sanitation wars raise larger political questions about the judiciary's role in compelling the state to provide adequate water and sanitation".⁴¹ How these wars play out in court is the main subject of the inquiry for this study.

³⁴ Section 153(a) of the *Constitution of the Republic of South Africa*.

³⁵ Pieterse 2014 *South African Law Journal* 157; ETU date unknown
<https://www.etu.org.za/toolbox/docs/localgov/webdevlocgov.html>.

³⁶ Section 195(1)(c) of the *Constitution of the Republic of South Africa*.

³⁷ Section 195(1)(f) of the *Constitution of the Republic of South Africa*.

³⁸ Section 195(1)(g) of the *Constitution of the Republic of South Africa*.

³⁹ Stacey 2018 *Law & Social Inquiry* 798.

⁴⁰ Sutherland *et al* 2021 *Science of the Total Environment* 1; DWAS *National Sanitation Policy* 3.

⁴¹ Barnes 2018 *Journal of Social and Political Psychology* 545.

1.3 Research question

How are courts holding local government legally accountable for failures in delivering sanitation services?

1.4 Research aim and objectives

The main aim of this research was to investigate how courts are holding local government legally accountable for failure to deliver sanitation services.

This main aim was realised through the following objectives:

- i. Understanding the constitutional and legislative basis for local government's obligation to provide general basic services duties and specific sanitation services obligations.
- ii. To review the judicial context within which local government accountability has played out, from both a past and present perspective.

1.5 Research method

This study used a desktop-based approach. This approach made use of relevant primary materials, such as the Constitution; relevant legislation regulating local government functions; and jurisprudence pronouncing on local government's legal accountability for failure to deliver on sanitation services.

1.6 Limitations and definitions

Sanitation issues are quite broad. For this reason, this study made a number of assumptions and set limitations, so as to properly limit and ground the discussion.

While it is clear that courts are considered not to be best placed to pronounce on policy decisions related to how the state renders socio-economic services,⁴² this study was limited to a discussion of legal accountability. This was insofar as failures in the delivery of basic services are concerned, or where a municipality deliberately contravened laws, as was the case with the *skelmpype*. As such, there is no discussion on free basic services

⁴² Van Zyl *Outlining a right of access to sanitation in South African Law* 34.

or access issues, as these will be accepted as standard. The main issue under discussion is accountability.

For the purposes of the discussion, and in defining basic services, the discussion adopted the inclusive and expansive description offered in the *Water Services Act*,⁴³ which defines basic services as “the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households”.⁴⁴ The failure to deliver on basic sanitation services, for the purposes of this discussion, refers to omissions to act (or to fulfil legal obligations);⁴⁵ defective action (i.e, incomplete, unreasonable or irrational actions)⁴⁶; or even unlawful actions, like the *skelmpype* issue.⁴⁷ The study considered sanitation services holistically, without discussing the component parts.

Legal accountability directly relates to the legal mechanisms that can be used where constitutional and legislative mandates directed to local government have either been breached or omitted.⁴⁸ As such, the right place to find legal accountability would either be through the constitution and specific legislative frameworks or through judicial action (litigation). Thus, while it is true that a “better living environment for everyone in South Africa is not necessarily going to happen through more litigation against and/or stricter regulation and control of and by local government”,⁴⁹ legal accountability is relevant to the extent that it clarifies what local government should do, while giving people an indication of what they should expect from their local government.

Lastly, as can be discerned from the discussion thus far, the terms, local government and municipality are used interchangeably where necessary. Within such a framework of

⁴³ *Water Services Act* 108 of 1997.

⁴⁴ Section 1 of the *Water Services Act*.

⁴⁵ See for example *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] 4 All SA 469 (KZP) (29 July 2019) discussed in Chapter 3 below.

⁴⁶ See for example *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) (19 November 2009) and *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 (WCC) (29 April 2011) discussed in Chapter 3 below.

⁴⁷ See for example *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] 4 All SA 469 (KZP) (29 July 2019) discussed in Chapter 3 below.

⁴⁸ Maropo *The lack of accountability and transparency in local government in South Africa* 51.

⁴⁹ Du Plessis 2015 *Potchefstroom Electronic Law Journal (PELJ)* 1866.

description, local government or municipality is inclusive of metropolitans, districts and local municipalities.

1.7 Framework

This study is structured as follows:

1. Introduction
2. Local government's legal mandate for basic service delivery
3. Legal accountability for failure to deliver on sanitation services
4. Findings and conclusion.

2 LOCAL GOVERNMENT'S LEGAL MANDATE FOR BASIC SERVICES DELIVERY

2.1 Introduction

The Constitution clearly sets out three different spheres of government: the executive, parliament and the judiciary. Within this structure, the executive as government is further divided into national, provincial and local government. The last-mentioned is the focus of the discussion. While the responsibilities of local government are clearly burdensome, there is a clear acceptance that it is an arm of the government which is primarily involved with communities in close proximity and one which renders "services that are considered to materially affect the livelihoods of those living within the geographically demarcated areas of local government".⁵⁰ As such, a discussion of local government speaks to the day-to-day lives of people.

In view of the above, the discussion in this foundational chapter is guided by the following question: *What does the legal and policy framework require of local government in relation to basic services?* An inquiry of this nature sets the context for an analysis of legal accountability for failures in the delivery of basic services. As such, to deliver on the potential promise of the question, the discussion is developed through an evaluation of the following points:

- The constitutional basis for local government's service-delivery obligations;⁵¹
- The legislative and policy basis for local government's service-delivery obligations;⁵² and
- The argument for sanitation as a specific basic service.⁵³

⁵⁰ Du Plessis 2010 *Stellenbosch L Rev* 272; Makoti and Odeku 2018 *African Journal of Public Affairs* 69.

⁵¹ Section 2.2.

⁵² Section 2.3, 2.4, and 2.5.

⁵³ Section 2.6.

2.2 The constitutional basis for local government's service-delivery obligations

Section 7(2) of the Constitution states that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights". This right, it has been argued, translates to duties and responsibilities for local government as well, since Specifically, Steytler⁵⁴ is of the view that Section 7(2) translates to a number of outcomes. For example, when local government respects rights, this means that there is a deliberate attempt to refrain from interfering with the enjoyment of rights; when local government protects rights, it means there must be efforts to ensure that third parties do not violate rights; when local government promotes rights, then there is a deliberate attempt to encourage the realisation of rights through mechanisms, like the increase in public awareness of the rights; and, lastly, when local government fulfils rights, then it means that there must be positive attempts to initiate processes that would allow for the fulfilment of rights, including the promulgation of relevant laws and policies as well as having administrative and budgetary measures.⁵⁵

The question is whether or not citizens have rights, which local government is mandated to respect, protect, promote, and fulfil. To answer this, it is necessary to review the applicable constitutional provisions.

2.2.1 Developmental local government

The *Constitution* heralded the concept of developmental local government through section 152, which reads as follows:

- (1) The objects of local government are-
 - (a) to provide democratic and accountable government for local communities;
 - (b) to ensure the provision of services to communities in a sustainable manner;
 - (c) to promote social and economic development;
 - (d) to promote a safe and healthy environment; and
 - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) *A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in Subsection (1).*

⁵⁴ Steytler 2004 *Law, Democracy & Development* 159.

⁵⁵ Steytler 2004 *Law, Democracy & Development* 159.

From this provision, one could say that the *Constitution* requires local government to prioritise the provision of basic services as part of a constitutional developmental role.⁵⁶ The concept of developmental local government is itself contained in the White Paper on Local Government (White Paper),⁵⁷ which states that:

In the future developmental local government must play a central role in representing our communities, protecting our human rights and meeting our basic needs. It must focus its efforts and resources on improving the quality of life of our communities, especially those members and groups within communities that are most often marginalised or excluded, such as women, disabled people and very poor people.⁵⁸

In other words, when municipalities do not develop their own strategies to meet community needs and improve citizens' quality of life, they are at odds with the mandate to foster developmental local government. For this reason, municipalities have a legal mandate that is coupled with a wide discretion on how they pursue developmental local government.⁵⁹ For example, it is up to municipalities to decide to even approach external service providers in ensuring that basic services are met. For this reason, it is arguable that developmental local government is inextricably linked to the development of the material lives of citizens, which is closely linked with dignity.

Steytler⁶⁰ is of the view that at a minimum, developmental local government requires local government to provide basic municipal services. It has to be at least the minimum, as only then could local government potentially meet the basic needs of the poor and those most vulnerable. Such an endeavour is in line with the view that the Constitution is transformative in nature. Fuo⁶¹ has specifically stated that "by implementing measures that target the poor and specifically ensure that their basic needs are met, municipalities contribute towards pursuing the transformative constitutional mandate and social justice". Viewed within this light, service delivery becomes the hallmark of local governance within a developmental prism, or as Scheepers⁶² clearly notes, "the products of development are *services*". However, Section 152(2) might create some problems, since it requires the obligation to provide for basic services to be done within local

⁵⁶ Steytler, De Visser and Mettler *Making law: A guide to municipal councils* 27.

⁵⁷ White Paper on Local Government in of GN 423 in GG 18739 of 13 March 1998.

⁵⁸ White Paper on Local Government in of GN 423 in GG 18739 of 13 March 1998, 23

⁵⁹ Steytler 2004 *Law, Democracy & Development* 167.

⁶⁰ Steytler 2004 *Law, Democracy & Development* 165.

⁶¹ Fuo 2013 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 225.

⁶² Scheepers 1999 *Koers-Bulletin for Christian Scholarship* 347.

government's "financial and administrative capacity". This is perhaps where Section 153 comes in. Section 153 of the *Constitution* states:

A municipality must-

- (a) structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.

From these provisions, it becomes clear that even when consideration is given to local government's "financial and administrative capacity", such capacity must at the very least give priority to basic services. As noted earlier, this is because basic services reside at the core of what it means to have a decent life for citizens and to perhaps even live a decent life. As the discussion will show, this becomes all the more crucial when viewed within the context of sanitation services.

To revisit Section 153 of the *Constitution*, the obligation to prioritise basic services implies that local government must develop mechanisms or strategies through which they can endeavour to facilitate citizens' access to basic services. Fuo,⁶³ for example, argued that integrated development plans (IDPs) are an appropriate mechanism for ensuring that municipalities plan for how they will deliver basic services. Specifically, Fuo⁶⁴ observes that "the IDP can be seen as a service delivery strategy plan defining municipal services provision, the means in which resources will be mobilised and specifying mechanisms for the transformation of basic service delivery". Local government is able to use such IDPs because they are autonomous. It is such independence which creates further basis for the obligation to provide basic services. In fact, the autonomy is why some have argued that "the powers of municipalities to self-govern are not absolute and they are to be exercised subject to the duties to render sustainable services to communities within their geographical areas".⁶⁵

Case law seems to support the legal mandate of local government to provide basic services. For example, such mandate was confirmed in the *Joseph* case. Briefly, *Joseph*

⁶³ See generally discussion in Fuo 2013 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*. IDPs are also catered for under Sections 25 and 26 of the *Local Government: Municipal Systems Act*.

⁶⁴ Cilliers *A critical analysis of local municipal capacity towards fulfilling their basic municipal services mandate* 27.

⁶⁵ Makoti and Odeku 2018 *African Journal of Public Affairs* 70.

was a case that had to do with the disconnection of electricity to lessees who had been paying rent to their landlord, yet the landlord had failed to pay the service provider. In the Constitutional Court, the issue was whether or not the lessees as citizens had the right to be notified (as part of procedural fairness) about the pending electricity cuts, although they were not in a contractual relationship with the service provider.⁶⁶ According to the court, "the real issue is whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of Section 3 of PAJA".⁶⁷ In making its finding and in its obiter, the court made specific reference to the necessity of basic services, finding that:

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 whether or not they have a contractual relationship with the relevant public service provider.⁶⁸

In another case, concerning contempt of court proceedings for failure to deliver on basic services related to housing, the Constitutional Court confirmed in *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*,⁶⁹ that:

The general duty imposed on municipalities in respect of the provision of municipal services, includes giving effect to the Constitution by prioritising the basic needs of the community, promoting the development of the community and ensuring that there is access to at least the minimum level of municipal services.⁷⁰

In summary, it seems reasonable to conclude that if indeed the Constitution is transformative in nature, and if indeed it requires that there be developmental local government, then there is at least an arguable constitutionally-based legal mandate for municipalities to strive to meet the basic needs of the communities within their jurisdiction. However, there is a further legal basis for determining the legal mandate of local government to deliver on basic services, and this could be deciphered from enabling legislation.

⁶⁶ *Joseph and Others v City of Johannesburg and Others*, para 2.

⁶⁷ *Joseph and Others v City of Johannesburg and Others*, para 33.

⁶⁸ *Joseph and Others v City of Johannesburg and Others*, para 34. Own emphasis.

⁶⁹ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (6) BCLR 711 (CC) (7 May 2015).

⁷⁰ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*, para 58.

2.3 Legal mandate from the Local Government: Municipal Systems Act

The developmental local government mandate is reflected in the *Municipal Systems Act*; it states that local government should not only seek to provide services to people, but it should also be developmental in orientation.⁷¹ The preamble of the *Municipal Systems Act* links developmental local government with basic services:

Whereas there is a need to *set out the core principles, mechanisms and processes that give meaning to developmental local government* and to empower municipalities to *move progressively* towards the social and economic upliftment of communities and *the provision of basic services to all our people*, and specifically the poor and the disadvantaged.⁷²

From this, one could deduce that the need for accountability in basic service-delivery failures is all the more pressing if consideration is given to the fact that it is the poor that suffer disproportionality when general service delivery fails (let alone specific basic services like sewage and waste water). For this reason, some see a clear link between failure in basic-services delivery and environmental injustice,⁷³ such that failures in service delivery could be an environmental injustice.

The *Municipal Systems Act* goes further in providing a definition for what a basic service is. Specifically, the *Municipal Systems Act* defines basic municipal services as “a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment”.⁷⁴ This definition provides perhaps the clearest link between basic services, like sanitation and environmental protection, through Section 24 of the *Constitution* and other provisions, like human dignity in terms of Section 10 of the *Constitution*.

Furthermore, there are provisions that make it clear that basic services are an entitlement to members of the community and that they have the right to expect such services. For example, Section 4 states that a municipal council (within its available resources) has a duty to provide to local communities “equitable access to the municipal services to which they are entitled”.⁷⁵ Concerning services as rights, Section 5 states that subject to the

⁷¹ Preamble of the *Local Government: Municipal Systems Act*.

⁷² Own emphasis to show the likely links.

⁷³ See for example general discussion in Molaiwa 2021 *Potchefstroom Electronic Law Journal (PELJ)*.

⁷⁴ Section 1 of the *Local Government: Municipal Systems Act*.

⁷⁵ Section 4(2)(f) of the *Local Government: Municipal Systems Act*.

payment of rates, local communities have the right “to have access to municipal services which the municipality provides”.⁷⁶ Additionally, local government has a direct duty to:

73. (1) A municipality must give effect to the provisions of the Constitution and—
- (a) give priority to the basic needs of the local community;
 - (b) promote the development of the local community; and
 - (c) ensure that all members of the local community have access to at least the 50 minimum levels of basic municipal services.

In summary, when the above provisions are considered in totality, the clear conclusion is that the *Municipal Systems Act* has direct provisions. These allude to the legal duty of local government to provide basic services. This duty has an associated entitlement on the part of local communities under the jurisdiction of a specific municipality.

2.4 Other laws and policies

In addition to the laws discussed above, there are other pieces of legislation that make reference to the legal mandate of local government to secure basic services for its communities. For example, the *Local Government: Municipal Finance Management Act*,⁷⁷ proscribes the selling of capital assets if such assets would be required to assist municipalities in providing a minimum level of basic-services provision.⁷⁸ The Act also proscribes the national treasury from stopping the provision of funds to municipalities, if such stoppage “affects the provision of basic municipal services in the municipality”.⁷⁹ Furthermore, if the municipality has debts, it may not provide any asset as security, which would affect its ability to provide for basic municipal services.⁸⁰ The most far-reaching provisions are perhaps the ones which allow for the possibility of a provincial government intervening in the affairs of local government if, for any financial reasons (described as a crisis in the Act), the municipality “is in serious or persistent material breach of its obligations to provide basic services”.⁸¹

Apart from these laws, there are also policies which function as guidelines for the conduct of local government and civil servants in the discharge of their obligation to deliver basic

⁷⁶ Section 5(1)(f) of the *Local Government: Municipal Systems Act*.

⁷⁷ *Local Government: Municipal Finance Management Act* 56 of 2003.

⁷⁸ Section 14(1) and 90(1) of the *Local Government: Municipal Finance Management Act*.

⁷⁹ Section 38(3) of the *Local Government: Municipal Finance Management Act*.

⁸⁰ Section 48(3) of the *Local Government: Municipal Finance Management Act*.

⁸¹ Section 136(4) and section 139 of the *Local Government: Municipal Finance Management Act*.

services. While there might be many policies, perhaps the well-known one is the *Transforming Public Service Delivery White Paper* (Batho Pele White Paper).⁸² The Batho Pele White Paper has eight core principles, which stand as the framework in which service delivery should be implemented. The principles are as follows:

- i. Consultation: Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered.
- ii. Service standards: Citizens should be told what level and quality of public services they will receive so that they are aware of what to expect.
- iii. Access: All citizens should have equal access to the services to which they are entitled.
- iv. Courtesy: Citizens should be treated with courtesy and consideration.
- v. Information: Citizens should be given full, accurate information about the public services they are entitled to receive.
- vi. Openness and transparency: Citizens should be told how national and provincial departments are run, how much they cost, and who is in charge.
- vii. Redress: If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response.
- viii. Value for money: Public services should be provided economically and efficiently in order to give citizens the best possible value for money.⁸³

⁸² Transforming Public Service Delivery White Paper (Batho Pele White Paper) in Government Gazette No. 18340 of 1997.

⁸³ These principles are also acknowledged in the National Sanitation Policy. See DWAS Date Unknown [https://www.dws.gov.za/National%20Water%20and%20Sanitation%20Master%20Plan/DocumentsReports.aspx](https://www.dws.gov.za/National%20Water%20and%20Sanitation%20Master%20Plan/DocumentsReports.aspxDWAS_National_Sanitation_Policy) DWAS *National Sanitation Policy* 6.

In addition to this, in 2014, former president Jacob Zuma hosted a Presidential Local Government Summit which resulted in the adoption of the Back to Basics Strategy.⁸⁴ Labelled a programme for change, the Back to Basics Strategy has one of its goals as the creation of:

conditions for decent living by consistently delivering municipal services to the right quality and standard. This includes planning for and delivery of infrastructure and amenities, maintenance and upkeep, including the budgeting to do this. Ensure no failures in services and where there are, restore with urgency.⁸⁵

Again, it is clear from even a policy perspective (the Batho Pele White Paper and the Back to Basics Strategy), that there is recognition of the mandate that local government has to its people, and that local government is only functional and successful if it can tend to the basic services of local communities.

2.5 Sanitation as a basic service

Access to sanitation services is a worldwide pressing issue, especially for developing countries. It is not surprising then that the Sustainable Development Goals list sanitation as an urgent goal to be addressed by 2030.⁸⁶ Statistics show that almost 36% of the global population lacks access to sufficient sanitation services.⁸⁷ In South Africa, the situation is dire, such that at times there are deaths related to sanitation issues. For example, in the 2019 State of the Nation address, it was revealed that two learners in Limpopo had drowned in pit toilets.⁸⁸ There is thus a case to be made for sanitation as a basic service. In fact, as to the legal nature of the necessity of sanitation services, the starting point would be Part B of Schedule 4 of the *Constitution* which notes that local government has the competency to handle sanitation services. This is also why the Back to Basics Strategy clearly notes sanitation as a basic service by also stating that “municipalities must deliver the basic services (Basic electricity, basic water, sanitation, waste removal and so on)”.⁸⁹ Sanitation also links with other fundamental rights. For example, Section 27 of the *Constitution* states that “everyone has the right to have access

⁸⁴ COGTA *Back to Basics - Serving our Communities Better*.

⁸⁵ COGTA *Back to Basics - Serving our Communities Better* 7.

⁸⁶ UN Date Unknown <https://sdgs.un.org/goals/goal6>.

⁸⁷ Simha and Ganesapillai 2017 *Sustainable Environment Research* 107.

⁸⁸ Nhamo, Nhemachena and Nhamo 2019 *Science of the Total Environment* 130.

⁸⁹ COGTA *Back to Basics - Serving our Communities Better* 16.

to - ...(b) sufficient food and water".⁹⁰ The provision also requires the State to progressively realise this right, subject to available resources. While sanitation is not explicitly mentioned, it falls within access to water. In this regard, some scholars state that "the right to sanitation could be derived from the right to a clean environment read together with the right of access to clean water."

Furthermore, there is also an inescapable link between sanitation as a basic service and the NEMA, the framework environmental legislation. NEMA recognises that the State must meet the basic needs of its citizens. Specifically, the environmental management principles in Section 2 of NEMA are indicative of the State's "responsibility [to] respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination".⁹¹ Furthermore, NEMA recognises that meeting the basic needs of communities is consistent with the principles underpinning sustainable development. For example, NEMA states that any sustainable development planning must consider and ensure that "equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued". Thus, if indeed there is a legal duty for local government to provide basic services in general, the logical corollary of that duty is that there must be legal accountability to remedy or redress failures in realising or fulfilling such duty.⁹² In fact, Du Plessis links the argument for local government duties in relation to basic services with Section 24 of the Constitution, arguing that:

An inclusive reading of the Constitution, together with an understanding of the inseparable link between, on the one hand, environmental resources such as water, air and soil, and, on the other, 'basic needs' serves to reinforce the idea that the Constitution creates a legally valid and enforceable environmentally relevant expectation on the part of rights holders.⁹³

⁹⁰ Section 27(1) of the *Constitution*.

⁹¹ Section 2(1)(a) of the *National Environmental Management Act*.

⁹² Sanitation as a basic service helps to fulfil and protect section 24's environmental rights. As such, while writing on socio-economic rights within the context of section 24 of the Constitution, Du Plessis argued that "based on the now well-established enforceability of socio-economic rights in South Africa, local authorities can be held liable, even if only to some degree, should they not adhere to the duties created by section 24." See Du Plessis 2010 *Stellenbosch L Rev* 269. There is therefore room for holding local government liable.

⁹³ Du Plessis 2010 *Stellenbosch L Rev* 269; Du Plessis 2009 *SA Publiekreg= SA Public Law* 59.

Sanitation as a basic service is clearly inseparably linked with the protection of the right to a healthy environment, as envisaged by Section 24.

2.5.1 Sanitation and local government: the Water Services Act linkage

The *Water Services Act*⁹⁴ defines basic sanitation as “the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households.”⁹⁵ Basic sanitation services are in turn defined as “the collection, removal, disposal or purification of human excreta, domestic waste-water, sewage and effluent resulting from the use of water for commercial purposes.”⁹⁶ Furthermore, the *Water Services Act* makes it clear that sanitation services are handled by water services authorities, which are the municipalities.⁹⁷

Lastly, the Water Services Act explicitly states that access to basic sanitation is a right. Specifically, in terms of Section 3 of the Act,

- (1) Everyone has a right of access to basic water supply and basic sanitation.
- (2) Every water services institution must take reasonable measures to realise these rights.
- (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.

The result is that within the context of this discussion, when legislation speaks of access, it denotes a specific duty on the part of local government.⁹⁸ Such duty, includes providing infrastructure for sanitation services as well as the continued servicing of such infrastructure so that it works as intended.⁹⁹ Consequently, citizens being entitled through the legal framework as discussed above, are enjoined to enforce legal accountability by virtue of the social contract theory they might have with their government. This is consistent with the idea of a rights-based approach to sanitation services.

⁹⁴ *Water Services Act.*

⁹⁵ Section 1 of the *Water Services Act.*

⁹⁶ Section 1 of the *Water Services Act.*

⁹⁷ Section 1 of the *Water Services Act.*

⁹⁸ Van Zyl *Outlining a right of access to sanitation in South African Law* 14.

⁹⁹ Van Zyl *Outlining a right of access to sanitation in South African Law* 14.

2.6 Conclusion

This chapter sought to contextualise the legal basis for local government's service-delivery obligations. From a generalised perspective, the discussion shows that there is a legal mandate that stems from the *Constitution* and all the way to legislation. This qualifies the duty of local government and entitles communities in the jurisdiction of local government to expect at least a minimum level of service delivery. Moving from the general to the specific, the discussion then showed that the National Water Services Act clearly has sanitation services as a litigable right, in that everyone is entitled to access to sanitation services. It is on this basis that, if there is a failure on the part of local government in delivering such service, then legal accountability must ensue.

In what remains of the study, the discussion will now consider legal accountability for failures in the delivery of sanitation services, as well as the mechanisms and options through which this could be pursued.

3 LEGAL ACCOUNTABILITY FOR FAILURE TO DELIVER ON SANITATION SERVICES

3.1 Introduction

The previous chapter established that there is a constitutional and legislative legal mandate on local government to provide for sanitation services, and that failure to do so, should warrant legal accountability. It is important to know that the existing legal frameworks, as discussed above, do not provide sanctions for local government. Even the *Water Services Act*, which presents sanitation services as a right, does not provide sanctions.¹⁰⁰ However, as argued in Chapter 1, legal accountability could be sought through legislation where, for example, there are either omissions to act (or to fulfil legal obligations),¹⁰¹ defective actions on the part of local government (i.e, incomplete, unreasonable or irrational actions)¹⁰² or when local government engages in otherwise unlawful actions or conduct.¹⁰³

In view of the above, the chapter will evaluate the following question: *How has litigation facilitated legal accountability for local government's failure to deliver on sanitation services?* This inquiry will be pursued through a discussion of the following discursive points:

- The importance of litigation in pursuing legal accountability;¹⁰⁴ and
- A series of four decisions detailing legal accountability.¹⁰⁵

¹⁰⁰ Algotsson *et al* 2009 *LHR Publication Series (1/2009)*, funded by Developed Bank of South Africa 5. The authors conclude that liability and accountability could be through the *Health Act* which requires authorities to purify water and also the *Local Government: Municipal Finance Management Act* which provides for accountability for wasteful expenditure.

¹⁰¹ See for example *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] 4 All SA 469 (KZP) (29 July 2019) discussed in Chapter 3 below.

¹⁰² See for example *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* and *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 (WCC) (29 April 2011) discussed in Chapter 3 below.

¹⁰³ See for example *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] 4 All SA 469 (KZP) (29 July 2019) discussed in Chapter 3 below.

¹⁰⁴ Section 3.1 below.

¹⁰⁵ By failure to deliver on basic sanitation services, this discussion refers to either omissions to act (or to fulfil legal obligations),¹⁰⁵ defective action (i.e, incomplete, unreasonable or irrational actions)¹⁰⁵ or even unlawful actions like the *skelmpype* issue.¹⁰⁵

These issues are in turn addressed below.

3.2 Litigation

That litigation can be a protracted and costly exercise should be obvious; yet, as the cases will show, there is no doubt as to the strength of litigation, especially in relation to the vindication of rights. It is usually through litigation that the State's duties to protect, promote, respect and fulfil rights find expression. In South Africa, there is a legitimate view that the nature of governance (which is at times fragmented) and general public administration call for judicial oversight through litigation. In this regard, Van Zyl is of the view that:

Litigation can be used as an effective mechanism to enforce rights, hold government to account, and ensure that communities have appropriate remedies... Furthermore, litigation offers more than just an opportunity for immediate redress and presents the potential for greater legal certainty in future sanitation claims.¹⁰⁶

In view of this, any discussion related to sanitation in South Africa has to acknowledge the case of *Mazibuko and Others v City of Johannesburg and Others (Mazibuko)*.¹⁰⁷ While the case was not necessarily concerned with sanitation but rather with the right of access to water, the court still made some important dicta, which has implications for sanitation services. Briefly, the facts were that residents in the City of Johannesburg challenged the City's decision to allocate 6 kilolitres of water per month to every account holder. That amount of water constituted the Free Basic Water policy, with the implication that, beyond 6 kilolitres, every account holder would be liable to pay for any additional water consumption.¹⁰⁸ The Constitutional Court acknowledged the onerous task the City faced in relation to access to water.¹⁰⁹ Yet, in making its findings, the court considered the reasonableness of the policy adopted by the City of Johannesburg. While the minute details of the findings of the Court are beyond the scope of this study, the Court established the circumstances where government (and in the context of this discussion, local government) could be challenged in court for failure to respect, promote, protect

¹⁰⁶ Van Zyl *Outlining a right of access to sanitation in South African Law* 30.

¹⁰⁷ *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).

¹⁰⁸ *Mazibuko and Others v City of Johannesburg and Others*, para 6.

¹⁰⁹ *Mazibuko and Others v City of Johannesburg and Others*, para 7.

and fulfil rights (in other words, failure to deliver on basic services). The Constitutional Court stated the following:

Thus, the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government-adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.¹¹⁰

Viewed within this reasoning, the expectation that municipalities deliver on their service-delivery mandate, and specifically sanitation, would be grounded in a number of possibilities: that there are policies for sanitation, and whether such policies are reasonable or not; that the existing policies are being honoured and the extent to which they are being honoured; or even whether or not municipalities are engaging in sanitation-related activities that directly infringe on other existing rights (like the *skelmpype* issue). It is on this basis that the court concluded that, if citizens are aware of these issues, they could demand accountability through the electoral democratic process, or through litigation:

The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.¹¹¹

In view of this brief exposition, the discussion that follows traces legal accountability of local government for the failure to deliver sanitation services, through the lens of four cases.

¹¹⁰ *Mazibuko and Others v City of Johannesburg and Others*, para 67.

¹¹¹ *Mazibuko and Others v City of Johannesburg and Others*, para 160.

3.3 Cases

3.3.1 *Nokotyana: when judicial deference reigns*

The earliest case through which the right of access to sanitation was an issue, is the Constitutional Court case of *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*.¹¹² In this case, residents of the Harry Gwala Informal Settlement were requesting that the Ekurhuleni Metropolitan Municipality build or construct ventilated, improved pit latrine toilets (also known as VIP latrines) for them.¹¹³ The community believed each family deserved a single VIP latrine (or at least one latrine per two households), as opposed to the chemical toilets that had been allocated to ten families per toilet.¹¹⁴ While acknowledging the role of the courts in facilitating enforcement of access to socio-economic rights, the court also noted the limitations of "the role of courts in the achievement of socio-economic goals is an important but limited one and that bureaucratic efficiency and close co-operation between different spheres of government and communities are essential".¹¹⁵

The court relayed the history of the matter, noting that the residents had in fact been made a promise by the municipality that the informal settlement would be upgraded into a formal township. Upgrading would then entitle the residents to the normal basic services provided to formal township dwellers.¹¹⁶ It is on this basis that the residents were demanding the provision of basic services, including sanitation, with immediate effect, pending the upgrade. For the municipality, such an obligation only arose when a decision for the upgrade had been finalised, since such obligation required extensive capital resources and planning. In the initial High Court matter, the municipality had accepted an obligation to provide tap water and refuse-removal services, but the High Court found that the case for the provision of sanitation services had not been made.¹¹⁷

In the Constitutional Court, the applicants were essentially arguing that the municipality was failing in its delivery obligations of sanitation services, since the allocation of one

¹¹² *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*. The case also concerned requests for lighting as well. The discussion will be limited to the issues implicating sanitation.

¹¹³ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 3.

¹¹⁴ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 3.

¹¹⁵ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 4.

¹¹⁶ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 4.

¹¹⁷ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 7.

chemical toilet per ten families was irrational and unreasonable, and they had been waiting three years for a final decision on the upgrade.¹¹⁸ Furthermore, for the applicants, budgetary constraints could not be used as an excuse for the failure to provide what they characterised as free basic sanitation.¹¹⁹ In turn, the respondents were of the view that practicalities and budgetary issues could not be ignored, such that:

...the true difference between the parties is the practical implementation of measures to achieve the applicants' constitutional rights, not their entitlement to these rights. Thus, it is contended, the real question for consideration is whether the Municipality has been unreasonable in declining to provide the services claimed within the timeframe and to the extent that they are claimed.

In making its decision, the Constitutional Court agreed that a decision to provide sanitation services as contended by the applicants, fell short of the standards set out in law, like the *Housing Act*, since a decision for specific services, like sanitation as requested by the applicants, could not be effected before the decision to upgrade was finalised.¹²⁰ In other words, the municipality's commitments and actions had not been unreasonable or irrational.¹²¹ On the question of whether or not the municipality could accept assistance from the provisional government to assist this specific community (amongst the many other informal settlements within the jurisdiction of the municipality), the Constitutional Court found as follows:

It is tempting to order the Municipality to accept the assistance offered in order to improve the lives of at least the applicants before this Court, by describing their situation as exceptional and unique. Unfortunately though, it is not so exceptional or unique. According to the Municipality, there are 110 other similar informal settlements within its area of jurisdiction. In another 16 cases, the Municipality informs the Court, the Province has also delayed taking a decision on applications for upgrading. Elsewhere in the province and the country there are thousands more in similarly unsatisfactory circumstances. It would not be just and equitable to make an order that would benefit only those who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind.

This finding almost reads as if suggesting that a failure, or at least a failure to accept assistance in fulfilling basic services, is acceptable, to the extent that such failure is consistent (or applicable to everyone), yet the facts are that this specific community was the one that was before the court, and not the absent ones. Whether or not this was

¹¹⁸ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 11.

¹¹⁹ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 11.

¹²⁰ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 11.

¹²¹ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 12.

indeed just and equitable, is beyond the scope of discussion, but this much is clear (at least within the context of *Nokotyana*) – unless there is an “exceptional and unique” scenario, municipalities might be given “a pass”, in that their actions might be considered reasonable, even though there might be an obvious shortcoming in the services they offer.

3.3.2 *Beja: when dignity reigns*

Legal accountability for failure to deliver on sanitation services could be successfully pursued through arguments related to the violation of dignity. , Such was the case in *Beja and Others v Premier of the Western Cape and Others (Beja)*,¹²² where, in the first paragraph and before any facts had been relayed, the High Court noted that “[w]e have a duty, more particularly public representatives and government to promote human dignity. This duty must be fulfilled responsibly and with the utmost maturity. A failure to do this diminishes us all”.¹²³ The relevant facts are that, as with *Nokotyana*, the municipality had sought to upgrade an informal settlement at Silvertown Khayelitsha. Because of the number of people in the informal settlement, the municipality then relocated some of them to demarcated spaces, which then formed what became known as the Silvertown project.¹²⁴

Part of the plans for this project were that the municipality would construct one toilet for every five families in what would be known as communal toilets.¹²⁵ While the toilets were still to be constructed, the communities expressed discontent at the toilets, demanding that there be individual toilets for each erf. The municipality agreed to this, on the condition that the constructed toilet would not be enclosed, with such responsibility falling to the community.¹²⁶ While some residents had closed off the toilets, some had not. To appreciate the nature of these toilets, the court described them as follows:

The unenclosed toilets consisted of a concrete slab for the toilet to stand on with the cistern and a water pipe that was not affixed to any walls. The toilets were completely open and in full view of every person in the community, and mostly situated close to the road. It is disturbing to note from correspondence between the consulting engineers and the

¹²² *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 (WCC) (29 April 2011).

¹²³ *Beja and Others v Premier of the Western Cape and Others*, para 1.

¹²⁴ *Beja and Others v Premier of the Western Cape and Others*, para 12.

¹²⁵ *Beja and Others v Premier of the Western Cape and Others*, para 15.

¹²⁶ *Beja and Others v Premier of the Western Cape and Others*, para 12.

municipal managers that these structures were referred to as “a loo with a view”. This term unfortunately also found its way into official reports and was used as a description, in the media. I wish to point out that this description and the continued use thereof, even after complaints were lodged with the SAHRC, is reprehensible and fails to afford any regard to the dignity of poor people, compelled to use these toilets in unfortunate circumstances.¹²⁷

It turned out that there were, unfortunately, also incidents of vandalism in relation to attempts to enclose some of the toilets. The turning point was perhaps the incident when one of the applicants, 76-year-old Mrs Beja, had gone to relieve herself, covered with a blanket, and was stabbed on her return from the toilet.¹²⁸ Thus, upon an inspection in loco, the Court issued interim orders of a structural nature, with specificities as to exactly how and when the municipality would construct and enclose toilets within the community, pending finalisation of the main case.¹²⁹

The Court considered many provisions in detailing its decision, including constitutional rights to human dignity and even the limitation of rights; provision of the *Housing Act* and its policies and regulations; as well as the *Water Services Act*, to make a number of findings. First, the court found that there was no meaningful engagement with the community, and no proof the community had agreed to open toilets. This was because only 60 people in the 6,000-strong community had attended the meeting, with the result that the 60 people, including even their ward councillor, could not sign away the dignity rights of members of the community.¹³⁰ This was because “a collective agreement of this nature, alleged by the City, cannot amount to a waiver of individual fundamental rights to dignity and privacy”.¹³¹

Secondly, unlike the Constitutional Court in the *Nokotyana case*, where the municipality managed to get away with budgetary arguments, the High Court in *Beja* was perhaps more sympathetic to the plight of the residents, as it was of the view that the argument by the municipality – that its intention was not to violate the dignity of the residents – was unsustainable. To the Court, the requirement for municipalities to offer the minimum level of basic municipal services meant that, in their decisions, municipalities must give thought to how the impact of such decisions would affect their constituent residents.

¹²⁷ *Beja and Others v Premier of the Western Cape and Others*, para 19.

¹²⁸ *Beja and Others v Premier of the Western Cape and Others*, para 23.

¹²⁹ *Beja and Others v Premier of the Western Cape and Others*, para 32-34.

¹³⁰ *Beja and Others v Premier of the Western Cape and Others*, para 100.

¹³¹ *Beja and Others v Premier of the Western Cape and Others*, para 101.

Consequently, while not dictating what minimum standards should be, the Court was of the view that:

Such minimum level would include the provision of sanitation and toilet services. Irrespective whether it is built individually on separate erven, or communally, it must provide for the safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution. Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity. "[t]he City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights."¹³²

As a result, the court found that constitutional rights, including the right to dignity, were violated. The municipality was ordered to enclose all the 1,316 toilets in the Silverton project.¹³³ The biggest takeaway from *Beja*, which also stands as the greatest divergence from *Nokotyana*, is that legal accountability for the failure to deliver on sanitation services was not reduced to budgetary and planning constraints, but was hinged on the inherent dignity of residents. In other words, and even within the ambit of the progressive realisation of rights, budgetary constraints (at least within the context of *Beja*) could not be used to limit the dignity of citizens in a blanket fashion.

3.3.3 *Kenton: when the structural interdict becomes necessary*

In *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*,¹³⁴ as with *Beja*, the Eastern Cape High Court relayed its judgment with an appreciation of the "sad tale" of the effects of neglected sewage works on the well-being of the residents of Kenton on Sea and Bushman's River Mouth. In the Court's view, this case raised issues related to the reasonable standard expected for the maintenance of essential municipal services.¹³⁵ The facts were that at some point, a structural interdict had been ordered against the First Respondent, in terms of which they had to report on what they had done to control sewage reticulation. Although a service provider had been appointed to oversee the process, such sewage reticulation process was not functioning, since there was no electricity connection for the pump that ran it. The result was that sewage was overflowing into the Bushman's River estuary, on which some residents

¹³² *Beja and Others v Premier of the Western Cape and Others*, para 143.

¹³³ *Beja and Others v Premier of the Western Cape and Others*, para 192.

¹³⁴ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others* 2017 (2) SA 86 (ECG) (15 June 2016).

¹³⁵ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*, para 2.

relied. While the pump had been fixed at some point, it routinely required servicing for it to continue functioning. This maintenance was not done by the authorities. As such, the applicants were requesting the Court to order the authorities “to keep the pump station fully maintained, in good working order and operational at all times”.¹³⁶ Failure to do so, would amount to a violation of the applicants’ right to a healthy environment in terms of Section 24 of the Constitution.¹³⁷ There was thus the question of whether or not contempt of court proceedings could be constituted against the authorities and to whom such contempt proceedings would be directed.

The Court traced the local government’s responsibilities to Schedules 4 and 5 of the Constitution, the *Municipal Structures Act* (Sections 83 and 84 on the division of duties between district and local municipalities) and scholarly works to hold that municipalities actually had no discretion on whether they should provide services (and maintenance of such services).¹³⁸ What’s more, the court was of the view that the duties of local government to deliver on sanitation services was coupled with the obligation to respond promptly to concerns raised about the nature and quality of services received.¹³⁹ As such, the court was of the view that if an order was given that sanitation services must be routinely provided, and that infrastructure for such must be routinely maintained, failure to abide by this order would mean that the accounting officer of the Municipality – the Municipal Manager – would be liable for such contempt:

... from the statutory provisions relating to Municipalities it is clear that the Municipal Manager is, insofar as the officials of the Municipality are concerned, the responsible person whose duty is to oversee and implement court orders against the Municipality. The Municipal Manager would know, as the Accounting Officer, what is feasible and what is not. The Municipal Manager cannot pass responsibility for these administrative duties to a Manager or Director who is not directly accountable in terms of his/her duties. The court held that the Municipal Manager is the official who is responsible for the overall administration of the Municipality and the logical person to be held responsible. This is so even if he delegates the tasks flowing from a court order to others.¹⁴⁰

Although they had remedied the pump issue, the authorities were thus found to have been in contempt of court orders for failing to timeously address the issue of the sewage spills and the maintenance of the sewage reticulation pump. The Court then ordered

¹³⁶ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*, para 15.

¹³⁷ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*, para 16.

¹³⁸ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*, para 26.

¹³⁹ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*, para 45.

¹⁴⁰ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*, para 58.

another structural interdict, specifying that the local municipality and its Municipal Manager were in contempt of court and were required to report to the Court “on affidavit by no later than 14 July 2016, as to the steps First Respondent intends to take relevant to the further maintenance and continued functioning of the pump station at the conservancy tank situated at Fourth Avenue, Rivers Bend, Bushman’s River”,¹⁴¹ and that after such report is given to the Court, the applicants could challenge such report within 15 days of its filing, after which the matter is set down for argument. Only then could any findings in relation to the report be made an order of Court. The Court then made adverse costs ruling in favour of the applicants.

This was a far-reaching decision, one which clearly epitomised Barnes’¹⁴² contention that “the water and sanitation wars raise larger political questions about the judiciary’s role in compelling the state to provide adequate water and sanitation”. Yet, there is reason to celebrate that at the very least, where appropriate, courts are willing to hold both the municipality and its accounting officer directly liable for failure to abide by court orders requiring the provision of sanitation services. A structural interdict is thus significant, to the extent that it allows the courts to remain part of the governance process until compliance is secured.

3.3.4 Msunduzi: when the structural interdict is concretised.

The latest case in which the structural interdict seems to have now been concretised by the courts is the 2019 case of *Mshengu and Others v Msunduzi Local Municipality and Others* (Msunduzi).¹⁴³ Consistent with *Beja* and *Kenton*, the Court in *Msunduzi* humanised the plight of the First Applicant, who had passed away by the time of the judgment, at the age of 104 years.¹⁴⁴ Such was the plight and the struggle of the First Applicant, that the court concluded the judgment would refer to Mr Zabalaza Mshengu by name throughout (as opposed to the traditional ‘First Applicant’).

The facts in *Msunduzi* were that Mr Zabalaza, along with his adult sons and grandsons, was a resident of Edmore Farm, which was within the jurisdiction of the Msunduzi Local

¹⁴¹ *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*, para 116.

¹⁴² Barnes 2018 *Journal of Social and Political Psychology* 545.

¹⁴³ *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] 4 All SA 469 (KZP) (29 July 2019).

¹⁴⁴ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 1.

Municipality. Mr Zabalaza had lived on this farm his entire life, as had his father before him.¹⁴⁵ Access to water on this farm was described by the court as cumbersome, given Mr Zabalaza lived on a hill-top and water was to be found downhill at a communal tap. On the other hand, the Second Applicant lived on another farm (Greenbranch, which was in the jurisdiction of the Second Respondent's municipality), which had no ablution at all, with the closet facilities being over 10 kms away. Their plight was made even worse by the fact that when they tried to dig pit toilets at their own cost, the farm personnel stopped them, arguing that they could continue using the sugarcane plantation. The Court characterised this response in this way:

Mr Meyer advised them that they were not allowed to construct pit toilets on the settlement and were to use the sugarcane plantation as their toilets. Mr Meyer told them that human waste is a form of manure that assists with fertilising his crop. There are no lights installed in the sugarcane plantation and the places that the occupiers are currently using as toilets are unhygienic, smelly and attract flies and other vermin. Women in particular suffer great hardship, humiliation and impairment of their dignity as they do not have a proper place to dispose of their used sanitary towels when they undergo their menstrual cycle.¹⁴⁶

As such, when the residents of Greenbranch approached their ward councillor for assistance in the provision of basic services, the response from the councillor was that such services could not be provided since the landowners did not approve. This led to the applicants seeking legal advice, through which letters were sent in 2015 and 2016 to the municipalities, seeking commitments on how they would address, among other concerns, the sanitation issues facing the applicants. There was no proper response, except from the Second Respondent. It was on the basis of many ignored letters that the applicants sought from the court declarations to the effect that, by failing to provide basic services, including sanitation services, the respondent municipalities had violated a litany of constitutional rights. They were thus requesting that, among other requests, the respondent municipalities be directed to provide VIP latrines; to prioritise basic rights of farm occupiers in IDPs; and the issuance of a structural interdict with clear directions on what the municipalities had to do and when it would be done.¹⁴⁷

As part of its defense in relation to sanitation services, the First Respondent municipality argued that its capacity to provide for such services was inhibited by the fact that the

¹⁴⁵ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 2.

¹⁴⁶ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 5.

¹⁴⁷ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 12-13.

applicants were residing on private land, and that in the absence of authority from the private land owner, they had no jurisdiction.¹⁴⁸ In other words, the municipality was of the view that property rights were paramount, even at the expense of the basic services of vulnerable citizens. In a manner reminiscent of arguments of the respondent in *Nokotyana*, the First Respondent in *Msunduzi* also argued on the basis of budgetary constraints, and that the court could not make an order for the municipality to construct sanitation and other basic-services infrastructure on private land, since that would be an intrusion into the sacrosanct separation-of-powers doctrine.¹⁴⁹

In coming to its decision, the Court accepted that in terms of Section 152 and 153 of the *Constitution*, municipalities had an obligation to provide basic services and to actually budget for such services.¹⁵⁰ In addition, the Court observed that Section 27(1)(b) of the *Constitution*, read alongside Section 3 of the *Water Services Act*, provided the applicants with a clear right of access to water and basic services.¹⁵¹ The Court went as far as to demonstrate that, even in terms of applicable regulations like the *Regulations relating to compulsory national standards and measures to conserve water*,¹⁵² the municipalities as water- services authorities had to provide a minimum standard for basic sanitation, which included “a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests”.¹⁵³

In relation to the demeanour of landowners in refusing occupiers the chance to construct their own toilets for example, the Court was of the view that it was untenable, in light of the *Extension of Security of Tenure Act*,¹⁵⁴ which grants occupiers access to water rights, as well as health services.¹⁵⁵ For this reason, there was no basis for a landowner to deny a municipality the opportunity to fulfil its obligations. In fact, the obligation to provide

¹⁴⁸ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 36.

¹⁴⁹ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 36.

¹⁵⁰ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 41.

¹⁵¹ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 45.

¹⁵² Regulations relating to compulsory national standards and measures to conserve water, in Government Gazette No. 22355 GN R509 of 8 June 2001.

¹⁵³ Section 2(b) of the Regulations relating to compulsory national standards and measures to conserve water, in Government Gazette No. 22355 GN R509 of 8 June 2001.

¹⁵⁴ *Extension of Security of Tenure Act* 62 of 1997.

¹⁵⁵ See specifically sections 6(2)(e)-(f) of the *Extension of Security of Tenure Act*.

water and sanitation services fell on water-services authorities, and not landowners, such that:

Even in instances where landowners are to provide water services to another in terms of a contract, s 26(3) of the WSA authorises the water services authority, if the intermediary fails to perform its obligations in terms of the agreement to 'take over the relevant functions of the water services intermediary'.¹⁵⁶

As such, the Court ultimately concluded, whether there were budgets or not, there was a need to at least have a plan that details how local government's constitutional obligations to provide for basic services would be met. It is within such a plan that budgetary issues would be considered.¹⁵⁷ The Court was damning of local government, concluding that, on the evidence before the Court, the First Respondent had "failed to comply with its statutory obligation within its available resources to provide water, sanitation and refuse removal to the farm occupiers and labour tenants".¹⁵⁸

As noted earlier, the remedy given by the Court was a structural interdict. The basis for such was that the prior conduct of the respondents necessitated supervision: "the first, second and third respondents' prior failures and current attitude justify supervision. As the defect lies in the omission by the three respondents, the just and equitable order is to direct them to cure the omissions". As such, the Court concluded (among many other findings) that constitutional rights, including the right to dignity, had been violated; the Court then ordered the three municipalities to construct VIP toilets for each household of the farm occupiers; to report within six months on the plan developed and progress on identifying all farm occupiers and what type of basic services had been extended to them; to post the plan on the municipal websites; to subject the plan to comments within one month of its filing; and even to provide monthly reports on progress in relation to the extension of basic services to water and sanitation.¹⁵⁹

As with *Kenton*, *Msunduzi* is consistently advancing the necessity of a structural interdict. It represents a recognition that local government is not always to be trusted to deliver on promises and or obligations. Where legal accountability ensues, judicial supervision

¹⁵⁶ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 62.

¹⁵⁷ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 79.

¹⁵⁸ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 81.

¹⁵⁹ *Mshengu and Others v Msunduzi Local Municipality and Others*, para 86.

might be the only way through which the vulnerable, the poor, and the citizens at large could have their rights to basic services honoured by local government.

3.4 Conclusion

Courts are considered to be the final arbiter so far as it relates to the declaration and enforcement of rights. Consistent with this statement, the case law discussed shows that, where appropriate, courts have been developing practical solutions in the form of structural interdicts. Although such solutions have been slowly developing, and if the case law discussed is anything to go by, then a case could be made that municipal accountability for the failure to deliver on basic sanitation services is an omission or act which courts will be ready to adjudicate and pronounce on.

4 FINDINGS AND CONCLUSION

In this final part of the discussion, an effort is made to synthesise the overall findings of the discussion, with a view to offering an overall perspective on the accountability of local government failing to deliver basic sanitation services.

4.1 Summary

4.1.1 Local government's legal mandate for basic service delivery

The discussion in Chapter 2 was guided by the question below:

What does the legal and policy framework require of local government in relation to basic services?

The discussion considered the legal and policy framework as a basis for the mandate of local government to deliver on basic services, specifically sanitation services. Baring all but bare bones, the chapter's overall finding and argument is that first, Section 153 of the *Constitution* requires municipalities to plan and budget in a manner that responds to basic needs of communities. Second, Sections 1 and 73 of the *Municipal Systems Act* oblige municipalities to provide basic services. Third, the *Water Services Act* singles out water and sanitation as basic rights, which are an entitlement for all. Fourth, a purpose reading of these main provisions arguably confirms that local government *must* provide basic services in general and sanitation services in particular. Last, if indeed sanitation is a basic service, without which residents' (within a municipality's jurisdiction) rights to dignity or even environmental rights could be violated, then the logical corollary of this is that local government *must* plan, budget for and deliver on sanitation services. Failure to do so, should warrant legal accountability.

4.1.2 Legal accountability for failure to deliver on sanitation services

Accepting that failure to deliver on sanitation services should logically warrant legal accountability, the discussion then sought (against the obviously egregious *skelmpype* scenario in Chapter 1 as contextual background), to evaluate the following question:

How has litigation facilitated legal accountability for local government's failure to deliver on sanitation services?

With reference to *Mazibuko*, this question necessitated documenting that litigation results in the vindication of rights and the declaration of duties, especially in the context of local government. As such, through four cases, stretching as far back as 2010 to as recently as 2019, the discussion considered *Nokotyana*, *Beja*, *Kenton* and *Msunduzi* as illustrative and authoritative reference points in determining how the courts have facilitated legal accountability for the failure of local government to deliver sanitation services.

Nokotyana could be considered a conservative case, which gave too much reverence to the principle of separation of powers. Accountability in *Nokotyana* was lacking, as it failed to redress the specific violations of the specific case before the court. *Beja* was the opposite, as the Court found that failure to deliver on basic services constituted a violation of the dignity of residents. Here, accountability was facilitated with an order of specificities as to how the municipality would construct enclosed toilets. *Kenton* took this a step further, with the courts realising the power of a structural interdict. It is because of such a structural interdict that the Court concluded that the accounting officer (the Municipal Manager) and the municipality itself can be held in contempt of court for failing to address failures confirmed and instructions ordered by the Court. The case of *Msunduzi* saw the courts openly castigating local government for their failure to deliver basic services, and noting that property rights could not be paramount at the expense of the basic services of vulnerable citizens. The court went as far as to order a far-reaching structural interdict, which the Court could supervise and through which residents could comment.

4.2 Concluding remarks

The overall question guiding the discussion was as follows:

How and through which methods are courts holding local governments legally accountable for failures in delivering sanitation services?

Reverting to the 2018 concerns echoed by Stacey,¹⁶⁰ that there is a gap between constitutional norms and municipal conduct, one cannot help but feel that, at times, local

¹⁶⁰ Stacey 2018 *Law & Social Inquiry* 798.

government does indeed let down its residents. What this discussion has shown, however, is that litigation does indeed stand as the bulwark to ensure that, when failures do happen, local government is held to account. Specifically, the structural interdict might become the most important remedy in future, when matters of local government's failure to deliver on sanitation services come before the courts. Litigants will, however, have to be strategic, as it seems that structuring arguments along "dignity rights" seemingly wins the case.

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